



Lenders Get Protection Under New Amendments to Nevada's HOA Lien Priority Statute

In a September 2014 ruling, the Nevada Supreme Court sent shockwaves through the lending community by holding that a homeowners association's (HOA) non-judicial foreclosure sale can extinguish a mortgage lender's previously-recorded first deed of trust on a property if that foreclosure is to recover assessments categorized as super priority amounts (or nine months of regular assessments, plus any amounts required for abatement) as set forth in Nevada Revised Statute (NRS) 116.3116. *SFR Invest. Pool I, LLC v. U.S. Bank, N.A. et al.*, 334 P.3d 408 (Nev. Sept. 18, 2014). Using ambiguity in NRS 116 and on the heels of the *SFR* ruling, HOAs continued to conduct foreclosures of HOA assessment liens, selling properties at auction for a fraction of the amount owed to the lender – in some instances as low as \$3,000. These sales were often made to third party purchasers or investors. The winning bidder at the foreclosure sales then frequently followed up with a quiet title action, claiming to own the property free and clear of all other liens, including the lender's previously-recorded first deeds of trust on the property.

On May 28, 2015, the shockwaves quelled a bit as new amendments to NRS 116.3116 were signed by Nevada Governor Brian Sandoval. The revised law, which takes effect Oct. 1, 2015, clarifies the super-priority statute and provides lenders much needed protection in the wake of the *SFR* decision. Some of the more pertinent revisions to the statute include the following:

- > Provides new notice protections for lienholders, including a requirement that the HOA mail to the first deed of trust holder the default and sale notices within 10 days of recording, as well as a requirement that the HOA record an affidavit indicating those notices were sent to the first lien holder;
- > Provides a cap on the amount of fees and costs which may be considered part of the "super priority" lien—significantly, the new revisions explicitly forbid the addition of any attorney's fees and costs into the "super priority" amount;

- > Changes to the sale location to where a lender's non-judicial trustee sale of real property is normally held;
- > Requires HOAs repost and republish the sale information after three oral postponements (mirrors NRS 107);
- > Requires that the HOA sale crier announce whether super priority lien has or has not been satisfied;
- > Provides that if the first lienholder pays the super priority lien not later than five days before a prospective HOA sale, that the sale does not extinguish the first lien;
- > Provides for a 60-day post-sale redemption period to the owner of the property and the first lienholder;
- > Requires that the first lienholder notify an HOA when a unit is subject to Nevada's Foreclosure Mediation Program (FMP) and to notify the association that the trustee has received the required Certificate from the FMP;
- > Requires that certain banks and lenders provide the Division of Financial Institutions the name and address of a person to whom the borrower must send any document necessary to facilitate a mediation and to whom a unit owners' association must send any notice pursuant to the HOA foreclosure statutes.

The new amendments only apply to HOA foreclosure sales that occur on or after Oct. 1, 2015. Since there is no retroactive application of the new changes, past foreclosure sales or sales leading up to the effective date will not be subject to the various lender protections contained in the new amendments.

Greenberg Traurig has been at the forefront of the fight on behalf of lenders in cases where HOA foreclosures have already occurred, and there are a number of bases on which lenders can defend a claim by an HOA or third party purchasers that an HOA lien extinguished a first priority deed of trust. Depending on the conduct of the sale and the applicable facts of each case, these defenses may include: special protection for FHA loans; challenges to the HOA based on failure to follow procedural requirements; constitutional and due process challenges; as well as reliance on contractual theories and/or mortgage savings clauses contained in applicable HOA covenants.

Despite the new revisions to NRS 116.3116, lenders still need to proceed with caution in Nevada and act promptly to preserve their rights against an HOA claiming delinquent assessments. The firm's Las Vegas office is uniquely prepared to assist lenders in auditing their loan portfolios and addressing issues that arise on loans secured by real property in Nevada.

This *GT Alert* was prepared by **Jacob D. Bundick**, **Jennifer L. Gray**, **Leslie S. Godfrey**, and **Sean A. Gordon**. Questions can be directed to:

- > [Jacob D. Bundick](mailto:bundickj@gtlaw.com) | +1 702.599.8038 | bundickj@gtlaw.com
- > [Jennifer L. Gray](mailto:grayjen@gtlaw.com) | LA: +1 310.586.7730; NY +1 212.801.6837 | grayjen@gtlaw.com
- > [Leslie S. Godfrey](mailto:godfreyl@gtlaw.com) | +1 702.938.6877 | godfreyl@gtlaw.com
- > [Sean A. Gordon](mailto:gordonsa@gtlaw.com) | +1 678.553.2185 | gordonsa@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

Albany +1 518.689.1400	Denver +1 303.572.6500	New York +1 212.801.9200	Shanghai +86 (21) 6391.6633
Amsterdam +31 (0) 20 301 7300	Fort Lauderdale +1 954.765.0500	Northern Virginia +1 703.749.1300	Silicon Valley +1 650.328.8500
Atlanta +1 678.553.2100	Houston +1 713.374.3500	Orange County +1 949.732.6500	Tallahassee +1 850.222.6891
Austin +1 512.320.7200	Las Vegas +1 702.792.3773	Orlando +1 407.420.1000	Tampa +1 813.318.5700
Boca Raton +1 561.955.7600	London* +44 (0) 203 349 8700	Philadelphia +1 215.988.7800	Tel Aviv^ +972 (0) 3 636 6000
Boston +1 617.310.6000	Los Angeles +1 310.586.7700	Phoenix +1 602.445.8000	Tokyo[‡] +81 (0)3 3216 7211
Chicago +1 312.456.8400	Mexico City+ +52 (1) 55 5029 0000	Sacramento +1 916.442.1111	Warsaw[~] +48 22 690 6100
Dallas +1 214.665.3600	Miami +1 305.579.0500	San Francisco +1 415.655.1300	Washington, D.C. +1 202.331.3100
Delaware +1 302.661.7000	New Jersey +1 973.360.7900	Seoul[∞] +82 (0) 2 369 1000	Westchester County +1 914.286.2900 West
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