

THE BIG CHILL: DEFICIENCY ACTIONS AND NONJUDICIAL FORECLOSURES IN NEVADA

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It was widely understood that the passage of Nevada Assembly Bills 273 and 284 was going to have an impact on the lending and the secondary purchasing markets in Nevada. After several

months of application of the new laws, the effect has been deep and wide-reaching, including conflicting court rulings for deficiency judgments and a remarkable drop in foreclosure filings.

Upon implementation on June 10, 2011, AB 273 limited a court's award of a monetary judgment in the amount of consideration paid by the assignee, minus the bid amount or fair market value. Two Nevada state court decisions in October created conflicting decisions as to the bill's retroactivity. Clark County District Court Judge Elissa Cadish held that in litigation commenced nearly

two years prior to the implementation of AB 273, the defendant guarantors were entitled to a win via summary judgment, thus retroactively applying the legislation to the benefit of those guarantors.

In another, Clark County District Court Judge Elizabeth Gonzalez ruled against a retroactive application of AB 273, finding that the statute applied only to contracts entered into after the bill's June 10, 2011 effective date. Judge Gonzalez additionally held that the legislature could not change the terms of a contract that existed prior to the passage of the law. This decision has been appealed to the Nevada Supreme Court but, as of the date of this writing, that court has yet to rule.

It is certain that these court rulings affect the viability of collections for those beneficiaries seeking legal action against borrowers, guarantors and sureties.

Additionally since its implementation on October 1, 2011, AB 284 has had a substantial affect on commercial and residential foreclosures. The query in Nevada is who will execute the Notice of Default and now required Affidavit (jointly the documents that initiate a foreclosure proceeding) within the consortium of business entities aiding in the foreclosure process of any given real property? Stated another way, who within the foreclosure process will take the risk of being civilly sued or possibly criminally prosecuted for any discrepancies known or unknown by the signor?

This uncertainty has led to a substantial decrease in the filings of Notices of Default. RealtyTrac reports that Notices of Default recordings fell by 75% statewide, from 4,725 in September 2011 to 1,201 in October 2011.¹ Presumably the documentation required to foreclose on commercial properties is less in volume or more readily

available than that of residential properties, therein causing less of a decrease in the commercial foreclosure market than the residential market. However, no data was available for this difference in foreclosure filings.

If any question exists as to whether the Nevada Attorney General will seek criminal prosecutions for alleged violations of Nevada foreclosure laws, the answer is a resounding yes. On November 16, 2011, the Nevada Attorney General sought and received an indictment of two Lender Processing Services employees, Gary Trafford and Gerri Sheppard, for a total of 606 felony and misdemeanor counts of notarization, certification and recording-related offenses on Notices of Default. Bail for each of the defendants has been set at \$500,000.00.

The Nevada Attorney General has taken additional actions against Nevada notaries. On November 30, 2011, the Nevada Attorney General filed a criminal complaint against three Nevada notaries, alleging each had notarized signatures of persons not in the notary's presence.

Needless to say, the actions of the Nevada Attorney General and the heightened requirements of AB 284 will likely continue to have a momentous chilling effect on Nevada foreclosure filings. As of the time of this writing, November 2011 foreclosure filing statistics were not available.

¹ Other reports claim greater drops in Nevada foreclosure filings, including ForeclosureRader.com, which pegs the decrease at 81%.



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