

NO. 41985-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Trustee's Sale of real property of:

NORM B. GIANNUSA, SR.,

Appellant,

v.

COMPLETE BOWLING SERVICE COMPANY,

Respondent.

BRIEF OF RESPONDENT

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

Attorneys for Respondent

John M. Casey, WSBA #24187
Andrea L. Schiers, WSBA # 38383
Curran Law Firm P.S.
555 West Smith Street
Kent, Washington 98032
(253) 852-2345

STATE OF WASHINGTON
BY: [Signature]
11/02/19 11:12

ORIGINAL

Table of Contents

I. RESPONDENT'S STATEMENT OF THE CASE..... 1

 A. Introduction 1

 B. Issues Presented..... 2

 1. Whether a second-position junior lienholder that purchases the subject property at a senior lienholder's nonjudicial foreclosure sale may recover the surplus funds remaining after the senior lien is satisfied. 2

 2. Whether the merger doctrine applies to a second-position junior lienholder's acquisition of title to the subject property at a senior lienholder's nonjudicial foreclosure sale 2

 C. Factual and Procedural Background..... 2

II. ARGUMENT..... 4

 A. Complete Bowling is entitled to the surplus funds by operation of RCW 61.24.080(3) 5

 1. A junior lienholder may recover against the debtor for the underlying debt after a senior lienholder forecloses 6

 2. Washington law does not distinguish between purchasing junior lienholders and other junior lienholders..... 10

 3. Application of the plain language of RCW 61.24.080(3) does not offend public policy..... 16

 B. The merger doctrine does not apply. 18

III. CONCLUSION..... 23

Table of Authorities

CASES

<i>Adams v. FedAlaska Federal Credit Union</i> , 757 P.2d 1040 (1988)	13, 14, 17, 18
<i>Altabet v. Monroe Methodist Church</i> , 54 Wn. App. 695, 777 P.2d 544 (1989).....	19
<i>Anderson v. Starr</i> , 159 Wash. 641, 294 P. 581 (1930)	19, 22
<i>Beal Bank, SSB v. Sarich</i> , 161 Wn.2d 544, 167 P.3d 555 (2007).....	<i>passim</i>
<i>Carrillo v. Valley Bank of Nevada</i> , 103 Nev. 157, 734 P.2d 724 (1987)	12, 13, 14
<i>Gill v. Strouf</i> , 5 Wn.2d 426, 105 P.2d 829 (1940).....	21, 22
<i>In re Trustee's Sale of Real Property of Brown</i> , 161 Wn. App. 412, 250 P.3d 134 (2011).....	9
<i>In re Upton</i> , 102 WN. APP. 220, 6 P.3D 1231 (2000).....	4, 9, 20
<i>Peninsula Development Co. v. Savidge</i> , 163 Wash. 36, 299 P. 654 (1931) ..	18
<i>Sator v. State Dept. of Revenue</i> , 89 Wn.2d 338, 572 P.2d 1094 (1977)	18
<i>Saviano v. Westport Amusements, Inc.</i> , 144 Wn. App. 72, 180 P.3d 874 (2008).....	19
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P.3d 1024, <i>review denied</i> , 147 Wn.2d 1016, 56 P.3d 992 (2002)	18
<i>State v. Lough</i> , 70 Wn. App. 302, 853 P.2d 920 (1993), <i>affirmed</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	22, 23
<i>Stroh Brewery Co. v. State, Dept. of Revenue</i> , 104 Wn. App. 235, 15 P.3d	

<i>U.S. Bank of Washington v. Hursey</i> , 116 Wn.2d 522, 806 P.2d 245 (1991)	21
<i>Vannoy v. Pacific Power & Light Co.</i> , 59 Wn.2d 623, 369 P.2d 848 (1962)	15
<i>Walter E. Heller Western Inc. v. Bloxham</i> , 176 Cal.App.3d 266, 221 Cal.Rptr. 425 (1985)	12
<i>Washington Mutual Savings Bank v. United States</i> , 115 Wn.2d 52, 793 P.2d 969, clarified on denial of reconsideration, 800 P.2d 1124 (1990)	<i>passim</i>
<i>Wilson v. Henkle</i> , 45 Wn. App. 162, 724 P.2d 1069 (1986)	9
<i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 174 P.3d 24 (2007)	15

STATUTES

RCW 61.24.080	<i>passim</i>
RCW 61.24.100	6, 11, 13, 14
Alaska Stat. § 34.20.100	14

RULES

RAP 2.5(a)	18
RAP 10.3(a)(6)	19, 22

SECONDARY SOURCES

18 William B. Stoebuck, John W. Weaver, <i>Washington Practice, Real Estate</i> , §18:29 (2 nd ed., 2011)	19
John D. Sullivan, Comment, <i>Rights of Washington Junior Lienors in Nonjudicial Foreclosure</i> , 67 WASH. L. REV. 235, 248 (1992)	17

I. RESPONDENT'S STATEMENT OF THE CASE

A. Introduction

Creditors' liens against real property attach to the excess funds remaining after a nonjudicial foreclosure sale in the same order of priority they attached to the property before the foreclosure. There is no exception to this, or another rule of law, that applies only to junior lienholders that purchase the subject property at a foreclosing senior lienholder's sale.

Respondent Complete Bowling Service Company ("Complete Bowling") held a deed of trust in the property at issue, second only to the lienholder that foreclosed on the property. It is thus entitled to the surplus funds that remained after the sale. That it purchased the property at the sale is of no legal significance.

The trial court ruled to that effect and disbursed the funds to Complete Bowling. Appellant Norman Giannusa ("Giannusa") asks this Court to contort its way around the plain language of the statute that controls this case and, in its place, announce a new rule of law that lacks any support in Washington's statutes or case law. This Court should decline the invitation and affirm the trial court's order.

///

B. Issues Presented

1. **Whether a second-position junior lienholder that purchases the subject property at a senior lienholder's nonjudicial foreclosure sale may recover the surplus funds remaining after the senior lien is satisfied?**
2. **Whether the merger doctrine applies when a second-position junior lienholder acquires title to the subject property at a senior lienholder's nonjudicial foreclosure sale?**

C. Factual and Procedural Background

Norman Giannusa, doing business as Precision Bowling Services, operated bowling pro shops. Clerk's Papers ("CP") at 77. He opened a credit account with Complete Bowling and personally guaranteed payment of it. *Id.* Complete Bowling supplies materials and equipment to bowling pro shops. *Id.* Giannusa placed numerous orders for bowling equipment and supplies on the account. *Id.* Complete Bowling supplied the goods, but Giannusa got behind on his payments by a significant amount. *Id.*

Complete Bowling and Giannusa agreed to reduce the debt owed to writing with a payment plan. *Id.* at 71, 77. In January 2009, Giannusa and his spouse signed a promissory note in favor of Complete Bowling for the principal amount of \$159,797.24 plus interest. *Id.* at 77-79. The note was secured by a deed of trust against the real property at issue in this case ("the Property"). *Id.* at 78, 80-83. The deed of trust is dated January 29, 2009, and

was recorded on February 10, 2009, under Pierce County Auditor's No. 200902101082. *Id.* As of January 31, 2011, the outstanding balance owed on the note was \$115,824.11, plus interest and attorney's fees. *Id.* at 78.

Meanwhile, SunTrust Mortgage, Inc., which held a first-position deed of trust against the Property elected to foreclose on its deed of trust. *Id.* at 74. On December 27, 2010, Northwest Trustee Services, Inc., as Successor Trustee, held a trustee's sale pursuant to the provisions for a nonjudicial foreclosure under Chapter 61.24 RCW. *Id.* Complete Bowling bought the Property at the public sale for \$97,000. *Id.* at 2. That amount exceeded the obligation Giannusa owed to the foreclosing senior lienholder, and the Successor Trustee thus deposited the surplus funds in the Pierce County Superior Court Registry on January 27, 2011. *Id.* at 1-2. It gave notice of the deposit to all interested parties pursuant to RCW 61.24.080. *Id.* at 2. The surplus funds deposited in the court registry amounted to \$20,029.94. *Id.*

On January 31, 2011, Giannusa moved the trial court to disburse the surplus funds to him under RCW 61.24.080(3), pursuant to his "possessory interest" in the Property. *Id.* at 28-31. On February 22, 2011, Complete Bowling responded to Giannusa's motion, contending that, under that statute, its second-position deed of trust attached to the surplus funds ahead of any interest of Giannusa's. *Id.* at 40-42. Giannusa replied that Complete Bowling could not recover the surplus funds because it purchased the Property at the

sale. *Id.* at 57-61.

Complete Bowling objected to Giannusa's reply and asked for the opportunity to respond to his arguments raised in the reply. *Id.* at 65-66. With the court's permission, the parties submitted additional briefing. *Id.* at 87-95. On March 10, 2011, the trial court denied Giannusa's motion for disbursement of the surplus funds. *Id.* at 97-98.

Complete Bowling also moved the trial court to disburse the surplus funds to it and gave notice to all interested parties. *Id.* at 70-86. The court granted Complete Bowling's motion.

Giannusa now appeals the order denying his motion.

II. ARGUMENT

While Giannusa asserts that the standard of review in this case is abuse of discretion, this appeal concerns only issues of law and statutory interpretation. As such, the appropriate standard of review is *de novo*. *In re Upton*, 102 Wn. App. 220, 223, 6 P.3d 1231 (2000); *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 556, 167 P.3d 555 (2007). Nevertheless, under either standard, the trial court correctly denied Giannusa's motion for disbursement of the surplus funds, for the reasons explained below.

///

///

A. Complete Bowling is entitled to the surplus funds by operation of RCW 61.24.080(3).

The plain language of the statute pertaining to surplus funds following a nonjudicial foreclosure sale, RCW 61.24.080(3), governs this case. Simply put, the interests in the property that are eliminated by the foreclosure sale “attach to the surplus in the order of priority that had attached to the property.” *Id.* That is, the right to recover any amount of surplus funds corresponds with the order of priority of interests in the property pre-foreclosure.

Here, before the nonjudicial foreclosure sale, Complete Bowling held a second-position deed of trust against the Property. By operation of Washington’s Deed of Trust Act, Chapter 61.24 RCW, the sale divested the foreclosing lienholder and all junior lienholders of their interests in or liens against the Property. Pursuant to RCW 61.24.080(3), then, these liens against the Property attached to the surplus funds in the same order of priority they had attached to the Property before the sale. Because Complete Bowling’s interest was second only to the foreclosing lienholder’s interest, once the foreclosing lienholder’s obligation was satisfied out of the sale proceeds, Complete Bowling’s interest attached to the surplus funds as next in line.

The deed of trust in favor of Complete Bowling secured a note with a balance of \$115,824.11 owed as of January 31, 2011, plus interest and

attorneys' fees. CP at 46. This amount far exceeds the approximately \$20,000 in surplus funds deposited into the court registry. CP at 2. Therefore, Complete Bowling had the priority interest to the entire amount deposited into the registry in connection with the foreclosure sale.

Giannusa resists this simple reading of the relevant statute by relying heavily on the Washington Supreme Court's decision in *Washington Mutual Savings Bank v. United States*, 115 Wn.2d 52, 793 P.2d 969, *clarified on denial of reconsideration*, 800 P.2d 1124 (1990). There, the Court ruled that a nonjudicial foreclosure by a senior lienholder extinguished the rights of all junior lienholders to seek deficiency judgments against the foreclosed debtor. *Id.* at 58-59. Giannusa maintains that this decision definitively bars junior lienholders who purchase at the foreclosure sale, such as Complete Bowling did here, from seeking any other remedy against the debtor for the underlying debt. His reliance is misplaced for several reasons.

1. A junior lienholder may recover against the debtor for the underlying debt after a senior lienholder forecloses.

First, the *Washington Mutual* Court held that no deficiency judgment may be obtained by a nonforeclosing junior lienholder following a nonjudicial foreclosure sale because there is no statutory authority for deficiency judgments of any kind in RCW 61.24.100. *Id.* However, it later clarified that its ruling did not address "the matter of a junior deed of trust holder's

continued right to sue the debtor on the promissory note” because that issue was not before the Court. *Washington Mutual*, 800 P.2d 1124. That is, the *Washington Mutual* decision did not bar junior lienholders from pursuing other remedies to collect on the debt.

The Washington Supreme Court later underscored this point in *Beal Bank*, 161 Wn.2d at 545, where it explicitly held that a junior lienholder may still recover from the debtor after a senior lienholder forecloses on its deed of trust. The Court allowed a junior lienholder to sue the debtor on its promissory note, which had been secured by a deed of trust, after the subject property was sold at the senior lienholder’s foreclosure sale. *Id.* at 550. The debtors there argued that the *Washington Mutual* decision meant “a nonjudicial foreclosure eliminates the ability of *any* lienholder, including the non-foreclosing junior lienholders, to sue the debtor for a deficiency.” *Id.* at 548 (emphasis in original) (internal quotations and citations omitted). The *Beal Bank* Court, however, rejected that interpretation and explained:

To accept the [debtor’s] argument would render a result whereby all liens attached to security would be automatically extinguished upon foreclosure. We find nothing in the statutory scheme supporting this conclusion. While foreclosure eliminates the security of a junior lienholder, the debts and obligations owed to that nonforeclosing junior lienholder are not affected by foreclosure under the statutes.

...

... [W]hile [the nonforeclosing junior lienholder]’s rights in

the collateral are extinguished by [the foreclosing senior]’s trustee’s sale, the underlying promise by the [debtors] to pay [the nonforeclosing junior] on the two notes continues via the promissory notes, although the promissory notes are now unsecured as a result of that trustee’s sale.

Id. at 548-49.

The same is true here. Although its security interest in the Property was extinguished by the sale, Complete Bowling retains the right to hold Giannusa to his promise to pay on the underlying debt, the promissory note. Complete Bowling may still pursue its legal remedies to collect from Giannusa. One of those remedies, according to *Beal Bank*, would be to sue Giannusa on the note. *Id.* Another would be to seek the surplus funds after the nonjudicial foreclosure sale pursuant to RCW 61.24.080(3), as Complete Bowling did here.

Accepting Giannusa’s argument that pursuing surplus funds is the equivalent of obtaining a deficiency judgment, and is therefore prohibited by Chapter 61.24 RCW, would mean that no junior lienholder could ever recover the funds remaining after a sale. This interpretation would render RCW 61.24.080(3) entirely superfluous, which courts are loathe to do. *See Stroh Brewery Co. v. State, Dept. of Revenue*, 104 Wn. App. 235, 239-40, 15 P.3d 692, *review denied*, 144 Wn.2d 1002, 29 P.3d 718 (2001) (“In interpreting and construing a statute, we must give effect to all of the language, rendering no portion meaningless or superfluous.”). Indeed, courts

have allowed junior lienholders to collect surplus funds under RCW 61.24.080(3) since the *Washington Mutual* decision. *See Upton*, 102 Wn. App. at 221 (second-position junior lienholder has superior interest in surplus funds over the property owner's homestead interest); *In re Trustee's Sale of Real Property of Brown*, 161 Wn. App. 412, 250 P.3d 134 (2011). Clearly, those courts did not consider the surplus funds a form of deficiency judgment, and this Court should similarly resist Giannusa's entreaty.

Because Complete Bowling retained its right to collect from Giannusa, Giannusa cannot claim that Complete Bowling has no right to recover the excess funds remaining after the foreclosure sale in this case. He still owes Complete Bowling a debt, and the company's second-position lien against the Property attached to the surplus funds in that same priority by operation of RCW 61.24.080(3). *See Upton*, 102 Wn. App. at 224-25 (a junior lienholder maintains its priority interest in surplus funds remaining after senior's foreclosure under RCW 61.24.080(3)); *Wilson v. Henkle*, 45 Wn. App. 162, 171, 724 P.2d 1069 (1986) (purchasers of property at nonjudicial foreclosure sale were entitled to the surplus funds remaining after the sale and after creditors were paid). Accordingly, the trial court correctly denied Giannusa's motion for disbursement of the funds, and this Court should affirm that order.

///

2. Washington law does not distinguish between purchasing junior lienholders and other junior lienholders.

Giannusa invents a legal distinction between the junior lienholder who purchases at a senior's foreclosure sale and the others who do not. According to Giannusa, the former are not entitled to pursue any other remedy to collect on the underlying debt; they are left with the property purchased at the sale and no other rights. Inconveniently for Giannusa, neither the case law he cites nor the statutes that control the issue support his position.

Primarily, Giannusa stresses the fact that the junior lienholder who purchased the property at issue in *Washington Mutual* was not allowed to pursue a deficiency judgment against the debtor in that case, while the junior lienholder who did *not* purchase the property at issue in *Beal Bank* was allowed to sue on the underlying debt. Appellant's Br. at 11-13. He then stretches this factual distinction between the cases to reach a strained conclusion that the difference was, in actuality, the entire basis for each ruling.

But neither decision makes any legal distinction among junior lienholders. *Washington Mutual* holds that *no* junior lienholders have a right to a deficiency judgment. 115 Wn.2d at 58 ("We do not deem it necessary to determine how a deficiency judgment should be measured in this case since

we hold here that none may be obtained by a nonforeclosing junior lienor following a nonjudicial foreclosure sale.”¹ The Court interpreted RCW 61.24.100 to deny flatly any deficiency judgments after a nonjudicial foreclosure sale, and it refused to create an exception for junior lienors by “judicial fiat.” *Id.*

Beal Bank holds that *all* junior lienholders may still recover on the underlying debt. 161 Wn.2d at 545. (“[W]e ... hold, under Washington law, that the ‘foreclosure’ of a senior deed of trust does not extinguish the debt/obligation of any junior lienholder or otherwise preclude an action to recover that debt.”)² Neither pronouncement leaves room for reading a new rule between them that applies only the junior lienholder who purchases at the sale. Giannusa’s gymnastic attempt to manufacture such a rule stretches both cases too far. Despite his yearnings to the contrary,³ an incidental fact an entire new rule of law does not make.

Moreover, the non-Washington authorities Giannusa points to for support of his invented new rule actually serve only Complete Bowling’s

¹ The fact that the junior lienholder purchased the property at the nonjudicial foreclosure sale was relevant only to a *different* issue before the Court in *Washington Mutual*: that of the application of an Internal Revenue Code provision allowing the United States a right of redemption against such purchasers when the property is subject to tax liens. *See Washington Mutual*, 115 Wn.2d at 56-57.

² While the *Beal Bank* Court mentions, in dicta, that the bank there was not the purchaser of the property at nonjudicial foreclosure sale, the Court provides no further explanation as to the importance of this remark, or how, or even if, it factored into the Court’s analysis. *See Beal Bank*, 161 Wn.2d at 550.

position. Giannusa cites decisions from California and Nevada that limit the recovery available to a junior lienholder who purchases at a senior's nonjudicial foreclosure sale. See *Walter E. Heller Western Inc. v. Bloxham*, 176 Cal.App.3d 266, 221 Cal.Rptr. 425 (1985); *Carrillo v. Valley Bank of Nevada*, 103 Nev. 157, 734 P.2d 724 (1987).

However, Giannusa glosses over the fact that these courts ruled that junior lienholders, *including those that purchase*, could still seek deficiency judgments after the senior's foreclosure sale. *Bloxham*, 176 Cal.App.3d at 273 (“a junior lienor purchasing at the senior's sale is not barred from a deficiency judgment[.] ... [H]e is not the one who elected the private sale and had no opportunity to evaluate the desirability of that remedy ... It would be unfair to eliminate the purchasing junior's right to a deficiency based on a choice made by the senior lienholder.”); *Carrillo*, 103 Nev. at 60 n. 1 (explaining the “proper procedure for a purchasing junior lienor to follow in seeking a deficiency judgment is as set forth in [Nevada Revised Statute] 40.455”). The issue before the California and Nevada courts in those cases was whether the deficiency of the purchasing junior should be limited by the fair market value of the property, pursuant to each state's statutory scheme. *Bloxham*, 176 Cal. App.3d at 273-74 (applying California Code of Civil Procedure 580a); *Carrillo*, 103 Nev. at 159-60 (applying Nevada Revised

³ Br. of Appellant at 11-13, 15-16.

Statutes 40.457 and 40.459). Based on those statutes, the courts ruled the purchasing junior's recovery should be so limited and available only to the extent that the fair market value exceeds the combined debts of the senior and junior lienholders. *Bloxham*, 176 Cal. App.3d at 273-74; *Carrillo*, 103 Nev. at 159-60.

The situation in Washington is much different. Here, no junior may obtain a deficiency judgment after a nonjudicial foreclosure sale, regardless whether it purchased the foreclosed property. *Washington Mutual*, 115 Wn.2d at 58-59. As such, our state's statutory scheme does not, and cannot, limit any junior's recovery against the debtor by the fair market value of the property. RCW 61.24.100. In this state, a junior lienholder is left to pursue its other legal remedies against the debtor for the debt remaining after the sale, which include suing the debtor and/or collecting the surplus funds via RCW 61.24.080(3). In this way, Washington is in a position more similar to Alaska, as explained in *Adams v. FedAlaska Federal Credit Union*, 757 P.2d 1040 (1988).

In *Adams*, the Alaska Supreme Court allowed a junior lienholder who purchased the property at the senior's foreclosure sale to pursue an action against the debtor on the junior's underlying promissory note. *Id.* The Court explained that, under Alaska law, "upon sale by the senior lienholder . . . the junior lienholder . . . lost its security interest in the property. The statutes

contain no exception to this rule when the purchaser at the sale is a junior lienholder.” *Id.* at 1042. The same is true in Washington; “foreclosure eliminates the security of the junior lienholder[.]” *Beal Bank*, 115 Wn.2d at 548; RCW 61.24.100. Alaska law also prohibits deficiency judgments after a foreclosure sale. Alaska Stat. § 34.20.100. And the same is true in Washington. *Washington Mutual*, 115 Wn.2d at 58-59.

The Alaska Court in *Adams* then noted the exceptions carved out by California and Nevada, which allow junior lienholders to obtain deficiency judgments and limit purchasing junior lienholders by the fair market value of the property. *Adams*, 757 P.2d at 1042 (discussing *Bloxham*, 176 Cal.App.3d at 221 and *Carrillo*, 103 Nev. at 158). The Alaska Court declined to follow the other two states, finding that to do so would be an “excessive intrusion into the province of the legislature” because Alaska does not share California’s or Nevada’s statutory schemes. *Id.* at 1043. Further, the Alaska Court identified “a strong argument against the position of the California court”:

That is, if the Alaska law is strictly followed, the position of [the debtor] is no different whether [a junior lienholder] or a third party buys the property. In either case [the junior] would lose its security and [the debtor] would be personally liable for the note. Under the approach argued by [the debtor], [she] fortuitously benefits by [the junior lienor’s] purchase. And it is the [junior lienor] that assumes the risk of reselling the land for the value of the security. If [the junior lienor’s] attempt to collect on the loan were to be characterized as a deficiency

judgment and therefore prohibited, [the junior] would be required to assume this risk.

Id. at 1043-44. Consequently, the Alaska Court upheld the right of the purchasing junior to recover the remaining amount due on the underlying debt. *Id.* at 1044.

The same result is appropriate here. The relevant Washington statute makes no distinction between junior lienholders that purchase and those that do not. RCW 61.24.080(3) is direct and unequivocal: liens attach to surplus funds in the order they attached to the subject property before foreclosure. There is no exception for junior lienholders that purchase at the sale. When, like here, a statute's meaning is plain on its face, courts must give effect to that plain meaning as the expression of legislative intent. *See Woods v. Kittitas County*, 162 Wn.2d 597, 607, 174 P.3d 24 (2007). It is beyond the power and function of a court to read wording into statutes that is not there. *Vannoy v. Pacific Power & Light Co.*, 59 Wn.2d 623, 629, 369 P.2d 848 (1962).

Unlike the statutory schemes at work in California and Nevada, and similar to that in Alaska, Washington provides no deficiency judgments for junior lienholders after a nonjudicial foreclosure, let alone limits such judgments by the fair market value of the property. As such, there is no statutory or case law basis for Giannusa's proposed new rule that purchasing

juniors may recover nothing more from the debtor. The out-of-state authority he clings to for this distinction among juniors does not avail him. Rather, the *Adams* decision squarely addresses the arguments Giannusa asserts here and this Court should follow the Alaska Supreme Court’s reasoning in rejecting them.

3. Application of the plain language of RCW 61.24.080(3) does not offend public policy.

Finally, Giannusa complains that the “unfair competitive advantage”⁴ a junior lienholder obtains by purchasing the property offends public policy. He imagines a scenario in which a purchasing junior sells the property at a profit and then sues the debtor to recover on the underlying debt. To the extent that this scenario contemplates the junior lienholder recovers up to the amount it is owed, the public can take no offense. Creditors are entitled to be fully repaid. To the extent that the scenario assumes the junior lienholder will recover more than it is owed, Giannusa assumes too much.

First, he assumes the junior would keep the proceeds from a sale and, for some reason, not apply those funds to the underlying debt. This strains credulity. Any amount obtained in a resale of the property would certainly reduce the amount recoverable in an action on the debt. Second, Giannusa assumes the property can be sold at a profit. In this situation, a “profit”

⁴ Br. of Appellant at 13.

would mean a price higher than the amount of both the senior and purchasing-junior liens; this could not always be a safe bet and instead would depend on particular circumstances of each case.

Third, Giannusa assumes that a junior lienholder will always improve its position by purchasing the property, but that is simply not the case. As the Alaska Supreme Court articulated in the *Adams* case, a purchasing junior assumes the risk of reselling the property for the value of the security. *See* 757 P.2d at 1044. If the purchasing junior cannot sue on the underlying debt, and the property later sells for anything less than combined amount of both the senior and junior obligations, the purchasing junior recovers less than the full debt owed to it. *See* John D. Sullivan, Comment, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure*, 67 WASH. L. REV. 235, 248 (1992). That outcome is completely out of the purchasing junior's control. Meanwhile, the *debtor* gains an unfair advantage if the purchaser at the sale happens to be a junior lienholder and so cannot collect the remaining debt from him. *Adams*, 757 P.2d at 1044. Junior lienholders ought not be so penalized by the whim of the senior lienholder who decided to foreclose. *See* Sullivan, 67 WASH. L. REV. at 245; *Bloxham*, 176 Cal.App.3d at 273 (“It would be unfair to eliminate the purchasing junior’s right to a deficiency based on a choice made by the senior lienholder.”).

Finally, even if Giannusa’s concerns were legitimate, this Court is not

the appropriate forum to address them; the Legislature is. *Sator v. State Dept. of Revenue*, 89 Wn.2d 338, 344, 572 P.2d 1094 (1977); *Peninsula Development Co. v. Savidge*, 163 Wash. 36, 39-40, 299 P. 654 (1931); *Sullivan*, 67 Wash. L. Rev. at 255; *Adams*, 757 P.2d at 1043.

In sum, Giannusa cannot prevail against Complete Bowling under the plain wording of the surplus funds statute, RCW 61.24.080(3). Instead, he invites this Court to read an unwritten exception into the statute in which nonforeclosing junior lienholders that successfully bid at the trustee's sale have no right to obtain the remaining debt owed to them, including the right to surplus funds. For this, he relies on a strained reading of Washington cases, out-of-state authority that does not support his position, and a public policy argument that unravels upon inspection. Accordingly, this Court should decline his invitation and instead affirm the trial court's order denying his motion for the surplus funds.

B. The merger doctrine does not apply.

For the first time in this case, Giannusa posits in his opening brief that Complete Bowling should not have recovered the surplus funds because, he argues, the merger doctrine applies to extinguish the underlying debt when Complete Bowling bought the Property at the trustee's sale. This Court should decline to consider this argument, as Giannusa did not present it to the trial court. RAP 2.5(a); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290,

299, 38 P.3d 1024, *review denied*, 147 Wn.2d 1016, 56 P.3d 992 (2002). He entirely fails to demonstrate that the trial court's order involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Moreover, Giannusa cites no authority for his position that the merger doctrine applies in a foreclosure situation. As such, this Court need not address it. RAP 10.3(a)(6); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

Even if this Court does consider this new argument, the argument rings hollow. The merger doctrine does not apply here. Merger occurs when a fee interest and a deed of trust vests in the possession of one person. *Altabet v. Monroe Methodist Church*, 54 Wn. App. 695, 698, 777 P.2d 544 (1989) (citing *Anderson v. Starr*, 159 Wash. 641, 643, 294 P. 581 (1930)).

The doctrine of merger arises from the fact that, when the entire legal and equitable estates are united in one person, there can be no occasion to keep them distinct; but if there is an outstanding intervening title, the foundation of the merger does not exist as a matter of law. Equity does not favor the doctrine of merger, and even though two or more rights or estates are united in one person, equity will keep them distinct where it appears from the intention of the person, either express or implied, that he wishes them to be so kept.

Id. (quoting *Anderson*, 159 Wash. at 643). "In actual practice, the event that most frequently brings the two interests together in one person is the mortgagor's giving of a deed *in lieu of foreclosure* to the holder of the mortgage." 18 William B. Stoebuck, John W. Weaver, *Washington Practice*,

Real Estate, §18:29 (2nd ed., 2011) (emphasis added).

Clearly, this doctrine is inapposite to the situation presented here, for several reasons. First, Giannusa's argument rests on the faulty premise that the foreclosure sale did not eliminate Complete Bowling's deed of trust. He maintains that the *sale* did not eliminate the security, but, rather, Complete Bowling's *purchase* of the Property at the sale did, by way of merger. Br. of Appellant at 19. Actually, the opposite is true. *See Beal Bank*, 115 Wn.2d at 548 ("... foreclosure eliminates the security of the junior lienholder[.]"); *Upton*, 102 Wn. App. at 224 ("A nonjudicial foreclosure extinguishes all junior liens on the property."). The foreclosure sale itself facilitated the purchase. Giannusa's contention hangs Complete Bowling's legal rights on a distinction without a difference and this Court should reject it.

Second, the legal and equitable estates are not united. After the sale, Giannusa still owed Complete Bowling a debt that was entirely separate from the title to the Property. Merger may have applied if, for example, Complete Bowling was the lender for the Property's mortgage and it accepted a deed in lieu of foreclosure from Giannusa. In that situation, if the only two interests in or encumbrances against the land were the title and Complete Bowling's mortgage, the transfer would eliminate the mortgage and Complete Bowling would have clear title. 18 *Washington Practice* §18:29. But that is clearly not the situation here. Complete Bowling is not Giannusa's mortgagor. Instead,

the Property secured a debt Giannusa owed Complete Bowling on his credit account with the business; acquiring legal title to the Property through the foreclosure sale did not satisfy that separate, underlying debt.

Third, if the merger doctrine applied here, Giannusa forgets the rights of the other junior lienholders. There is a presumption against merger where junior liens are involved. *U.S. Bank of Washington v. Hursey*, 116 Wn.2d 522, 528 n. 2, 806 P.2d 245 (1991); *Gill v. Strouf*, 5 Wn.2d 426, 431, 105 P.2d 829 (1940). Despite Giannusa's bald assertion to the contrary,⁵ several creditors junior to Complete Bowling held liens against the Property, including federal tax liens, judgments, warrants in favor of the State of Washington, and a claim of lien by the State Employment Security Department. CP at 9-11. The existence of these junior liens weighs against application of the merger doctrine. As explained by Professors Stoebuck and Weaver:

... [M]erger becomes a problem when there are interests, generally other mortgages or liens, whose priority is junior to [the merged] mortgage. ... If the senior mortgagee, in lieu of foreclosure, chooses to take a title deed from the mortgagor or current owner of the encumbered land, and if his senior mortgage is extinguished by being merged into the title, then he suffers a detriment. His title is subject to the other liens, and he must either satisfy the obligations they secure or suffer foreclosure against his title.

Fortunately for the senior mortgagee, merger is unlikely to be

⁵ Br. of Appellant at 18.

found when the effect would be to advance junior liens.

18 *Washington Practice* §18:29.

Finally, whether merger happens depends on the intention of the party against whom it would apply. *Gill*, 5 Wn.2d at 430; *Anderson*, 159 Wash. at 644-45. Here, that is Complete Bowling. Contrary to Giannusa's position,⁶ there must be affirmative evidence showing an intention to merge estates – not a lack of evidence against it. *See Gill*, 5 Wn.2d at 432-33 (“There was no agreement to *assume* the junior obligations.”) (emphasis in original); *Anderson*, 159 Wash. 648 (“There is no finding that the [creditor] intended a merger as against the [debtors], and the evidence in the case would not support such a finding. ... [I]t necessarily follows that there was no merger[.]”).

Here, there is nothing in the record to indicate that Complete Bowling intended its right to collect on the promissory note to merge with the title it acquired at the foreclosure sale, and it has never expressed or implied such an intention. To the contrary, Complete Bowling has always maintained its right to recover the full amount it is owed and has acted accordingly by, in this instance, claiming the surplus funds remaining after the foreclosure sale. Giannusa does not, and cannot, point to any evidence in the record to support his contention. As such, this Court should disregard it. RAP 10.3(a)(6); *State*

v. Lough, 70 Wn. App. 302, 335, 853 P.2d 920 (1993), *affirmed*, 125 Wn.2d 847, 889 P.2d 487 (1995) (“[I]f the briefs on appeal do not properly cite to [the] record as may have been provided, the issues need not be reviewed.”).

There was no merger. Complete Bowling’s deed of trust was eliminated by the foreclosure sale. It retained the right to collect on the underlying debt Giannusa still owes it.

III. CONCLUSION

The trial court correctly applied the plain language of RCW 61.24.080(3) when it denied Giannusa’s motion for the surplus funds remaining after the foreclosure sale, and instead awarded them to Complete Bowling. Giannusa offers no binding or persuasive argument to the contrary. Consequently, this Court should affirm the trial court’s order denying Giannusa’s motion for disbursement of the funds.

Dated this 18th day of October 2011.



John M. Casey WSBA # 24187
Andrea L. Schiers WSBA # 38383
CURRAN LAW FIRM P.S.
Attorneys for Respondent
555 West Smith Street
Kent, WA 98032
(253) 852-2345

⁶ Br. of Appellant at 18.

CERTIFICATE OF SERVICE

Kristina Church, being first duly sworn, on oath deposes and says:
I am over the age of 18 years and am not a party to the within cause. I am employed by Curran Law Firm P.S. and on this date I caused to be served by ABC Legal Messengers and electronic mail (with permission of the served party) a true and correct copy of the above **Brief of Respondent** on the following persons set forth below:

Counsel for Respondent:

Jan Gossing
BTA Lawgroup, PLLC
31811 Pacific Hwy S, B-101
Federal Way, WA 98003

11 OCT 20 11 1:13
STATE OF WASHINGTON
BY _____
DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Kent, Washington, this 19th day of October 2011.

Kristina Church
Kristina Church

APPENDIX TO RESPONDENT’S BRIEF

1.	18 William B. Stoebuck, John W. Weaver, <i>Washington Practice, Real Estate</i> , §18:29 (2 nd ed., 2011).....	19
2.	John D. Sullivan, Comment, <i>Rights of Washington Junior Lienors in Nonjudicial Foreclosure</i> , 67 WASH. L. REV. 235, 248 (1992) .	17
3.	RCW 61.24.080	<i>passim</i>
4.	RCW 61.24.100	6, 11, 13, 14
5.	Alaska Stat. § 34.20.070	13-15
6.	Alaska Stat. § 34.20.080	13-15
7.	Alaska Stat. § 34.20.090	13-15
8.	Alaska Stat. § 34.20.100	14
9.	Nevada Revised Statute § 40.455	12
10.	Nevada Revised Statute § 40.457	13
11.	Nevada Revised Statute § 40.459	13

67 Wash. L. Rev. 235

Washington Law Review

January, 1992

Note

RIGHTS OF WASHINGTON JUNIOR LIENORS IN NONJUDICIAL FORECLOSURE--
WASHINGTON MUTUAL SAVINGS BANK v. UNITED STATES, 115 WASH. 2D 52, 793
P.2D 969, CLARIFIED, RECONSIDERATION DENIED, 800 P.2D 1124 (WASH. 1990)

John D. Sullivan

Copyright (c) 1992 by the Washington Law Review Association; John D. Sullivan

Abstract: In *Washington Mutual Savings Bank v. United States*, the Washington Supreme Court extended the anti-deficiency provisions of the Deed of Trust Act to all non-foreclosing junior lienors. Because this decision makes all junior obligations uncollectible following a nonjudicial foreclosure, it may have a chilling effect on lenders and a serious impact on the availability of home equity loans. This Note examines the Washington Mutual decision and suggests that the court should have determined instead that a deficiency is allowed, but should be computed after applying any surplus value in the property sold against junior obligations. This Note also recommends a statutory solution to restrict the anti-deficiency provisions to foreclosing lienors.

Suppose Mega Corporation decides to expand its business operations into Yourtown, Washington. Mega purchases a \$1,000,000 office building by paying \$100,000 cash and borrowing \$900,000 from International Big Bank, which secures the loan with a deed of trust. Later, Mega borrows \$50,000 from Little Neighborhood Savings Bank to construct a plush office suite in the building. Mega signs a promissory note and gives Little Neighborhood Savings Bank a second priority deed of trust on the building. When profits fall off, Mega defaults on both loans. International Big Bank exercises its option to foreclose nonjudicially. Big Bank's trustee quickly sells the building for \$900,000, which the trustee promptly pays to International. Because of this sale, Little Neighborhood Savings Bank's security, the building, is gone. Under Washington law, can Little Neighborhood Savings Bank recover the \$50,000 loan Mega Corporation promised to repay? Apparently it cannot, based on the Washington Supreme Court's interpretation of the Washington Deed of Trust Act in *Washington Mutual Savings Bank v. United States*.¹

The Washington Deed of Trust Act² created a nonjudicial foreclosure option for deeds of trust as an alternative to the cumbersome traditional judicial mortgage foreclosure system.³ Because foreclosing lienors derive substantial benefit from the nonjudicial alternative, the Act also included anti-deficiency provisions.⁴ These provisions limit nonjudicially foreclosing lienors, such as the hypothetical Big Bank, to recovery of the foreclosure sale price.⁵ The *Washington Mutual Savings Bank v. United States*⁶ decision wrongly extended the reach of this statute to preclude non-foreclosing junior lienors' recovery. By applying the anti-deficiency provisions so broadly, the Washington Supreme Court has placed junior lienors, such as Little Neighborhood Savings Bank, in an untenable position. Now, not only do junior lienors have no control over the loss of their security, but they also lose the underlying obligation. Because the underlying obligation is eliminated, borrowers like Mega Corporation avoid their debts to junior lienors.

The court subsequently issued a clarification of its *Washington Mutual* holding.⁷ While continuing to hold that junior lienors have no right to "sue for a deficiency" the court stated that it was not addressing the continued right of junior deed of trust holders to "sue the debtor on the promissory note."⁸ However, this "clarification" only made the law more uncertain because the term "sue the debtor on the promissory note" is the same as "sue for a deficiency." The legislature should amend the Deed

of Trust Act to eliminate this ambiguity and to restore non-foreclosing junior lienors' rights to obtain full payment of their obligations following nonjudicial foreclosure.

I. BACKGROUND

A. The Washington Deed of Trust Act

The use of deeds of trust as a security device for real property financing is not new in Washington.⁹ However, prior to enactment of the Washington Deed of Trust Act¹⁰ in 1965, the only method available for lenders to collect on loans from defaulting borrowers was judicial foreclosure of the trust deed as a mortgage.¹¹ Judicial foreclosure, which is still available, has certain disadvantages for lenders. Not only *237 do lenders face delays inherent in any judicial proceeding, but purchasers of judicially foreclosed property do not initially acquire clear title to the property.¹² Foreclosed borrowers and junior lienors have the right to redeem the property up to one year from the date of sale.¹³ Consequently, lenders sought a more favorable alternative.¹⁴

The Washington Legislature enacted the Deed of Trust Act to provide an efficient and inexpensive alternative to judicial mortgage foreclosure.¹⁵ The Act reflects a compromise. It attempts to balance the lenders' benefits with the borrowers' rights and to place the judicial and nonjudicial methods on equal footing. The Deed of Trust Act statutorily imposes on lenders a choice of remedies.¹⁶ Lenders may sue on the obligation, judicially foreclose as a mortgage, or nonjudicially foreclose under the trust deed power of sale.¹⁷

In a traditional judicial foreclosure, the foreclosure itself destroys the underlying obligation only to the extent the sale price satisfies the obligation.¹⁸ Any part of the judgment that remains unsatisfied is a "deficiency."¹⁹ Lenders then may obtain a deficiency judgment.²⁰ This judgment imposes personal liability on mortgagors for the unpaid balance.²¹

*238 If the lender elects the streamlined nonjudicial method, the Act precludes the lender's right to recover any deficiency.²² The nonjudicial alternative authorizes the trustee of a deed of trust to conduct a public sale of the property.²³ Such a sale results in the purchaser acquiring title free and clear of junior liens because the foreclosed debtor has no right of redemption in nonjudicial foreclosure, and because junior liens are extinguished.²⁴ Under the anti-deficiency provisions, a foreclosing lienor's recovery is limited to the proceeds from the sale of the security and the lienor has no recourse against the borrower personally.²⁵ However, the Act does not provide expressly for destruction of the underlying obligation.

B. Application of the Washington Anti-Deficiency Provisions

Prior to *Washington Mutual Savings Bank v. United States*,²⁶ no Washington court had addressed the applicability of the anti-deficiency provisions to non-foreclosing junior lienors. The courts have, however, explained foreclosure options under the Deed of Trust Act, and the application of the anti-deficiency provisions to foreclosing lienors.

The Washington Supreme Court first addressed foreclosure options available to lenders in *Fluke Capital & Management Services Co. v. Richmond*.²⁷ The court found that creditors may use judicial or nonjudicial procedures to enforce their security.²⁸ If creditors elect the *239 nonjudicial method,²⁸ that election limits their remedy to the proceeds from the foreclosure sale.²⁹

The court expanded on the Fluke decision in *Donovick v. Seattle-First National Bank*,³⁰ where the court explained that although the waiver of the right to a deficiency judgment is part of the price lenders pay for using the nonjudicial procedure, such a waiver does not include relinquishing the right to realize on all the security given on the loan.³¹ The debtor, *Donovick*, argued that the nonjudicial foreclosure of one trust deed fully satisfied the underlying obligation, thus precluding the creditor bank from foreclosing on a second deed of trust another parcel of land that secured the same obligation because such foreclosure would be equivalent to granting a deficiency judgment.³² The court upheld *Seattle-First's* right to foreclose the second trust

deed, concluding that a contrary holding would result in “an unjustified, unwarranted windfall to the debtor” by eliminating both Seattle-First's security in the second parcel and its right to collect on the underlying obligation.³³

C. The Washington Mutual Case

The Washington Supreme Court applied the anti-deficiency provisions to a non-foreclosing junior lienor in Washington Mutual. The case arose when the United States Court of Appeals for the Ninth Circuit certified to the Washington Supreme Court the question whether Washington law allows a non-foreclosing junior lienor that purchases property at a nonjudicial foreclosure sale to recover a deficiency.³⁴ The underlying case was a quiet title action on real property owned by Robert and Christine Shell.³⁵ The property had a fair market value of \$64,000.³⁶ Yakima Federal Savings & Loan Association held a first trust deed on the property to secure a debt of \$41,000. In addition, Washington Mutual Savings Bank held a second trust deed on a loan with a \$29,800 balance. Finally, the Internal Revenue Service (IRS) had filed a third-priority tax lien for \$150,000.³⁷

*240 The Shells defaulted on both loans and Yakima nonjudicially foreclosed.³⁸ To protect its interests, Washington Mutual purchased the property at the trustee's sale for the amount then owed on Yakima's loan, \$42,020,³⁹ considerably less than the fair market value. The IRS stated its intention to redeem the property from Washington Mutual, as authorized by the Internal Revenue Code.⁴⁰ The Code allows the IRS to redeem real property subject to federal tax liens from purchasers at nonjudicial foreclosure sales.⁴¹ The IRS offered Washington Mutual \$42,020 for the property, based on the Code provision that defines the redemption price in such cases.⁴² The Code states that the redemption price is the actual price paid by the purchaser at the foreclosure sale and includes that amount of the purchaser's secured obligation that is satisfied by the sale.⁴³ At issue was how much of Washington Mutual's obligation the foreclosure sale satisfied. Only to the extent Washington Mutual could not obtain a deficiency judgment against the Shells would the IRS pay any amount over the price paid by Washington Mutual. The IRS argued that Washington law allows a non-foreclosing junior lienor to obtain a deficiency judgment after a nonjudicial foreclosure.⁴⁴

Washington Mutual agreed, but contended that the IRS's offered redemption price of \$42,020 was computed incorrectly.⁴⁵ Washington Mutual argued that the IRS should pay either: (1) the purchase price plus the balance due on Washington Mutual's deed of trust,⁴⁶ or (2) the fair market value of the property.⁴⁷ The district court agreed that the redemption price should be the fair market value.⁴⁸ After the IRS refused to pay this price, the court quieted title in Washington Mutual.⁴⁹ The IRS appealed to the Ninth Circuit Court of Appeals, which certified to the Washington Supreme Court the following question: *241 “In Washington, may a nonforeclosing junior lienor who purchases property at a nonjudicial foreclosure sale sue for a deficiency under Washington law, and, if so, what is the manner of computing the deficiency?”⁵⁰

The Washington Supreme Court answered the certified question by holding that “there is no authority in Washington law for allowing any lienholder to sue for a deficiency following a nonjudicial foreclosure sale.”⁵¹ Washington Mutual moved for reconsideration,⁵² contending that although the court's conclusion was correct “as applied to the narrow facts of this case,” the anti-deficiency provisions should be applied only to a non-foreclosing junior lienor who purchases at the foreclosure sale.⁵³ The IRS did not object.⁵⁴ The court denied that motion, but did issue a “clarification” of its holding.⁵⁵ The clarification said in full, “We do not herein address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note because it is not before us.”⁵⁶

D. The Law in Other States

Four states with deed of trust systems have anti-deficiency provisions similar to Washington's, in that they prohibit lienors that choose nonjudicial foreclosure from obtaining a deficiency judgment. Courts in three of the four states, California, Alaska, and Montana, have addressed the applicability of these statutes to non-foreclosing junior lienors.⁵⁷ In each case they have

concluded that non-foreclosing junior lienors have a right to obtain a deficiency judgment following a senior lienor's nonjudicial foreclosure.

The California Code of Civil Procedure contains anti-deficiency provisions analogous to the Washington Deed of Trust Act.⁵⁸ The *242 Code prohibits deficiency judgments when the property has been sold by a mortgagee or trustee under a deed of trust power of sale.⁵⁹ The California Code, however, also has "fair value" provisions that more specifically define how to compute a deficiency. It is the difference between the amount of the obligation and the greater of the foreclosure sale price or the fair market value.⁶⁰ These "fair value" provisions, passed before the anti-deficiency provisions, were enacted to prevent lienors from purchasing property for a nominal sum at a foreclosure sale and then realizing a double recovery by obtaining a large deficiency judgment.⁶¹

The California Supreme Court has reviewed the applicability of the anti-deficiency provisions to non-foreclosing junior lienors. In *Roseleaf Corp. v. Chierighino*,⁶² the court held that junior lienors that lose their security through a senior lienor's nonjudicial foreclosure sale may obtain a deficiency judgment.⁶³ The *Roseleaf* court reasoned that a junior lienor's right to recover a deficiency should not be controlled by the whim of a senior lienor.⁶⁴ Justice Traynor noted that unlike the selling senior lienor, the junior lienor is not in control and "is in no better position to protect himself than is the debtor."⁶⁵

Although the California Supreme Court has not specifically addressed the effect of the anti-deficiency provisions on purchasing, non-foreclosing junior lienors, California courts of appeals have. In *Walter E. Heller Western, Inc. v. Bloxham*,⁶⁶ the court held that even junior lienors that purchase at senior lienors' nonjudicial foreclosure sales are not barred from obtaining a deficiency judgment.⁶⁷ Therefore, *243 California courts have applied anti-deficiency provisions after which Washington's were modeled in a manner contrary to the apparent holding in *Washington Mutual*.

Alaska's anti-deficiency provisions also contain language similar to Washington's.⁶⁸ These provisions prohibit a deficiency judgment when a trustee makes a sale under a deed of trust.⁶⁹ The Alaska Supreme Court, in *Adams v. FedAlaska Federal Credit Union*,⁷⁰ stated that the Alaska provisions are similar to California's and held that junior lienors who purchase at a nonjudicial foreclosure sale may obtain a deficiency judgment.⁷¹ Thus, the Alaska courts, like the California courts, disagree with the Washington Supreme Court's position.

The Montana Code's terminology varies somewhat from the Washington, California or Alaska statutes.⁷² It refers to trust indentures and foreclosure by advertisement and sale, which are the functional equivalents of trust deeds and nonjudicial foreclosure. The Code prohibits a deficiency judgment when a trust indenture is foreclosed by advertisement and sale.⁷³ In *First Interstate Bank of Kalispell, N.A. v. Wann*,⁷⁴ the Montana Supreme Court found that the statutory prohibition does not apply to a creditor holding a note that is no longer secured because of a foreclosure action taken by a senior creditor.⁷⁵ The court based its decision on statutory construction. It found that the use of the definite article "the" to modify the words "note" and "trust indenture" plainly indicated that only the creditor possessing the foreclosed obligation and trust indenture was prohibited from obtaining a deficiency judgment.⁷⁶

*244 II. ANALYSIS

In *Washington Mutual*, the court held that there is no authority in Washington law for allowing any lienor to recover a deficiency following a nonjudicial foreclosure sale.⁷⁷ This holding places junior lienors in an untenable position when a senior lienor elects to pursue nonjudicial foreclosure, in that the junior lienors lose not only their security but also their underlying obligations. This decision goes beyond both the language of the anti-deficiency provisions and the policy behind the Deed of Trust Act. As a result, the *Washington Mutual* decision is likely to have a chilling effect on lenders because of the increased risk that lenders will be unable to recover fully on their obligations. Moreover, the court's "clarification" has only made the law more

uncertain. The court should have allowed a deficiency judgment but offset the amount of the deficiency by any surplus value in the purchased property.

A. Washington Mutual Exceeds the Scope of the Washington Deed of Trust Act

The court's broad holding in *Washington Mutual* extends the anti-deficiency provisions beyond the scope of the Deed of Trust Act by making the provisions applicable to all lienors regardless of their participation in the foreclosure sale. Apparently, junior lienors lose not only their security, but also their right to satisfaction of the underlying obligation. This holding is inconsistent with both the language and the purposes of the Deed of Trust Act.

1. Statutory Language Precludes Application of the Anti-Deficiency Provisions to Non-Foreclosing Lienors

Strict statutory construction would limit the anti-deficiency provisions of the Washington Deed of Trust Act to foreclosing lienors. The ordinary rules of statutory construction, as adopted by the Washington Supreme Court, dictate applying the plain meaning of the statute's language after giving every word effect.⁷⁸ The Act's language, like that in the Montana Code, narrowly defines its application by using the definite article "the" to modify the words "obligation" and "deed *245 of trust."⁷⁹ Thus, the deficiency judgment prohibition should only apply to foreclosed obligations and deeds of trust. The Washington Supreme Court should have followed its own precedent and applied the same plain-meaning analysis as the Montana Supreme Court has, and concluded that the Washington anti-deficiency provisions apply only to foreclosing lienors and not to non-foreclosing junior lienors.

2. Denial of a Deficiency Judgment Is Contrary to the Purpose of the Deed of Trust Act

The Deed of Trust Act provides an efficient alternative to the cumbersome judicial foreclosure that preserves the balance between lenders' and borrowers' rights.⁸⁰ The denial of deficiency judgment rights to non-foreclosing junior lienors disrupts this balance by contravening three important policy objectives. First, the lenders' and borrowers' expectations should be met by using the property to satisfy as much of the underlying debt as possible. Debtors should not receive unwarranted windfalls. Second, foreclosing lienors should be forced to an election of remedies and to waive their right to a deficiency in order to obtain the more efficient nonjudicial foreclosure. At the same time, junior lienors should not be penalized by the whim of a more senior lienor. Third, the law should promote stability and certainty. *Washington Mutual* accomplishes none of these objectives.

a. The Security Ought To Be Used to Satisfy as Much Debt as Possible

Ideally, in both judicial and nonjudicial foreclosures, the full value of the foreclosed property satisfies the entire debt and there is no deficiency. Lenders take security for a debt to achieve this protection of their loaned assets. Borrowers likewise hope to avoid further personal liability by applying the security fully to satisfy the debt. This ideal is accomplished when the foreclosure sale price is at least equal to the debt. However, frequently this does not happen. The Deed of Trust Act attempts to achieve this ideal by implementing procedures to discourage deficiencies.

In a judicial foreclosure, the redemption right pressures bidders at the foreclosure sale to bid a fair price because the borrower or a non-foreclosing junior lienor can redeem the property at the sale price.⁸¹ *246 Also, the court can establish an upset price in advance of the sale.⁸² Alternatively, if the sale price is too low, the court can refuse to confirm the sale unless the fair value of the property is applied to satisfy the debt.⁸³ These procedures support the legislative policy by forcing the full utilization of the value of the security. Moreover, if a foreclosing lienor purchases the property at the judicial foreclosure sale and retains the property, the lienor can still obtain a judgment for the deficiency.⁸⁴ However, that deficiency should be the amount of the debt less the fair value of the property. In such a case the purchasing lienor is analogous to a mortgagee who obtains the property through strict foreclosure.⁸⁵ In both cases the property itself, rather than the proceeds from the sale of the property, is used to satisfy the obligation. Although strict foreclosure is now prohibited statutorily in most states, including Washington, under the common law the mortgagee could obtain a deficiency judgment equal to the difference between the fair market value of the

property and the obligation.⁸⁶ This common law principle carries through in judicial foreclosure and was recognized by the legislature when it gave courts the discretion to apply the fair value against the obligation as a condition for sale confirmation.⁸⁷ If the Washington Mutual case had involved a judicial foreclosure, Washington Mutual clearly could have obtained a deficiency judgment.⁸⁸ Washington Mutual's underlying obligation was for about \$30,000, and it paid \$42,000 to obtain the \$64,000 property.⁸⁹ Thus, Washington Mutual's total outlay was about \$72,000. Assuming it retained the property, it would have \$22,000 additional value above the purchase price. If it were to sue on the obligation, common law principles dictate that the court not recognize the full \$30,000 debt, but instead credit the \$22,000 surplus value against that debt.⁹⁰ Thus, *247 the amount of deficiency would be \$8,000, the difference between the fair market value of the property and the sum of the debt plus the costs to acquire the property. This would be a fair result for both the borrower and the lender.

Any result achieved through nonjudicial foreclosure ought to be equally fair to both parties by using the security to satisfy as much of the debt as possible. The Washington Legislature specifically provided that in judicial foreclosures, courts may exercise discretion by crediting the fair value of a property against the underlying obligation.⁹¹ The courts should exercise the same discretion to ensure fairness in a suit for a deficiency after nonjudicial foreclosure, particularly when the purchasing lienor does not in fact acquire nonredeemable title. The legislature did not alter the common law equitable remedy by prohibiting its use in the nonjudicial foreclosure alternative.⁹² Thus, the security would pay each succeeding lienor as much of each debt as possible up to, but not beyond, the full amount of the debt. Any remaining debt above the fair market value would be the deficiency, for which the lienor may obtain a judgment.

b. The Deed of Trust Act's Election of Remedies Should Not Penalize Non-Foreclosing Junior Lienors

The Deed of Trust Act's bar to a deficiency judgment after a nonjudicial sale was not intended to deny creditors their remedies. The Act merely requires an election of remedies and puts an additional price on one of those elections in order to place judicial and nonjudicial foreclosure on equal footing.⁹³ The nonjudicial foreclosure alternative provides the benefit of nonredeemable title in exchange for the lienors' loss of their right to a deficiency judgment.⁹⁴ This provides strong incentive for the lienor to ensure that the debt is not undersecured. It provides even stronger incentive to ensure that the price bid at a foreclosure sale is fair and at least covers the obligation.⁹⁵

*248 The same incentive does not exist for non-foreclosing junior lienors because the junior lienors are not in control.⁹⁶ Once the senior lienor forecloses and sells the property, junior lienors lose their security no matter what price is paid. The surplus over the senior lienor's obligation received from the sale will be paid over to satisfy other creditors' obligations.⁹⁷ However, if junior lienors also are barred from suing on the obligation, then the junior lienors recover less than their full debt when the security is sold for less than the combined amount due on both the senior and junior obligations. This is true regardless of what other assets the debtor may have.

Although junior lienors have no redemption right, they can purchase at the trustee's sale. However, if the net value of the property, or the fair market value less the sale price, is less than the junior lienors' obligations and the junior lienors are barred from a deficiency judgment, then they will not improve their positions by purchasing the security. Junior lienors will be discouraged from any competitive bidding that reduces the net value. Faced with foreclosing property with market value less than the likely sale price plus the debt, junior lienors would choose judicial foreclosure and a right to a deficiency judgment. When the senior lienor preempts that choice, junior lienors should not be penalized.⁹⁸

c. Courts Should Promote Stability and Certainty in the Law

Stability and certainty in the law are important to lenders because real property financing generally involves long-term obligations.⁹⁹ The legislature, through the Deed of Trust Act, only altered common law mortgage concepts in well-defined areas.¹⁰⁰ Therefore, the court ought to construe narrowly any legislative change to that common law norm.¹⁰¹ It is true that

a clear and unequivocal interpretation of the law that is contrary to current expectations would have provided a new set of expectations for future transactions. However, the Washington Mutual decision is neither clear nor unequivocal because of the *249 court's confusing "clarification." Even if Washington Mutual were clear, because court decisions are retroactive interpretations of existing law, the ruling still would thwart the expectations of current lenders who entered into their transactions with the reasonable expectation of a right to full recovery.

3. Washington Case Law Does Not Support Extension of the Anti-Deficiency Provisions to Non-Foreclosing Junior Lienors

The Washington Mutual decision deviates from past Washington Supreme Court decisions that viewed the anti-deficiency provisions as a price imposed on foreclosing lienors' choice to use the more efficient and inexpensive nonjudicial method.¹⁰²

In *Fluke*, the court reasoned that it is the election of nonjudicial foreclosure that limits the remedy.¹⁰³ Lienors gain certain advantages by choosing nonjudicial foreclosure, but they also give up their right to obtain a deficiency judgment. In Washington Mutual, on the other hand, the court denied a deficiency to the non-foreclosing junior lienor irrespective of its lack of election to foreclose nonjudicially. Thus, Washington Mutual does not adhere to the quid-pro-quo rationale of *Fluke*. Similarly, the Washington Mutual decision is not in accord with *Donovick*, in that the Washington Mutual court extinguished both the junior lienor's security and its underlying obligation.¹⁰⁴ It did so, not as the junior lienor's price for choosing the nonjudicial procedure, but merely because a senior lienor exercised its choice.

B. The Chilling Effect of Washington Mutual on Lenders

The Washington Supreme Court's holding in Washington Mutual and its subsequent "clarification" may have a chilling effect on lenders, especially those potentially in a junior position. Lenders could be reluctant to make loans and take junior lienor positions because the "clarification" makes Washington law uncertain. More importantly, these lenders may be unwilling to risk the loss of their right to recover on the obligation as a result of the court's broad application of the anti-deficiency provisions in the initial Washington Mutual decision.

*250 1. The "Clarification" Has Made Washington Law Uncertain

The Washington Supreme Court's "clarification" of the Washington Mutual holding has increased the confusion rather than clarified the law because the term "sue the debtor on the promissory note" is the same as "sue for a deficiency."¹⁰⁵ When the court "clarified" its decision in Washington Mutual, it apparently intended to address some ambiguity in the opinion.¹⁰⁶ The court seemed to distinguish deficiency judgments from suits on the obligation. "Deficiency judgment" is generally associated with judicial foreclosures because there is an actual judgment as part of the foreclosure. The court may have intended a semantic distinction between the two processes because there is no judgment in a nonjudicial foreclosure. Thus, "deficiency judgment" would apply only to judicial foreclosures and a "suit on the obligation" would apply to nonjudicial foreclosures. This distinction is confusing because the anti-deficiency provisions of the Deed of Trust Act, which only apply to nonjudicial foreclosure, use the terms "deficiency decree or other judgment."¹⁰⁷

The court need not have distinguished between a "deficiency judgment" and a "suit on the obligation" regarding the federal redemption statute because the statute does not use the term "deficiency judgment." Instead it refers to "the amount of the obligation secured by such lien to the extent satisfied by reason of such sale."¹⁰⁸ The court may have intended to leave open the possibility of distinguishing later cases by limiting the Washington Mutual holding to the facts of that case: a federal tax lien redemption from a non-foreclosing junior lienor who purchases at a nonjudicial foreclosure sale. However, if this was the court's intent it should have clearly stated so. Further, it would have been unnecessary to distinguish future cases if the court had simply applied the property's surplus value against the obligation before determining any deficiency.

2. Washington Mutual Has Increased Lenders' Risk

The broad holding in Washington Mutual transforms the anti-deficiency provisions and the entire Deed of Trust Act from an equitable, efficient alternative to judicial foreclosure into a system that not only will penalize junior lienors but also could have

a wide-reaching effect on both lenders and borrowers throughout the state. The potential **251* inequity of denying a deficiency judgment to non-foreclosing junior lienors is best shown by returning to the Mega Corporation hypothetical.

Mega's office building, with a fair market value of \$1,000,000, now is encumbered by a first deed of trust securing a \$900,000 debt and a second deed of trust securing a \$50,000 debt, together representing ninety-five percent of the market value of the building, or \$950,000. A contractor performs minor remodeling work on an executive's office and files a mechanic's lien for the amount due, \$3,000. Mega defaults on the first deed of trust and International Bank nonjudicially forecloses. Lacking the cash to purchase the building, or considering the \$950,000 cash outlay to protect a \$3,000 debt unreasonable, the contractor does not bid at the foreclosure sale. If the anti-deficiency provisions were applied to any non-foreclosing junior lienor, the debt underlying the mechanic's lien would be extinguished. The contractor would have no recourse, even though the \$50,000 surplus from the sale at fair market value would be available to satisfy general creditors.¹⁰⁹

The result in this hypothetical is even more extraordinary when one considers that the contractor actually could improve its position by releasing the security.¹¹⁰ If the contractor were to release the mechanic's lien prior to the nonjudicial foreclosure, then the contractor would become an ordinary creditor and not a non-foreclosing junior lienor. Neither the Washington Mutual decision nor the anti-deficiency provisions would apply. This creates an incentive to release security that would not otherwise exist. The contractor could then sue on its debt and recover, along with other general creditors, out of the \$50,000 surplus from the sale. In other words, such a creditor would be better off by not taking security for the obligation!

Perhaps the most egregious case is the judgment creditor. Suppose our contractor had not filed a mechanic's lien. Then, when Mega failed to pay for the remodeling, the contractor obtained a judgment for the \$3,000. A person who obtains a judgment automatically obtains a lien on the judgment debtor's real property, junior to the other liens.¹¹¹ If International Bank, a senior lienor, were to elect to **252* foreclose nonjudicially, the contractor would lose both the lien and the judgment even though the contractor did not choose to attach the lien.

Under these circumstances, lenders may be reluctant to make loans secured by junior liens. Lenders have few options. They may charge higher interest rates to offset the increased risks, or establish greater equity requirements. This could have a severe impact on large commercial property financing. Equally important, it could well devastate ordinary homeowners by making unavailable or unaffordable the now-common home equity loans that are used for such things as home improvements and children's college educations.

C. The Supreme Court Should Have Recognized the Junior Lienor's Right to a Deficiency Judgment, Subject to Offset by Any Surplus

The Washington Mutual court should have held that any non-foreclosing junior lienor has a right to a deficiency judgment following a nonjudicial foreclosure sale, provided that when the junior lienor purchases at the foreclosure sale, the difference between the price paid and the fair market value of the property acquired must first be applied against the obligation to determine the amount of a deficiency.¹¹² This approach overcomes the complication created by the IRS's redemption, and accounts for the equitable considerations unique to this case. Thus, the court would have accomplished the same result for Washington Mutual without altering the law.

1. The Federal Tax Lien Complication

The court's decision in the Washington Mutual case was made difficult by the particular facts of the case. Strong equitable considerations pointed toward a decision in favor of Washington Mutual. In the normal scheme of nonjudicial foreclosure, Washington Mutual would have acquired nonredeemable title to the property it purchased at the trustee's sale.¹¹³ However, the third-position federal tax lien complicated the issues by giving the IRS a federal statutory right of redemption unavailable to other Washington lienors in nonjudicial foreclosure.¹¹⁴ This redemption right could cost Washington Mutual any advantage it may have gained by purchasing the property. At the foreclosure sale, Washington Mutual had paid only the amount **253* remaining on Yakima's loan.¹¹⁵ Under the federal tax lien redemption rules, if Washington Mutual were not allowed any

deficiency judgment, the IRS would have to pay Washington Mutual its purchase price plus the amount of the deficiency deemed satisfied by the sale, but not more than fair market value.¹¹⁶ In this case, Washington Mutual would realize \$21,080, or about two-thirds of its obligation. The IRS would gain nothing, because it would have to pay fair market value for the property. On the other hand, if Washington Mutual could retain its right to a deficiency judgment for the full amount of its obligation, the IRS would be obliged to pay only the foreclosure sale price.¹¹⁷ The IRS would acquire the foreclosed property for about two-thirds its market value and could recover at least some of the taxes owed. Washington Mutual could sue the debtors personally on the underlying note. However, because the debtors were bankrupt, Washington Mutual would recover nothing. Yakima, which elected the foreclosure method, would be paid in full. The IRS, third in priority, would recover some of its taxes. Thus, Washington Mutual would literally be “caught in the middle.” Washington Mutual should not be penalized in favor of a more junior lienor, the IRS, because Washington Mutual did not choose the foreclosure process and merely purchased the property to protect its interests.¹¹⁸

2. The Equitable Considerations Could Have Been Accounted For by Applying the Surplus to the Deficiency

The Washington Supreme Court failed to address a third option that could have accomplished the same equitable result for Washington Mutual without denying a deficiency judgment. In so doing, the court failed to consider adequately both the creditor's right to be paid fully and the disposition of the surplus value in the foreclosed property. The court should have allowed a judgment only for the deficiency remaining after applying the surplus value in the acquired property against Washington Mutual's underlying obligation. In other words, because Washington Mutual acquired a \$64,000 property *254 for only \$42,000, the \$22,000 surplus value in the property should be applied against the \$30,000 remaining on Washington Mutual's obligation, yielding an \$8,000 deficiency for which Washington Mutual could seek a judgment. Since the debtors are bankrupt, Washington Mutual likely would be unable to recover that deficiency, but would have received about two-thirds of the debt in property value. The full value of the security is thus used to satisfy, in priority, as much debt as possible—all of Yakima's and two-thirds of Washington Mutual's obligations.

The federal redemption statute requires the IRS to pay Washington Mutual's purchase price plus the amount of the secured obligation satisfied by the sale. Because Washington Mutual acquired the surplus value in the property through the foreclosure sale, and used it to satisfy part of the obligation, the \$22,000 would be included in the redemption price. The IRS would have to pay Washington Mutual the same amount in either case: the fair market value, \$64,000. The IRS would be unlikely to seek redemption if required to pay fair market value because it would gain nothing. However, regardless of whether the IRS purchases, Yakima would be paid in full and Washington Mutual would obtain two-thirds of its obligation.¹¹⁹ The junior lienors' obligations would remain and could be satisfied by other assets, yet no lienor would receive a windfall.

D. Recommended Solution

Either the courts or the legislature could resolve the present uncertainty in the law. Perhaps the Washington Supreme Court will, in some future case, further clarify its holding in Washington Mutual by limiting the case to its unusual facts—a non-foreclosing junior lienor that purchases at the trustee's sale and is subject to a tax lien redemption. However, this artificial approach would not completely resolve the conflict, because the basis for even such a limited holding would be unclear. The non-foreclosing junior lienor's right to enforce its obligation should not depend upon either a senior lienor's choice of remedy or on the identity of a more junior lienor. The court could also unequivocally overrule Washington Mutual. However, this would require both a willing court and a suitable case, either of which may be lacking. A legislative solution is a better alternative.

The Washington Legislature should amend the anti-deficiency provisions specifically to exempt the non-foreclosing junior lienor. *255 Section 6I.24.100 of the Revised Code of Washington should be changed to read: “Foreclosure . . . shall satisfy the obligation secured by the deed of trust foreclosed, but not a lien or mortgage or trust deed junior to the one foreclosed . . .”¹²⁰ Such an amendment would comport with the purpose of the Deed of Trust Act while preserving the foreclosing lienor's choice of remedies. It would also retain the burdens placed upon the foreclosing lienor that chooses nonjudicial foreclosure. At the same time, it would not penalize the non-foreclosing junior lienor when a senior lienor elects remedies over which the junior lienor has no control.

III. CONCLUSION

As a result of the Washington Mutual decision, the reach of the Washington anti-deficiency provisions in nonjudicial foreclosures is unclear. These provisions always have been applied to a lienor who forecloses. Now they may also apply to all non-foreclosing junior lienors. If so, the Washington Mutual holding is contrary to the case law of other states with similar provisions and is inconsistent with both the language and the purpose of the Washington Deed of Trust Act. More important, application to non-foreclosing junior lienors is unfair. Such application destroys the creditor's reasonable expectation of full payment of a just debt and results in the unjust enrichment of the debtor. A more harmonious, rational and symmetrical result would be achieved by allowing non-foreclosing junior lienors to sue for a deficiency, subject to offset by any surplus value acquired by purchasing at the trustee's sale. Therefore, the Washington Legislature immediately should amend the Deed of Trust Act to rectify this unfortunate decision.

Footnotes

- 1 115 Wash. 2d 52, 793 P.2d 969, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990).
- 2 1965 Wash. Laws ch. 74, §§ 1-13 (codified as amended at WASH. REV. CODE §§ 61.24.010-.130 (1989 & Supp. 1990)).
- 3 A trust deed is a mortgage equivalent, in which the borrower deeds the property to a third party (trustee) who holds the deed as security for the lender. Gose, *The Trust Deed Act in Washington*, 41 WASH. L. REV. 94, 96 (1966).
- 4 WASH. REV. CODE § 61.24.100.
- 5 *Id.*
- 6 115 Wash. 2d 52, 793 P.2d 969, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990).
- 7 800 P.2d at 1124 (clarification was later incorporated in the amended 115 Wash. 2d 52, but not identified as a clarification).
- 8 115 Wash. 2d at 59, 800 P.2d at 1124.
- 9 Gose, *supra* note 3, at 94.
- 10 1965 Wash. Laws ch. 74, §§ 1-13 (codified as amended at WASH. REV. CODE §§ 61.24.010-.130 (1989 & Supp. 1990)).
- 11 Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 WASH. L. REV. 323 (1984) (authored by Joseph Hoffmann).
- 12 Gose, *supra* note 3, at 94-95.
- 13 Redemption must occur within eight months of sale for non-agricultural property if the judgment creditor has waived its right to deficiency judgment; otherwise, it must occur within one year. WASH. REV. CODE §§ 6.23.010-.020 (1989). Further, if the foreclosed property is the borrower's homestead, the borrower has the right to continued occupancy during the redemption period. *Id.* § 6.23.110.
- 14 Gose, *supra* note 3, at 95.
- 15 *Id.* at 95-96; see also *Cox v. Helenius*, 103 Wash. 2d 383, 387, 693 P.2d 683, 685-86 (1985).
- 16 See *infra* notes 26-33 and accompanying text; see also *Whitehead v. Derwinski*, 904 F.2d 1362, 1363-64 (9th Cir. 1990) (explaining the choice of remedies under the Deed of Trust Act).
- 17 *Thompson v. Smith*, 58 Wash. App. 361, 366, 793 P.2d 449, 451 (1990). However, the lender must choose only one of these options. WASH. REV. CODE § 61.12.120 (1989) ("The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage . . ."). Washington does not permit strict foreclosure.

- Id. § 61.12.060. A judicial decree of strict foreclosure vests title of the property in the mortgagee without any sale of the property. BLACK'S LAW DICTIONARY 646 (6th ed. 1990).
- 18 See generally G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 2.1-2.2 (2d ed. 1985).
- 19 Id.
- 20 WASH. REV. CODE § 61.12.060 (1989). Similarly, under common law, a lender also could obtain a deficiency judgment following strict foreclosure. G. OSBORNE, MORTGAGES § 333 at 699 (2d ed. 1970).
- 21 BLACK'S LAW DICTIONARY 422 (6th ed. 1990). The court may exercise discretion before the sale to establish a minimum bid (upset price) or after the sale to set a fair market value. If the court sets a fair market value, the excess of the fair market value of the property sold over the sale price then must be credited against the foreclosing lienor's obligation before determining any deficiency. WASH. REV. CODE § 61.12.060 (1989); McClure v. Delguzzi, 53 Wash. App. 404, 406-07, 767 P.2d 146, 147-48 (1989); see also National Bank of Washington v. Equity Investors, 81 Wash. 2d 886, 924-25, 506 P.2d 20, 43 (1973); Bank of Hemet v. United States, 643 F.2d 661, 669 (9th Cir. 1981) (applying California's analogous statute).
- 22 WASH. REV. CODE § 61.24.100 (1989 & Supp. 1990).
- 23 Id. § 61.24.040. Sale may occur as soon as 190 days after default. Id.
- 24 Id. § 61.24.050; *Donovick v. Seattle-First Nat'l Bank*, 111 Wash. 2d 413, 420-21, 757 P.2d 1378, 1382 (1988) (Dore, J., dissenting) (borrower has no right to statutory redemption in nonjudicial foreclosure). However, the IRS can redeem under federal statute. See *infra* note 41 and accompanying text. Because judicial foreclosure is a forced sale, the borrower also has a right to preserve a certain portion of the value of residential property as a homestead. WASH. CONST. art. XIX, § 1. Prior to either judicial or nonjudicial foreclosure, all lienors (as well as the defaulting owner) have a right of equitable redemption, which permits a lienor to acquire the senior obligation by paying the amount in default. Such payment reinstates the debt and avoids foreclosure. G. OSBORNE, *supra* note 20, §§ 304-05.
- 25 WASH. REV. CODE § 61.24.100 (1989 & Supp. 1990) ("Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation . . .").
- 26 115 Wash. 2d 52, 793 P.2d 969, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990).
- 27 106 Wash. 2d 614, 724 P.2d 356 (1986).
- 28 Id. at 624, 724 P.2d at 363.
- 29 Id.
- 30 111 Wash. 2d 413, 757 P.2d 1378 (1988).
- 31 Id. at 416, 757 P.2d at 1379-80; see also *Gose*, *supra* note 3, at 96 n.14.
- 32 111 Wash. 2d at 415, 757 P.2d at 1379.
- 33 Id. at 416, 757 P.2d at 1380.
- 34 *Washington Mut. Sav. Bank v. United States*, 115 Wash. 2d 52, 54, 793 P.2d 969, 970, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990).
- 35 Id.
- 36 Id. Dollar amounts are rounded, but are accurate enough for our purposes.

- 37 Id.
- 38 Id.
- 39 Id. The purchase price represented the \$41,000 initial debt, plus interest.
- 40 Id. at 55, 793 P.2d at 970.
- 41 See 26 U.S.C.A. § 7425(d)(1) (West 1989). Of course statutory redemption was not available under Washington law. WASH. REV. CODE § 61.24.050 (1989).
- 42 115 Wash. 2d at 55-56, 793 P.2d at 970-71.
- 43 28 U.S.C.A. § 2410(d) (West 1978); Treasury Regulations on Procedure and Administration, 26 C.F.R. § 301.7425-4(b)(2)(ii) (1989) (provides for treating a junior lienor who purchases at foreclosure sale as a foreclosing lienor).
- 44 Brief of Appellant at 10, Washington Mut. Sav. Bank v. United States, 115 Wash. 2d 52, 793 P.2d 969, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990) (No. 56245-8).
- 45 Washington Mutual, 115 Wash. 2d at 55, 57, 793 P.2d at 970, 971.
- 46 Purchase price of \$42,020, plus the \$29,800 balance due, or \$71,820.
- 47 Fair market value was \$64,000. Washington Mutual, 115 Wash. 2d at 54, 793 P.2d at 970.
- 48 Id. at 55, 793 P.2d at 970.
- 49 Id.
- 50 Id.
- 51 Id.
- 52 Washington Mut. Sav. Bank v. United States, 800 P.2d 1124 (Wash. 1990).
- 53 Motion for Reconsideration at 4, Washington Mut. Sav. Bank v. United States, 800 P.2d 1124 (Wash. 1990) (No. 56245-8).
- 54 Appellant's Answer to Motion for Reconsideration at 2, Washington Mut. Sav. Bank v. United States, 800 P.2d 1124 (Wash. 1990) (No. 56245-8).
- 55 115 Wash. 2d at 59, 800 P.2d at 1124.
- 56 Id.
- 57 See *infra* notes 58-76 and accompanying text. The fourth state, Oregon, has no case law on point.
- 58 The California Code of Civil Procedure provides:
 No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property . . . hereafter executed in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.
 CAL. CIV. PROC. CODE § 580(d) (West 1990).
 The Washington Deed of Trust Act and mortgage statutes were modeled after Oregon statutes, which in turn were copied from California. 2 WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK § 41.1, at 41-5 (1979).
- 59 CAL. CIV. PROC. CODE § 580(d) (West 1990).

- 60 Id. §§ 580(a), 726; *Cornelison v. Kornbluth*, 15 Cal. 3d 590, 542 P.2d 981, 988-89, 125 Cal. Rptr. 557, 564-65 (1975); see also *Coppola v. Superior Court (Singer)*, 211 Cal. App. 3d 848, 259 Cal. Rptr. 811, 826 (1989) (equity dictates applying § 580(a) to junior lienor who purchases at senior's nonjudicial foreclosure sale).
- 61 *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 378 P.2d 97, 101, 27 Cal. Rptr. 873, 877 (1963).
- 62 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963).
- 63 378 P.2d at 101, 27 Cal. Rptr. at 877.
- 64 Id. at 102, 27 Cal. Rptr. at 878.
- 65 Id. at 100, 27 Cal. Rptr. at 876.
- 66 176 Cal. App. 3d 266, 221 Cal. Rptr. 425 (4th Dist. Ct. App. 1985).
- 67 Id. at 273, 221 Cal. Rptr. at 429. The deficiency judgment is limited to the lesser of the excess of indebtedness over the fair market value or the excess over the sale price. CAL. CIV. PROC. CODE § 580(a) (West 1990); 176 Cal. App. 3d at 270, 221 Cal. Rptr. at 427; see also *Bank of Hemet v. United States*, 643 F.2d 661, 667-70 (9th Cir. 1981); *Citrus State Bank v. McKendrick*, 215 Cal. App. 3d 941, 949 n.10, 263 Cal. Rptr. 781, 786 n.10 (2d Dist. Ct. App. 1989).
- 68 ALASKA STAT. § 34.20.100 (1990) ("When a sale is made by a trustee under a deed of trust . . . no other or further action or proceeding may be taken nor judgment entered against the maker or the surety or guarantor of the maker, on the obligation secured by the deed of trust for a deficiency."). Compare id. with WASH. REV. CODE § 61.24.100 (1989 & Supp. 1990) (quoted supra note 25).
- 69 ALASKA STAT. § 34.20.100 (1990).
- 70 757 P.2d 1040 (Alaska 1988).
- 71 Id. at 1042, 1043-44.
- 72 MONT. CODE ANN. § 71-1-317 (1989) ("When a trust indenture executed in conformity with this part is foreclosed by advertisement and sale, no other or further action, suit, or proceedings shall be taken or judgment entered for any deficiency against the grantor . . . on the note, bond, or other obligation secured by the trust indenture . . .").
- 73 Id.
- 74 235 Mont. 111, 765 P.2d 749 (1988).
- 75 765 P.2d at 750.
- 76 Id.
- 77 *Washington Mut. Sav. Bank v. United States*, 115 Wash. 2d 52, 55, 793 P.2d 969, 970, clarified, reconsideration denied, 800 P.2d 1124 (Wash. 1990).
- 78 *Cox v. Helenius*, 103 Wash. 2d 383, 387-88, 693 P.2d 683, 686 (1985); *State v. Houck*, 32 Wash. 2d 681, 684, 203 P.2d 693, 695 (1949); see also 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 46.01, 46.06 (4th ed. 1984).
- 79 MONT. CODE ANN. § 71-1-317 (1989); see supra notes 72-76 and accompanying text; cf. supra note 25.
- 80 See supra notes 15-25 and accompanying text.
- 81 WASH. REV. CODE § 6.23.010 (1989).
- 82 Id. § 61.12.060.

- 83 *Id.* The statute codifies the inherent equitable power of the court. *Washington Mut. Sav. Bank v. Horn*, 186 Wash. 75, 76-77, 56 P.2d 995 (1936) (inherent power of court to refuse to confirm unfair sale); see also *Gelfert v. Nat'l City Bank*, 313 U.S. 221, 231-32 (1941) (long history of control of judicial sales by equity courts); *Federal Title & Mortgage Guaranty Co. v. Lowenstein*, 113 N.J. Eq. 200, 166 A. 538, 541 (1933) (tracing historical origins of this equitable power).
- 84 WASH. REV. CODE §§ 61.12.060, .080.
- 85 G. OSBORNE, *supra* note 20, § 312, at 652; 3 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 469 (P. Rohan ed. 1990).
- 86 G. OSBORNE, *supra* note 20, § 312, at 652; R. POWELL, *supra* note 85, ¶ 469; see, e.g., *Hammond v. Stiles*, 567 A.2d 444, 446 (Me. 1989).
- 87 WASH. REV. CODE § 61.12.060.
- 88 *Id.* § 61.12.080.
- 89 See *supra* notes 36-39 and accompanying text.
- 90 See *supra* notes 84-87 and accompanying text.
- 91 WASH. REV. CODE § 61.12.060.
- 92 The California “fair value” provisions also apply surplus value against a purchasing junior lienor’s obligation to compute any deficiency, whether the junior lienor purchases at a judicial or a nonjudicial foreclosure sale. See *supra* notes 58-61 and accompanying text. The anti-deficiency and “fair value” provisions are complementary, providing an equitable result regardless of the foreclosure method, and regardless of whether a junior lienor purchases at the foreclosure sale. See generally *Hetland, Deficiency Judgment Limitations in California—A New Judicial Approach*, 51 CALIF. L. REV. 1, 28-31 (1963).
- 93 See *supra* notes 16-33 and accompanying text.
- 94 *Id.*
- 95 In fact, there is strong incentive for the foreclosing senior lienor to bid up to the full amount of its debt at the sale. At best, this sets a minimum sale price. At worst, the lender acquires the secured property for the price of the debt, returning the lender to its original position.
- 96 See *supra* notes 65-67 and accompanying text.
- 97 WASH. REV. CODE § 61.24.080.
- 98 *Accord Helbling Bros. v. Turner*, 14 Wash. App. 494, 497-98, 542 P.2d 1257, 1259 (1975).
- 99 G. NELSON & D. WHITMAN, *supra* note 18, § 1.1, at 2.
- 100 See WASH. REV. CODE § 61.24.020 (“Except as provided in this chapter, a deed of trust is subject to all laws relating to mortgages on real property.”).
- 101 C. SANDS, *supra* note 78, §§ 50.01, 50.05; see also WASH. REV. CODE § 61.24.020; *Kennebec, Inc. v. Bank of the West*, 88 Wash. 2d 718, 724-25, 565 P.2d 812, 815-16 (1977).
- 102 See *supra* notes 27-33 and accompanying text.
- 103 *Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wash. 2d 614, 724 P.2d 356 (1986).
- 104 *Donovick v. Seattle-First Nat'l Bank*, 111 Wash. 2d 413, 757 P.2d 1378 (1988); see *supra* notes 30-33 and accompanying text for discussion of *Donovick*.

- 105 See BLACK'S LAW DICTIONARY 421-22 (6th ed. 1990).
- 106 See supra notes 52-56 and accompanying text.
- 107 WASH. REV. CODE § 61.24.100 (1989 & Supp. 1990).
- 108 28 U.S.C.A. § 2410(d) (West 1978).
- 109 The foreclosing lienor would have to pay over to the superior court any amount realized from the sale of the security in excess of the debt and expenses. The court would then apply these funds against other lien claims. WASH. REV. CODE § 61.24.080 (1989).
- 110 A lienor may elect to abandon the security and sue upon the debt alone. *Sullins v. Sullins*, 65 Wash. 2d 283, 285, 396, P.2d 886, 888 (1964); see also 51 AM. JUR. 2D Liens § 41, at 180 (1970).
- 111 WASH. REV. CODE § 4.56.190.
- 112 See supra notes 81-92 and accompanying text.
- 113 WASH. REV. CODE § 61.24.050 (1989).
- 114 See supra notes 40-44 and accompanying text.
- 115 See supra note 39 and accompanying text.
- 116 *Id.*
- 117 *Id.* This price is limited by the federal redemption statute. In normal redemption after a judicial foreclosure, a redemptioner such as the IRS would have to pay the foreclosure sale price plus the amount of any more senior liens, such as Washington Mutual's. WASH. REV. CODE § 6.23.020.
- 118 Of course, Washington Mutual could have protected itself before foreclosure by paying off and reinstating Yakima's obligation. See supra note 24.
- 119 The Shells' insolvency and the federal statute cause Washington Mutual to receive only two-thirds. If the Shells were solvent, Washington Mutual would receive full payment.
- 120 For comparison with current statutory language, see supra note 25.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

18 Wash. Prac., Real Estate § 18.29 (2d ed.)

Washington Practice Series TM
Real Estate: Transactions
Current through the 2011 Pocket Parts

William B. Stoebuck^{a0}, John W. Weaver^{a1}

Chapter 18. Mortgages—Between Formation and Foreclosure
E. Payment and Discharge

§ 18.29. Merger of title and mortgage

West's Key Number Digest

West's Key Number Digest, Mortgages ¶ 295

Legal Encyclopedias

C.J.S., Mortgages §§ 441 to 444

“Merger” is a curious word in the law, which has various meanings in several contexts. As applicable here, the general concept is that if one person acquires at different times two estates or interests in the same land, not separated by another interest held by someone else, the smaller of the two estates or interests merges into the larger, so that the person has the combination of them. By way of example, if the owner of a life estate acquires the remainder or reversion in fee simple that follows the life estate, the life estate merges into the remainder or reversion, so that he has a fee simple absolute. Or if a leasehold tenant releases the leasehold to the landlord, assuming the landlord owned in fee, the leasehold disappears, and the former landlord now has the unencumbered fee simple absolute. However, merger does not operate with mechanical absoluteness. It is sometimes said that merger does not operate if it would be contrary to the parties' apparent intent or if it would defeat their expectations.¹

In mortgage law, a merger will, or may, occur when the mortgaged estate and the mortgage come together in the same person; *i.e.*, when the mortgage is assigned to the owner of the mortgaged estate or when the owner of that estate conveys the estate to the holder of the mortgage. A mortgagee might, for instance, acquire the title at a tax sale, or a third person might separately acquire both the mortgage and the mortgaged estate. If merger then occurs, the mortgage, being the lesser interest, is merged into the estate and disappears. In actual practice, the event that most frequently brings the two interests together in one person is the mortgagor's giving of a deed in lieu of foreclosure to the holder of the mortgage. Indeed, the merger question is so closely associated with the deed in lieu of foreclosure that the two subjects should be considered together. Thus, the present section should be read together with the next section, entitled “Deed in Lieu of Foreclosure.”

If, when the holder of a mortgage takes a title deed from the mortgagor or current owner of the mortgaged land, the only two interests in or encumbrances against the land are the title and his mortgage, merger is of no consequence to him. Though his mortgage is merged into the title and extinguished, he has title free and clear. Or if there are encumbrances on the land that are senior to his mortgage, it is no detriment to him to take title subject to them; his mortgage was subject to them from the beginning. But merger becomes a problem when there are interests, generally other mortgages or liens, whose priority is junior to his mortgage. Had he not taken the deed, but had chosen to foreclose his mortgage and, as he should have and presumably would have done, to name the junior interests as defendants, he could have foreclosed them out, subject to any statutory redemption rights they had.² For instance, if a senior mortgagee had chosen to foreclose and to join, say, two junior lienors, he could have extinguished their liens, subject to their statutory redemption rights. However, if the senior mortgagee, in lieu of foreclosure, chooses to take a title deed from the mortgagor or current owner of the encumbered land, and if his senior

mortgage is extinguished by being merged into the title, then he suffers a detriment. His title is subject to the other liens, and he must either satisfy the obligations they secure or suffer foreclosure against his title.

Fortunately for the senior mortgagee, merger is unlikely to be found when the effect would be to advance junior liens. Merger is not automatic. Washington and other jurisdictions say that no merger will occur if it is against the expressed or presumed intention of the person in whom it would occur. It will be against that person's "presumed intention" if it would be inimical to his interests. That is the case, of course, when a person acquires both the senior mortgage and the mortgaged estate. The working rule, then, is that, unless the person who acquires both the senior mortgage and the mortgaged estate actually wants to have junior liens advanced, there will be no merger, *i.e.*, no advancement of them.³ Obviously a merger will be found if the person who acquires both the estate and the mortgage has expressly indicated that he intends junior liens to be advanced. Also, there is authority that he will be found to intend a merger if he has agreed to assume a junior lien, a rule recognized, though not applied on the facts, in Washington decisions.⁴

a0 Judson Falknor Professor of Law Emeritus, University of Washington, Of Counsel, Karr Tuttle Campbell, Member of the Washington Bar.

a1 Professor of Law, Seattle University, Member of the Washington Bar.

1 See brief discussion in R. Cunningham, W. Stoebuck & D. Whitman, Property § 6.83 (3d ed. 2000).

2 Foreclosure of mortgages and sales are governed by RCWA Chap. 6.21 and RCWA Chap. 61.12. The statutory redemption system is governed by RCWA Chap. 6.23.

3 See Gill v. Strouf, 5 Wn.2d 426, 105 P.2d 829 (1940); Anderson v. Starr, 159 Wash. 641, 294 P. 581 (1930); Hitchcock v. Nixon, 16 Wash. 281, 47 P. 412 (1896); G. Nelson & D. Whitman, Real Estate Finance Law § 6.17 (4th ed. 2001).

4 Gill v. Strouf, 5 Wn.2d 426, 105 P.2d 829 (1940); Hitchcock v. Nixon, 16 Wash. 281, 47 P. 412 (1896); G. Nelson & D. Whitman, Real Estate Finance Law § 6.17 (4th ed. 2001).

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Revised Code of Washington Annotated

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)

Chapter 61.24. Deeds of Trust (Refs & Annos)

West's RCWA 61.24.080

61.24.080. Disposition of proceeds of sale--Notices--Surplus funds

Currentness

The trustee shall apply the proceeds of the sale as follows:

(1) To the expense of sale, including a reasonable charge by the trustee and by his or her attorney: PROVIDED, That the aggregate of the charges by the trustee and his or her attorney, for their services in the sale, shall not exceed the amount which would, by the superior court of the county in which the trustee's sale occurred, have been deemed a reasonable attorney fee, had the trust deed been foreclosed as a mortgage in a noncontested action in that court;

(2) To the obligation secured by the deed of trust; and

(3) The surplus, if any, less the clerk's filing fee, shall be deposited, together with written notice of the amount of the surplus, a copy of the notice of trustee's sale, and an affidavit of mailing as provided in this subsection, with the clerk of the superior court of the county in which the sale took place. The trustee shall mail copies of the notice of the surplus, the notice of trustee's sale, and the affidavit of mailing to each party to whom the notice of trustee's sale was sent pursuant to RCW 61.24.040(1). The clerk shall index such funds under the name of the grantor as set out in the recorded notice. Upon compliance with this subsection, the trustee shall be discharged from all further responsibilities for the surplus. Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property. A party seeking disbursement of the surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited. Notice of the motion shall be personally served upon, or mailed in the manner specified in RCW 61.24.040(1)(b), to all parties to whom the trustee mailed notice of the surplus, and any other party who has entered an appearance in the proceeding, not less than twenty days prior to the hearing of the motion. The clerk shall not disburse such surplus except upon order of the superior court of such county.

Credits

[1998 c 295 § 10; 1981 c 161 § 5; 1967 c 30 § 3; 1965 c 74 § 8.]

Notes of Decisions (8)

Current with all 2011 Legislation

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Revised Code of Washington Annotated

Title 61. Mortgages, Deeds of Trust, and Real Estate Contracts (Refs & Annos)

Chapter 61.24. Deeds of Trust (Refs & Annos)

West's RCWA 61.24.100

61.24.100. Deficiency judgments--Foreclosure--Trustee's sale--Application of chapter
Currentness

(1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.

(2)(a) Nothing in this chapter precludes an action against any person liable on the obligations secured by a deed of trust or any guarantor prior to a notice of trustee's sale being given pursuant to this chapter or after the discontinuance of the trustee's sale.

(b) No action under (a) of this subsection precludes the beneficiary from commencing a judicial foreclosure or trustee's sale under the deed of trust after the completion or dismissal of that action.

(3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:

(a)(i) To the extent the fair value of the property sold at the trustee's sale to the beneficiary or an affiliate of the beneficiary is less than the unpaid obligation secured by the deed of trust immediately prior to the trustee's sale, an action for a deficiency judgment against the borrower or grantor, if such person or persons was timely given the notices under RCW 61.24.040, for (A) any decrease in the fair value of the property caused by waste to the property committed by the borrower or grantor, respectively, after the deed of trust is granted, and (B) the wrongful retention of any rents, insurance proceeds, or condemnation awards by the borrower or grantor, respectively, that are otherwise owed to the beneficiary.

(ii) This subsection (3)(a) does not apply to any property that is occupied by the borrower as its principal residence as of the date of the trustee's sale;

(b) Any judicial or nonjudicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure the obligation that was secured by the deed of trust foreclosed; or

(c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

(4) Any action referred to in subsection (3)(a) and (c) of this section shall be commenced within one year after the date of the trustee's sale, or a later date to which the liable party otherwise agrees in writing with the beneficiary after the notice of foreclosure is given, plus any period during which the action is prohibited by a bankruptcy, insolvency, moratorium, or other similar debtor protection statute. If there occurs more than one trustee's sale under a deed of trust securing a commercial loan or if trustee's sales are made pursuant to two or more deeds of trust securing the same commercial loan, the one-year limitation in this section begins on the date of the last of those trustee's sales.

(5) In any action against a guarantor following a trustee's sale under a deed of trust securing a commercial loan, the guarantor may request the court or other appropriate adjudicator to determine, or the court or other appropriate adjudicator may in its discretion determine, the fair value of the property sold at the sale and the deficiency judgment against the guarantor shall be

for an amount equal to the sum of the total amount owed to the beneficiary by the guarantor as of the date of the trustee's sale, less the fair value of the property sold at the trustee's sale or the sale price paid at the trustee's sale, whichever is greater, plus interest on the amount of the deficiency from the date of the trustee's sale at the rate provided in the guaranty, the deed of trust, or in any other contracts evidencing the debt secured by the deed of trust, as applicable, and any costs, expenses, and fees that are provided for in any contract evidencing the guarantor's liability for such a judgment. If any other security is sold to satisfy the same debt prior to the entry of a deficiency judgment against the guarantor, the fair value of that security, as calculated in the manner applicable to the property sold at the trustee's sale, shall be added to the fair value of the property sold at the trustee's sale as of the date that additional security is foreclosed. This section is in lieu of any right any guarantor would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale.

(6) A guarantor granting a deed of trust to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only to the extent stated in subsection (3)(a)(i) of this section. If the deed of trust encumbers the guarantor's principal residence, the guarantor shall be entitled to receive an amount up to the homestead exemption set forth in RCW 6.13.030, without regard to the effect of RCW 6.13.080(2), from the bid at the foreclosure or trustee's sale accepted by the sheriff or trustee prior to the application of the bid to the guarantor's obligation.

(7) A beneficiary's acceptance of a deed in lieu of a trustee's sale under a deed of trust securing a commercial loan exonerates the guarantor from any liability for the debt secured thereby except to the extent the guarantor otherwise agrees as part of the deed in lieu transaction.

(8) This chapter does not preclude a beneficiary from foreclosing a deed of trust in the same manner as a real property mortgage and this section does not apply to such a foreclosure.

(9) Any contract, note, deed of trust, or guaranty may, by its express language, prohibit the recovery of any portion or all of a deficiency after the property encumbered by the deed of trust securing a commercial loan is sold at a trustee's sale.

(10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.

(11) Unless the guarantor otherwise agrees, a trustee's sale shall not impair any right or agreement of a guarantor to be reimbursed by a borrower or grantor for a deficiency judgment against the guarantor.

(12) Notwithstanding anything in this section to the contrary, the rights and obligations of any borrower, grantor, and guarantor following a trustee's sale under a deed of trust securing a commercial loan or any guaranty of such a loan executed prior to June 11, 1998, shall be determined in accordance with the laws existing prior to June 11, 1998.

Credits

[1998 c 295 § 12; 1990 c 111 § 2; 1965 c 74 § 10.]

Notes of Decisions (18)

Current with all 2011 Legislation

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Alaska Statutes Annotated

Title 34. Property

Chapter 20. Mortgages and Trust Deeds

Article 2. Deeds of Trust

AS § 34.20.070

§ 34.20.070. Sale by trustee

Currentness

(a) If a deed of trust is executed conveying real property located in the state to a trustee as security for the payment of an indebtedness and the deed provides that in case of default or noncompliance with the terms of the trust, the trustee may sell the property for condition broken, the trustee, in addition to the right of foreclosure and sale, may execute the trust by sale of the property, upon the conditions and in the manner set forth in the deed of trust, without first securing a decree of foreclosure and order of sale from the court, if the trustee has complied with the notice requirements of (b) of this section. If the deed of trust is foreclosed judicially or the note secured by the deed of trust is sued on and a judgment is obtained by the beneficiary, the beneficiary may not exercise the nonjudicial remedies described in this section.

(b) Not less than 30 days after the default and not less than 90 days before the sale, the trustee shall record in the office of the recorder of the recording district in which the trust property is located a notice of default setting out (1) the name of the trustor, (2) the book and page where the trust deed is recorded or the serial number assigned to the trust deed by the recorder, (3) a description of the trust property, including the property's street address if there is a street address for the property, (4) a statement that a breach of the obligation for which the deed of trust is security has occurred, (5) the nature of the breach, (6) the sum owing on the obligation, (7) the election by the trustee to sell the property to satisfy the obligation, (8) the date, time, and place of the sale, and (9) the statement described in (e) of this section describing conditions for curing the default. An inaccuracy in the street address may not be used to set aside a sale if the legal description is correct. At any time before the sale date stated in the notice of default or to which the sale is postponed under AS 34.20.080(e), if the default has arisen by failure to make payments required by the trust deed, the default may be cured and sale under this section terminated by payment of the sum then in default, other than the principal that would not then be due if no default had occurred, and attorney and other foreclosure fees and costs actually incurred by the beneficiary and trustee due to the default. If, under the same trust deed, notice of default under this subsection has been recorded two or more times previously and the default has been cured under this subsection, the trustee may elect to refuse payment and continue the sale.

(c) Within 10 days after recording the notice of default, the trustee shall mail a copy of the notice by certified mail to the last known address of each of the following persons or their legal representatives: (1) the trustor in the trust deed; (2) the successor in interest to the trustor whose interest appears of record or of whose interest the trustee or the beneficiary has actual notice, or who is in actual physical possession of the property; (3) any other person actually in physical possession of the property; (4) any person having a lien or interest subsequent to the interest of the trustee in the trust deed, where the lien or interest appears of record or where the trustee or the beneficiary has actual notice of the lien or interest, except as provided in (f) of this section. The notice may be delivered personally instead of by mail.

(d) If the State of Alaska is a subsequent party, the trustee, in addition to the notice of default, shall give the state a supplemental notice of any state lien existing as of the date of filing the notice of default. This notice must set out, with such particularity as reasonably available information will permit, the nature of the state's lien, including the name and address, if known, of the person whose liability created the lien, the amount shown on the lien document, the department of the state government

involved, the recording district, and the book and page on which the lien was recorded or the serial number assigned to the lien by the recorder.

(e) The statement required by (b)(9) of this section must state that, if the default has arisen by failure to make payments required by the trust deed, the default may be cured and the sale under this section terminated if

(1) payment of the sum then in default, other than the principal that would not then be due if default had not occurred, and attorney and other foreclosure fees and costs actually incurred by the beneficiary and trustee due to the default is made at any time before the sale date stated in the notice of default or to which the sale is postponed; and

(2) when notice of default under (b) of this section has been recorded two or more times previously under the same trust deed and the default has been cured under (b) of this section, the trustee does not elect to refuse payment and continue the sale.

(f) In (c)(4) of this section, if the existence of a lien or nonpossessory interest can only be inferred from an inspection of the real property, the person holding the lien or nonpossessory interest is not entitled to notice under (c) of this section unless the lien or nonpossessory interest appears of record or a written notice of the lien or nonpossessory interest has been given to the beneficiary or trustee before the recording of the notice of default.

(g) If the trustee delivers notice personally under (c) of this section to the property or to an occupant of the property, the trustee may, notwithstanding (c) of this section, deliver the notice up to 20 days after the notice of default is recorded. If there is not a structure on the property and a person is not present on the property at the time of delivery, the trustee may place the notice on the property, or as close as practicable to the property if

(1) there is not a practical road access to the property; or

(2) access to the property is restricted by gates or other barriers.

(h) If the trustee or other person who delivered notice under (g) of this section signs an affidavit for the delivery, the affidavit is prima facie evidence that the trustee complied with (g) of this section. After one year from the delivery, as evidenced by the affidavit, the trustee is conclusively presumed to have complied with (g) of this section unless, within one year from the delivery, an action has been filed in court to contest the foreclosure based on failing to comply with (g) of this section.

(i) If a person who is entitled to receive notice by mail under (c) of this section is known by the beneficiary or trustee to be deceased, the trustee may satisfy the notice requirements of (c) of this section by mailing the notice to the last known address of the deceased person and to the personal representative of the deceased person if the beneficiary or trustee knows that a personal representative has been appointed for the deceased person.

(j) If a person who is entitled to receive notice by mail under (c) of this section is known by the beneficiary or trustee to be deceased but the trustee and the beneficiary do not know that a personal representative has been appointed for the deceased person, the trustee may satisfy the notice requirements of (c) of this section by

(1) mailing the notice to the heirs and devisees of the deceased person

(A) whose names and addresses are known to the beneficiary or trustee; or

(B) who have recorded a notice of their interest in the property; and

(2) publishing and posting the notice of the foreclosure as provided by law for the sale of real property on execution, except that the notice must be titled "To the Heirs or Devisees of (insert the name of the deceased person)" and include in the body of the notice a list of the names of the persons who are known by the beneficiary or trustee to be the heirs and devisees of the deceased person.

(k) If notice is given as required by (i) and (j) of this section, an heir or devisee of the deceased person may not challenge the foreclosure on the ground that the heir or devisee did not receive notice of the sale, unless the heir or devisee challenges the foreclosure on this ground within 90 days after the sale.

(l) A person may bring an action in court to enjoin a foreclosure on real property only if the person is

- (1) the trustor of the deed of trust under which the real property was foreclosed;
- (2) a guarantor of the obligation that the real property is securing;
- (3) a person who has an interest in the real property that has been recorded;
- (4) a person who has a recorded lien against the real property;
- (5) an heir to the real property;
- (6) a devisee of the real property; or
- (7) the attorney general acting under other legal authority.

(m) If a person brings an action under (l) of this section to stop a sale of real property, and if the sale is being brought because of a default in the performance of a nonmonetary obligation required by the deed of trust that the real property is securing, the court may impose on the person the conditions that the court determines are appropriate to protect the beneficiary.

(n) In this section, “devisee,” “heir,” and “personal representative” have the meanings given in AS 13.06.050.

Credits

SLA 1957, ch. 116, § 1; SLA 1968, ch. 122, § 1; SLA 1970, ch. 50, § 1; SLA 1976, ch. 176, § 1; SLA 1988, ch. 44, § 1; SLA 1993, ch. 58, § 3; SLA 2003, ch. 35, §§ 39, 40. Amended by SLA 2010, ch. 62, §§ 4 to 6, eff. Sept. 7, 2010.

Prior Codifications: ACLA 1949, § 22-5-1.

Notes of Decisions (41)

Current through September 8, 2011 of the First Regular Session and First Special Session of the 27th Legislature.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Alaska Statutes Annotated

Title 34. Property

Chapter 20. Mortgages and Trust Deeds

Article 2. Deeds of Trust

AS § 34.20.080

§ 34.20.080. Sale at public auction

Currentness

(a) The sale authorized in AS 34.20.070 shall be made under the terms and conditions and in the manner set out in the deed of trust. The proceeds from a sale shall be placed in a trust account until they are disbursed. However, the sale shall be made

(1) at public auction held at the front door of a courthouse of the superior court in the judicial district where the property is located, unless the deed of trust specifically provides that the sale shall be held in a different place, except that a trustee may also accept bids by telephone, the Internet, and electronic mail if the trustee has taken reasonable steps to ensure that the bidding methods using the telephone, the Internet, or electronic mail are fair, accessible, and designed to result in money that is immediately available for disbursement; and

(2) after public notice of the time and place of the sale has been given in the manner provided by law for the sale of real property on execution.

(b) The attorney for the trustee or another agent of the trustee may conduct the sale and act in the sale as the auctioneer for the trustee. The trustee may set reasonable rules and conditions for the conduct of the sale. Sale shall be made to the highest and best bidder. The beneficiary under the trust deed may bid at the trustee's sale. Except as provided by (g) of this section, the trustee shall execute and deliver to the purchaser a deed to the property sold.

(c) The deed must recite the date and the book and page of the recording of default, and the mailing or delivery of the copies of the notice of default, the true consideration for the conveyance, the time and place of the publication of notice of sale, and the time, place, and manner of sale, and refer to the deed of trust by reference to the page, volume, and place of record or to the place of record and the serial number assigned to the deed of trust by the recorder.

(d) After the sale an affidavit of mailing the notice of default and an affidavit of publication of the notice of sale shall be recorded in the mortgage records of the recording district where the property is located.

(e) The trustee may postpone sale of all or any portion of the property by delivering to the person conducting the sale a written and signed request for the postponement to a stated date and hour. The person conducting the sale shall publicly announce the postponement to the stated date and hour at the time and place originally fixed for the sale. This procedure shall be followed in any succeeding postponement, but the foreclosure may not be postponed for more than 12 months unless a new notice of the sale is given under (a)(2) of this section. A sale may be postponed for up to 12 months from the sale date stated in the notice of default under AS 34.20.070(b) without providing a basis for challenging the validity of the foreclosure process because of the length of time the foreclosure has been pending.

(f) After delivery of a deed under (b) of this section, the trustee shall distribute any cash proceeds of the sale in the following order to

(1) the beneficiary of the deed of trust being foreclosed until the beneficiary is paid the full amount that is owed under the deed of trust to the beneficiary;

(2) the persons who held, at the time of the sale, recorded interests, except easements, in the property, that were subordinate to the foreclosed deed of trust; the distribution under this paragraph shall be made according to the priority of the recorded interest, and a recorded interest with a higher priority shall be satisfied before distribution is made to the recorded interest that is next lower in priority; however, if a person holds a recorded interest that is an assessment, the person is entitled only to the amount of the assessment that was due at the time of the sale; in this paragraph, "recorded interest" means an interest, including a lease, recorded under AS 40.17;

(3) the trustor in the trust deed if the trustor is still the owner of the property at the time of the foreclosure sale, but, if the trustor is not still the owner of the property at the time of the foreclosure sale, then to the trustor's successor in interest whose interest appears of record at the time of the foreclosure sale.

(g) The trustee may withhold delivery of the deed under (b) of this section for up to 10 days after the sale. If, during the 10 days, the trustee determines that the sale should not have proceeded, the trustee may not issue the deed but shall

(1) inform the beneficiary, the otherwise successful bidder, and the trustor of the trust deed or the trustor's successor in interest that the sale is rescinded; and

(2) return to the otherwise successful bidder money received from the otherwise successful bidder as a bid on the property; return of this money is the otherwise successful bidder's only remedy if the trustee withholds delivery of the deed under (b) of this section.

(h) If a trustee rescinds a sale under (g) of this section and the obligation secured by the deed of trust remains in default, the trustee may, at the request of the beneficiary, reschedule the sale for a date that is not less than 45 days after the date of the rescinded sale. Not less than 30 days before the rescheduled sale date, the trustee shall

(1) mail notice of the rescheduled sale date by certified mail to the last known address of each of the persons identified by AS 34.20.070(c); and

(2) publish and post the notice of the rescheduled sale date as provided by law for the sale of real property on execution.

(i) Unless a sale is rescinded under (g) of this section, the sale completely terminates the rights of the trustor of the trust deed in the property.

(j) If a sale is rescinded under (g) of this section, the deed of trust foreclosed in the rescinded sale is restored to the validity and priority it would have had as though the sale had not occurred.

Credits

SLA 1957, ch. 116, § 2; SLA 1966, ch. 19, § 1; SLA 1972, ch. 3, § 1; SLA 1977, ch. 44, § 2; SLA 2003, ch. 35, § 41. Amended by SLA 2010, ch. 62, §§ 7 to 10, eff. Sept. 7, 2010.

Prior Codifications: ACLA 1949, § 22-5-2.

Notes of Decisions (18)

Current through September 8, 2011 of the First Regular Session and First Special Session of the 27th Legislature.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Alaska Statutes Annotated

Title 34. Property

Chapter 20. Mortgages and Trust Deeds

Article 2. Deeds of Trust

AS § 34.20.090

§ 34.20.090. Title, interest, possessory rights, and redemption

Currentness

(a) The sale and conveyance transfers all title and interest that the party executing the deed of trust had in the property sold at the time of its execution, together with all title and interest that party may have acquired before the sale, and the party executing the deed of trust or the heirs or assigns of that party have no right or privilege to redeem the property, unless the deed of trust so declares.

(b) The purchaser at a sale and the heirs and assigns of the purchaser are, after the execution of a deed to the purchaser by the trustee, entitled to the possession of the premises described in the deed as against the party executing the deed of trust or any other person claiming by, through or under that party, after recording the deed of trust in the recording district where the property is located.

(c) A recital of compliance with all requirements of law regarding the mailing or personal delivery of copies of notices of default in the deed executed under a power of sale is prima facie evidence of compliance with the requirements. The recital is conclusive evidence of compliance with the requirements in favor of a bona fide purchaser or encumbrancer for value and without notice.

Credits

SLA 1957, ch. 116, § 3.

Prior Codifications: ACLA 1949, § 22-5-3.

Notes of Decisions (25)

Current through September 8, 2011 of the First Regular Session and First Special Session of the 27th Legislature.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Alaska Statutes Annotated

Title 34. Property

Chapter 20. Mortgages and Trust Deeds

Article 2. Deeds of Trust

AS § 34.20.100

§ 34.20.100. Deficiency judgment prohibited

Currentness

When a sale is made by a trustee under a deed of trust, as authorized by AS 34.20.070 - 34.20.130, no other or further action or proceeding may be taken nor judgment entered against the maker or the surety or guarantor of the maker, on the obligation secured by the deed of trust for a deficiency.

Credits

Prior Codifications: ACLA 1949, § 22-5-4.

Notes of Decisions (16)

Current through September 8, 2011 of the First Regular Session and First Special Session of the 27th Legislature.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Nevada Revised Statutes Annotated

Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)

Chapter 40. Actions and Proceedings in Particular Cases Concerning Property (Refs & Annos)

Foreclosure Sales and Deficiency Judgments

N.R.S. 40.455

40.455. Deficiency judgment: Award to judgment creditor or beneficiary of deed of trust; exceptions

Currentness

1. Except as otherwise provided in subsection 3, upon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.
2. If the indebtedness is secured by more than one parcel of real property, more than one interest in the real property or more than one mortgage or deed of trust, the 6-month period begins to run after the date of the foreclosure sale or trustee's sale of the last parcel or other interest in the real property securing the indebtedness, but in no event may the application be filed more than 2 years after the initial foreclosure sale or trustee's sale.
3. If the judgment creditor or the beneficiary of the deed of trust is a financial institution, the court may not award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust, even if there is a deficiency of the proceeds of the sale and a balance remaining due the judgment creditor or beneficiary of the deed of trust, if:
 - (a) The real property is a single-family dwelling and the debtor or grantor was the owner of the real property at the time of the foreclosure sale or trustee's sale;
 - (b) The debtor or grantor used the amount for which the real property was secured by the mortgage or deed of trust to purchase the real property;
 - (c) The debtor or grantor continuously occupied the real property as the debtor's or grantor's principal residence after securing the mortgage or deed of trust; and
 - (d) The debtor or grantor did not refinance the mortgage or deed of trust after securing it.
4. As used in this section, "financial institution" has the meaning ascribed to it in NRS 363A.050.

Credits

Added by Laws 1969, p. 573. Amended by Laws 1979, p. 450; Laws 1985, p. 371; Laws 1987, p. 1345; Laws 2009, c. 310, § 2.

Notes of Decisions (17)

Current through the 2009 75th Regular Session and the 2010 26th Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2010).

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Nevada Revised Statutes Annotated

Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)

Chapter 40. Actions and Proceedings in Particular Cases Concerning Property (Refs & Annos)

Foreclosure Sales and Deficiency Judgments

N.R.S. 40.457

40.457. Hearing before award of deficiency judgment; appraisal of property sold

Currentness

1. Before awarding a deficiency judgment under NRS 40.455, the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale or trustee's sale. Notice of such hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for hearing.

2. Upon application of any party made at least 10 days before the date set for the hearing the court shall, or upon its own motion the court may, appoint an appraiser to appraise the property sold as of the date of foreclosure sale or trustee's sale. Such appraiser shall file with the clerk the appraisal, which is admissible in evidence. The appraiser shall take an oath that the appraiser has truly, honestly and impartially appraised the property to the best of the appraiser's knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court. The court shall fix a reasonable compensation for the appraiser, but the appraiser's fee shall not exceed similar fees for similar services in the county where the encumbered land is situated.

Credits

Added by Laws 1969, p. 573.

Notes of Decisions (21)

Current through the 2009 75th Regular Session and the 2010 26th Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2010).

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

West's Nevada Revised Statutes Annotated

Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)

Chapter 40. Actions and Proceedings in Particular Cases Concerning Property (Refs & Annos)

Foreclosure Sales and Deficiency Judgments

N.R.S. 40.459

40.459. Limitations on amount of money judgment

Currentness

After the hearing, the court shall award a money judgment against the debtor, guarantor or surety who is personally liable for the debt. The court shall not render judgment for more than:

1. The amount by which the amount of the indebtedness which was secured exceeds the fair market value of the property sold at the time of the sale, with interest from the date of the sale; or
2. The amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, with interest from the date of sale, whichever is the lesser amount.

Credits

Added by Laws 1969, p. 573. Amended by Laws 1985, p. 371; Laws 1987, p. 1644; Laws 1989, p. 1770; Laws 1993, p. 152.

Notes of Decisions (27)

Current through the 2009 75th Regular Session and the 2010 26th Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2010).

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.