

Nevada Supreme Court Clarifies That 'Consideration Paid' by Successor Note-Holders Can Limit Recovery in Deficiency Actions

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In late 2013, the **Nevada Supreme Court** issued a 5-2 decision in ***Sandpointe Apartments v. Eighth Judicial Dist. Ct.*** which found that 2011 amendments modifying Nevada's anti-deficiency protections created limitations on the amount a note-purchaser could recover as part of a deficiency judgment. The operable change in the law was codified in NRS 40.459(1) (c) and indicated where the right to obtain a deficiency judgment had been acquired from a person who previously held the right, the total amount of indebtedness was capped by the "consideration paid" to acquire that right.

In effect, a note-purchaser in the secondary market could only recover the difference between what it paid for the note and the fair market value of the property after a foreclosure sale occurs. Thus, if a distressed \$100,000 note was acquired on the secondary market for \$50,000, that purchaser was precluded from recovering anything beyond the \$50,000 purchase price for the note. The main issue in *Sandpointe* focused on the timing of the law and whether it applied retroactively. The Court concluded that NRS 40.459(1)(c) only applied to notes where the foreclosure sale took place after the effective date of the law, June 10, 2011.

While this would have seemed to settle the matter in part, the use of the phrase "consideration paid" created a potential issue with existing law. Other Nevada statutes that govern anti-deficiency laws also limited indebtedness to the "consideration paid." This resulted in litigation regarding these revisions to the law and if the revisions impacted existing statutes between successor note-purchasers and borrowers/guarantors for whom the 2011 amendments did not apply. The predominant argument of the borrowers/guarantors was that all note-purchasers should be limited to what the successor note-holders paid for the note, regardless of when the note was acquired or when the foreclosure sale took place.

In response to these arguments, the Nevada Supreme Court issued a unanimous decision Dec. 24, 2014, holding that the existing statute was always clear and no foreclosures that occurred prior to June 10, 2011, could be limited by the changes to the law. In *First Financial Bank, N.A. v. Lane*, the Court reversed a district court decision and explained that *Sandpointe* had no effect on pre-existing law. Thus, in any instances where foreclosure sales were completed prior to June 10, 2011, the note-

purchaser could still obtain a deficiency judgment for the full value of the note.

In addition to clarifying this ambiguity, *First Financial* may offer some possible insight as to how the Court may rule on the meaning of the deficiency statutes going forward. After *Sandpointe*, several constitutional issues remained undetermined regarding loans acquired from the FDIC-as-receiver for failed banks. That said, the Court in *First Financial* placed substantial reliance on the federal case *Interim Capital LLC v. Herr Law Group, Ltd.*, which concluded that applying limits to notes purchased from the FDIC was a violation of the Federal Constitution. However, since this decision addressed pre-existing law only, there remains significant uncertainty as to whether the Court will adopt any other implications of the *Interim Capital* decision when it reviews NRS 40.459(1)(c) under such circumstances. Such uncertainty cannot be ignored. As such, until this ambiguity is addressed, note-purchasers should remain cautious in the manner in which they acquire notes on the secondary market, including notes acquired from the FDIC.

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National Law Review, Volume V, Number 93

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