



2 January 2014

TO:
Common Interest Communities
Common Interest Community Managers

Re: *2013 Legislative Changes to NRS and NAC Chapters 116*

Dear All:

In addition to the changes and amendments to NRS 116 mentioned in my letter of 30 July 2013, and included herewith for your convenience, Assembly Bill 273 has made an additional important change to HOA foreclosures of owner occupied units.

As of 1 October 2013, any beneficiary under a Deed of Trust must, upon recording of a Notice of Default and Election to Sell, for any owner occupied unit, as defined by NRS 107.086, enter into the Foreclosure Mediation Program ("FMP") with the owner of the unit.

Now that the Foreclosure Mediation Program is mandatory in the State of Nevada pursuant to changes approved in AB273, we can no longer proceed with an Association foreclosure sale following the recordation of the Notice of Default unless the unit is tenant occupied or the beneficiary of the Deed of Trust has received and recorded a Certificate of Completion of the FMP. This means it will be necessary for us to obtain an updated title report or guarantee prior to proceeding with a foreclosure sale.

Should you have any questions or concerns, please feel free to contact me right away to set a time to discuss this.

Sincerely,

MATUSKA LAW OFFICES, LTD.

By:


Michael L. Matuska

MLM/lts
(Encl. – AB 273)

Assembly Bill No. 273—Committee
on Commerce and Labor

CHAPTER.....

AN ACT relating to real property; revising provisions governing the amount which a person holding a junior lien on real property may recover in a civil action under certain circumstances; prohibiting certain persons holding a junior lien on certain residential property from bringing a civil action under certain circumstances; revising provisions governing the amount of a deficiency judgment after the foreclosure of a mortgage or a deed of trust; limiting the amount of certain judgments against guarantors, sureties or other obligors of obligations secured by real property under certain circumstances; revising provisions governing mortgages and deeds of trust; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a judgment creditor or a beneficiary of a deed of trust may obtain, after a hearing, a deficiency judgment after a foreclosure sale or trustee's sale 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 the judgment creditor or beneficiary of the deed of trust. Existing law requires a judgment creditor or beneficiary of a deed of trust to bring an action for such a deficiency judgment within 6 months after the foreclosure sale or trustee's sale. For an obligation secured by a mortgage or deed of trust on or after October 1, 2009, a court may not award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if: (1) the creditor or beneficiary is a financial institution; (2) the real property is a single-family dwelling and the debtor or grantor was the owner of the property; (3) the debtor or grantor used the loan to purchase the property; (4) the debtor or grantor occupied the property continuously after obtaining the loan; and (5) the debtor or grantor did not refinance the loan. (NRS 40.455)

Sections 3, 3.3 and 5.7 of this bill enact similar provisions to govern deficiency judgments sought by junior lienholders after a foreclosure sale, a trustee's sale or any sale or deed in lieu of a foreclosure sale or trustee's sale. **Section 3** provides that, if the circumstances prohibiting a deficiency judgment after a foreclosure sale or trustee's sale under current law exist with respect to a junior lienholder, the creditor may not bring a civil action to recover the debt owed to it after a foreclosure sale, a trustee's sale or a sale or deed in lieu of a foreclosure sale or trustee's sale.

Existing law authorizes a creditor under an obligation secured by a junior mortgage or deed of trust to bring an action to obtain a personal judgment against the debtor only if the action is commenced within 6 years after the date of the debtor's default. (NRS 11.190) Under **sections 3.3 and 5.7** of this bill, if the real property securing such an obligation is the subject of a foreclosure sale, a trustee's sale or a sale or deed in lieu of such a sale, the creditor may bring an action to obtain a personal judgment against the debtor only if the action is brought within 6 months after the foreclosure sale, the trustee's sale or the sale in lieu of a foreclosure sale or trustee's sale.



Under existing law, the amount of a deficiency judgment after a foreclosure sale or a trustee's sale may not exceed the lesser of: (1) the amount of the indebtedness minus the fair market value of the foreclosed property at the time of the sale; or (2) the amount of the indebtedness minus the amount for which the foreclosed property actually sold. (NRS 40.459) **Section 5** of this bill provides that, for a deficiency judgment sought by a secured creditor after a foreclosure sale, trustee's sale or sale in lieu of a foreclosure sale or trustee's sale, the amount of the deficiency judgment must be reduced by the amount of any insurance proceeds received by, or payable to, the creditor. **Section 2** of this bill enacts a corresponding provision for money judgments sought against a debtor by a junior lienholder after a foreclosure sale, a trustee's sale or a sale or deed in lieu of a foreclosure sale or trustee's sale.

Sections 2 and 5 also limit the recovery of a creditor who acquired the right to obtain payment for an obligation secured by the real property from another person who owned that obligation. If the creditor is seeking a deficiency judgment after a foreclosure sale, a trustee's sale or a sale in lieu of a foreclosure sale or trustee's sale, **section 5** provides that the creditor may not receive an amount which exceeds the lesser of: (1) the consideration paid for the obligation minus the fair market value of the property at the time of the foreclosure sale, with interest from the date of sale and reasonable costs; or (2) the consideration paid for the obligation minus the amount for which the property actually sold, with interest from the date of sale and reasonable costs. If the creditor is a junior lienholder who filed a civil action to obtain a money judgment against the debtor, **section 2** provides that the creditor may not receive an amount greater than the consideration paid for the obligation, with interest from the date on which the person acquired the right to obtain payment and reasonable costs.

Section 5.5 of this bill limits the amount of a judgment against a guarantor, surety or other obligor, other than a mortgagor or grantor of a deed of trust, in an action commenced before a foreclosure sale or trustee's sale to enforce the obligation to pay, satisfy or purchase all or part of an obligation secured by a mortgage or other lien on real property. Under **section 5.5**, the amount of the judgment may not exceed the lesser of: (1) the amount of the indebtedness minus the fair market value of the real property at the time of the commencement of the action; or (2) if a foreclosure sale or a trustee's sale is completed before the date on which judgment is entered, the amount of the indebtedness minus the amount for which the foreclosed property actually sold.

Section 6 of this bill provides that the amendatory provisions of: (1) **sections 1-3** apply only prospectively to obligations secured by a mortgage, deed of trust or other encumbrance upon real property on or after the effective date of this bill; (2) **sections 3.3 and 5.7** apply only to an action commenced after a foreclosure sale or sale in lieu of a foreclosure sale that occurs on or after July 1, 2011; and (3) **section 5.5** apply only to an action against a guarantor, surety or other obligor commenced on or after the effective date of this bill. Under **section 7** of this bill, the amendatory provisions of **section 5** become effective upon passage and approval and thus apply to a deficiency judgment awarded on or after that effective date.

Section 6 of Assembly Bill No. 284 of this session requires the trustee under a deed of trust to be: (1) an attorney licensed in this State; (2) a title insurer or title agent authorized to do business in this State; or (3) a person licensed as a trust company or exempt from the requirement to be licensed as a trust company. **Section 5.8** of this bill amends section 6 of Assembly Bill No. 284 of this session: (1) to authorize any foreign or domestic entity which holds a current state business license to be the trustee under a deed of trust; and (2) to specifically describe certain persons who are exempt from the requirement to obtain a license as a trust



company and who are authorized to be the trustee under a deed of trust. Sections 5.9 and 5.95 of this bill change the effective date of Assembly Bill No. 284 of this session from July 1, 2011, to October 1, 2011.

EXPLANATION - Matter in *bolded italics* is new; matter between brackets ~~{omitted-material}~~ is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 40 of NRS is hereby amended by adding thereto the provisions set forth as sections 1.2 to 3.3, inclusive, of this act.

Sec. 1.2. *As used in sections 1.2 to 3.3, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 1.4, 1.6 and 1.8 of this act have the meanings ascribed to them in those sections.*

Sec. 1.4. *“Foreclosure sale” has the meaning ascribed to it in NRS 40.462.*

Sec. 1.6. *“Mortgage or other lien” has the meaning ascribed to it in NRS 40.433.*

Sec. 1.8. *“Sale in lieu of a foreclosure sale” means a sale of real property pursuant to an agreement between a person to whom an obligation secured by a mortgage or other lien on real property is owed and the debtor of that obligation in which the sales price of the real property is insufficient to pay the full outstanding balance of the obligation and the costs of the sale. The term includes, without limitation, a deed in lieu of a foreclosure sale.*

Sec. 2. 1. *If a person to whom an obligation secured by a junior mortgage or lien on real property is owed:*

(a) Files a civil action to obtain a money judgment against the debtor under that obligation after a foreclosure sale or a sale in lieu of a foreclosure sale; and

(b) Such action is not barred by NRS 40.430,

in determining the amount owed by the debtor, the court shall not include the amount of any proceeds received by, or payable to, the person pursuant to an insurance policy to compensate the person for losses incurred with respect to the property or the default on the obligation.

2. If:

(a) A person acquired the right to enforce an obligation secured by a junior mortgage or lien on real property from a person who previously held that right;



(b) *The person files a civil action to obtain a money judgment against the debtor after a foreclosure sale or a sale in lieu of a foreclosure sale; and*

(c) *Such action is not barred by NRS 40.430, ↪ the court shall not render judgment for more than the amount of the consideration paid for that right, plus interest from the date on which the person acquired the right and reasonable costs.*

3. *As used in this section, "obligation secured by a junior mortgage or lien on real property" includes, without limitation, an obligation which is not currently secured by a mortgage or lien on real property if the obligation:*

(a) *Is incurred by the debtor under an obligation which was secured by a mortgage or lien on real property; and*

(b) *Has the effect of reaffirming the obligation which was secured by a mortgage or lien on real property.*

Sec. 3. 1. *A person to whom an obligation secured by a junior mortgage or lien on real property is owed may not bring any action to enforce that obligation after a foreclosure sale of the real property which secured that obligation or a sale in lieu of a foreclosure sale if:*

(a) *The person is a financial institution;*

(b) *The real property which secured the obligation 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 sale in lieu of a foreclosure sale;*

(c) *The debtor or grantor used the amount of the obligation to purchase the real property;*

(d) *The debtor or grantor continuously occupied the real property as the debtor's or grantor's principal residence after securing the obligation; and*

(e) *The debtor or grantor did not refinance the obligation after securing it.*

2. *As used in this section, "financial institution" has the meaning ascribed to it in NRS 363A.050.*

Sec. 3.3. *A civil action not barred by NRS 40.430 or section 3 of this act by a person to whom an obligation secured by a junior mortgage or lien on real property is owed to obtain a money judgment against the debtor after a foreclosure sale of the real property or a sale in lieu of a foreclosure sale may only be commenced within 6 months after the date of the foreclosure sale or sale in lieu of a foreclosure.*

Sec. 4. (Deleted by amendment.)



Sec. 5. NRS 40.459 is hereby amended to read as follows:

40.459 *I.* 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:

~~1-1~~ (a) 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; ~~for~~

~~2-1~~ (b) 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 ~~1-1~~; or

(c) *If the person seeking the judgment acquired the right to obtain the judgment from a person who previously held that right, the amount by which the amount of the consideration paid for that right exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs,*

↪ whichever is the lesser amount.

2. For the purposes of this section, the "amount of the indebtedness" does not include any amount received by, or payable to, the judgment creditor or beneficiary of the deed of trust pursuant to an insurance policy to compensate the judgment creditor or beneficiary for any losses incurred with respect to the property or the default on the debt.

Sec. 5.5. NRS 40.495 is hereby amended to read as follows:

40.495 *1.* The provisions of NRS 40.475 and 40.485 may be waived by the guarantor, surety or other obligor only after default.

2. Except as otherwise provided in subsection ~~4-1~~ *5*, a guarantor, surety or other obligor, other than the mortgagor or grantor of a deed of trust, may waive the provisions of NRS 40.430. If a guarantor, surety or other obligor waives the provisions of NRS 40.430, an action for the enforcement of that person's obligation to pay, satisfy or purchase all or part of an indebtedness or obligation secured by a mortgage or lien upon real property may be maintained separately and independently from:

- (a) An action on the debt;
- (b) The exercise of any power of sale;
- (c) Any action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby; and



(d) Any other proceeding against a mortgagor or grantor of a deed of trust.

3. If the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby, the guarantor, surety or other obligor may assert any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to 40.463, inclusive.

4. *If, before a foreclosure sale of real property, the obligee commences an action against a guarantor, surety or other obligor, other than the mortgagor or grantor of a deed of trust, to enforce an obligation to pay, satisfy or purchase all or part of an indebtedness or obligation secured by a mortgage or lien upon the real property:*

(a) The court must hold a hearing and take evidence presented by either party concerning the fair market value of the property as of the date of the commencement of the action. Notice of such hearing must be served upon all defendants who have appeared in the action and against whom a judgment is sought, or upon their attorneys of record, at least 15 days before the date set for the hearing.

(b) After the hearing, if the court awards a money judgment against the debtor, guarantor or surety who is personally liable for the debt, the court must not render judgment for more than:

(1) The amount by which the amount of the indebtedness exceeds the fair market value of the property as of the date of the commencement of the action; or

(2) If a foreclosure sale is concluded before a judgment is entered, the amount that is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured,

whichever is the lesser amount.

5. The provisions of NRS 40.430 may not be waived by a guarantor, surety or other obligor if the mortgage or lien:

(a) Secures an indebtedness for which the principal balance of the obligation was never greater than \$500,000;

(b) Secures an indebtedness to a seller of real property for which the obligation was originally extended to the seller for any portion of the purchase price;

(c) Is secured by real property which is used primarily for the production of farm products as of the date the mortgage or lien upon the real property is created; or

(d) Is secured by real property upon which:

(1) The owner maintains the owner's principal residence;



- (2) There is not more than one residential structure; and
- (3) Not more than four families reside.

6. As used in this section, "foreclosure sale" has the meaning ascribed to it in NRS 40.462.

Sec. 5.7. NRS 11.190 is hereby amended to read as follows:

11.190 Except as otherwise provided in NRS 125B.050 and 217.007, *and section 3.3 of this act*, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:

1. Within 6 years:

(a) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or the renewal thereof.

(b) An action upon a contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding sections of this chapter.

2. Within 4 years:

(a) An action on an open account for goods, wares and merchandise sold and delivered.

(b) An action for any article charged on an account in a store.

(c) An action upon a contract, obligation or liability not founded upon an instrument in writing.

(d) An action against a person alleged to have committed a deceptive trade practice in violation of NRS 598.0903 to 598.0999, inclusive, but the cause of action shall be deemed to accrue when the aggrieved party discovers, or by the exercise of due diligence should have discovered, the facts constituting the deceptive trade practice.

3. Within 3 years:

(a) An action upon a liability created by statute, other than a penalty or forfeiture.

(b) An action for waste or trespass of real property, but when the waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the waste or trespass.

(c) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof, but in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which has a recorded mark or brand upon it at the time of its loss, and which strays or is stolen from the true owner without the owner's fault, the statute does not begin to run against an action for the recovery of the animal until the owner has



actual knowledge of such facts as would put a reasonable person upon inquiry as to the possession thereof by the defendant.

(d) Except as otherwise provided in NRS 112.230 and 166.170, an action for relief on the ground of fraud or mistake, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(e) An action pursuant to NRS 40.750 for damages sustained by a financial institution or other lender because of its reliance on certain fraudulent conduct of a borrower, but the cause of action in such a case shall be deemed to accrue upon the discovery by the financial institution or other lender of the facts constituting the concealment or false statement.

4. Within 2 years:

(a) An action against a sheriff, coroner or constable upon liability incurred by acting in his or her official capacity and in virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution.

(b) An action upon a statute for a penalty or forfeiture, where the action is given to a person or the State, or both, except when the statute imposing it prescribes a different limitation.

(c) An action for libel, slander, assault, battery, false imprisonment or seduction.

(d) An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

(e) Except as otherwise provided in NRS 11.215, an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another. The provisions of this paragraph relating to an action to recover damages for injuries to a person apply only to causes of action which accrue after March 20, 1951.

(f) An action to recover damages under NRS 41.740.

5. Within 1 year:

(a) An action against an officer, or officer de facto to recover goods, wares, merchandise or other property seized by the officer in his or her official capacity, as tax collector, or to recover the price or value of goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention or sale of, or injury to, goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making the seizure.

(b) An action against an officer, or officer de facto for money paid to the officer under protest, or seized by the officer in his or her



official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

Sec. 5.8. Section 6 of Assembly Bill No. 284 of this session is hereby amended to read as follows:

Sec. 6. Chapter 107 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The trustee under a deed of trust must be:

- (a) An attorney licensed to practice law in this State;*
- (b) A title insurer or title agent authorized to do business in this State pursuant to chapter 692A of NRS;*
- (c) A person licensed pursuant to chapter 669 of NRS;*
- (d) A domestic or foreign entity which holds a current state business license issued by the Secretary of State pursuant to chapter 76 of NRS;*
- (e) A person who does business under the laws of this State, the United States or another state relating to banks, savings banks, savings and loan associations or thrift companies;*
- (f) A person who is appointed as a fiduciary pursuant to NRS 662.245;*
- (g) A person who acts as a registered agent for a domestic or foreign corporation, limited-liability company, limited partnership or limited-liability partnership;*
- (h) A person who acts as a trustee of a trust holding real property for the primary purpose of facilitating any transaction with respect to real estate if he or she is not regularly engaged in the business of acting as a trustee for such trusts;*
- (i) A person who engages in the business of a collection agency pursuant to chapter 649 of NRS; or*
- (j) A person who engages in the business of an escrow agency, escrow agent or escrow officer pursuant to the provisions of chapter 645A or 692A of NRS.*

2. A trustee under a deed of trust must not be the beneficiary of the deed of trust for the purposes of exercising the power of sale pursuant to NRS 107.080.

3. A trustee under a deed of trust must not:

- (a) Lend its name or its corporate capacity to any person who is not qualified to be the trustee under a deed of trust pursuant to subsection 1.*
- (b) Act individually or in concert with any other person to circumvent the requirements of subsection 1.*



4. *A beneficiary of record may replace its trustee with another trustee. The appointment of a new trustee is not effective until the substitution of trustee is recorded in the office of the recorder of the county in which the real property is located.*

5. *The trustee does not have a fiduciary obligation to the grantor or any other person having an interest in the property which is subject to the deed of trust. The trustee shall act impartially and in good faith with respect to the deed of trust and shall act in accordance with the laws of this State. A rebuttable presumption that a trustee has acted impartially and in good faith exists if the trustee acts in compliance with the provisions of NRS 107.080. In performing acts required by NRS 107.080, the trustee incurs no liability for any good faith error resulting from reliance on information provided by the beneficiary regarding the nature and the amount of the default under the obligation secured by the deed of trust if the trustee corrects the good faith error not later than 20 days after discovering the error.*

6. *If, in an action brought by a grantor, a person who holds title of record or a beneficiary in the district court in and for the county in which the real property is located, the court finds that the trustee did not comply with this section, any other provision of this chapter or any applicable provision of chapter 106 or 205 of NRS, the court must award to the grantor, the person who holds title of record or the beneficiary:*

(a) Damages of \$5,000 or treble the amount of actual damages, whichever is greater;

(b) An injunction enjoining the exercise of the power of sale until the beneficiary, the successor in interest of the beneficiary or the trustee complies with the requirements of subsections 2, 3 and 4; and

*(c) Reasonable attorney's fees and costs,
↪ unless the court finds good cause for a different award.*

Sec. 5.9. Section 14.5 of Assembly Bill No. 284 of this session is hereby amended to read as follows:

Sec. 14.5. The amendatory provisions of:

1. Section 1 of this act apply only to an assignment of a mortgage of real property, or of a mortgage of personal property or crops recorded before March 27, 1935, and any assignment of the beneficial interest under a deed of trust, which is made on or after ~~July~~ **October** 1, 2011.



2. Section 2 of this act apply only to an instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived as to priority which is made on or after ~~July~~ **October** 1, 2011.

3. Section 5 of this act apply only to an instrument encumbering a borrower's real property to secure future advances from a lender within a mutually agreed maximum amount of principal, or an amendment to such an instrument, which is made on or after ~~July~~ **October** 1, 2011.

4. Section 9 of this act apply only to a notice of default and election to sell which is recorded pursuant to NRS 107.080, as amended by section 9 of this act, on or after ~~July~~ **October** 1, 2011.

Sec. 5.95. Section 15 of Assembly Bill No. 284 of this session is hereby amended to read as follows:

Sec. 15. This act becomes effective on ~~July~~ **October** 1, 2011.

Sec. 6. The amendatory provisions of:

1. Sections 1 to 3, inclusive, of this act apply only to an obligation secured by a mortgage, deed of trust or other encumbrance upon real property on or after the effective date of this act.

2. Sections 3.3 and 5.7 of this act apply only to an action commenced after a foreclosure sale or sale in lieu of a foreclosure sale that occurs on or after July 1, 2011.

3. Section 5.5 of this act apply only to an action against a guarantor, surety or other obligor commenced on or after the effective date of this act.

Sec. 7. 1. This section and sections 1 to 3, inclusive, 5, 5.5 and 5.8 to 6, inclusive, of this act become effective upon passage and approval.

2. Sections 3.3 and 5.7 of this act become effective on July 1, 2011.

