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REAL ESTATE FINANCE AND BANKRUPTCY & TROUBLED LOANS PRACTICE GROUPS | JANUARY 2015

Otten Johnson Alert -

Prospective waiver of lender's duty to bid good faith estimate of fair market value at foreclosure sale

In 2014 the Colorado Court of Appeals decided an important question affecting the rights of creditors, borrowers and guarantors in post-foreclosure deficiency lawsuits. In Colorado, if, after a foreclosure sale, there remain amounts outstanding under the loan, a creditor has the ability to seek a judgment for the deficiency against the borrower and/or the guarantors.

In such deficiency lawsuits, Colorado Revised Statute §38-38-106(6) provides borrowers and guarantors with a defense in the event that a creditor did not bid its good faith estimate of a property's fair market value at the foreclosure sale. If the defendants can prove that the creditor bid less than its good faith estimate of fair market value, then the court will decrease the amount of the deficiency to the amount it would have been had the creditor submitted a good faith bid.

Recently, in the case *Armed Forces Bank, N.A. v. Hicks*, the Colorado Court of Appeals addressed whether this statutory defense can be prospectively waived in a guaranty agreement. The U.S. District Court in Colorado, in its 1992 decision *Federal Deposit Insurance Corp. v. Lichtenfels*, had previously rejected a creditor's attempt to argue that the language of the guaranty at issue in that case prospectively waived the statutory defense. However, the Colorado Court of Appeals distinguished the *Lichtenfels* case and determined that the statutory defense can be prospectively waived under certain waiver language.

The Colorado Court of Appeals reasoned that the language of the C.R.S. §38-38-106(6) was permissive in nature and that a prospective waiver of the statutory defense was not against public policy. The Court then turned its attention to the specific language of the guaranty agreement at issue and determined that language that waived **“defenses arising by reason of ...anti-deficiency law”** and **“any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness”** was sufficient to prospectively waive the statutory defense of requiring a good faith bid.

The Court's decision leaves open the question of whether a borrower or guarantor can use the implied covenant of good faith and fair dealing in lieu of the defense set forth in C.R.S. §38-38-106(6) or, similarly, whether the implied covenant of good faith and fair dealing can itself be prospectively waived in a loan document. However, the Court does mention that trial courts still have the equitable power to overturn unconscionably low bids. Regardless, this decision highlights how important it is for both lenders and borrowers to pay careful attention to waiver language in loan documents to ensure that the waivers included therein represent the parties' intent.

The Real Estate Finance and Bankruptcy & Troubled Loans practice groups have substantial experience in helping clients to navigate waiver issues both in the context of contract negotiations and in litigation. For more information on this Client Alert or for help evaluating your current situation, contact any of the attorneys in the Real Estate Finance or Bankruptcy & Troubled Loans practice groups ([for a listing, please click here](#)).

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