

Financial Institutions Law Update

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The Washington Court of Appeals Strengthens the Ability of Lenders to Obtain Summary Judgment Against Commercial Guarantors on Post-Foreclosure Deficiency Claims

Post-foreclosure deficiency lawsuits against guarantors of commercial loans can be expensive and time consuming — particularly when measured against the sometimes uncertain collectability of the deficiency judgment. Under Washington state law, if a guarantor claims that the non-judicially foreclosed real property was sold for less than its “fair value,” the guarantor may ask the court to reduce his or her deficiency judgment by that “fair value.” RCW 61.24.100(5). Guarantors have historically attempted to take advantage of the factual nature of this “fair value” defense, and the lack of precedent on the meaning of “fair value,” to delay deficiency lawsuits and force lenders into unfavorable settlements in lieu of expensive trials. However, a recent decision by the Washington Court of Appeals in *Washington Federal v. Mark A. McNaughton, et al.* --- P.3d ---, 2014 WL 2053980 (Wash. App. May 19, 2014), may make it difficult for guarantors to employ such a strategy in the future — at least absent some tangible and objective evidence to support a legitimate dispute over the market value of the property as of the date of the trustee’s sale.

In *Washington Federal v. Mark A. McNaughton, et al.*, a case argued by Lane Powell, the Washington Court of Appeals affirmed the lower court’s summary judgment ruling in favor of Washington Federal, holding that (i) guarantors have the burden of proof on a “fair value” defense, (ii) the concept of “fair value” is consistent with the property’s market value in an arm’s-length transaction at the time of the trustee’s sale, and (iii) the factors relevant to “upset price” in the context of a judicial foreclosure do not apply to determination of “fair value” in the context of a non-judicial foreclosure. The court’s decision strengthens the ability of lenders to obtain post-foreclosure deficiency judgments at summary judgment, thereby avoiding costly litigation and trials. The decision should also facilitate early settlement of deficiency lawsuits by requiring commercial guarantors to provide evidence of the property’s purported “fair value” well before trial.

**For all other inquiries, please contact the Financial Institutions Practice Group at
Lane Powell: lppc@lanepowell.com**

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