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Description

From the Solution in Search of a Problem Dept.

From The Unknown Title Examiner (TUTE)

A little-noticed change in Virginia mortgage foreclosure law went into effect July 1, 2024. Because it affects only foreclosures of junior deeds of trust, itâ??s likely that few agents have encountered it or had to deal with its provisions. [We might go so far as to say itâ??s likely trustees may be unaware of it as well.]

Hereâ??s the statute change, in its entirety:

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Â§ **55.1-321**. Notices required before sale by trustee to owners, lienors, etc.; if note lost.

A1. If the proposed sale is initiated due to a default in payment under a security instrument that (i) was, at the time it was recorded, subordinate to another security interest encumbering the same real property and (ii) has not subsequently been elevated to a first priority lien by a recorded voluntary subordination agreement, such subordinate mortgage lienholder shall submit to the trustee an affidavit affirming whether monthly statements were sent to the property owner for each period that any interest, fees, or other charges were assessed. No such interest, fees, or other charges shall be assessed or charged for any period during which periodic statements were not sent unless the subordinate mortgage lienholder identifies a specific exemption pursuant to applicable law for which such subordinate mortgage lienholder was not required to send such specific statements for any period of time enumerated in the affidavit. Such affidavit shall also include an itemized list of the current amount owed, including any periods in which interest, fees, and other charges were waived because no monthly statements were sent during such period. The subordinate mortgage lienholder shall provide a copy of such affidavit to the person required to pay the instrument with written notice that a request for sale shall be made of the trustee upon the expiration of 60 days from the day of mailing such notice. Such notice shall be sent by certified mail, return receipt requested, to the last known mailing address of such person required to pay the instrument. Such notice shall advise the person required to pay the instrument that if such person believes that such interest, fees, or other charges have been assessed in error, such person may, prior to the sale, petition the circuit court of the city or county where such property or some part thereof lies for an accounting and order declaring the proper balance secured by the subordinate mortgage. If the court determines that charges were assessed in error, such person shall be entitled to recover attorney fees and costs against the subordinate mortgage lienholder. The provisions of this subsection shall not apply to subordinate lienholders who are either (a) the original creditor, (b) a mortgage servicer acting on behalf of the original creditor, (c) a national or state chartered bank, or (d) a federal or state chartered credit union.

A2. Any purchaser at a foreclosure sale shall provide certification that such purchaser shall pay off any priority security instruments no later than 90 days from the date that the trusteeâ??s deed conveying

the property pursuant to such sale is recorded in the land records. The person originally required to pay the instrument shall have the right to petition the circuit court of the city or county where the property or some part thereof lies to recover from the purchaser any payments toward such priority lien amounts made by such person required to pay the instrument after the date of the foreclosure sale, plus any attorney fees and costs.

Okay, letâ??s dive into this a little deeper. A1 is fairly straightforward; if the foreclosing lender is the original lender or its servicer, or a national or state bank or credit union, A1 doesnâ??t apply. Whoâ??s left? Purchasers of notes who typically deal in B and C paper and acquire the indebtedness usually for pennies on the dollar. â??Hard moneyâ?• lenders in junior positions would most likely also have to comply with A1.

Now we need our SCUBA gear for the interpretation of A1:

a. Thereâ??s no penalty for failure to provide the affidavit to the trustee. The only penalty on the lender is if the debtor challenges the charges in court, but the challenge has to be filed in the circuit court prior to the sale. True, the lender has to tell the debtor the trustee can be requested to proceed to sale after 60 days. But if the affidavit isnâ??t provided to the trustee?
b. Interest, fees, and charges canâ??t be assessed if periodic statements arenâ??t sent *unless the subordinate mortgage lienholder identifies a specific exemption pursuant to applicable law for which such subordinate mortgage lienholder was not required to send such specific statements for any period of time enumerated in the affidavit.* Any idea what such a specific exemption might be? State law? Federal law? Bankruptcy? Maybe contract law if the note provides it?
c. Letâ??s suppose that the noteholder at time of default is exempt from providing the notice pursuant to the last sentence of A1 and directs the trustee to proceed to sale. What happens if the noteholder prior to the sale sells the note to an entity that *isnâ??t* exempt? (And TUTE has seen this happen.)

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As if A1 isnâ??t enough of a boondoggle, we have A2:

Any purchaser at a foreclosure sale shall provide certificationâ?¦ [to whom? the Trustee? the closing agent? the foreclosing lender? And when? at the auction? at the closing?]

â?¦that such purchaser shall pay off any priority security instruments no later than 90 days from the date that the trusteeâ??s deed conveying the property pursuant to such sale is recorded in the land records. [does the trustee have an obligation to ascertain the ability of the purchaser to pay off the senior lien? what if the purchaser doesnâ??t pay off the prior mortgages? who has the benefit of the certification and can enforce it? the Trustee? (the trustee canâ??t reauction the propertyâ??his authority has ended.) the prior lender? if the auction purchaser assigns the sale, is the assignee bound by the certification? or is the certification personal to the certifying individual?]

Assuming everything covered by A1 and A2 is â??peachy keen,â?• letâ??s not overlook the plight of the settlement agent. Because the clock for the payoff of the senior lien doesnâ??t start until the deed is recorded, how does the settlement agent handle it? Itâ??s easy enough to put an exception in the ownerâ??s policy, but what if the auction buyer has obtained a loan to finance the sale? One supposes the loan policy could contain an exception for the senior lien with a note â??to be paid within 90 days,â?• but is that going to be acceptable to a lender who has to trade the paper on the secondary market?

Then thereâ??s the situation in which the auction sale purchaser flips the property within the 90 daysâ?¦

TUTE is sure there are scenarios lurking beneath the surface which he/she has overlooked, to which one can only say

Ugh.

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