

FINANCIAL INSTITUTIONS ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Tennessee Legislature Adopts New Foreclosure Deficiency Judgment and Notice Statutes

June 8, 2010

On June 2, 2010, Governor Bredesen signed into law Tennessee's new foreclosure deficiency statute, which drastically changes the law for determining the deficiency judgment a creditor may recover after a foreclosure sale pursuant to a deed of trust. The new statute, effective September 1, 2010, applies to foreclosures of both residential and commercial property and is a major change to existing Tennessee law.

Previously, the foreclosure sale price obtained at a regularly-conducted foreclosure sale determined the amount of credit to be applied to the loan balance unless fraud or similar misconduct contributed to a lower sale price. The amount of a deficiency judgment was based on the difference between the loan balance (including cost for foreclosure) and the foreclosure sale price.

The new statute allows a borrower to challenge the foreclosure sale price, for deficiency purposes, based on the "fair market value" of the property at the time of the foreclosure sale. The statute provides that the foreclosure sale price is presumed to be the fair market value, but the presumption can be overcome if, by a preponderance of the evidence, the debtor establishes that the property sold for an amount materially less than the fair market value of the property at the time of foreclosure. If so, the amount of deficiency would be the total amount of the indebtedness less the "true" fair market value of the property at the time of the sale as so established. The statute does not provide definitions of "materially less" or "fair market value."

In addition, the statute contains a limitation of two years after a foreclosure sale within which a lender can institute a legal proceeding to recover a deficiency.

Tennessee's General Assembly also amended the state's foreclosure statute to require the sending of a Notice of the Right to Foreclosure to a borrower at least 60 days prior to the first publication of a foreclosure notice. The amendment is effective July 1, 2010, and applies to foreclosures published on or after September 1, 2010. Information required in the Notice is specified in the statute, which includes availability of federal loan modification programs and contact information for federal agencies.

If you have any questions regarding the information in this alert, or with respect to other provisions for this legislation, please contact any of the attorneys in our Commercial or Financial Services Litigation Practice Groups listed below.

Bass, Berry & Sims Commercial and Financial Services Litigation Attorneys

Annie T. Christoff
(901) 543-5939
achristoff@bassberry.com

John S. Golwen
(901) 543-5903
jgolwen@bassberry.com

Brian R. Iverson
(615) 742-7918
biverson@bassberry.com

Anthony J. McFarland
(615) 742-6250
amcfarland@bassberry.com

Stephen W. Ragland
(901) 543-5917
sragland@bassberry.com

D. Mark Sheets
(615) 742-6258
msheets@bassberry.com

John A. Stemmler
(901) 543-5908
jstemmler@bassberry.com

Tiffany A. Yates
(901) 543-5933
tyates@bassberry.com

E. Steele Clayton, IV
(615) 742-6205
sclayton@bassberry.com

M. Jason Hale
(615) 742-6573
jhale@bassberry.com

Paul G. Jennings
(615) 742-6267
pjennings@bassberry.com

Michael S. Peek
(615) 742-6231
mpeek@bassberry.com

John S. Seehorn
(615) 742-7754
jseehorn@bassberry.com

John C. Speer
(901) 543-5919
jspeer@bassberry.com

William G. Whitman
(901) 543-5931
bwhitman@bassberry.com

Felix R. Dowsley, III
(615) 742-6228
fdowsley@bassberry.com

Colleen D. Hitch
(901) 543-5929
chitch@bassberry.com

Nolan M. Johnson
(901) 543-5937
njohnson@bassberry.com

Peter R. Pettit
(901) 543-5911
ppettit@bassberry.com

Cynthia N. Sellers
(615) 742-6255
csellers@bassberry.com

Richard R. Spore, III
(901) 543-5902
rspore@bassberry.com

Clarence A. Wilbon
(901) 543-5927
cwilbon@bassberry.com

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