Federal Foreclosure Bar Preempts Nevada HOA Superpriority Statute

The U.S. Court of Appeals for the Ninth Circuit recently held that the Federal Foreclosure Bar's prohibition on nonconsensual foreclosure of assets of the Federal Housing Finance Agency preempted Nevada's superpriority lien provision and invalidated a homeowners association foreclosure sale that purported to extinguish Freddie Mac's interest in the property.

A copy of the opinion is available at: Link to Opinion.

In 2013, an investor purchased a home at a homeowners association foreclosure sale for $10,500 and recorded a deed in his name. The purchaser argued that Nevada's superpriority lien provision, Nev. Rev. Stat. § 116.3116, allowed the association to sell the home to him free and clear of any other liens. The Federal Home Loan Mortgage Corporation ("Freddie Mac") claimed it had a priority interest in the purchased home.

As you may recall, Freddie Mac is under Federal Housing Finance Agency conservatorship, meaning the FHFA temporarily owned and controlled Freddie Mac's assets. See 12 U.S.C. § 4617(b)(2)(A)(i) (FHFA acquired Freddie Mac's "rights, titles, powers, and privileges … with respect to [its] assets" for the life of the conservatorship).

Protection of the FHFA's assets is provided for in 12 U.S.C. § 4617(j)(3), a provision of the Housing and Economic Recovery Act of 2008 (HERA). Also known as the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3)'s prohibition on nonconsensual foreclosure protected the FHFA's conservatorship assets. ("No property of the [FHFA] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [FHFA], nor shall any involuntary lien attach to the property of the [FHFA].").

The purchaser sued to quiet title in Nevada state court. Freddie Mac intervened and counterclaimed for the property's title, removed the case to federal district court, and moved for summary judgment. The FHFA joined Freddie Mac's counterclaim. Together the federal entities argued that the purchaser did not acquire "clean title" in the home because the Federal Foreclosure Bar preempted Nevada law, and invalidated any purported extinguishment of Freddie Mac's interest through the association foreclosure sale. The trial court ruled in favor of the federal entities.

On appeal, the purchaser argued that the Federal Foreclosure Bar did not apply in this case, and even if it did, Freddie Mac lacked an enforceable property interest due to a split of the note and the security instrument.

First, the purchaser argued that the Federal Foreclosure Bar did not apply to private homeowners association foreclosures generally, because it protected the FHFA's property only from state and local tax liens.

To determine whether the Federal Foreclosure Bar applied to private foreclosures, the Ninth Circuit began by examining the HERA statute's structure and plain language. The section titled "Property protection" did not expressly use the word "taxes." 12 U.S.C. § 4617(j)(3). The statute did not limit "foreclosure" to a subset of foreclosure types. Id.

In the Ninth Circuit's view, a plain reading of the statute revealed that the Federal Foreclosure Bar was not focused on or limited to tax liens, and therefore the provision should apply to any property for which the FHFA served as conservator and immunized such property from any foreclosure without FHFA consent. 12 U.S.C. § 4617(j)(1), (3).

The purchaser citied *F.D.I.C. v. McFarland*, 243 F.3d 876 (5th Cir. 2001) as support for his argument that the Federal Foreclosure Bar applied only to tax liens. In *McFarland*, the Fifth Circuit interpreted 12 U.S.C. § 1825(b)(2), a provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 that governed Federal Deposit Insurance Corporation receiverships. The FIRREA provision is worded identically to HERA's Federal Foreclosure Bar provision except that the word "Corporation" appeared in the former where "Agency" appeared in the latter. Compare 12 U.S.C. § 1825(b)(2) with 12 U.S.C. § 4617(j)(3). The court in *McFarland* declined to extend § 1825(b)(2) to private foreclosures.

The Ninth Circuit, however, distinguished *McFarland* and reasoned that the statutory framework in that case was different from the framework surrounding the Federal Foreclosure Bar. Specifically, the Ninth Circuit found that unlike § 1825, § 4617(j) did not include any language limiting its general applicability provision to taxes alone.

Therefore, the Ninth Circuit held that the language of the Federal Foreclosure Bar cannot be fairly read as limited to tax liens.

The purchaser then argued that the Federal Foreclosure Bar did not apply in this case because Freddie Mac and the FHFA implicitly consented to the foreclosure when they took no action to stop the sale.

The Ninth Circuit rejected this argument because the plain language of the Federal Foreclosure Bar did not require the Agency to actively resist foreclosure. See 12 U.S.C. § 4617(j)(3) (flatly providing that "[n]o property of the Agency shall be subject to … foreclosure, or sale without the consent of the Agency").

Thus, the Court concluded that the Federal Foreclosure Bar applied generally to private association foreclosures and specifically to this foreclosure sale.

Next, the Ninth Circuit addressed the issue of whether the Federal Foreclosure Bar preempted Nevada state law, which had triggered multiple lawsuits in Nevada.

As you may recall, "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Rich*, 545 U.S. 1, 29 (2005). Preemption arises when "compliance with both federal and state regulations is a physical impossibility, or … state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Bank of Am. v. City & Cty. Of S.F.*, 309 F.3d 551, 558 (9th Cir. 2002).

First, the Ninth Circuit determined that the Federal Foreclosure Bar did not demonstrate clear and manifest intent to preempt Nevada's superpriority lien provision through an express preemption clause. Nevertheless, the Court found that the Federal Foreclosure Bar implicitly demonstrated a clear intent to preempt Nevada's superiority lien law.

Nevada law allowed homeowners association foreclosures under the circumstances present in this case to automatically extinguish a mortgagee's property interest without the mortgagee's consent. See Nev. Rev. Stat. § 116.3116. Because the Federal Foreclosure Bar prohibited foreclosures on FHFA property without consent, in the Ninth Circuit's view, Nevada's law was an obstacle to Congress's clear and manifest goal of protecting the FHFA's assets in the face of multiple potential threats, including threats arising from state foreclosure law.

Therefore, as the two statutes impliedly conflict, the Ninth Circuit held that the Federal Foreclosure Bar preempted the Nevada superpriority lien provision.

In addition, the purchaser argued that even if the Federal Foreclosure Bar applied to this case and was preemptive, Freddie Mac did not hold an enforceable property interest for "splitting" the note from the deed of trust, and failing to present sufficient evidence to establish its interest for purposes of summary judgment.

The Ninth Circuit rejected these arguments because Nevada law recognized that, in an agency relationship, a note holder remained a secured creditor with a property interest in the collateral even if the recorded deed of trust named only the owner's agent. Although the recorded deed of trust here omitted Freddie Mac's name, Freddie Mac's property interest is valid and enforceable under Nevada law.

Moreover, Freddie Mac introduced evidence showing that it acquired the loan secured by the subject property in 2007, and that the beneficiary of the deed of trust was Freddie Mac's authorized loan servicer.

The Appellate Court concluded that the trial court correctly found Freddie Mac's priority property interest enforceable under Nevada law. Accordingly, the Ninth Circuit affirmed the trial court's summary judgment in favor of Freddie Mac and the FHFA.