

# Washington Court of Appeals Confirms Lenders' Right to Obtain Deficiency Judgments Against Guarantors Following Nonjudicial Foreclosure of Commonly Used Form of Deed of Trust



**T**he Deed of Trust Act generally bars a lender from seeking a deficiency judgment against a borrower following nonjudicial foreclosure of a deed of trust securing the borrower's loan. The Act contains some exceptions in the case of a commercial loan and it expressly permits a lender to seek a deficiency judgment against a guarantor of a foreclosed loan, subject to the guarantor's right to challenge the fair value paid for the property at the trustee's sale. RCW 61.24.100(3)(c), (5).

In *Washington Federal v. Gentry*, 319 P.3d 823 (Wash. App. 2014), Division One of the Washington State Court of Appeals confirmed that a lender has a right to bring an action for a deficiency judgment against a guarantor even where the foreclosed deed of trust can be interpreted to secure both the borrower's loan and the guarantor's separate guaranty. Division One's opinion in *Gentry* conflicts with *First Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 314 P.3d 420 (Wash. App. 2013), an earlier published opinion issued by Division Two of the Court of Appeals, in which Division Two reached the opposition conclusion on similar facts and loan documents.

The *Gentry* case arose from the borrower LLC's default on a multi-million dollar real estate development loan. The loan was secured by a form deed of trust on the borrower's property (sometimes called a "LaserPro" deed of trust) and personally guaranteed by one of the

borrower's principals. The bank nonjudicially foreclosed on the property and then filed a lawsuit against the guarantor for the deficiency. The trial court dismissed the suit. First, in the absence of any evidence regarding the parties' intent, the court interpreted the language of the deed of trust as securing both the commercial loan and the guaranty because, among other reasons, the deed's boilerplate definitions of "indebtedness" and "related documents" included the word "guaranties." Second, the court ruled that RCW 61.24.100(10) must be construed as an exception to the rule allowing deficiency actions against guarantors in cases where the foreclosed deed of trust also secured the guaranty.

In its published opinion, the Court of Appeals reversed and found for the bank on both issues. Taking the statutory issue first, the court confirmed that RCW 61.24.100(3) expressly allowed deficiency actions against guarantors of commercial loans and that the statute contained no exception for cases where the guaranty is secured by the borrower's foreclosed deed of trust. Relying on rules of statutory construction, the court rejected the guarantor's argument that RCW 61.24.100(10) should be construed as an implied prohibition in such cases. On the contractual issue, the court held that, even if it accepted the guarantor's construction of the statute, the bank still would be entitled to bring an action for a deficiency judgment because the deed of trust did not secure the guaranty. The court refused to read the deed's definitions in isolation and, after considering the language of the

deed of trust as a whole, it concluded that the parties intended the deed to secure only the indebtedness and obligations of the borrower, not a guarantor.

The defendant in *Gentry* has asked the Washington State Supreme Court to review the case and resolve the apparent conflict between *Gentry* and *First Citizens*. It is expected that the Supreme Court will decide whether to accept review sometime this Summer. Unless and until the court resolves the conflict, lenders face uncertainty regarding the availability of a post-foreclosure deficiency judgment action on commercial guaranties executed in conjunction with older LaserPro deeds of trust. Lenders should consult with their counsel to fully understand the various options available to them, including judicial foreclosure or pre-foreclosure lawsuits on the debt and guaranty.



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