

Ahh... That Perplexing Sheriff's Sale

What Impact, If Any, Does Such A Sale Have On YOUR Mortgage?

BY BRUCE J. BERGMAN

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Servicing mortgages is a challenging enough calling without extra intrusive headaches - such as a confusing sheriff's

sale of the property. But let's present a frame of reference before we create more agitation than the offending sheriff.

In many states, a mortgage foreclosure sale is conducted by a court appointed officer, typically a referee. In some states the official who supervises

the foreclosure sale is the sheriff, although that function is not the focus of this discussion.

Our topic is directed not to the *foreclosure* sale, but to some *other* sale (such as ex-



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cution upon a judgment) which could affect the mortgaged property and which, not incidentally, has the potential to portend nervousness for some servicers.

The scenario

Here is the potentially discomforting scenario:

Your mortgage is executed, acknowledged and delivered on a particular day and recorded that very same day. (It doesn't happen quite that quickly in some jurisdictions, but let's make that assumption for illustrative purposes.)

A few months later, the borrower suffers a judgment against him for \$20,000. Being far less creditworthy then the lender had envisioned, the borrower is then the object of judgments in the respective amounts of \$25,000, \$30,000 and \$40,000.

Of course, the borrower does not satisfy those judgments and eventually the first judgment creditor (the one for \$20,000) decides that something has to be done to collect the debt. That "something" is an execution upon property of the judgment debtor - the borrower, in this case.

Conspicuous among the available assets, and perhaps the only one, is the house burdened by the lender's mortgage. Execution, in turn, is accomplished through a sheriff's sale.

(Note: Mechanical and technical rules about how this is done and the attendant priorities can certainly vary from state to state. The example here is based upon New York law, but there is still much uniformity to the

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concept and it does serve to make the point.)

The issue is basic

Befuddling though it all may seem, in the end it is really an issue of the standard priorities well understood by lenders and servicers.

If your mortgage is senior, a later, junior and subordinate interest cannot rise above your position and cannot reverse priorities merely because execution upon a judgment is sought.

Of course, the opposite is true as well. If a lender takes back a mortgage *behind* a judgment, a judgment of the variety which remains superior to the mortgage, then execution upon that superior interest *will* extinguish the mortgage. That, obviously, is one of the reasons why mortgage lenders will only rarely allow judgments to remain of record prior to their mortgages.

So if your mortgage is inferior to a judgment, there is certainly some risk involved and you may have to satisfy that judgment should execution upon it ever issue. But that is an aberrant situation which need not be addressed here.

Our area of exploration is the later, subsequent judgment creditor which chooses to execute. How that is done leads up to how a senior lender may learn of it and perhaps become uneasy.

Examining local practice

Here is where local practice becomes more of an issue, but the ideas should be mentioned as a basis of inquiry.

In some states - New York, for example - if the property is owned and occupied as a principal residence of the judgment debtor, then the creditor who wishes to execute must first obtain permission of a court to sell the homestead. Obviously, if the property is not the principal residence, if it is business property or a vacation home, for example, then permission of the court to proceed with the execution is not required.

Following that stage (assuming it was necessary in the first place), there is typically a procedure of advertising and notice to cause the sheriff to hold the execution sale.

One of the things the sheriff must usually do is serve a copy of the notice of sale upon every person who had of record any interest in or lien upon the property. The category, of course, includes mortgage holders. It is this notice which comes to a lender or servicer and which is the source of the frequent inquiry about what will happen to the mortgaged premises.

But if the junior position cannot affect a senior interest, then whatever the executing judgment creditor does cannot change the position of the senior mortgagee.

So what happens?

What does typically happen, then?

Using the example of the \$20,000 judgment, if at the sheriff's sale up to \$20,000 is bid, all that money goes to the executing judgment creditor. (There is a homestead exemption in many states to one extent or another, but those principles are not relevant to the issue presented.)

Whoever buys the house at the sheriff's sale - and it may indeed be a bargain - takes *subject* to the mortgage in our example. The purchaser at the sheriff's sale may or may not choose to satisfy the senior mortgage - your mortgage in the illustration - but if he does not, and if there is a default, he is in no better situation than the borrower had been. Either he takes care of the mortgage or he will lose the property he bought at a foreclosure sale.

If the mathematics dictate, it is certainly possible that someone will bid more than \$20,000 at the sheriff's sale. Local statute will control where the money goes, but a rather standard approach is to distribute proceeds to the judgment creditors who have themselves delivered to the sheriff ex-

ecutions against the debtor before the sale, in the order in which the judgments have priority.

Thus, while the judgment creditors will divide the booty in order of their own priorities, no money goes up the line to the mortgage holder. But again, at the same time, no one gains any priority *over* the mortgage holder. And if the proceeds at a sheriff's sale are more than sufficient to pay all judgment creditors, any balance remaining usually goes to the judgment debtor.

The final outcome

In the end, there is much smoke, but little fire - at least where the mortgage holder is concerned.

Title to the property can be lost by the owner/borrower and there may be

much effort expended in bringing about the sheriff's sale. But the mortgage stays in place, always holding its relative priority.

To the extent that the proliferation of judgments and execution upon those judgments are unstabilizing and unwelcome events, then a mortgage lender or servicer is understandably concerned when such episodes occur. But it never changes the *relationships* and that's the key.

Lenders and servicers may prefer not to encounter this scenario (although a sheriff's sale purchaser who has the funds might just satisfy the mortgage faster than the borrower could), but it is certainly not fatal. It really isn't even a problem if you know what it's about. GM

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