RIKER DANZIG SCHERER HYLAND PERRETTI LLP

Supreme Court of Arizona Holds That Credit Bid at Trustee's Sale Is Not a Payment Under a Title Insurance Policy

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In recent years, the question of whether a full-credit bid at a foreclosure sale constitutes a payment under a title insurance policy has been the subject of widespread dispute. Jumping into the fray, the Arizona Supreme Court recently ruled on the issue and held that an insured lender's full-credit bid at a trustee's sale did not constitute such a payment. See Equity Income Partners, LP v. Chicago Title Ins. Co., 241 Ariz. 334 (2017). In the case, the insured lender issued two loans in the amount of $1,200,000 each which were secured by deeds of trust on two adjacent properties. The title insurance company issued a 1992 ALTA Loan Policy for each property. After discovering they could not legally access the properties, however, the borrowers defaulted on the loans. The lender acquired title to both parcels at the trustee's sale via full-credit bids totaling $2,620,725.18. The lender then sued the title insurance company for the full amount of the policies due to the lack of access, which was insured under the policies. The title insurance company moved for summary judgment, arguing that the full-credit bids constituted "payments" under the policies that reduced the amount of insurance to nothing. The district court agreed, holding that "the amount of insurance was reduced to nil by Plaintiffs' payments to themselves," and granted the title insurance company summary judgment. See 2013 WL 6498144. On appeal, the Ninth Circuit certified the question of "whether a lender's full-credit bid at an Arizona trustee's sale constitutes payment under a lender's title insurance policy" to the Arizona Supreme Court. See 828 F.3d 1040.

The Arizona Supreme Court first reviewed the relevant sections of the policies. Condition 2(a) states that coverage under the policies continues in favor of an insured lender who acquires title to the property through, inter alia, foreclosure or a trustee's sale. Condition 2(c) states that the amount of insurance after the insured's acquisition shall not exceed the least of (i) the amount of insurance stated in the policy; or (ii) the amount of the principal of

the indebtedness "reduced by the amount of all payments made[.]" Finally, Condition 9 states that "[a]ll payments under this policy, . . . shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage."

Upon review, the Court stated that the term "payment" was not defined in the policies, and therefore that any ambiguity would be construed against the insurer. It then reviewed Arizona's public policies regarding foreclosures and insurance policies. First, it referenced the fact that Arizona's laws generally protect borrowers from deficiency judgments. As a result of these laws, a credit bid does not have the same effect as a payment from a lender's perspective because a lender is not necessarily made whole if it acquires a property via a full-credit bid. Second, it noted that Arizona's public policy protects insureds, and the title insurance company's interpretation of the policy would contravene this policy. Therefore, the Court held that a full-credit bid could not be considered a payment under the policies. Instead, the Court found that the "payment" received by the lender is the fair market value of the properties, which had not been determined.

This decision is in line with a series of other recent decisions. See, e.g., Bank of Idaho v. First Am. Title Ins. Co., 156 Idaho 618, 623 (2014); Pres. Capital Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309, 319 (2013). However, other courts have held that credit bids are proof of a property's value and reduce the amount of insurance accordingly. See Freedom Mortg. Corp. v. Burnham Mortg., Inc., No. 2006 WL 695467, at *11 (N.D. Ill. Mar. 13, 2006), rev'd on other grounds, 569 F.3d 667 (7th Cir. 2009) ("absent proof that a lender's credit bid was the proximate result of fraud, the bid stands as against third parties"); Romo v. Stewart Title of California, 35 Cal. App. 4th 1609, 1615 (1995) ("The lender's full credit bid establishes the value of the security as being equal to the amount of the indebtedness. Hence, the lender cannot establish any impairment of security.").

For a copy of the decision, please contact Michael O'Donnell at modonnell@riker.com, Michael Crowley at mcrowley@riker.com or Clarissa Gomez at cgomez@riker.com.

Attorneys:

Michael R. O'Donnell · Michael Crowley · Clarissa Gomez

Practices:

Title Insurance · Financial Services