

Underwriting Bulletin: UNNAT-2024-010

DATE: August 15, 2024
TO: Minnesota, Iowa, Missouri, Arkansas, Nebraska, North Dakota, and South Dakota Agents
FROM: DAVID HAYS, GENERAL COUNSEL

RE: Effect of Senior Lien Foreclosure on Non-IRS Junior Federal Lien

The purpose of this bulletin is to set a standard underwriting requirement for insuring a transaction following a foreclosure initiated under state law of a senior lien where the title also encumbered a Non-IRS junior federal lien.

It has been an assumption that state law governs the rights of the United States when a nonjudicial foreclosure of a senior lien purports to extinguish a non-IRS junior federal lien on the property. *United States v. Brosnan*, 363 U.S. 237 (1960). Further, the section of the governing statute, 28 U.S.C. § 2410 was amended to include two requirements: 1) Judicial sale required when foreclosure action names the U.S. as a party and 2) the U.S. has a statutory right of redemption of one year from the date of the judicial sale (not including IRS liens.)

Pursuant to a 2023 decision from the Eighth circuit in *Show Me State Premium Homes v United States*, 74 F.4th 911 (8th Cir. 2023): the court held that a nonjudicial foreclosure DOES NOT extinguish a Non-IRS junior federal lien. In direct response to the decision, the U.S. Department of Justice has also asserted that nonjudicial foreclosures have no effect on Non-IRS Junior Federal Liens held by the United States.

Therefore: the following requirement applies when underwriting the elimination of a Non-IRS Junior Federal Lien held by the U.S. Government (i.e. Depart of Housing and Urban Development (HUD), the Federal Housing Authority (FHA), the Department of Veterans Affairs (VA) Farmers Home Administration (FmHA) The Small Business Administration (SBA), the Department of Energy (DOE) or the U.S. Securities and Exchange Commission (SEC), following the foreclosure of a senior lien or mortgage:

Type of transaction:

Judicial foreclosure with a judicial sale:

A Non-IRS Junior Federal Lien may be eliminated by judicial action if proper notice of the foreclosure is provided and unless exempt by federal statute, the one-year redemption period has passed without the government exercising its redemption rights. The notice requirements for foreclosure actions filed in state court are set out in 28 U.S.C. § 2410(b).

Commitment requirement:

A judicial sale of the subject lien or receipt of a release or written waiver of the United States' right to require a judicial sale as provided under 28 U.S.C. § 2410 (c) arising from its interest in mortgage/deed of trust dated XX-XX-XXXX and filed of record on XX-XX-XXXX in Book XXXX at Page XX or as Document No XXXXXXXXXX.

Nonjudicial Foreclosure:

Any unreleased Non-IRS Junior Federal Lien found in the chain of title will be shown as a Schedule B exception in the commitment and policy. (Even if there was a nonjudicial foreclosure of a prior senior lien)

Exception requirement:

Any right, or claim of right, arising from the interest of the United States in (insert junior lien document – Mortgage/Deed of Trust) dated XX-XX-XXXX and filed of record XX-XX-XXXX in Book XXXX at Page XX or as Document No. XXXXXXXX because of failure to conduct a judicial sale with joinder of and service of process on the United States, as required by 28 U.S.C. § 2410 (c) to foreclose that certain mortgage/deed of trust to secure debt dated XX-XX-XXXX and filed of record XX-XX-XXXX in Book XXXX at Page XX or Document no XXXXXXXX (Senior Lien info)

Further: if the statutory post-foreclosure right of redemption applies to a Non-IRS Junior Federal Lien and has NOT expired, the lien instrument must continue to be shown as a requirement in B-I or an exception in BII of the commitment and policy.

Commitment requirement:

Expiration of the one-year right of redemption of the United States, provided under 28 U.S.C. § 2410 (c), arising from its interest in Mortgage/Deed of Trust dated XX-XX-XXXX and filed of record on XX-XX-XXXX in Book XXXX at Page XX or Document No XXXXXXXX, or receipt of a written waiver of United States' right of redemption in a form satisfactory to the company.

Exception requirement:

Any right, or claim of right, arising from the interest of the United States in (insert junior lien document – Mortgage/Deed of Trust) dated XX-XX-XXXX and filed of record XX-XX-XXXX in Book XXXX at Page XX or as Document No. XXXXXXXX because of the one-year right of redemption of the United States, provided under 28 U.S.C. §2410 (c).

FNTI requires underwriting approval prior to removal of any requirement or exception set forth herein.

Please contact the underwriting department for any questions or requests that deviate from this bulletin

This Underwriting Bulletin becomes a part of the principles and practices with which you are to comply under the terms of your Underwriting Agreement with First National Title Insurance Company. Should the content of this bulletin address the closing and escrow function, this information should be considered a directive and part of the principles and practices if non-compliance would result in liability to FNTI under either the insured closing service letter or policy of title insurance notwithstanding that the Underwriting Agreement does not include the closing and escrow functions of your agency.