

# BURR ALERT

## Is “MATERIALLY LESS” The Same As “GROSSLY INADEQUATE”?

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### BACKGROUND

Tennessee was one of many states jumping on the debtor-protection bandwagon following disclosures of lender misconduct in the wake of the 2007 real estate market collapse. The legislative solution crafted into Tenn. Code Ann. 35-5-118 created a rebuttable presumption that the amount bid at a foreclosure sale equaled the fair market value of the property. Debtors could overcome this presumption by showing that the bid was “materially less” than fair market value. The statute became effective September 1, 2010. Prior to that time, the standard for setting aside foreclosures was whether the bid amount was “grossly inadequate.”

There has been much debate in legal circles as to whether the new statutory approach would pave the way for debtors to defeat or reduce deficiency judgments. In the only two cases decided since the act went into effect, both the Eastern and Middle Sections of the Court of Appeals have found in favor of the lenders.

### CASES

The first such decision arose in the context of setting aside a default judgment, and quoted both the “grossly inadequate” and “materially less” standards. As a result, it was of limited value in predicting the course of future decisions. However, the opinion handed in December, 2012, *Greenbank v. Sterling Ventures, LLC*, indicates that overcoming the rebuttable presumption is still a formidable challenge for debtors.

GreenBank purchased its own collateral at foreclosure for a mid-range bid of \$667,400, based on a current appraisal valuing the collateral between \$581,000 and \$710,000. The debtor’s affidavit valued the property at \$750,000. On motion for summary judgment, the trial court held in favor of the lender, with the Court of Appeals affirming, noting that a sales price of 89% of the debtor’s higher valuation number was not “materially less” than fair market value.

Judge Stafford’s carefully reasoned opinion goes on at some length analyzing the legislative history in an effort to determine whether “materially less” was meant to lower the burden previously placed on debtors by the “grossly inadequate” standard. Although some of the legislative comments would support that conclusion, the Court ultimately stated that the “[l]egislative intent . . . was not to lessen the burden on the debtor so much as to negate the presumption that the sale price represents the fair market value.” The court declined to set a bright line percentage above or below which the statutory presumption is rebutted.

### CONCLUSION

Lenders are well-advised to continue their practice of obtaining current appraisals and documenting discounts attributable to prior encumbrances, necessary repairs and holding and resale costs, such as insurance, security, brokerage commissions and closing costs. Future cases should be monitored with counsel, to identify any developing trends and incorporate them into foreclosure procedures.

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