

Perspective



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JANUARY 2009

This newsletter is designed to address legal issues that impact lending in Florida. Whether making loans or collecting bad loans, *The Lender's Perspective* will provide timely and valuable insight to the creditor.

A Mortgage Lender's Guide to Homeowner's Association Liens

By Douglas L. Waldorf, Jr., J.D., M.B.A.

With the increased volume of foreclosures, mortgage lenders are frequently asking whether they have to pay homeowner's association liens for unpaid assessments. This issue of *The Lender's Perspective* will address the recent changes in Florida law on the subject and their impact on the foreclosing lender.

What property can be subject to homeowner's association liens?

The first question to answer is whether the collateral property can be subject to homeowner's association liens. Property located in a platted subdivision is often subject to restrictive covenants. These recorded documents set out the rules and regulations for the development and use of the property. They typically provide for the establishment of a non-profit corporation (the homeowner's association which we will abbreviate as "HOA") to administer and enforce the covenants. Most restrictive covenants allow the HOA to place a lien on property for which assessments have not been paid. A title search report (which is routinely obtained in anticipation of foreclosure) should disclose whether the

property is subject to restrictive covenants and also whether there are any recorded liens.

Let's consider the bank's liability for the unpaid assessments. Assume that the bank's mortgage encumbers residential property, in a platted subdivision and is subject to restrictive covenants. Further, assume those covenants call for the establishment of a HOA and a check with the State of Florida Division of Corporations has shown that a HOA has indeed been formed. Finally, a title search shows that the HOA has recorded a claim of lien for unpaid assessments on the property that is encumbered by the bank's mortgage.

Florida Statutes Chapter 720

The issue we have raised is addressed by Florida Statutes 720.3085. First created in 2007, and substantially revised effective July 1, 2008, the statute:

- grants to HOAs a lien on each parcel of property to secure payments of assessments so long as the restrictive covenants authorize it. The effective date of the lien is the date the restrictive covenants were recorded. While this may raise a concern to a mortgage

lender, fear not and read on! There is an exception that was added for first mortgage holders. This should, however, raise a red flag for second mortgage holders such as equity line lenders.

- provides a mechanism for associations to enforce the lien by foreclosure (similar to a mortgage foreclosure).
- affords property owners the opportunity to contest the lien and also to temporarily stop association foreclosures by making a settlement offer.
- enables assessments to bear interest at the rate provided in the restrictive covenants, or 18% if no rate is provided.
- allows the HOA to charge a late fee, not to exceed the greater of \$25 or 5% of the amount of any past due assessment installment, if the covenants so permit.
- entitles the HOA to recover attorney's fees in the event it forecloses the assessment lien.

How does the law treat a first mortgage lender?

Fortunately, the statute contains an exception to the general rule of priority for first mortgage holders. It provides that, as to first mortgages, the HOA lien

is effective as of the date the association records a claim of lien in the public records of the county in which the property is located. Since the statute was effective July 1, 2008, for liens recorded after that date, the mortgage will take priority so long as it was recorded prior to the lien. If the lien was recorded *before* July 1, 2008, the issue of priority is not as easily resolved. In those cases, the lender should carefully review the restrictive covenants. You want to determine whether the association has the right to impose a lien and, if so, what the covenants state with respect to the effective date of the lien. It is possible that the mortgage could be subject to the entire lien. Some covenants may state that the lien is effective as of the recording of the lien. In that instance, the mortgage will have priority if recorded first. So, suffice it to say that some uncertainty still exists for liens recorded before July 1, 2008.

For those HOA liens recorded after July 1, 2008, things are a bit clearer. Again,

the lien is effective as of the date of recording, at least as it pertains to first mortgages. Further, the statute contains a limitation of liability for first mortgage holders. It states that the mortgage holder or its successors who acquire title to property by foreclosure (or deed in lieu of foreclosure) will only be responsible for an amount which is the lesser of 12 months of assessments (coming due immediately prior to acquiring title) or 1% of the original mortgage principal amount. There is one caveat here, to take advantage of the limitation, the foreclosing mortgagee must name the HOA as a defendant in the foreclosure suit.

Some Final Thoughts

Are we confused yet? I can assure you that there will be questions arising from this statute that will need to be addressed by courts in the future. Until then, one additional thought to keep in mind: a recorded lien is not presumed to be

valid under the law. Rather, the statute sets out a number of requirements that the HOA must follow in order to have a valid lien. Do not assume that a lien is valid. Instead, discuss it with counsel and evaluate your options. Remember also that most anything can be negotiated, including payoffs on HOA liens. Don't be shy about contacting the association or its counsel about a discounted payoff.

Mr. Waldorf is a Board Certified Real Estate Lawyer whose practice focuses on banking industry clients. He represents lenders in commercial and residential loan transactions, mortgage foreclosures, deeds in lieu of foreclosure, forbearance agreements, and defaulted loan workouts.



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*In the next issue of The Lender's Perspective we will discuss fraudulent transfers by debtors.
Until then, thanks for reading!*

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