

Tuesday, July 23

Roundtable Session 2

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3:00 - 4:00 p.m.

Broadmoor Hall D

Priority Liens: Protecting a Lender's Mortgage Interest & HOA Implications

From the late 1980's through to the present, Super/Priority Lien Laws have been enacted throughout the country enhancing condominium associations and local/federal government power to collect fees at the peril of mortgage holders. These statutes are the single biggest emerging threat to lenders today due to confusion about priority legislation. Given the high number defaults, many first mortgage interests have been lost due to misconceptions about the laws. Accordingly, this session shall focus on the fundamentals of what a Super/Priority lien is; how it is prosecuted and defense tactics the lender can utilize to not only protect its mortgage, but mitigate costs and expenses in the process. The session will walk the audience through various enforcement processes in different regions of the country from start to finish. Additionally, the panel will suggest best practices for lenders to identify Super/Priority Lien issues early and resolve them before significant legal costs are incurred. This comprehensive review will also touch upon the lender's rights, litigation, preserving the state of title, and redemption. Hear from our panel of experts on the challenges of managing the HOA and condo association dues throughout the default lifecycle

Moderator: Joseph A. Camillo, Jr., Esq., Partner / Managing Attorney - Default Servicing, Shechtman Halperin Savage, LLP

Speakers: Gini Spaziano, Esq., Partner & Co-Managing Attorney – Default Servicing, Shechtman Halperin Savage, LLP; Robert J. Hopp, Attorney, Randall S. Miller & Associates, PC

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Mr. Camillo is a partner and managing attorney of SHS's Default Servicing Practice Groups. Mr. Camillo has over 19 years of experience in the areas of Banking, Creditors' Rights, Bankruptcy, Foreclosure, Real Estate, Litigation, Regulatory Compliance and Condominium Law. Mr. Camillo also has extensive experience in representing public sector/quasi governmental agencies such as Massachusetts Housing Finance Agency; Rhode Island Housing; Fannie Mae; Freddie Mac; HUD, USDA and the Veterans Association. He is admitted to practice law in all state and federal courts in Massachusetts and New Hampshire, US District Court for the District of Vermont and the United States Court of Appeals for the First Circuit. Mr. Camillo earned his J.D. from the Massachusetts School of Law in 1994, and his B.A. from St. Bonaventure University in 1989. Mr. Camillo lectures extensively throughout the country on topics such as foreclosure, bankruptcy, eviction, condominium law and litigation. Mr. Camillo serves as corporate counsel for the New England Adjustment Managers Association (NEAMA); a Conference Faculty member of Massachusetts Continuing Legal Education (MCLE) as well as a faculty member of the Real Estate Bar Association (REBA).

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A Partner with the firm with more than a decade of experience in diverse areas of law, including commercial and residential real estate, receiverships, commercial lending and finance, corporate transactions, foreclosure, collections, and tax and zoning appeals, Ms. Spaziano presently concentrates her practice in Default Servicing. Ms. Spaziano is admitted to practice in all state and federal courts in Rhode Island and Massachusetts. She is also licensed as an agent for several national title insurance companies. Ms. Spaziano earned her J.D. from Suffolk University Law School in 1993, and her B.S. from Providence College in 1987. Ms. Spaziano is a member of the Rhode Island and Massachusetts Bar Associations and the Volunteer Lawyers' Association, and has taught seminars in such areas as Land Use, Foreclosure, Bankruptcy, and Evictions.

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Robert J. Hopp has been practicing law in Colorado state and federal courts since 1995 as a creditor rights attorney focusing on mortgage defaults, collections and asset recovery across multiple asset classes. Mr. Hopp has lobbied and spoken nationally on topics concerning real estate, secured interested and issues impacting creditors and the banking industry. In 2005-2007 Robert was selected and served as a drafter of several Colorado statutes concerning asset recovery and foreclosures. Throughout his career he has served businesses and individuals as counsel in both transactional and litigated matters focusing on regional and national clients in the area of asset recovery.

Mr. Hopp had focused a great deal of his practice on lender servicing, mortgage default and asset recovery through collections, foreclosure, creditor bankruptcy, loan work outs and modifications surrounding real and personal property loans. Mr. Hopp earned his Juris Doctorate from University of Denver, College of Law and his Bachelor of Science in Business Administration from Eastern Michigan University.

PROTECTING A LENDER'S MORTGAGE INTERESTS AND HOA IMPLICATIONS



TUESDAY JULY 23, 2013
ROUNDTABLE SESSION 2
BROADMOORE HALL D

PANEL

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Partner/Managing Attorney –Default Servicing
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LIEN PRIORITY

- ▣ Liens that have attached to title before the mortgage lien are said to be senior to the mortgage lien.
- ▣ Those attaching afterward are said to be junior or subordinate.
- ▣ This priority establishes the order in which lien holders are entitled to foreclose their liens to recover their debts.
- ▣ General Rule: “First in Time, First in Right”

MUNICIPAL LIENS

- Generally a lien for unpaid real estate taxes, water, sewer, condemnation etc. is granted a super priority status.
- A municipal lien jumps ahead of any and all mortgages or other liens, even those taken out years before the municipal liens are assessed.
- If the taxes remain unpaid, the property can be deeded/sold by the collector to the municipality or third party, and the lien of the mortgage is extinguished.
- That is why many financial institutions escrow for taxes and why a failure to pay municipal charges when due is a breach/default of the mortgage covenants.
- Each jurisdiction has different requirements regarding what notice of these proceedings is required to be given.

HOA / CONDOMINIUM

- ❑ The downturn in the real estate market in the late 1980's left many mortgagees undersecured.
- ❑ In the 1980's the HOA / condominium lien was junior to the mortgage interest and was meaningless. Associations were unable to collect necessary fees to ensure the upkeep and maintenance of the buildings and common areas.
- ❑ Few lenders understood HOA / condominium financing and many were unwilling to make these types of loans.
- ❑ Condominiums were considered high risk collateral due to their deteriorating conditions.

THE “SUPERLIEN”

- ▣ The high risk collateral classification began to change when variations of "Super Lien" statutes were enacted throughout the country.
- ▣ The strength in lending to unit owners lies in the association's ability to collect fees on a timely basis.
- ▣ With the help of the Superlien, most associations began to have healthier cash flows, stronger balance sheets and better maintained buildings.

GENERAL ANATOMY OF HOA SUPERLIEN

- ▣ Created by Statute
- ▣ Grants lien priority over all other liens and encumbrances except municipal liens.
- ▣ Priority over a first mortgage is typically limited to six (6) months of regular common expense payments including attorneys fees and costs associated with enforcement.
 - ▣ Prioritization of attorneys fees usually requires some additional action (i.e. pre-enforcement notice to 1st Mortgagee).
 - ▣ In some jurisdictions attorneys fees are capped.

▣ Rolling Lien:

Depending upon the jurisdiction and statutory interpretation, a Superlien may be considered “rolling”. A rolling lien can be obtained for successive periods. Thus each periodic interval (6 months) would have priority over the first mortgage.

In some jurisdictions this practice has been contested, and in Massachusetts, an appellate court decision which upheld denial of a “rolling lien”, is on appeal (See *Drummer Boy Homes Association, Inc. V. Carolyn P. Britton*, 2011 Mass. App. Div. 186.)

▣ The priority amount usually shall not include:

- a. Late charges
- b. Fines
- c. Penalties
- d. Interest
- e. Special assessments (unless adopted in the annual budget)

PRIORITY vs. NON-PRIORITY

- ▣ Priority amounts are senior to a 1st mortgage but junior to municipal liens.
- ▣ Non-priority amounts are junior to 1st mortgage interest, but senior to 2nd mortgage interests and all other junior liens.
- ▣ Order of priority:
 - Municipal liens
 - HOA priority Superlien
 - First mortgage
 - HOA non-priority lien
 - All other liens in order of time

- ▣ Upon receipt of any document that appears to be legal in nature, a Lender/Servicer should immediately contact in-house/outside counsel and forward all documents for review. It is at this critical stage that immediate action must be taken to protect the mortgage interest and mitigate the fees and costs.

MITIGATION AND SATISFACTION OF THE PRIORITY LIEN

- ❑ The earlier the priority amounts are determined and paid, the less association legal fees and costs are included. Needless to say, these fees and costs add up quickly.
- ❑ A written request to the association should be made for a statement or ledger identifying all amounts owed.
- ❑ Some statutes require the association to respond to a written request within a specific period of time.

- ▣ The ledger from the association or its attorney guards against future allegations that additional priority amounts were not paid.

- ▣ The ledger should be carefully reviewed to identify any amounts that are not deemed priority by statute:
 - a. Late charges
 - b. Fines
 - c. Penalties
 - d. Interest
 - e. Special assessments
 - f. Unperfected/prioritized legal fees and costs

- ▣ In most jurisdictions, payment of the priority Superlien protects the first mortgage interest.
- ▣ In most jurisdictions, payment of the “non-priority” amounts protects junior mortgagees and other lien holders.
- ▣ After the amounts to be paid are agreed upon between the association and the bank, copies of all checks and transmittal letters should be saved for future reference.
- ▣ Upon payment of the priority lien amounts, steps should be taken to ensure that the lien is documented as satisfied. This includes a dismissal of any court action with prejudice.

- ▣ Request a satisfaction of judgment be filed with the court.
- ▣ Record a certified copy of the satisfaction at the applicable registry of deeds.
- ▣ A written request to notify the bank or its attorney if the owner again falls delinquent in the future should be made to the association

REDEMPTION VS. SATISFACTION

- In some jurisdictions a mortgagee has the choice to either redeem the property for the priority amounts or pay the entire outstanding lien any time prior to the redemption date.
- If the mortgagee desires to take title to the property, it would REDEEM by paying the priority amounts. Title will then vest in the mortgagee free and clear of all encumbrances (except those having priority to the condominium lien) by virtue of the satisfaction of judgment in the Mortgagee's name.
- If the mortgagee does not wish to take ownership of the property, it can SATISFY the full amount of the outstanding association lien, which will terminate/dismiss the foreclosure action.

FORECLOSURE SALE

- ▣ If the association lien has not been satisfied (i.e. a judgment is obtained, or if it is a non-judicial jurisdiction) the next step to enforce the priority lien is to set a sale.
- ▣ Usually various statutes require that the association publish notice in a newspaper with circulation in the town where the land is located.
- ▣ Usually, as a matter of courtesy, the association will send the lien holders notice of the sale.
- ▣ **HOWEVER, many statutes do not require notice other than publication, and there should be no reliance on receiving a mailed notice to trigger action to protect the first mortgage interest.**

- ▣ If there is a foreclosure by sale, the mortgagee has the option to either SATISFY the full amount of the outstanding Association lien, (which will terminate the foreclosure.)

Or

- ▣ Bid at foreclosure sale held by the HOA to protect its interests.

- ▣ THIS APPROACH SHOULD BE UTILIZED CAUTIOUSLY AS A METHOD OF PROTECTING THE FIRST MORTGAGE LIEN.

DAMAGE CONTROL

- ▣ Should the first mortgagee fail to protect its lien at sale, it should immediately contact its attorney. Although the mortgage interest is gone, in an extremely small number of instances, attempts to purchase an assignment of bid from the high bidder at the sale have been successful.

Post-Sale Distribution of Sales Proceeds

From the sales proceeds, the Association will:

- ▣ retain all sums comprising the priority lien
- ▣ pay over to the first mortgagee surplus if any;
- ▣ retain any additional surplus to be applied to its non-priority lien
- ▣ disburse additional amounts, if any, to junior lienholders, in order of priority and then to the former unit owner.

LITIGATION

- ▣ In some priority lien states, litigation is filed by condominium associations to secure a priority lien on the property, as well as place lien holders on notice of the lien's existence.
- ▣ Though lenders can choose to litigate aspects of the priority lien, deciding whether to contest the lien in court or simply pay the lien often becomes a cost/benefit analysis.

Common Disagreements

- ▣ Duration of priority lien.
 - Example: Does the association's six month lien start in June or July?

- ▣ Amount of priority lien.
 - Example: Is a "supplemental assessment" part of the priority lien when it was not adopted as part of the annual budget?

- ▣ Lender's ongoing obligation to pay assessments.
 - Example: After priority payment is tendered, is the lender obligated to pay condominium assessments as they become due?

- ▣ Effects of judgment and priority payment.
 - Example: Is the condominium association obligated to accept the priority payment post judgment?

QUESTIONS AND ANSWERS