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## Lender Liability for Florida HOA and Condominium Association Assessments -- Don't Overpay!

In one of the longest residential real estate downturns in decades, lenders are increasingly obtaining possession of their collateral by way of foreclosure lawsuits or deeds in lieu of foreclosure. Many of these residential properties are subject to homeowners' association (HOA) assessments or condominium association assessments. Lenders taking title to the property should be aware of the extent of assessment liability imposed on them under Florida law.

### HOA Assessment Liability:

In order to analyze the issues relating to mortgagee liability for Florida HOA assessments, it is important to review the HOA Declaration and any amendments thereto to see what the governing documents provide as to mortgagee liability. If the HOA documents were recorded **prior to July 1, 2008** then the HOA documents control as to mortgagee liability for prior assessments.

If the HOA documents were recorded **on or after July 1, 2008** or if the mortgage was recorded **on or after July 1, 2008**, then the mortgagee liability is governed by Florida Statutes Section 720.3085 (2)(c), which limits mortgagee liability to the lesser of 12 months of assessments or 1% of the original mortgage amount. In order to obtain the benefits of this law, the lender must join the association as a defendant in any foreclosure action.

Many associations throughout Florida are providing estoppel letters to lenders and closing agents based on this new law without checking to see whether the Declaration and mortgage were recorded prior to July 1, 2008. The associations (and many lawyers representing associations) provide payoff or estoppel letters stating that in order to obtain a release of an HOA lien, the foreclosing lender must pay the lesser of 12 months of HOA assessments or 1% of the original mortgage amount. In a large number of cases, this is not accurate.

Many of the HOA Declarations that were drafted prior to the new HOA law contained "subordination" provisions that were favorable to lenders who took title to their collateral by way of foreclosure or deeds in lieu of foreclosure. The idea behind such subordination provisions was that lenders should be given certain protections against past due HOA dues so that lenders would be encouraged to make loans within the subdivision. The protection given to lenders is that any HOA lien for assessments would be subordinate to the lender's mortgage.

A sample "subordination" provision from an HOA Declaration is as follows:

The lien of the assessments provided for in this Article shall be a lien superior to all other liens less and except real estate tax liens and the lien of any mortgage to any Institutional Lender which is now or hereafter placed upon any property subject to assessment as long as said mortgage lien is a first lien against the property encumbered thereby. Provided, however, that any such mortgagee, when in possession, or any receiver, and in the event of a foreclosure, any purchaser at a foreclosure sale, and any such mortgagee acquiring a deed in lieu of foreclosure, and all persons claiming by, through or under such purchaser or mortgagee, shall hold title subject to the liability and lien of any assessment coming due after such foreclosure (or conveyance in lieu of foreclosure). Any unpaid assessments which cannot be collected as a lien against any Lot by reason of the provisions of this Section shall be deemed to be an assessment divided equally among, payable by a lien against all Lots subject to assessment by the Association, including the Lots as to which the foreclosure (or conveyance in lieu of foreclosure) took place. Notwithstanding any contrary provision hereof, no Institutional Lender acquiring title to a Lot through foreclosure or conveyance in lieu of foreclosure, and no purchaser at a foreclosure sale, and no persons claiming by, through or under such Institutional Lender or purchaser, shall be personally obligated to pay assessments that accrue prior to the Institutional Lender's or the foreclosure purchaser's acquiring title.

Florida courts have upheld such subordination provisions and have noted that the legislature cannot unconstitutionally impair contracts (i.e. "Declarations") so long as the language in the Declaration is unambiguous. See *Coral Lakes Community Association, Inc. v. Busey Bank, N.A.*, 30 So.3d 579 (Fla. 2d DCA 2010) ("We conclude that because of the Declaration's plain and unambiguous language subordinating any claim for unpaid HOA assessments to a first mortgagee's claim upon foreclosure or deed in lieu of foreclosure, it controls and absolves the Bank, as first mortgagee, from liability for any assessments accruing before it acquires the parcel.").

An interesting question arises as to the effect of such a "subordination" provision and a new Florida Statute that makes future owners *jointly and severally* liable for HOA assessments. Effective **July 1, 2007**, a property owner is liable for all assessments that come due while he or she is the owner, and is jointly and severally liable with the previous parcel owner for unpaid assessments due up to the time of transfer of title. Sec. 720.3085(2a) and (2b), Florida Statutes. Thus, the issue arises as to whether a third party purchaser from a lender who takes title by way of foreclosure or deed in lieu of foreclosure would be subject to the assessments which were not paid by the prior owner of the property who was foreclosed upon (or who deeded the property to the lender). As a result of this uncertainty, many title insurance underwriters will not insure the title of any buyer from a foreclosing lender free and clear of any lien for past due HOA assessments unless it receives either (i) an estoppel letter from the HOA claiming that there are no prior HOA assessments due for that parcel; or (ii) an indemnification from the lender.

One Florida court determined that the application of the "joint and several" liability language under the new Florida Statute does not apply to lenders who were in title to the property and took back a purchase money mortgage upon the sale of the property to a third party. In *Ecoventure WGV, Ltd. v. Saint Johns Northwest Residential Association, Inc.*, 56 So.3d 126 (Fla. 5<sup>th</sup> DCA 2011), the Court stated that "imposing section 720.3085, which was enacted after the mortgage was extended, completely alters Ecoventure's vested rights by making it jointly and severally liable with the 'previous parcel owner for all unpaid assessments that came due up to the time of transfer of title'....[I]mposing the statute on Ecoventure 'would operate to severely, permanently, and immediately change the parties' economic relationship...a circumstance not supportable under the law.'"

An assessment lien filed by a homeowners' association recorded after a purchase money mortgage may nevertheless have priority over the purchase money mortgage where subdivision restrictions recorded prior to the purchase money mortgage specifically authorize enforcement of assessment liens and provide that the lien shall have priority over any mortgage placed on the property. See *Association of Poinciana Villages v. Avatar Properties, Inc.*, 724 So.2d 585 (Fla. 5th DCA 1998). As noted above, many Florida CC&R's drafted prior to July 1, 2008, however, provide that institutional first mortgagees have no responsibility for HOA assessments accruing prior to the time the mortgagee takes title to the property.

Effective July 1, 2008, Sec. 720.3085(1), Florida Statutes, causes a homeowners' association assessment lien to relate back to the date on which the original declaration of the community was recorded when such liens are authorized by the governing documents. This provision creates a "super" priority position for HOA assessment liens. However as to first mortgages of record, the lien is effective from and after the recording of a claim of lien under Sec. 720.3085(1), F.S.

### **Condominium Assessment Liability:**

The Condominium Statute provides a somewhat broader coverage for lender liability for past due assessments as the statutory language has been in place since 1992. Florida Statutes Section 718.116(1)(b) provides that the liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lesser of: (a) the unit's unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or (b) one percent of the original mortgage debt. In order to obtain the "protections" of the statute, the first mortgagee must join the association as a defendant in the foreclosure action. Notwithstanding this provision of the Statute, a first mortgagee or its successor or assignees who acquire title to a condominium unit as a result of the foreclosure of the mortgage or by deed in lieu of foreclosure of the mortgage shall be exempt from liability for all unpaid

assessments attributable to the parcel or chargeable to the previous owner which came due prior to acquisition of title **if the first mortgage was recorded prior to April 1, 1992**. If, however, the first mortgage was recorded on or after April 1, 1992, or on the date the mortgage was recorded, the declaration included language incorporating by reference future amendments to the Condominium Statute, then the provisions requiring the lender to pay assessments would apply.

Lenders should be aware that the above statute was amended effective as of **July 1, 2010** to expand the lender's liability from six months of assessments to 12. Thus, for mortgages recorded **prior to July 1, 2010**, lenders should pay close attention to the governing documents to see whether the Declaration incorporated future amendments to the Condominium Statute. If not, then the lender's liability could be limited to six month's worth of assessments instead of 12.

If you have questions regarding HOA or condominium association assessment liability, please contact [Paul S. Quinn, Jr.](#) in the Orlando office, or anyone in the [Real Estate Practice Group](#).