



Professional Delinquent Assessment Recovery

THE EFFECT OF PRIORITY ON ENFORCEMENT OF
ASSESSMENT LIENS

By Richard G. Witkin, Esq.

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Obligations secured by real property, like promissory notes, easements, some judgments and, after a lien is recorded, homeowners dues, have to be sorted out in some order.

Why? Because a lender like Bank of America is not going to make a loan to a new homeowner if that loan is lower in the pecking order than some other lien on the property. Bank of America's best security for its loan (as in the case of all secured loans) is the real property itself.

But, since the bank's loan only attaches to the value in the property left over after other liens are paid (the owner's "equity"), the bank might end up with nothing if its lien was not ahead of most others.

There are differing methods in different states for determining priority. In California, the "race-notice" method is used. The "race-notice" method holds that whatever lien is created and recorded first has the highest priority.

Loans by banks to fund the purchase of new homes are almost always first loans, also known as first trust deeds, in California. Note that the document creating the security interest, the trust deed, rarely states "first trust deed" on its face. Similarly, most second, third and fourth trust deeds don't state their priority on them. That is because, as prior (or senior) liens are paid off, lower liens move up in their priority. A second trust deed becomes a first trust deed when the first trust deed is paid off. So, liens can move up in priority but, the real point is, they do not move down in priority (absent an express agreement agreeing to do so (a subordination agreement)).

What does this mean for community associations? As a rule, it means that

liens to secure non-payment of delinquent assessments, sometimes recorded years after the owner's acquisition loans, are lower in priority, (also known as inferior or junior), to liens on the property recorded before the assessment lien. Provisions in CC&Rs that state that assessment liens are inferior or junior only to first trust deeds are not well received by the California courts since such provisions do not conform with the race-notice method of determining priority. The import of all this is that, depending on the value of the property compared to the value of all of the liens senior to the assessment lien, there may or may not be enough equity left in the property to make the assessment lien well secured.

How does this work for the association in practice? If the homeowner has lots of equity in the property, he or she is very likely to pay the delinquent dues and not risk loss of his or her equity in the property. If the homeowner has little or no equity, he or she is more likely to "let the property go" in a lien enforcement action (foreclosure). If the owner lets the property go to a senior lienholder, the association will be facing what is known as a "senior wipe-out".

However, you should know that the amount of equity in the property is not always the determining factor in whether or not the association gets paid. There are other factors that influence the outcome of the collection procedure. For instance, even the owner of over-encumbered property may want to keep the property hoping for future appreciation in value. Additionally, if an owner lets the property go, the owner will, most likely, have to move out soon after the sale.

In most cases, proceeding with the collection process in an orderly, yet inexorable, manner yields the greatest likelihood of success. Trying to guess in advance what the property owner or other lien holders might do leads to delays that only stand to lessen the chances of collection.

This article presents only a brief summary of applicable California law. For a more detailed discussion, please consult your attorney.

Richard G. Witkin, Esq. has practiced exclusively in the area of trust deed and assessment lien foreclosures for the past 20 years. If you have any questions or comments regarding the content of this article, you are welcome to contact Mr. Witkin, who may be reached at the firm of Witkin & Neal, Inc., by calling (818) 845-8808.