

SUPERLIENS

In recent years, some courts have interpreted existing state model laws, and some states have looked at passing so-called “superlien” laws, which give homeowners association (HOA) assessment liens “super” priority over mortgage lenders’ liens. These laws raise the possibility that, in cases of foreclosure, a lender’s lien might be extinguished, thus eliminating its collateral. This increases risk for financial institutions and could severely affect both mortgage price and availability.

This also means that a mortgage lender could see a property for which it holds a mortgage sold in a HOA superlien foreclosure to an investor for a fraction of what that mortgage is worth, simply to cover the outstanding HOA fees. Investors can then turn around and resell the property, free of the original mortgage. The losses suffered affect more than just the lender since many mortgages are pooled into securities and thus owned by multiple parties.

Recent court decisions in Nevada and Washington D.C. have reinterpreted the HOA superlien to grant it a “true priority” status — giving HOAs the ability to extinguish a lender’s interests through a foreclosure initiated by the HOA, ahead of the first lien holder.

SFR INVESTMENTS POOL 1, LLC. V. U.S. BANK, N.A. (NEVADA)¹

The Nevada Supreme Court issued an opinion holding that a HOA lien is a true super-priority lien, which if foreclosed upon, extinguishes a first deed of trust.

In this case, the original mortgage was for \$885,000. The original HOA lien was \$1,225.19 (\$1149.24 of which was collection and attorney’s fees) and subsequently rose to \$2,550.06 and \$4,542.06. SFR Investments LLC then purchased it for \$6,000.

It should be noted that the Nevada legislature fixed this issue by statute so that the same scenario could not repeat itself there, but other states have sought to create legislation like Nevada’s previous law.

¹ *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (Nev. 2014).

CHASE PLAZA CONDOMINIUM ASSOCIATION, INC. V. JPMORGAN CHASE BANK, N.A. (DISTRICT OF COLUMBIA)²

In Washington D.C., the court initially determined that an association's statutory "super-priority" lien for unpaid assessments took priority of position, not just priority of payment, over the lender's mortgage lien.

Subsequently, the Court of Appeals held that foreclosure of the association's assessment lien extinguished the lender's mortgage lien. The court reached this conclusion even though the District of Columbia foreclosure laws do not require notice of the foreclosure to the lender. This means that lenders may be wiped out by an association's assessment lien foreclosure without any notice to the lender or opportunity to cure.

AFSA'S POSITION

AFSA believes that HOA assessments may take priority status where authorized by law, but true "superlien" laws that extinguish a mortgagor's interest must be resisted and repealed where necessary, so that the mortgage market in general, and the foreclosure process in particular, can operate effectively. As things stand, the level of additional risk to which these laws subject financial institutions is significant and unnecessary and is likely to have a dampening effect on the availability of mortgage credit.

Of particular concern is that the outcome of the cases in Washington D.C. and Nevada, combined with the continuing echoes of the housing crisis, are likely to accelerate the number of HOA foreclosures. HOAs may see foreclosing on a superlien as a fast way to recoup overdue fees in the short term, but in the long run, they serve only to damage their relationship with lenders and impair the availability of credit in the community.

² *Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166 (D.C. 2014).