

## How Super are Super Priority HOA Liens

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Ordinarily, a lien has priority based on the date the lien is recorded. When a new lien is recorded, it becomes next in line to any liens previously recorded.

First mortgages are in a unique position of power when it comes to asserting lien position as long as the proper title work and front end activity takes place. With the exception of tax liens, virtually all other lien interests secured after the recordation of the first mortgage lien are inferior to the first mortgage lien. Therefore, junior liens are generally extinguished when a First mortgage forecloses.

### Super priority liens

The HOA laws in Nevada<sup>1</sup> uniquely affect first mortgage holders' lien hold position because homeowners associations are granted what is known as a super-priority lien, in which some of the delinquent assessments survive a lender's first deed of trust foreclosure sale. In this state, the HOA super-priority lien includes nine months worth of delinquent assessments and other permissible charges.

A current controversy in Nevada lies in the amounts demanded by the HOA lienholders over and above the dues. For years, HOAs and their collection agencies have been including in their liens amounts which are questionably in excess of the statutory guidelines. When the post foreclosure lender tries to sell its REO and is presented with a HOA bill, the lender generally just pays the HOA to get the deal closed and clear title. There usually is not enough time to question the HOA bill in court before escrow closes on the property. Thus, the lender may be paying amounts that would otherwise be subject to dispute or at least negotiation.

Currently, there are pending class action lawsuits in Nevada trying to clarify NRS 116.3116, including a class action against more than 100 HOAs? And another class action against the big HOA collection companies? These class actions address two issues: (1) What makes a junior lien into a super priority lien (i.e. whether the HOA must file suit to obtain super-priority status?) and (2) What portion of the junior lien is allowed to become a super-priority lien?

### What makes a junior lien into a super lien?

HOAs in Nevada have taken the position that they automatically obtain super-priority status on their liens. The HOAs can accrue thousands of dollars of delinquent assessments, penalties, fees, late charges, fines, and interest, then claim they are automatically entitled to a super priority lien against those acquiring real property through foreclosure auctions. However, it can be argued that a HOA junior lien does not become a super-priority lien until a HOA files an action in court to enforce the lien.

Looking at the plain language of NRS 116.3116(2), the class action suit takes the position that filing “an action to enforce the lien” is a condition precedent to the establishment of a super priority lien? Therefore, a junior lien does not become a super-priority lien until the HOA files a complaint with a court to enforce the lien. Furthermore, under most circumstances, a HOA lien would not be able to obtain super-priority status because the junior lien is extinguished at the foreclosure sale. According to the class action, the HOA needs to institute an action to enforce the lien prior to the foreclosure sale for there to be any chance of it obtaining a super-priority lien.

What portion of the junior lien is allowed to become a super-priority lien?

Assuming the HOA has perfected its super-priority lien via the institution of an action, a question still remains as to the amount of the super-priority lien.

HOAs point to the case of Korbel Family Trust v. Spring Mountain Ranch Master Association for guidance as to how to calculate the amount of the super-priority lien. In Korbel, a December 2006 Clark County district court case, the judge found as follows:

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association’s super priority claim shall include the following amounts:

- (a) Six (6) months of the assessments for common expenses;
- (b) Six (6) months of late fees imposed for non- payment of the assessments for common expenses;
- (c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association’s governing documents;
- (d) The Association’s costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and
- (e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust...”

This case makes it clear that interest, late fees, and collection costs are all included in the nine month super-priority.<sup>6</sup>

The differences in interpretation rest in the calculation of the cap. Without a doubt, fees, charges, late charges, attorney fees, fines, and interest may be included as part of the super-priority amount. However, the class action suits disagree with the Korbel decision, and instead take a more narrow interpretation of NRS 116.3116(2). The class actions suggest that collection costs and attorney’s fees are not added on top of the nine month amount. Rather, collection costs and attorney’s fees may be incorporated within that amount, provided the super-priority lien does not exceed the limit of nine times the association’s monthly

assessments. If the total of all assessments, fees, costs, and other charges combined exceed nine times the monthly assessments, the excess amounts will be junior to the first mortgage.

With the sheer number of foreclosures in Nevada, the plaintiffs claim the HOAs are potentially collecting tens of millions of dollars from foreclosure buyers in excess of what is allowed by Nevada statutes, and until these class action cases are decided or the Nevada laws change, Nevada foreclosure buyers will not know how “super” these liens really are.

<sup>1</sup> NRS 116.3116.

<sup>2</sup> NRS 116.3116 is still subject to Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association requirements. Regulations adopted by FNMA and FHLMA limit the super priority lien to six (6) months in the case of mortgages on individual condominium units.

<sup>3</sup> Higher Ground LLC, Plaintiff(s) vs. Alliante Master Association, Defendant(s).

<sup>4</sup> Higher Ground LLC, Plaintiff(s) vs. Nevada Association Services Inc, Defendant(s).

<sup>5</sup> “The lien is also prior to all security interests described in paragraph (b)...to the extent of the assessments... which would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce the lien.”

<sup>6</sup> an amendment to the NRS extending the period of the super-priority lien from six (6) months to nine (9) months was signed by the Governor of Nevada on May 28, 2009 and became effective October 1, 2009, hence why the Korbelt decision references a six month super-priority lien.

<sup>7</sup> Borrowing analysis from the Colorado Supreme Court, which has a super priority lien statute that mirrors Nevada’s statute. BA Mortg., LLC v. Quail Creek Condominium Ass’n. Inc., 192 P.3d 447, 451 (Colo.App., 2008).

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