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Homeowners Associations and "Super Liens"

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For years, jurisdictions granting "super priority" liens to homeowners and condo owners associations (HOAs) have allowed these liens to be satisfied ahead of the mortgage lender's interests in foreclosure. Typically, these liens have been for a portion of the delinquent assessments and fees owed to the HOA, and once this "payment priority" has been satisfied lenders have been able to recoup their own investment. However, recent court decisions in places like Nevada and D.C. have reinterpreted the HOA super lien 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. **This reinterpretation is a major issue for AFSA, MBA, and the entire real estate finance industry. Both associations fervently believe HOA super liens should not have the ability to extinguish a lender's interests under any circumstance.**

There are profound, unintended consequences to lenders, consumers and communities arising from this issue. A lender could see its $500,000 mortgage wiped out at the expense of a $5,000 HOA super lien. This lien could also be sold to a speculative investor in order for the HOA to quickly recoup these overdue assessments, allowing the investor to experience a windfall profit upon resale by freeing the property of its encumbering mortgage. Either action would result in a staggering loss to the lender. And since many mortgages are pooled as securities, it is likely that securitization pools would begin excluding these mortgages to limit exposure, limiting options for creditworthy borrowers. Moreover, what about homeowners who owe delinquent HOA assessments and are mortgage-free? Their hard-earned investment is extremely vulnerable under this reinterpretation.

Further complicating matters is the fact that lenders and their mortgage servicers may be unaware that an HOA delinquency even exists on the loans under their care. Currently, Nevada and D.C. law both contain inadequate noticing requirements that have already caused significant losses. And even if a lender does find that the property is subject to an HOA lien, communication may be difficult. Most HOAs do not have current registered agent information on file with the secretary of state and less than 20 percent of HOAs are managed by a professional company. Payment history on the underlying mortgage is also an unreliable indicator because many HOA delinquencies are the result of the homeowner's unwillingness to pay (due to a dispute with the HOA) rather than an inability to pay.

Given the continuing echoes of the housing crisis, this legal reinterpretation may spread to other jurisdictions under the guise of a solvency "solution" for HOAs, who see foreclosing on their super lien as a fast way to recoup owed assessments. But this is only a short-term and short-sighted — fix. In the long run this process will only damage HOA–lender relationships and impair the availability of mortgage credit in communities, as lenders will need to price this risk through higher down payment amounts and interest rates. Moreover, consumers may find that they are unable to find a lender willing to extend a mortgage loan or refinance option for properties subject to an HOA agreement. **This cannot be the outcome that policymakers intended.**

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