

HOA Super Liens by Janeen R. Hill, Esq. and [Jonathan A. Goodman](#), Esq.

Question: *I just bought a property through the foreclosure process. I expected that the foreclosure of the first deed of trust would extinguish all liens against the property, including delinquent homeowner's association fees. Now the association is claiming a lien for six months of assessments, plus the attorneys fees spent attempting to collect them. Didn't the foreclosure clear the HOA lien from the property?*

Response: No, as confirmed by the recent Colorado Court of Appeals decision in *First Atlantic Mortgage, LLC v. Sunstone North Homeowners Association*, 2005 WL 427700 (Colo. App.).

Historically, HOA assessments were subordinate to the first deed of trust on a property, and had no recourse but to redeem if the senior deed of trust foreclosed on the property. The Colorado Common Interest Ownership Act ("CCIOA") was effective July 1, 1992. CCIOA is modeled on the Uniform Common Interest Ownership Act (the "Uniform Act"), some form of which has been enacted by more than 20 states. The Colorado version of the Uniform Act is in line with the Uniform Act as applied in other states, and so is the decision in *First Atlantic*.

The super-lien provision, Colorado Revised Statutes §38-33.3-316 authorizes the existence of a lien on a unit for

"any assessment levied against that unit or fines imposed against its owner. Unless the declaration otherwise provides, fees, charges, late charges, attorney fees, fines and interest charged pursuant to section 38-33.3-302(1)(j), (1)(k) and (1)(.), 313(6) and 315(2), are enforceable as assessments under this article".

This lien is given priority to the first deed of trust on the property to the extent of

"An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315(1) which would have become due, in the absence of any acceleration, during the six months immediately preceding institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien."

What this means in practical terms, is that at a closing on the property after a foreclosure, the homeowner assessments will have to be paid. How much is owed?

In *First Atlantic Mortgage, LLC v. Sunstone North Homeowners Association*, 2005 WL 427700 (Colo. App.), the court held that the lien may be more than the assessments alone. The language of the statute is clear - that "assessments" may include fees, charges, late charges, attorney fees, fines and interest. The *First Atlantic* decision holds that the lien value has a cap of *up to a total amount equal to six months of regular assessments*, plus attorney fees, interest and other allowable items.

In light of this decision, lenders may think about escrowing for association assessments. Because of the inclusion of attorney fees, late charges, interest, and fines, the super-lien could wind up being larger than the amount of property taxes owed. Investors buying property through the foreclosure process, and any purchaser of an REO property should be aware of and manage the risks of the HOA super-lien.

Janeen R. Hill is no longer with the law firm of [Frascona, Joiner, Goodman and Greenstein, P.C.](#)

[Jonathan A. Goodman](#) is a shareholder in [Frascona, Joiner, Goodman and Greenstein, P.C.](#), a Colorado law firm. His practice areas include [Real Estate](#), [Brokerage Law](#), [Contracts](#), [Land Use](#), [Leasing](#), [Real Estate Title](#), [Association Law](#), [Business Law](#), and [Finance](#). He can be reached at [contact Jonathan Goodman](#).

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