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BULLETIN

FLORIDA BULLETIN 08-07

To: All Old Republic National Title Agents and Offices

From: Underwriting Department

Re: Homeowner Association Assessments...The Saga Continues

Date: July 1, 2008

In the article entitled "Re-Assessing Homeowner Association Assessments..." which appeared in the Fourth Quarter 2007 edition of the *In the Title Corner* newsletter, we discussed how last year's revisions to *Chapter 720, F.S.*, resulted in some unintended consequences. Specifically, under subsection (2) of the newly created *Section 720.3085*, both current and previous parcel owners are jointly and severally liable for all unpaid assessments that came due up to the time of the transfer of title. This joint liability applied to all new parcel owners, even foreclosing lenders, which inadvertently created a "super priority" status for homeowner association liens. Trial courts began adding language to final judgments of foreclosure preserving the rights of homeowner associations to collect their past due assessments, notwithstanding the fact that the homeowner association lien was recorded after the foreclosing mortgage, and that association was named and served in the foreclosure action. Accordingly, Old Republic National Title Insurance Company changed its underwriting requirements to call for homeowner association liens to be released even if the homeowner association lien was filed after the mortgage that was foreclosed and the homeowner's association was named and served as a defendant in the foreclosure suit.

In response to some negative reaction by the lending and title insurance industries, the legislature again passed significant revisions to *Section 720.3085, F.S.*, which becomes effective July 1, 2008. This article will address the most significant revisions affecting title insurance agents.

A new subsection (1) was added to allow the governing documents of the homeowner's association to authorize a lien on each parcel to secure the payment of assessments, the priority of which is effective from and relates back to the date of the recording of the original declaration. However, there is an exception for first mortgages of record. As to recorded first mortgages, the lien is effective from and after the *recording* of a claim of lien. This section specifically states that it does not bestow upon any lien, mortgage, or certified judgment of record on the effective date, including the lien for unpaid assessments, a priority that, by law, the lien, mortgage, or judgment did not have before July 1, 2008.

The new subsection (1) also sets out the necessary elements for a valid claim of lien. Additionally, it includes a new provision allowing the parcel owner, or his/her agent or attorney, to file a Notice of Contest of Lien. The Notice of Contest of Lien must be recorded and a copy sent to the homeowner's association by the Clerk by certified mail, return receipt requested. Generally, the association has 90 days from the mailing of the copy to file an action to enforce the lien, or the lien is void.

This Bulletin is to become a permanent part of your Bulletin Manual to assist with your compliance with the requirements contained herein.

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The new legislation did not remove the "joint and several" liability language found in subsection (2) of the statute, but it did add a new subpart (c), which again carves out an exception for first mortgagees who acquire title to a parcel by foreclosure. The new language basically limits the liability of a first mortgagee who purchases property at a foreclosure sale, and reads as follows:

"Notwithstanding anything to the contrary contained in this section, the liability of a first mortgagee, or its successors or assignee as a subsequent holder of the first mortgage who acquires title to a parcel by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title, shall be the lesser of:

1. The parcel's unpaid common expenses and regular periodic or special assessments that accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or
2. One percent of the original mortgage debt."

The limitation on first mortgagee liability only applies, however, if the first mortgagee filed suit against the parcel owner and initially joined the association as a defendant in the mortgagee foreclosure action. However, joinder of the association is *not* required if, on the date the foreclosure complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location that was known to or reasonably discoverable by the mortgagee.

As a result of these changes, our commitments and subsequent Owners and Mortgagee policies must contain the following exception:

ANY LOSS OR DAMAGE ARISING FROM ASSESSMENTS RESULTING FROM THE PROVISIONS CONTAINED IN FLORIDA STATUTE SECTION 720.3085, NOTWITHSTANDING ASSURANCE TO THE CONTRARY IN ANY ALTA PUD ENDORSEMENT FORM 5.1 OR FLORIDA FORM 9 ENDORSEMENT WHICH MAY BE ATTACHED TO THIS COMMITMENT / POLICY.

If you have any questions, please contact the Old Republic National Title Insurance Company Underwriting Department.