




LIENS AND COMMUNITY ASSOCIATIONS

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WHAT IS A LIEN?



A lien is a security interest against a property designed to secure performance of some obligation.

Types of Liens



Consensual Liens

Arise out contract (deed of trust/mortgage)



Nonconsensual Liens

Arise out of statute or common law (cases)

Lien Examples:



Mechanic's Lien (nonconsensual)



Judgment Lien (nonconsensual)



Tax Lien (nonconsensual)



Mortgage Lien (consensual)



HOA Lien (consensual and nonconsensual)



Attorney Lien (nonconsensual)



Hospital Lien (nonconsensual)

How are Liens Created?

- Depends on the lien!
 - Operation of law – tax liens, HOA liens
 - Recording of a document in the County Records
- Liens are “perfected” when they are recorded, even if they exist by operation of law
- A “perfected” lien has an order of priority based on recording date

What good is a lien?

- Liens are leverage to compel someone who owes you money to pay.
- A lien may be used to threaten, or even undertake, foreclosure of the property.
- Not all liens make sense for foreclosure.

Mr. Greenacre Can't Pay His Bills

A lien story

- Mr. Greenacre contracted for some work to occur on his estate, Blackacre. Blackacre is his home, which he purchased for \$350,000 in 2019. It is now worth \$500,000. He took out a second mortgage to pay for upgrades, but spent the money in Blackhawk and lost his job after gambling away his company's petty cash. Mr. Greenacre's HOA provides snow removal, common area maintenance, and trash removal for \$100 a month.
- Mr. Greenacre stopped paying his mortgage in late 2023. Now, the bills are coming due and Blackacre is finding itself encumbered by a variety of liens.
- How will the bills be paid?

Blackacre Liens

Tax Lien \$2,000	2023 Taxes
HOA Superlien \$600	HOA Declaration Recorded 2000
First Mortgage Deed of Trust \$300,000	Recorded 1/1/2019
HOA Remainder Lien \$1000	HOA Declaration Recorded 2000
Second Mortgage Deed of Trust \$25,000	Recorded 1/1/2023
Mechanic's Lien Painter \$2,000	Recorded 2/1/2023
Mechanic's Lien Carpenter \$1,000	Recorded 2/2/2023
Judgment Lien Painter \$2,000	Recorded 6/1/2023
Judgment Lien Credit Card \$5,000	Recorded 7/1/2023

Foreclosure Options

- All lienholders have the right to foreclose against Blackacre
- Foreclosure is the process by which a property is sold at auction - either by the Public Trustee (most mortgage foreclosures) or the Sheriff (judicial foreclosure, for HOA liens, judgment liens, mechanic's liens)

Tax Lien \$2,000	2023 Taxes
HOA Superlien \$600	HOA Declaration Recorded 2000
First Mortgage Deed of Trust \$300,000	Recorded 1/1/2019
HOA Remainder Lien \$1000	HOA Declaration Recorded 2000
Second Mortgage Deed of Trust \$25,000	Recorded 1/1/2023
Mechanic's Lien Painter \$2,000	Recorded 2/1/2023
Mechanic's Lien Carpenter \$1,000	Recorded 2/2/2023
Judgment Lien Painter \$2,000	Recorded 6/1/2023
Judgment Lien Credit Card \$5,000	Recorded 7/1/2023

Junior Liens

- The mechanic's liens are junior liens. When a junior lien forecloses, it takes title to the property subject to the senior liens. Here, if the carpenter foreclosed his lien, he would take title subject to \$330,600 in senior liens between taxes, HOA, the painter's lien, and mortgages. The carpenter would then have to figure out how to pay those liens off to protect his ownership in the property. The carpenter also has to pay an amount to Mr. Greenacre for his homestead exemption. As such, foreclosure of a mechanic's lien is often not advisable.

Tax Lien \$2,000	2023 Taxes
HOA Superlien \$600	HOA Declaration Recorded 2000
First Mortgage Deed of Trust \$300,000	Recorded 1/1/2019
HOA Remainder Lien \$1000	HOA Declaration Recorded 2000
Second Mortgage Deed of Trust \$25,000	Recorded 1/1/2023
Mechanic's Lien Painter \$2,000	Recorded 2/1/2023
Mechanic's Lien Carpenter \$1,000	Recorded 2/2/2023
Judgment Lien Painter \$2,000	Recorded 6/1/2023
Judgment Lien Credit Card \$5,000	Recorded 7/1/2023

Personal Judgments

- The painter decided to not attempt to foreclose his lien and instead took Mr. Greenacre to County Court and obtained a personal judgment. The personal judgment allows the painter to try to collect against Mr. Greenacre's assets, and it also creates a judgment lien. While the judgment lien is very junior, it lasts up to six years whereas a mechanic's lien will drop off title after six months.

Deed of Trust Foreclosure

- The lender will often initiate foreclosure in these circumstances, after considering the viability of foreclosure, potential equity in the property, and any extenuating circumstances that might make foreclosure more difficult or expensive. When a lender initiates a foreclosure, it will pay the taxes and HOA superlien to protect its rights in the property.
- If the foreclosure goes to sale, and no junior lien “redeems” the foreclosure, the lender takes title to the property.
- Lenders require waivers of the homestead exemption in their loans, so Mr. Greenacre is not paid that amount by the foreclosing lender.

Redemption

- Redemption allows a junior lienholder to pay off senior lienholders in the foreclosure sale process.
- This allows the junior lienholder to take title to the property.
- Junior lienholders file a "Notice of Intent to Redeem."
- An intent to redeem can be filed to ensure payment out of overbid amounts, but the junior lienholder can then decline to take the property.
- Colorado policy contemplates that if foreclosure has to happen, it's best to have all debts paid by that foreclosure if possible.
- This protects the individual who is foreclosed upon from also facing liability for personal judgments.

Redemption Chart

Tax Lien \$2,000	2023 Taxes	Paid by lender in foreclosure
HOA Superlien \$600	HOA Declaration Recorded 2000	Paid by lender in foreclosure
First Mortgage Deed of Trust \$300,000	Recorded 1/1/2019	Foreclosed and included in bid
HOA Remainder Lien \$1000	HOA Declaration Recorded 2000	Intent to Redeem filed
Second Mortgage Deed of Trust \$25,000	Recorded 1/1/2023	Intent to Redeem filed
Mechanic's Lien Painter \$2,000	Recorded 2/1/2023	Extinguished by law
Mechanic's Lien Carpenter \$1,000	Recorded 2/2/2023	Extinguished by law
Judgment Lien Painter \$2,000	Recorded 6/1/2023	No response
Judgment Lien Credit Card \$5,000	Recorded 7/1/2023	Assigned to investor, Intent to Redeem filed

Results of Redemption Chart

- Assume that Blackacre sells at foreclosure for \$400,000 after a hotly contested bidding war. The lender's bid was its debt plus costs - \$305,000. That means there is a \$95,000 overbid.
- The HOA and second mortgage are paid their liens totaling \$26,000. \$69,000 remain in overbid funds.
- The mechanic's liens are extinguished because no foreclosure was initiated within six months of the work. They are of no use for redemption.
- The painter didn't open his mail and didn't realize there was a foreclosure. As a result, the \$2,000 lien is extinguished.
- The credit card company was paying attention and sold its lien to an investor for \$5,000. The investor redeems the lien, pays the winning bidder \$400,000, and takes title to the property with \$64,000 left in overbid funds.
- The investor renovates and sells the home for \$600,000, profiting \$150,000 after expenses.
- Mr. Greenacre is entitled to \$64,000 and will not owe his lenders, HOA, or vendors.



What about Mr. Greenacre?

- Several years ago, Mr. Greenacre also had a right of redemption. The legislature decided that it is better public policy to extend the timeframe before a foreclosure sale to allow owners a greater time to cure the default, and eliminate owner redemption.
- Owners rarely redeemed, and allowing owner redemption left investors with uncertain title to their properties.
- Many owners entitled to overbid funds don't realize they exist. The funds end up on the unclaimed property list.

So What About HOA Liens?

- HOA liens are created both by statute and contract.
- When you purchase your home in the community, you purchase it subject to a Declaration, Covenants, CCRs, or other document that is recorded against the title to your property.
- Once you owe a penny, the HOA statutory lien exists.
- Once the HOA complies with CCIOA rules regarding notice, payment plans, and Board approval, the HOA will perfect its lien by recording a paper lien against the property.
- The HOA lien “relates back” to the original recording date of the Declaration.
- Portions of the lien are foreclosable; other portions (fines, late charges, some attorney fees) are redeemable, and need to be paid if you sell, but are not foreclosable.

Relating Back and Lien Priority

- Lenders hate the relation back of an HOA lien to the recording date of the Declaration because Declarations are almost always recorded before the lender's deed of trust.
- Colorado's Common Interest Ownership Act is based on the 1982 Uniform Common Interest Ownership Act created by the Uniform Law Commission.

Policy on HOA Liens

"As to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit."

The Superlien and Policy

- To ensure that HOAs and condominiums can pay their bills in times of significant owner delinquency and mortgage foreclosures (2008), the superlien allows the HOA to force the lender to pay some amount to keep the lights on while the economy recovers.
- Discourages lenders from sitting on a property that is costing the HOA money (water service, maintenance, etc.) waiting for prices to rise.

Questions from the Public

Could you speak to the legal process in which an association's unpaid debt on assessments is transferred or sold to a collection's agency? What does the collections agency do with that debt?

Questions from the Public

Could you speak to any limitations on an association's ability to file/enforce a lien in a limited expense community (as the term is defined in the CCIOA)?

Questions from the Public

How soon should a lien be recorded when a delinquent owner has failed to respond to a Notice of Delinquency?

Questions from the Public

Should an HOA's lien remain in place after a delinquent owner has paid their assessment, but still owes late fees and other charges? In other words, the owner has made a partial payment to the HOA.

Questions from the Public

If an HOA initiates foreclosure, and the owner abruptly pays the delinquent assessment, can that owner “short-circuit” the foreclosure, preventing the HOA from being able to recover its legal costs via foreclosure? In other words, after starting the legal work of foreclosure is there a window of time during which the owner could pay the delinquent assessment and escape responsibility for paying the HOA’s legal costs?

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