ALABAMA BANKERS ASSOCIATION
BOARD BRIEFS
A NEWSLETTER FOR ALABAMA'S BANK DIRECTORS
JULY/AUGUST 2019 • VOLUME 4 • NUMBER 4

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BOARD BRIEFS
is published six times a year by the Alabama Bankers Association.

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An Ounce of Prevention: How to Avoid Lien Extinguishment under Alabama's Common Interest Community Super-Priority Lien Statute

by R. Aaron Chastain and Christopher K. Friedman

In 2014, the Nevada Supreme Court sent shockwaves through the mortgage lending industry when it held that a portion of a homeowners' association ("HOA") or condominium owners association's ("COA") statutory assessment lien had priority over a properly recorded first deed of trust – and more importantly, that the HOA or COA's nonjudicial foreclosure on its lien would extinguish the lender's first deed of trust. This is true even when the HOA or COA's so-called "super-priority" lien is a mere fraction of the outstanding loan balance. In light of the thousands of HOA and COA foreclosure sales in Nevada between 2009 and 2014, the Court's stroke of a pen could have wiped out hundreds of millions in lenders' collateral.

But as significant as that decision was, its impact has yet to be fully realized. Twenty additional states, the territory of Puerto Rico, and Washington, D.C. have statutes similar to Nevada that provide HOAs or COAs assessment liens that could be construed as having priority over a mortgage or deed of trust. Indeed, courts in in Rhode Island, Washington state, and Washington, D.C. have interpreted similar statutes as allowing an association's sale to wipe out a lender's mortgage or deed of trust.

Unfortunately for lenders and servicers that hold loans secured by real estate in Alabama, Ala. Code § 35-8A-316 provides an assessment lien for Alabama COAs that contains nearly the same language the Nevada Supreme Court held could allow a COA to wipe out a lender's first security interest.

Alabama's appellate courts have not issued a decision regarding the effect of a COA's foreclosure of a super-priority lien. However, given the court decisions in other states that have interpreted materially identical statutes as giving COAs a true super-priority lien, lenders and servicers should adopt a conservative approach to COA foreclosure sales, and would be well-served by developing specific policies and procedures designed to protect collateral that could be subject to a super-priority lien foreclosure sale.

HOA and COA Super Priority Liens

On first glance, it seems odd, and maybe even unfair, that an association's later-recorded lien could completely extinguish a lender's collateral. The rationale underlying these assessment lien statutes involves the purported economic hardships suffered by associations and their members when individuals fail to pay assessments. Specifically, when an individual homeowner fails to pay, the costs are passed onto fellow property owners, whose increased dues often inure to the benefit of the lender.

In response, the Uniform Law Commission ("ULC") developed model legislation, which has been adopted (sometimes with amendments) by the majority of "super-priority" lien states. Specifically, the ULC promulgated two model statutes that slightly altered the traditional "first-in-time, first-in-right" lien priority framework by splitting a community owners association's assessment lien into two pieces: a super-priority lien and a sub-priority lien. The super-priority lien, which consists of six-months of past due assessments, is expressly prior to mortgages and first deeds of trust. The sub-priority portion of the lien, which consists of the remaining amounts, is subordinate to, among other things, mortgages and first deeds of trust. According to the ULC, this split lien system assumes that "if an association [takes] action to enforce its lien and the unit owner fail[s] to cure its assessment default, the first mortgage lender [will] promptly institute foreclosure proceedings and pay the unpaid assessments (up to six months' worth) to the association to satisfy the association's limited priority lien."

Under Alabama law, COAs were formerly governed by Chapter 8 of Title 35 of the Alabama Code, which provided a COA with a lien for unpaid assessments that was subordinate to a first mortgage or deed of trust and had to be foreclosed judicially. In 1990, however, Alabama adopted a version of the Uniform Condominium Act and enacted Ala. Code § 35-8A-316, which contains the split-lien system developed by the ULC.

The SFR Decision and the Nature of an Association's Super-Priority Lien

The uniform statutes did not expressly state whether the six-month super-priority lien is a true priority lien that can extinguish a first deed of trust, or whether it is merely a payment priority lien that springs into existence following a lender foreclosure. If the lien were truly prior, then under the basic rule that foreclosure on a lien extinguishes all junior interests a foreclosure on the HOA or COA's super-priority lien would eliminate the supposedly "first" mortgage or deed of trust. On the other hand, if the prior nature of the HOA or COA's lien simply meant that the association received a first cut from the proceeds at a lender's foreclosure, then the lender could simply account for another expense at the time of foreclosure, without the lurking risk of losing its security interest.

It is in this context that the Nevada Supreme Court's 2014 decision in SFR Investments Pool 1, LLC v. U.S. Bank arose–a decision that would set the interpretive standard for states that have adopted–in whole or in part–the ULC model legislation. In SFR, the Nevada high court considered whether the six-month super-priority lien was merely a payment priority lien, or a truly senior lien. Unfortunately for lenders and servicers, the court decided on the latter, relying primarily on the plain language of the statute. Specifically, the Court noted that the Nevada Statute, which was patterned after ULC model legislation, states that an association's super-priority "lien . . . is prior to" a first deed of trust, and that the statute did not use the term "payment priority." The Court also recognized that the ULC–in its interpretive comments to the model legislation that forms the basis of the Nevada statute–explains that "[a]s a practical matter, secured lenders will most likely pay the six-months' assessments demanded by the association rather than having the association foreclose on the unit." The Court reasoned that reference to a secured lender paying off the super-priority portion of the lien to avoid the association's foreclosure would not have made sense if the lien was a payment priority lien.

High courts in Rhode Island, Washington, D.C., and Washington state have also used similar reasoning to determine that mostly parallel statutes afford an association a true priority lien that can wipe out a first deed of trust. Conversely, no state court has issued a published decision holding that a statute similar to the ULC model legislation provides an HOA or COA with only a payment priority lien.

Alabama's COA Assessment Lien Statute

Ala. Code § 35-8A-316 gives COAs a lien for past-due assessments and other amounts due for "special assessments or services or charges . . . ." Because the statute is patterned after ULC model legislation, it has split priority. First, an amount consisting of six months of past due "common expense assessments" is given priority over "a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent."

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The remaining amounts are subordinate to a first mortgage or deed of trust.

Alabama's COA assessment lien statute also contains a notice provision. Specifically, prior to the foreclosure, a COA "shall send reasonable advance notice of its proposed action to the unit owner and all lienholders of record of the unit." According to the drafter's official comments, this requirement means that COAs are required to run a title search, and that this provision is not satisfied by merely posting an advertisement of the sale. Rather, the statute requires actual notice. In addition, a lender is entitled to request a statement from the COA or its collection agent setting forth the amount of the lien. If the COA fails to deliver the statement within ten days, the lien is released.

Under the statute, a COA can foreclose on its lien "in like manner as a mortgage on real estate provided the declaration is in conformity with Article 1A of Chapter 10 of this title and subject to the rights under Article 14A of Chapter 5 of Title 6." This means that a COA can foreclose on its lien non-judicially, and that the borrower or lender may redeem the property within 180 days. In addition, a COA can still utilize Ala. Code § 35-8-17 to judicially foreclose on its lien. However, this lien is not afforded super-priority status.

What About Alabama HOAs?

HOAs are given a lien for past due assessments under Ala. Code § 35-20-12. However, the lien created by this statute is expressly subordinate to "deeds of trust securing an indebtedness." Thus, HOAs in Alabama do not have a statutory super-priority lien.

However, while section 35-20-12 of the Alabama Code does not create a super-priority lien, lenders should keep in mind that this section does not preempt HOA assessment liens created by the HOA's governing documents. In other words, if the HOA's declaration of covenants, conditions, and restrictions, or other governing document, appears to subordinate a mortgage or deed of trust to some or all of an HOA assessment lien, there is still a risk that foreclosure of the HOA's lien could extinguish the deed of trust.

How to Protect Your Lien

While COA and—to a lesser extent—HOA assessment liens pose a real threat to mortgages and deeds of trust, lenders with collateral in Alabama can protect their interest by implementing policies and procedures designed to minimize the risk of a super-priority foreclosure sale altogether. Servicers should also develop similar policies and procedures in order to protect their investor's collateral. For instance, a lender or servicer can likely extinguish the super-priority portion of an association's assessment lien by tendering the super-priority amount to the association or its agent before the association's foreclosure sale. Lenders and servicers can also minimize, or even eliminate the risk of a COA or HOA foreclosure sale by advancing assessments to the association and—if the mortgage or deed of trust allows it—requiring the borrower to escrow the assessment amounts.

Lenders and servicers should also be aware that loans owned or guaranteed by Government Sponsored Enterprises ("GSEs") such as the Fannie Mae, Freddie Mac, and Ginnie Mae are treated differently under the COA assessment lien statute, and may not be subordinate to the COA's lien despite the statute's super-priority provision. This is because, in 2018, Alabama amended Ala. Code § 35-8A-316 to add a provision subjecting a COA's statutory lien to GSE rules, regulations, and guidelines when the subject property is encumbered by a mortgage owned by a GSE. Similarly, although Alabama courts have not addressed the issue, other jurisdictions have held that association assessment lien foreclosures involving properties owned by GSEs were void under the Housing and Economic Recovery Act of 2008.

These and other potential protections are made somewhat easier to utilize by the COA assessment lien statute's notification requirements. However, because lenders are often required to act quickly and decisively in these situations, it can be easy to miss the steps required to protect a mortgage or deed of trust. As such, lenders and servicers should develop detailed and easy-to-use policies and procedures dedicated exclusively to the handling of association assessment lien foreclosure sales.

Aaron Chastain is a partner at Bradley law firm. He represents financial services institutions, healthcare companies, and other businesses in a broad range of litigation and compliance-related matters. Aaron has advised student loan and mortgage loan originators and servicers in complying with the complex universe of regulation and state lien laws, as well as in handling finance-related litigation, such as claims for violations of the Fair Debt Collection Practices Act (FDCPA), wrongful foreclosure, violations of the Truth in Lending Act (TILA), and violations of the Real Estate Settlement Procedures Act (RESPA). He has specific experience advising clients in the realms of student and mortgage lending, servicing, and operations.

Chris Friedman is also a partner at Bradley. He represents banks, servicers and other financial services institutions involved in civil litigation, as well as compliance and regulatory matters. Chris has defended financial institutions against claims of fraud, breach of contract, and misrepresentation. He has also advised institutions regarding lien rights and has experience in HOA and COA super-priority lien litigation. Chris also represents lenders and other housing providers involved in Fair Housing matters, and has written extensively on the topic of social media and fair housing.

Barbarians at the Gate: Are Your Competitors Poaching Your Best Talent?

by Chris Bottcher

Alabama's banking market remains dynamic and fluid. Competition for top talent is fierce, and proven performers are bombarded with attractive offers from competitors. Any bank that has developed a team of lenders that consistently generates new and recurring revenue knows how difficult retention can be. This article will discuss strategies for discouraging competitors from poaching talent, discouraging employees from defecting, and incentivizing employees to invest in your organization for the long term.

Restrictive Covenants

Non-compete and non-solicitation agreements can be useful tools to protect an employer's legitimate business interests in its customer relationships and its confidential/proprietary information. These agreements protect an employer's investment in customer relationships by giving a former employer time to forge a relationship between its customer and a new employee without interference by the former employee. Without this protection, it is much easier for a new employer to realize an immediate benefit by recruiting talent from its competitor. For this reason, banks are typically advised to seek these agreements with any employee who has access to confidential or proprietary information, or who has a meaningful contact with your customers.

Non-solicitation and non-compete agreements can be paired with each other, along with other restrictive covenants such as confidentiality provisions, to make it more difficult for an employee to move customer relationships to their new employer. Non-solicitation agreements allow an employer to contractually limit an employee's post-employment activities, by preventing former employees from soliciting their prior employer's customers for the benefit of a new employer for a defined period of time. Non-compete agreements, which are harder to enforce, prohibit an employee from accepting employment with a competitor for a defined period of time after terminating their employment.

Although these agreements can be valuable tools, they are not perfect solutions. The post-employment restrictions must be "reasonable" in scope and time, which means a court may later disagree with an employer's definition of "reasonable." (Even if a court ultimately deems a provision unreasonable, however, the specter of litigation expenses can deter competitors from recruiting employees subject to restrictive covenants.) In addition, if an employer has employment agreements containing restrictive covenants, it has to enforce those agreements or risk waiving them. Therefore, if the bank has employment agreements in place with an employee whom the employer does not perceive as a risk to transfer significant customer relationships leaves to work for a competitor, the employer may still have to spend some amount of time and/or money ensuring compliance. For these reasons, it's important to draft and enforce such agreements wisely, or the burdens can outweigh the benefits.

Deferred Compensation Agreements

Deferred compensation agreements can take several forms. They must comply with federal tax and labor laws. Broadly speaking, deferred compensation agreements incentivize employees to stay with their employer so they remain eligible to receive future compensation, in exchange for compliance with certain restrictions set forth in the agreement. (Such as promises not to compete, not to solicit customers, to comply with employer's policies and procedures, and/or to remain employed for a given period of time.) By increasing the cost of recruiting, these arrangements can also dissuade competitors from poaching employees.

One benefit deferred compensation agreements have over restrictive covenants is that they can be targeted. Although the cost of preparing deferred compensation agreements can be higher than simple restrictive covenants, employers can justify the expense by limiting their application to true high performers whose departure would sufficiently impact the organization. That allows employers to avoid the cost of enforcing restrictive covenants against low performing employees who leave to work for competitors.

Conclusion

Maintaining a successful team is much easier than creating one. Once a bank has assembled a team that produces results, allow-

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ing competitors to lure that team away and receive an immediate benefit is risky. With competition for talent so high, employers need a well-reasoned retention strategy to maintain and further a culture of success and growth.

Chris Bottcher is a Partner and the Managing Member of McGlinchey Stafford's Birmingham office. He is recognized in the 2020 edition of The Best Lawyers in America. Chris represents financial institutions in a wide range of business, corporate, and commercial litigation, including business disputes, fraud claims, counseling partners and shareholders in litigation and dissolution proceedings, as well as trade secrets, non-competition agreements, and the enforcement of restrictive covenants. He can be reached at CBottcher@mcglinchey.com or (205) 725-6401.

Capital One's Data Breach and the Legal Fallout

by Brian Malcom

Unfortunately, big data breaches are not new. So there is the temptation to shrug one's shoulders and think, "It's just another day in modern life." A data breach at a financial institution, however, demands our attention.

In March 2019, Capital One suffered a data breach exposing the information for over 100 million Capital One customers. The data compromised included 140,000 Social Security numbers, 80,000 bank account numbers, and an undisclosed number of names, addresses, credit information, balances and other private information.

Officials do not believe the hacker disseminated the information or actually used the stolen information for any fraudulent purpose, but investigations are still underway. Even still, this breach serves as an important reminder to financial institutions that they are targets for hackers seeking to gain access to private customer data.

While significant attention should be given to how to prevent a data breach, this article will discuss the potential legal fallout of a data breach and the claims a bank or financial institution might face under Alabama law in the wake of a data breach.

Breach of Contract – Express or Implied

In the event of a data breach, one claim that a bank can expect to see in a complaint is breach of contract. Customer agreements often govern the relationship between a bank and its customers, but they can also create a cause of action for a customer against the bank. If a customer agreement requires a bank to safeguard a customer's private data or implies in any way that the bank will safeguard the customer's private data, the bank can expect a breach of contract claim in the event of a data breach. This would expose the bank to actual damages suffered by an affected party or parties.

Even if the customer agreement does not expressly speak to a bank's obligations to secure personal information, a creative plaintiff's attorney might argue that an implied contract existed and file a civil action for breach of implied contract. In a July 30, 2019, putative class action relating to the Capital One data breach, the initial plaintiff alleges that Capital One breached an implied contract with him, a customer, because he entrusted his private information to the Capital One for the purpose of applying for a credit card and Capital One implicitly agreed that it would only use his private information for that purpose. The initial plaintiff also argues that Capital One implicitly agreed to safeguard his private information by accepting the private information for its credit card products. Should an Alabama bank suffer a data breach, that bank can expect that a plaintiff will allege a similar cause of action and argue that the bank agreed to safeguard the customer's private information in exchange for the customer's business.

Negligence or Negligence Per Se

Following the Capital One breach, plaintiff filed a putative class action alleging claims for negligence and negligence per se. The plaintiff alleged that Capital One was negligent because it solicited and took possession of customers' private information

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and had a duty to exercise reasonable care in securing that information. The plaintiff also alleged that Capital One had a duty to destroy applicants' personal information within a reasonable amount of time after the information was no longer required by Capital One. According to the plaintiff, these duties arose from its relationship with applicants and customers, federal laws, and from industry custom. And, according to the Complaint, Capital One breached these duties by failing to implement industry protocols, failing to exercise reasonable care, and by failing to provide timely notification of the breach.

The plaintiff also alleged a claim of negligence per se. While proving a negligence claim can sometimes be difficult, negligence per se lessens the burden of proof on the plaintiff because a violation of the law creates a presumption of negligence. The plaintiff pleaded negligence per se by pointing to the Federal Trade Commission Act ("FTC Act"). The Complaint argues that Capital One violated Section 5 of the FTC Act, which prohibits unfair practices in or affecting commerce, which, according to the plaintiff, includes a business's failure to properly secure private information. While Section 5(a) of the FTC Act exempts banks, although case law indicates it may not exempt some bank subsidiaries, the claim from the plaintiff in the Capital One putative class action is indicative of how a plaintiff might use a statutory duty to argue and plead negligence per se. For example, a plaintiff might point to a bank's statutory duties under the Gramm-Leach-Bliley Act ("GLBA") and argue negligence per se for a data breach pointing to a violation of the GLBA.

GLBA

The GLBA governs the treatment of nonpublic personal information about consumers by financial institutions. The GLBA requires financial institutions to design, implement and maintain standards to protect nonpublic consumer information, which become promulgated as the Safeguards Rule. The Safeguards Rule is implemented and enforced by eight different federal and state agencies, depending on the type of financial institution at issue. The Federal Trade Commission (FTC) has become a sort of "catch-all" regulator of the GLBA for financial institutions who do not fall within one of these or other enumerated categories, such as nonbank mortgage lenders, loan brokers, tax preparers, providers of real estate settlement services and debt collectors. While there is no private cause of action under the GLBA, officers and directors of the financial institution can face civil and criminal penalties that include fines and imprisonment. In the event of a data breach, a bank can expect federal and state agencies to examine the breach and, if appropriate, expect the government agencies to impose stiff penalties.

Conclusion

By no means is this an exhaustive list of possible claims a bank might face from private plaintiffs and state or federal agencies in the event of a data breach. A data breach will bring heightened scrutiny regarding a bank's security practices, and a bank should seek to limit its exposure by complying with all laws setting security standards, meeting or exceeding industry custom, and using commercially reasonable care to secure private and sensitive information. If a breach occurs, a bank should immediately seek counsel to help navigate and limit civil and criminal liability.

Brian Malcom is a partner at Waller Lansden Dortch & Davis LLP in Birmingham. Representing banks, lenders, financial institutions, and healthcare firms in litigation matters, Brian Malcom constantly seeks to insulate clients from liability, while minimizing the impact on their operations. Clients depend on Brian's analytic abilities to resolve commercial disputes related to financial products liability, contractual agreements, and other business issues.

FedNow: A New Real-Time Payments System is Coming to Town

by Compliance Alliance

Last week, the Federal Reserve Board announced plans to develop a new, 24/7 real-time payment and settlement service, called the FedNow Service. The idea is to give community banks the ability to allow customers to send and receive payments any time, any day, and have full access to their funds within mere seconds. Specifically, the goal is to be able to process individual credit transfers of $25,000 or less, 24 hours a day, 7 days a week, 365 days a year, and have funds be available in real time, as opposed to taking up to several days as is often the case with current services.

The Fed has strongly emphasized that its impetus to create FedNow is the potential to benefit end users by providing them with more flexibility to manage their money and make time-sensitive payments, and also benefit participating banks--especially smaller or rural ones--by giving them a more fair playing field when it comes to competing with the bigger institutions. Last year, the Fed requested public comment on potential services that could be developed to support faster payments and of the more than 350 comments received, more than 90% supported a round-the-clock, real-time payment and settlement service.

Besides making community bank services more attractive to customers, many predict that operating costs, settlement delays, and the high settlement risk that ACH carries will all decrease under this new system. Participating banks will be able to designate a service provider to submit and/or receive payments on their behalf, and will be able to settle payments in the account of a correspondent bank if they'd like.

The process has quite a few steps, but it's really quite straightforward.

First, Bank A's customer (the originator) will send a payment to the intended beneficiary through faster payment services provided by Bank A. It's important to note that some kind of intermediary service will be required in order to connect customers to the FedNow service, either provided by the banks themselves or through third-party vendors.

After the payment instructions have been sent, Bank A will then validate the customer's payment instructions and submit them to the FedNow Service to process. But before accepting them, Bank B (the beneficiary's bank) will confirm key information about the beneficiary that it received from the FedNow. Once Bank B confirms the information, it will let the FedNow know to accept and settle the payment. Finally, Bank A and Bank B will respectively let the originator and beneficiary know that the payment is complete.

Despite its name, FedNow is not available now or anytime soon. The Fed anticipates that the service will be available in 2023 or 2024 at the earliest, and will likely take longer for true nationwide reach. For the moment, the Fed has issued a request for comment, and is asking feedback on how the new service might be designed to most effectively support all stakeholders involved in the payment system and how the broader U.S. payment system functions. For any banks interested, comments are due Nov. 7, and can be submitted here (https://www.federalregister.gov/documents/2019/08/09/2019-17027/federal-reserve-actions-to-support-interbank-settlement-of-faster-payments).

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