# EQUAL PRIORITY HOA LIENS

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As common-interest communities have increased in popularity within Nevada,[i] it is common for a property to be located within two or more homeowners' associations—sometimes referred to as a "master-association" and a "sub-association(s)." When a property is located within multiple associations, the unit owner is often subject to more than one set of restrictive covenants ("CC&Rs") and governing documents.[ii] These CC&Rs typically require the unit owner to pay assessments to both a master-association and a sub-association. A unit owner's failure to pay these assessments results in the creation and perfection of foreclosable delinquent assessment liens in favor of both the master-association and sub-association. [iii] Pursuant to NRS 116.3116(8) these liens have "equal priority" unless the declaration[iv] provides otherwise.[v]

Pursuant to Nevada law, common-interest communities may pursue non-judicial foreclosure of delinquent assessment liens.[vi] A question of major importance arises, however, as to the effect of one association's foreclosure upon the "equal priority" lien of another association.[vii] On January 14, 2016, the Supreme Court of Nevada issued an opinion regarding the treatment of equal priority liens under these circumstances.[viii] In this opinion, the Court ruled that when one association forecloses on its delinquent assessment lien, any equal priority assessment liens held by other associations are extinguished. However, all associations holding equal priority liens, including the association initiating the foreclosure, are paid from the sale proceeds in full or "on a pro-rata basis if the sale proceeds are insufficient to fully pay all equal priority liens."[ix]

As a result, the non-foreclosing association can no longer pursue or foreclose on a lien against the property, and cannot demand or request the purchaser of the property to pay the association's claim. The non-foreclosing association's claim against the property and the purchaser was extinguished by the foreclosing association's sale, and converted into a claim against the sales proceeds generated from the foreclosing association's sale. If the proceeds of that sale are insufficient to pay both associations, then the associations "must share that loss pro-rata."[x]

Based on the forgoing, it is likely that associations will be motivated to work together in the foreclosure process, as the proceeds of any foreclosure sale must be disbursed to all associations which have an equal priority lien. If the foreclosing association does not include other equal priority liens in its foreclosure, then each association will be paid in full only if the amount recovered from the sale is sufficient to pay all equal priority liens. Alternatively, if the sale proceeds are insufficient to satisfy all equal priority liens, the foreclosing association is required to split those proceeds with any equal priority lienholders and all associations "must share that loss pro-rata."[xi]

The following examples may help illustrate the effect of the Nevada Supreme Court's equal priority lien opinion. Each example presumes the following facts: Master HOA is a common interest community created by virtue of a recorded declaration under NRS Chapter 116. Under its declaration, parcels or units within the Master HOA are subject to a mandatory common expense assessment that is unpaid in the amount of $1,200.00 and is owed to the Master HOA. Also located

within the community is a Sub HOA which was also created by virtue of a recorded declaration under NRS Chapter 116. Under its declaration, parcels or units within Sub HOA are subject to a mandatory common expense assessment that is unpaid in the amount of $1,000.00 and is owed to the Sub HOA. The Declaration does not "provide otherwise," as provided in NRS 116.3116(8), and therefore the liens are deemed to have "equal priority."

**Example One**: Homeowner fails to pay assessments to the Master HOA and the Sub HOA for a period of 12 months. Master HOA institutes non-judicial foreclosure proceedings against the delinquent owner and proceeds to sell the property for the Master HOA's lien claim of $1,200.00. The Sub HOA is owed $1,000.00. The property is sold to a third-party for the sum of $1,200.00. In this example, the Master HOA's sale extinguishes the Sub HOA's equal priority lien. However, the Sub HOA is entitled to receive its "pro-rata share" of the sale proceeds.[xii] Because the sale produced insufficient proceeds to satisfy both equal priority liens, neither HOA is made whole from the sale, since the Master and Sub HOA lien claims total $2,200.00, and they "share that loss pro-rata."[xiii]

**Example Two**: Homeowner fails to pay assessments to the Master HOA and the Sub HOA for a period of 12 months. Master HOA institutes non-judicial foreclosure proceedings against the delinquent owner and proceeds to sell the property for the Master HOA's lien claim of $1,200.00. The Sub HOA is owed $1,000.00. The property is sold to a third-party for the sum of $2,200.00. In this example, the Master HOA's sale extinguishes the Sub HOA's equal priority lien. However, unlike Example One, the equal priority liens of both HOAs are paid in full because there are sufficient proceeds from the sale to satisfy the Master and Sub HOA lien claims totaling $2,200.00.[xiv]

**Example Three**: Homeowner fails to pay assessment to the Master HOA and the Sub HOA for a period of 12 months. Master HOA institutes non-judicial foreclosure proceedings against the delinquent owner and proceeds to sell the property for the Master HOA's lien claim of $1,200.00. The Sub HOA is owed $1,000.00. The property is sold to a third-party for the sum of $10,000.00. In this example, the Master HOA's sale extinguishes the Sub HOA's equal priority lien. Additionally, because there are sufficient proceeds from the sale to satisfy the total HOA claims of $2,200.00, both HOAs are paid in full. Finally, because there are surplus proceeds in the amount of $7,800.00 after satisfaction of both HOAs' equal priority liens, those surplus proceeds are distributed to "subordinate claim[s] of record pursuant to NRS 116.31164(7)."[xv]

In conclusion, the Nevada Supreme Court's recent opinion has a direct and immediate impact on how homeowners associations may pursue satisfaction of delinquent assessments for properties encumbered by multiple equal priority liens. Homeowners associations should consult with legal counsel prior to implementing any changes to their collection policies and/or foreclosure procedures and before making any requests or demands on other associations with lien and foreclosure actions pending on a property on which the association may also have an "equal priority" lien claim.

[i] Community Association Institute, *Community Association Fact Book 2014*, p. 7 (2014) (CAI estimates the number of U.S. community associations in 2015 is between 336,000 and 338,000. CAI estimates that the number of U.S. community associations in 1970 was 10,000.)
[ii] NRS 116.049 (defining the term "Governing documents").
[iii] *See* NRS 116.3116.
[iv] NRS 116.037 (defining the term "Declaration").
[v] NRS 116.3116(8) (NRS 116.3116 was amended by the 2015 Legislature; former subsection (4) was renumbered and, with identical language, is now NRS 116.3116(8).
[vi] NRS 116.3116-31168, as amended by SB 306 (2015).
[vii] *See* NRS 116.31164.
[viii] *Southern Highlands Comm. Ass'n. v. San Florentine Ave. Trust*, 132 Nev. Ad. Op. 3 (2014).
[ix] *Id.* at 2.
[x] *Id*.
[xi] *Id*.
[xii] *Id*. at 10.
[xiii] *Id.* at 2.
[xiv] *Id*. at 10.
[xv] *Id.* at 9-10.