MORTGAGE LENDERS, HOLDERS, AND SERVICERS BEWARE: MASSACHUSETTS HIGH COURT ENDORSES CONDOMINIUM ASSOCIATION'S SUPER LIEN PRACTICE

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In a decision that should be read as a warning to mortgage industry participants doing business in the Commonwealth of Massachusetts, the state's high court has validated a condominium associations' so-called "rolling" priority lien practice, placing prior-recorded first mortgages at risk. In *Drummer Boy Homes Association, Inc. v. Britton*, SJC-11969 (Mass. Mar. 29, 2016), the Massachusetts Supreme Judicial Court (SJC) held that there is no limit to the number of priority liens available to condominium associations and/or community associations for unpaid common expenses, ignoring the rights of first mortgage holders. Prior to *Drummer Boy*, Massachusetts courts had largely held that condominium associations were limited to a single priority lien for six months of unpaid common expenses. The SJC broke with prior decisions and held that a condominium association can enforce multiple priority liens for successive six-month periods based upon language added to the Massachusetts Condominium Act, General Laws, Chapter 183A ("Chapter 183A") in 1998. In short, following *Drummer Boy*, any prior-recorded first mortgages may become junior to unlimited condominium association liens for unpaid common expenses.

Chapter 183A permits condominium associations to recover unpaid common area fees and special assessments from unit owners and provides for a general lien against the condominium units for the amount due. The statute provides further protection for condominium associations, allowing for a priority lien for up to six months' worth of unpaid condominium fees, plus all attorneys' fees and collection costs. The priority lien moves ahead of any prior-recorded first mortgage. In Massachusetts, condominium associations regularly seek to enforce *consecutive* priority liens for every six-month period, the so-called "rolling" priority lien practice. *Drummer Boy* sanctions the rolling priority lien practice.

Drummer Boy arose after condominium owners Carolyn and Randy Britton withheld payment of their monthly common expenses to their condominium association, after a dispute over parking rights. The association brought suit to recover the unpaid common expenses and to enforce a priority lien under Chapter 183A. The Brittons continued to withhold payment. As a result, the association commenced a second and third lawsuit, each seeking to enforce two additional priority liens. In total, the association sought to establish a priority lien for 16 months of unpaid fees. The trial court entered summary judgment in favor of the association but limited the priority lien to a single six-month period. The Massachusetts Appeals Court affirmed the trial court's decision, and the appeal to the SJC followed.

The SJC reversed, based in part upon a 1998 amendment to Chapter 183A. In that amendment, the legislature added language allowing a first mortgagee to prevent a condominium association from "enforc[ing] its priority liens" by agreeing in writing that such liens exist and making the necessary payments on the liens to the condominium association. The SJC reasoned that such language would be unnecessary if the condominium association could only enforce a priority lien for the recovery of a single six-month period of unpaid common expenses. It also took note of the legislature's use of the otherwise unnecessary plural "liens" in the amendment's language.

Drummer Boy shifts the burden for unpaid common expenses from the condominium owner to the first mortgagee, which must assume these obligations to maintain the priority status of its mortgage. The ruling is in stark contrast to the commonly accepted principle in real estate finance: "first in time, first in right." Under *Drummer Boy*, unlimited condominium liens arising after origination of a first lien mortgage can take priority over that mortgage. Left unpaid, successive priority liens could extinguish a first mortgagee's interests, thus eliminating its true priority.

Drummer Boy runs contrary to the traditionally held expectations of secured lenders. The decision has the potential to destabilize the real estate finance system in Massachusetts by undermining the value of the collateral and may result in higher costs that would ultimately be borne by consumers. For mortgage lenders, holders, and servicers in Massachusetts, the ruling highlights the risks to mortgage collateral caused by condominium priority liens. We will follow developments involving *Drummer Boy* and provide further relevant updates.

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