

LIENHOLDER CROSSROADS: POAs and Mortgagees Can Use the Law to Keep Debtors Out of Foreclosure

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It is inevitable that property owners' associations (POA or POAs) and mortgagees will cross paths. Both entities potentially are pursuing the same debtor and/or a lien against the same property. Debtors often have to make the difficult decision of which lienholder will receive payment. While at first glance the interests of POAs and mortgagees may appear adverse, it is better to view the two lien holders as having a shared goal. Neither entity wants to be in the situation of having to pursue a debtor for non-payment, which can and does result in foreclosure. Both entities would simply prefer that the debtors timely pay all charges owed through the life of the security instrument. The fact that the foreclosure process exists is clear proof that the law anticipates an imperfect debtor. With common goals identified and fostered between these two lien holders, the chances of collecting the debt, ideally without foreclosure, by both lien holders can be improved. It is essential that both parties have a clear understanding of lien priority and/or subordination, the instances where a POA holds a senior lien to that of a mortgagee, and rights of redemption available to a mortgagee. This will help the entities coexist in a scenario where both are pursuing the same debtor, property, and/or cash that will satisfy each party's relative debts.

Any discussion of POAs should address the fact that POAs are referred to by several different names and/or may be in different forms. Homeowners associations, property owners associations, community

associations, civic associations, condominium associations, commercial associations, etc.; these terms are often times used interchangeably, often perhaps incorrectly. Section 202.001 of the Property Code uses the term "property owners' association" and defines it as incorporated or unincorporated associations owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument¹ and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.² This statute is designed to include virtually every possible type of association that manages restricted property within any type of development.

However, Section 209.002(7) of the Property Code adds another definition for the term. A property owners' association is an incorporated or unincorporated association that:

- (1) is designated as the representative of the owners of property in a residential subdivision;
- (2) has a membership primarily consisting of the owners of the property covered by the

¹ The term "dedicatory instrument" is defined in Tex. Prop. Code §§ 82.003(a)(11-a), 202.001(1), and 209.002(4). The term is defined elsewhere in the Texas Property Code, but for purposes of this paper, we will not reference the other definitions.

² Tex. Prop. Code §202.001(2).

dedicatory instrument for the residential subdivision; and

- (3) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision.³

A condominium POA is governed by either (i) Chapter 81, 82 and 202 of the Property Code or (ii) Chapter 82 and 202 of the Property Code only.⁴ Chapter 81 of the Property Code applies only to a condominium regime created before January 1, 1994.⁵ “A condominium regime created before January 1, 1994, to which [Chapter 81] applies is also governed by Chapter 82 as provided by Section 82.002.”⁶ Industry lawyers refer to the provisions in Section 82.002 of the Property Code as “retroactive” provisions. Chapter 81 does not have a specific definition of the entity managing the development; however, the chapter repeatedly references a “condominium regime” identifying how it is created and its rights and responsibilities.⁷ Sections 82.003(a)(3) and 82.101 of the Property Code together define a condominium “association” as an incorporated profit or

nonprofit corporation organized as a unit owners’ association with the membership consisting exclusively of all the unit owners.⁸ This requirement is only for condominiums created after January 1, 1994 or those that have adopted all of the provisions of Chapter 82 of the Texas Property Code. It is still quite possible to see a pre 1994 condominium association that is not incorporated.

Simply put, all associations or POAs are governed at least by Chapter 202 of the Property Code. Additionally, most single-family POAs will also be governed by Chapter 209 of the Property Code. Condominium POAs will also be governed by either (i) Chapter 81 and the retroactive provisions of Chapter 82 of the Property Code or (ii) Chapter 82 of the Property Code.

For the sake of simplicity, this paper will use “POA” as the designation that applies to all forms of associations. The provisions to be discussed herein apply to all types of residential property unless distinguished as applying only to single-family POAs (POAs as defined by Section 209.002(7) of the Property Code) or only to condominium POAs.

I. LIEN PRIORITY & SUBORDINATION

Virtually every POA has a restrictive covenant identifying the POA’s lien position. In modern POA dedicatory instruments, there is typically a separate provision devoted to and titled “Lien

³ Tex. Prop. Code §209.002(7). It is of note that Title 11 of the Texas Property Code contains 10 Chapters that define the term “property owners’ association” including both Chapters 202 and 209 of the Texas Property Code. Many of the remaining chapters simply refer to the definition contained in Section 202.001(2) of the Texas Property Code, while the others have stand-alone, yet similar, definitions of the term. See Tex. Prop. Code Chapters 202, 204, 205, 207, 208, 209, 219, 211, 213, and 215

⁴ See Tex. Prop. Code §82.002(c).

⁵ Tex. Prop. Code §81.0011(a).

⁶ Tex. Prop. Code §81.0011(b).

⁷ Tex. Prop. Code §81.101; See generally, Tex. Prop. Code, Ch. 81.

⁸ Tex. Prop. Code §§82.003(a)(3), 82.101.

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