

## Availability of Wisconsin's Super-Priority Lien Status for Particular Mortgagees

Two recent court decisions have shed additional light on the super-priority lien status granted to particular mortgagees under the Wisconsin Statutes. Although each of these cases provides important guidance to Wisconsin practitioners, they also serve as a convenient way of alerting and/or reminding both out-of-state lenders and attorneys of the super-priority rights given to certain mortgage lenders in Wisconsin. In the article below, please find a short summary of the Wisconsin Statute creating these super-priority rights and their applicability to state and national banks and mortgage bankers.

### General Rule Governing Priority of Wisconsin Construction Liens: Section 779.01(4) of the Wisconsin Statutes

In determining the relative priority of construction lien claims, most states typically adhere to a general rule that a valid construction lien has priority over any mortgage or other lien that is granted after either (a) the date that the property owner enters into the contract with the construction lien claimant, or (b) the date upon which actual construction begins. Wisconsin also follows this general rule. Pursuant to Section 779.01(4) of the Wisconsin Statutes, a construction lien is deemed to be "prior to any lien which originates subsequent to the visible commencement in place of the work of improvement, except as otherwise provided by ss. 215.21(4)(a), 292.31(8)(i), 292.81 and 706.11(1) and (1m)."

### Exception Granted for Mortgages to National Banks, State Banks and Mortgage Bankers: Section 706.11(1) of the Wisconsin Statutes

For a typical mortgage lender, the most useful of the exceptions set forth in section 779.01(4) are generally those found in section 706.11 of the Wisconsin Statutes. Section 706.11(1)(d) provides that, upon proper recording, a mortgage granted to a state or national bank (or a state or federally chartered credit union) has priority over all other liens, except tax and special assessment liens filed after

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the recording of such mortgage. Similarly, section 706.11(1)(f) provides similar super-priority treatment to mortgages that are granted to a mortgage banker. Section 215.21(4) also provides enhanced priority for mortgages granted to state savings and loan associations, and section 706.11(1)(a) provides priority for federal savings and loan associations and federal savings banks. As a result, a Wisconsin mortgage granted to a state or national bank or to a mortgage banker would be deemed to have a higher priority than a valid construction lien even if the actual construction began prior to the date of the mortgage.

## **Interpreting Section 706.11(1) of the Wisconsin Statutes: "State Bank" Means Any Bank Chartered in Wisconsin or Any Other State**

In its 2009 decision in *Lowell Management Services, Inc. v. Geneva National PQC, LLC*, No. 2008AP2533 (Wis. Ct. App. Sept. 9, 2009), the Wisconsin Court of Appeals was called upon to determine whether the term "state bank" used in section 706.11(1) was intended to apply only to Wisconsin-chartered banks or, more broadly, to banks chartered in Wisconsin or any state. The Court of Appeals held in favor of the broader interpretation and found that a mortgage granted to the Kansas-chartered bank involved in the dispute was entitled to the same super-priority status that a Wisconsin-chartered bank would have enjoyed.

## **Interpreting Section 706.11(1) of the Wisconsin Statutes: The Super-Priority Given to State or National Banks Does Not Extend to Their Operating Subsidiaries**

In *SJ Properties Suites, Buyco, EHF v. DOC Milwaukee, LP*, No. 09CV9785 (Wis. Cir. Ct. Milwaukee County filed June 22, 2009), the Milwaukee County Circuit Court recently held in a July 27, 2011 decision that the super-priority status granted to mortgages held by state or national banks under the Wisconsin Statutes does not extend to the operating subsidiaries of such banks. This is a trial court decision and not precedential. However, in light of this decision, state and national banks that are interested in receiving a mortgage in Wisconsin should ensure that any mortgages that they are receiving in Wisconsin are granted to an entity that qualifies as a state or national bank and not granted to an operating subsidiary or other type of entity that is not chartered as a state or national bank.



## **Interpreting Section 706.11(1) of the Wisconsin Statutes: The Super-Priority Given to Mortgage Bankers**

To date, Wisconsin appellate courts have not addressed the question of whether a mortgage granted to a mortgage banker who holds no license, or is licensed in a state other than Wisconsin, would enjoy the same super-priority as a mortgage granted to a mortgage banker duly licensed in Wisconsin. Moreover, attempting to extrapolate from the holdings in *Lowell Management* and *SJ Properties Suites* does not help, as the two decisions seem to point in conflicting directions. On the one hand, the broad interpretation of the term "state bank" used by the Court of Appeals in *Lowell Management* suggests that a future court may decide that the non-Wisconsin mortgage bankers should enjoy the same priority as Wisconsin mortgage bankers. On the other hand, a court might adopt the ruling of the Milwaukee County Circuit Court in the *SJ Properties Suites* case, that the statute provides protection only to a mortgage banker licensed by the State of Wisconsin. Given this lack of clarity and the clear advantages offered by section 706.11(1), a mortgage banker should strongly consider becoming licensed in Wisconsin prior to making a loan secured by a mortgage granted to it that encumbers Wisconsin real estate. To become licensed in Wisconsin, a mortgage banker needs to submit a completed application to the Division of Banking of the Wisconsin Department of Financial Institutions and pay the licensing fee of \$750.

If you have questions about this update, please contact your Reinhart attorney or any member of the Reinhart Real Estate Opinion Team.

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