

# **CONDO ASSOCIATION LIENS IN CHAPTER 13**

Bankruptcy Bench Bar  
April 23, 2021

## **I. Creation of Condo Association Liens**

### **(i) Master Deed and Bylaws**

A condominium association is formed through a **Master Deed**. Unit owners pay monthly fees to support the association, sharing the costs of administering the association and maintaining the common areas, among other things. Unit owners are subject to the association's **Bylaws**. The Master Deed and Bylaws are recorded with the county pursuant to the provisions of the New Jersey Condominium Act, N.J.S.A. 46:8B-1, et. seq. (the "Condo Act").

Almost universally, an association's Master Deed and Bylaws provide the association with a lien against the unit for unpaid common expenses and assessments against the unit owner.

### **(ii) Statute**

The Condo Act also provides for a lien for unpaid common expenses and assessments AND provides for a limited priority for the lien:

a. The association shall have a lien on each unit for any unpaid assessment duly made by the association for a share of common expenses or otherwise, . . . upon proper notice to the appropriate unit owner, . . . Such lien shall be effective from and after the time of recording in the public records of the county in which the unit is located of a claim of lien . . . Such claim of lien shall include only sums which are due and payable when the claim of lien is recorded. . . Except as set forth in subsection b. of this section, all such liens shall be subordinate to any lien for past due and unpaid property taxes, the lien of any mortgage to which the unit is subject and to any other lien recorded prior to the time of recording of the claim of lien.

b. A lien recorded pursuant to subsection a. of this section shall have a limited priority over prior recorded mortgages and other liens, except for municipal liens or liens for federal taxes, to the extent provided in this subsection. This priority shall be limited as follows:

- 1) to a lien which is the result of customary condominium assessments as defined herein, the amount of which shall not exceed the aggregate customary condominium assessment against the unit owner for the six-month period prior to the recording of the lien. This limited priority shall be cumulatively renewed on an annual basis as necessary. . . .

N.J. STAT. ANN. § 46:8B-21.

## **II. Condo Association Liens in Chapter 13**

### **(i) The Anti-Modification Provision:**

**11 U.S.C. § 1322(b)(2)** permits a plan to modify the rights of holders of secured claims

“ . . . other than a claim secured only by a **security interest** in real property that is the debtor’s principal residence.”

See **Nobleman v. Am. Sav. Bank**, 508 U.S. 324 (1993) (bifurcating claim into secured and unsecured violates anti-modification provision); **In re McDonald**, 205 F.3d 606 (3d Cir. 2000) - a wholly unsecured mortgage is not subject to the anti-modification clause and may be crammed down.

### **(ii) Applicable Statutory Definitions**

**11 U.S.C. § 101(51)**: The term “security interest” means lien created by an agreement.

*Compare with:*\*

**11 U.S.C. § 101(36)**: The term “judicial lien” means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

*and*

**11 U.S.C. § 101(53)**: The term statutory lien means arising solely by force of a statute on specified circumstances or conditions . . . but does not include a security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

*\*The distinction is important because, according to the legislative history of the Bankruptcy Code:*

*The “three categories are mutually exclusive and are exhaustive except for certain common law liens.” H.R. REP. NO. 595 at 312, as reprinted in 1978 U.S.C.C.A.N. 5963, 6269*

### **(iii) Development of Recent Caselaw from the District of NJ**

#### **(a) Consensual Lien, Modification of Condo Lien Not Permitted**

**In re Rones**, 531 B.R. 526 (Bankr. D.N.J. 2015), *rev'd in part*, 551 B.R. 162 (D.N.J. 2016), Gravelle, J.

(condo lien is a security interest, not a statutory lien but, because the Condo Act prioritizes payment of a portion of the security interest, the statutory provision provides security for the lien in addition to the principal residence. Therefore, claim can be modified).

In defining the condo lien as a security interest, the Court reasoned that no benefit was conferred until the unit owner purchased the condominium unit, thereby becoming a member of the association and obligated by its master deed and bylaws. The act of purchasing the condominium unit, and voluntarily accepting and recording the unit deed gave rise to the lien.

**In re Rones**, 551 B.R. 162 (D.N.J. 2016):  
Wolfson, J.

The parties have not appealed, and this Court will not disturb, the Bankruptcy Court's determination that the Association's Lien was a consensual lien and, therefore, a security interest.

[T]he Condominium Act merely altered the priority of a portion of the Lien. Therefore, the Condominium Act **DOES NOT SERVE** as a source of collateral which would remove the Lien from the protection of the Anti-Modification Clause.

**In re Holmes**, 573 B.R. 549 (Bankr. D.N.J. 2017), *rev'd and remanded* 603 B.R. 757 (D.N.J. 2019)  
Gambardella, J.

(Disagreed with In re Kiese (see below) and found condo lien to be a security interest, originally created by the Master Deed).

The Court found the lien first arose by agreement when Debtor purchased the Property and agreed to the terms in the Master Deed. It also found that

the statutory framework of the Act supports the conclusion that the lien first arose by agreement. Pursuant to N.J.S.A. 46:8B–8, a condominium association is created and established by the recording of a master deed. Further, the Act requires that the master deed contain specific provisions in order to bring the association under the jurisdiction of the Act. N.J.S.A. 46:8B–9. These provisions, read together, establish that the recording of a master deed is a necessary prerequisite for the Act to apply. It follows that absent a master deed, an association can have no priority lien under N.J.S.A. 46:8B–21(a).

**In re Spradley**, 2019 WL 460224 (D.N.J. Feb. 6, 2019)

Sheridan, J.

(Court followed Judge Wolfson’s opinion in In re Rones).

### **(b) Consensual AND Statutory Lien, Modification of Condo Lien Permitted**

**In re Keise**, 564 B.R. 255 (Bankr. D.N.J. 2017), rev'd and remanded on other grounds, No. 17-cv-1832, 2018 WL 624105 (D.N.J. Jan. 30, 2018) (Wolfson, J.).\*\*

Kaplan, J.

(Court considered the treatment of a homeowner’s association (“HOA”) lien in a Chapter 13 plan and applied the Condo Act to its analysis finding the HOA's claim as secured simultaneously by two separate liens).

The Court found a consensual lien created by the Declaration, and a statutory lien created by the Condo Act, and noted that the HOA could employ either or both liens to enforce its claim. The Court noted that each lien offers both benefits and burdens with regard to creation, perfection and enforcement. By way of example, creation of a lien under the Act requires a detailed process of recording notices, not similarly necessary to enforce the lien created under the Declaration. Likewise, the Condo Act grants a limited priority for the statutory lien, unavailable to the HOA absent application of the Condo Act.

Because the lien was not secured only by the principal residence but also by the statutory lien, the anti-modification provision did not apply.

\*\***In re Keise**, No. 17-cv-1832, 2018 WL 624105 (D.N.J. Jan. 30, 2018)

Wolfson, J.

(remanded for bankruptcy court to determine whether HOA constituted a condominium so as to justify application of the Condo Act).

**In re Smiley**, 569 B.R. 377 (Bankr. D.N.J. 2017)

Meisel, J

(Court conducted through review of NJ caselaw with regard to this issue and applied the reasoning of In re Kiese to a condo unit, finding two liens).

**In re Holmes**, 603 B.R. 757 (D.N.J. 2019)

McNulty, J.

(Court recognized possibility of existence of two liens and remanded to the Bankruptcy Court instructing that court to make findings of fact regarding the creation and priority of liens).

The Court further analyzed the “two lien” theory and found:

[A] statutory lien under N.J. Stat. § 46:8B-21 arises because certain factual conditions are met (and the existence of a consensual security interest is disqualified as such a condition). Those conditions are the existence of an unpaid assessment and notice to the unit owner. If those facts are present, the lien becomes effective upon recordation. A lien under N.J. Stat. § 46:8B-21, then, does not depend on, refer to, or contemplate the existence of a master deed or other contractual document. Nor does the Condominium Act require that any such document, such as a master deed, contain its own lien-creating language. See N.J. Stat. § 46:8B-9.13 True, there is a requirement that a master deed contain “a statement submitting the land described in the master deed to the provisions of the Condominium Act.” N.J. Stat. § 46:8B-9(a). But that general reference, to my way of thinking, stops far short of melding a consensual, master-deed-created lien (if the deed even contains such a provision) with the automatic statutory-lien provision of the Act.

### **(c) Consensual and Judicial Lien, Modification of Condo Lien Permitted**

**In re Guice**, 2019 Bankr. LEXIS 634 (Bankr. D.N.J. Feb. 28, 2019)

Sherwood, J.

(Court found that condo association held a consensual lien and a judicial lien)

The association had obtained a judgment against the unit owner for past due condo fees. The Court noted that, before it could sell the condo unit to satisfy the judgment, it was required to first execute against the unit owner’s personal property. This distinguished the judgment from a foreclosure judgment. Under New Jersey law, mortgage lenders only have the right to enforce their security interest in the residence up to the point of the foreclosure sale. Only after that can they sue the borrowers personally for the balance due.

By obtaining a writ of execution and levying on the in personam judgment lien, the association acquired rights against the unit owner’s personal property, giving it more than just a security interest in the principal residence and making the anti-modification provision inapplicable.

