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LIABILITY WITHOUT A LEGAL INTEREST – THE 1010 LAKESHORE DEBACLE

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More than 115 years ago, the Illinois Supreme Court unequivocally held that merely being the high bidder at a judicial sale does not confer upon the bidder a legally cognizable right in the property until the sale is confirmed.¹ In 2008, the Illinois Supreme Court revisited the issue and reaffirmed this principle.²

It seems painstakingly clear that bidding should not carry with it any penalties or obligations, other than the obligation to purchase the property. However, the Illinois Condominium Property Act (“Act”)³ requires the purchaser of a condominium unit at a judicial foreclosure sale to pay the unit’s common expenses from the first day of the month after the date of the judicial foreclosure sale. According to the Act, simply being the high bidder imposes a legal obligation upon the bidder to start paying common expenses.

In the past, the incongruity between Illinois case law and the Act was inconsequential. The high bidder lender would have the sale confirmed, and once confirmed, pay the common expenses under the Act.

This balance was destroyed by the holding in 1010 Lake Shore Ass’n v. Deutsche Bank Nat’l Trust Co., 2014 IL App (1st) 130962, in which the Court held that unpaid assessments by a previous owner of a condominium unit are not fully extinguished following a judicial sale until the purchaser makes a payment for assessments incurred after the sale. The Court declined to follow more than 100 years of Illinois law, forcing a legal obligation upon a bidder prior to confirmation. Further, although the holding clearly establishes liability prior to confirmation, the opinion does not provide any guidance as to when a bidder’s obligation to pay actually begins, be it pre- or post-confirmation.

In creating this duty to pay, the decision in 1010 Lake Shore, does not confer a legally cognizable right in the property, but ominously punishes bidders as if it did. This has led to nightmare situations for lenders because the holding fails to set parameters on when a payment is actually due. As a result, most associations have taken the position that if payment is not tendered almost immediately after judicial sale, regardless of confirmation, that the full amount of the condominium lien is revived. Some associations have taken this unpolished holding to absurd lengths, insisting that the full amount of the condominium lien is revived if payment is not made by the second

day of the month after the date of the judicial foreclosure sale. And who could blame them? The 1010 Lake Shore holding incentivizes this type of misconduct.

Similarly, if a lender tries to obtain a ledger from an association immediately, associations commonly refuse to release the ledger under the auspice of privacy concerns because the lender has no legal interest in the property. Naturally, the same association inevitably sues the lender for full amount of the condominium lien after confirmation, arguing that the lender failed to tender timely payments. The same problem exists in the form of overcharging. If a lender takes the time to fight an overcharge, the association may acquiesce on the initial

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demand, but will then argue that the pre-foreclosure condominium liens are revived due to the lapse in time.

We are just now starting to understand the full scope of the real world problems stemming from the 1010 Lake Shore holding. These problems have created a windfall for the associations and headaches for the lenders and those seeking to purchase property at the REO stage. The current outcome cannot possibly be what was intended by the Act and by the Appellate Court.

¹ See *Jennings v. Dunphy*, 174 Ill. 86, 90 (Ill. 1898)

² See *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173 (Ill. 2008).

³ See 765 ILCS 605/9(g)(3)