

Lending Law Update



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Change in Delaware Mortgage Priority Statute Benefits Banks

Real estate mortgage lending is underwritten on the value of the financed property, making the lien priority of the mortgages securing these loans paramount. In Delaware, a new tool exists in helping banks achieve the coveted first mortgage lien position.

For more years than anyone can remember, a Delaware statute has provided that mortgages from purchasers to real estate sellers that secure seller loans that finance the purchaser’s payment of the purchase price of the property have special lien priority over other liens against the purchasers. This statute appears in the Delaware Code at Title 25, section 2108. An amendment signed into law by Governor Carney effective September 28, 2020 expands the scope of this “super priority” statute to mortgages in favor of lenders other than sellers, if the mortgage secures the repayment of money advanced to pay all or part of the purchase price at the time that the borrower acquires title to the mortgaged real estate. The statute applies only if the mortgage is recorded within ten days of the purchase. The qualifying “purchase money” mortgage has priority over judgments against the buyer and any other liens created or filed against the purchaser, including mechanics liens, even if recorded earlier. There can be multiple purchase money mortgages entitled to this priority; as between each other the priority is according to the time the purchase money mortgages are recorded, but they do not have a priority among themselves if they are recorded at the same time.

There is also a new provision in the statute that creates a rebuttable presumption that a mortgage qualifies as a purchase money mortgage if

the mortgage states it is intended to constitute a purchase money mortgage. Given this is a rebuttable presumption, if it is proven that the money secured by the mortgage was not actually used to pay the purchase price, the super priority status is lost – but the presumption does shift the burden of proving the statute does not apply to the other lienholder challenging the priority.

Bankers should take advantage of this statute. Nearly every residential mortgage securing a loan used to acquire real property should qualify if “this is a purchase money mortgage” is added to the text of the mortgage. In the commercial loan context, bankers might consider including acquisition costs as part of the use of the mortgage loan proceeds, unless required equity or underwriting prevents it. However, note that this statute will not apply to any loans refinancing existing debt, even if the refinanced debt was used for acquisition of the mortgaged property. Of course, the lender should never rely on the statute alone, and should always require a loan title insurance policy insuring the bank’s mortgage in first position and obtain subordination agreements from the holders of other mortgages encumbering the same property.