

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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(Small Business/Self-Employed)

from: Mitchel S. Hyman
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(Procedure & Administration)

subject: Mortgage electronic registration system and Florida Statute section 701.02

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

This memorandum relates to your request for advice dated April 26, 2011, concerning whether Florida Statute section 701.02 applies to Mortgage Electronic Registration System ("MERS"). Specifically, it addresses whether the Internal Revenue Service may take priority over a properly-recorded mortgage if—in violation of the statute—a subsequent assignment of that mortgage is not properly recorded before the Service records a federal tax lien on the property.

CONCLUSION

We conclude that the Service may not take priority over an unrecorded assignment of a previously perfected mortgage solely based on the violation of that statute.

LAW AND ANALYSIS

Interpretation and applicability of Florida Statute section 701.02

Florida Statute section 701.02(1) (2011) provides:

An assignment of a mortgage upon real property or of any interest therein, is not good or effective in law or equity against creditors or subsequent purchasers, for valuable consideration, and without notice, unless the assignment is contained in a document that, in its title, indicates an assignment of mortgage and is recorded according to law.

The Court of Appeals for the Eleventh Circuit has explained that:

The recording requirement is not intended to protect one claiming under a mortgagor—against whose property there is already a perfected mortgage—with respect to subsequent assignments of the mortgage. The mortgagor has actual notice of the original mortgage, and anyone claiming under the mortgagor has constructive notice if the mortgage is recorded.

Kapila v. Atl. Mortg. & Inv. Corp. (in Re Halabi), 184 F.3d 1335, 1338 (11th Cir. 1999).¹ Instead, the proper recordation of subsequent assignments has “bearing on the rights of the mortgagees *inter se*.” *Id.* at 1339. The court’s analysis was informed by the interpretation of the statute’s similarly worded predecessor by the Florida Supreme Court, which held that the law applied only to creditors or subsequent purchasers of a mortgagee:

[W]hen the original mortgage was recorded and no satisfaction thereof entered upon the record, in the absence of other definitive proof to the contrary, it must be assumed that the mortgage is still in full force and effect in the hands of some one and a subsequent purchaser or mortgagee has the right to require the production of the mortgage and note which it is given to secure, or a satisfaction on record.

Bradley v. Forbes, 116 Fla. 350, 355 (1934). This interpretation has been maintained regarding the current statute. See *J.P. Morgan Chase v. New Millennial, LC*, 6 So. 3d

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681, 686 (Fla. 2d DCA 2009). Thus, subsequent assignment(s) of the mortgage, whether recorded or not, are not dispositive regarding the validity of an interest being claimed by a mortgagor or by someone claiming under a mortgagor, and a failure to record a subsequent assignment should not afford an opportunity to avoid a mortgage that originally was recorded properly.

Federal tax lien priority

Section 6323(a) provides that:

The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of [section 6323(f)] has been filed by the Secretary.

A mortgagee is not a purchaser, mechanic's lienor, or a judgment lien creditor; but if the mortgagee is a holder of a security interest, its interest will have priority over a federal tax lien for which proper notice is not recorded until after the security interest arose.

Section 6323(h)(1) defines a security interest:

The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

Florida law provides that instruments recorded earlier have priority over instruments recorded later. Fla. Stat. § 695.11, *Instruments deemed to be recorded from time of filing*. If a mortgage is recorded properly, then Florida law protects that mortgage against a subsequent judgment lien (or the subsequent filing of a previous judgment lien) arising from an unsecured obligation. If the mortgagee parted with money or money's worth in addition to recording the mortgage, then the mortgage is a security interest. As long as the original mortgagee became the holder of a security interest before the Service filed a notice of federal tax lien ("NFTL"), the mortgage will have priority over a later-filed NFTL. I.R.C. § 6323(h)(1). Any party later claiming to be the mortgagee need only prove that it is a holder of the mortgage to retain that original priority.

Conclusion

Florida Statute section 701.02(1) does apply to MERS mortgages, to the same extent that it applies to any mortgages: Assignments must be recorded to have priority over

later-recorded assignments. However, the statute only protects assignees and their creditors against other assignees and their creditors. The statute is not intended to affect the priority of any of the mortgagor's creditors vis-à-vis the mortgage interest, regardless of who presently owns the mortgage.² The Service does not take priority to a mortgage when an NFTL is filed after the original mortgage is properly recorded but before an assignment of that mortgage is recorded—because the mortgage retains priority over the tax lien.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call David Skinner at (202) 622-3630 if you have any further questions.

² Well-established secured transaction principles protecting the transferability and negotiability of instruments would be inverted if a mortgagor's successor or creditor could effectively ignore a recorded mortgage simply because the mortgage had been sold to a different institution which failed to record the assignment. *J.P. Morgan Chase v. New Millennial, LC*, 6 So. 3d 681, 685-686 (Fla. 2d DCA 2009).