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# Foreclosing Subsequently Accruing Liens no Longer a Certainty under the Lis Pendens Statute

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The predictable landscape of foreclosing real property is no longer that for mortgagees, potential investors, construction professionals or municipalities in Florida. Last week, the Fourth District Court of Appeal confirmed that the lis pendens statute (section 48.23, Florida Statutes—the "Lis Pendens Statute") will not serve to extinguish liens which attach to foreclosed property after the entry of a final judgment for foreclosure, but before the judicial foreclosure sale. *See Ober v. Town of Lauderdale-by-the-Sea*, 41 Fla. L. Weekly 1978, Case No. 4D 14–4597 (Fla. 4th DCA, August 24, 2016). The Court's ruling in *Ober* may ultimately provide new lien rights to junior lienholders such as community associations imposing assessment liens and municipalities seeking to enforce code violations. At a minimum, most real estate professionals believe the holding in *Ober* will create uncertainty with marketable title.

## Background

The Lis Pendens Statute operates as an umbrella to shield property from liens which accrue subsequent to the date the lis pendens is recorded (typically the same date as the filing of a foreclosure complaint). However, when does the umbrella fold, and the protection from subsequently accruing liens terminate? In *Ober*, the Court held that the operative date under which the lis pendens terminates – and thus liens may begin to again attach to the property – is the date of the entry of final judgment. This holding is a significant departure from what was commonly believed to be the operative termination date – the judicial foreclosure sale. The latter is consistent with the form foreclosure judgment found at Form 1.996(a), Florida Rules of Civil Procedure, which provides: "On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed." However, the Court correctly notes that termination of the lis pendens is not directly addressed in the Lis Pendens Statute, nor has the issue been directly litigated until *Ober*; accordingly, the Court was not bound to the limitations of Form 1.996(a).

## Why it Matters

The landscape after *Ober* is terribly uncertain. Foreclosing lenders and third-party investors looking to purchase property at foreclosure sale are no longer assured that the title they receive is clear. To the contrary, and especially in cases where there is a significant gap between final judgment and foreclosure sale, a winning bidder now needs to perform more due diligence than ever before. Specifically, code enforcement liens and other junior encumbrances may attach prior to sale which greatly impact marketability, or may even necessitate a re-foreclosure. The holding in *Ober* is an outlier inasmuch as almost 4 years elapsed between the entry of the final judgment and the foreclosure sale. However, the authors of this article are concerned with *Ober's* effect on routine foreclosures. Particularly, judges routinely order extended sale dates (to try to work out a loan modification or provide time for relocation), notwithstanding that such an order is wholly at odds with the foreclosure sale statute

(section 45.031, Florida Statutes). This statute requires the court to schedule a foreclosure sale "not less than 20 days or more than 35 days" after the entry of the final judgment. Following *Ober*, a foreclosing plaintiff must nervously await its sale, hoping that an intervening lien is not recorded which adversely affects marketability of title.

**Where does *Ober* go from here?**

Practitioners, real estate professionals and bankers alike should note that the *Ober* opinion is not final. The Court may still reconsider its opinion *sua sponte*, or Mr. Ober may seek a rehearing. Should the Court reconsider or rehear the matter, it need look no further than the jurisdictional reservation language in foreclosure judgments to find that its original opinion may be in error. Specifically, if a trial court continues to hold jurisdiction over the action to consider matters such as the distribution of surplus proceeds,[1] a deficiency action[2] or a determination of entitlement to condominium or homeowners' association assessments,[3] then the "action" has not ended and the lis pendens should not terminate under section 48.23, Florida Statutes. Whether the Court will address the issue of jurisdictional reservation remains to be seen.

Shumaker, Loop & Kendrick, LLP's Financial Institutions practice group will continue to monitor the *Ober* decision and its potential progeny. If you have questions or concerns regarding your rights and responsibilities following this controversial decision, please contact Meghan Serrano at mserrano@slk-law.com or Tyler Hayden at thayden@slk-law.com for more information.

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[1] See Sec. 45.031(1)(a) & (7)(b), Fla. Stat.
[2] See Garcia v. Dyck-O'Neal, Inc., 178 So. 3d 433 (Fla. 3rd DCA 2015).
[3] See Cent. Mortg. Co. v. Callahan, 155 So. 3d 373, 376 (Fla. 3d DCA 2014) (holding that a reservation of jurisdiction may specifically address the trial court's continued jurisdiction over the original action to determine assessment disputes with community associations).