

# PUBLICATION

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## Beware of Intervening Liens in Subordination Agreements

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Most lenders that service second mortgages or equity lines have received requests to subordinate their loan to a subsequent refinance loan. Many times these requests come years after the refinance loan was closed. Most servicers will agree to such requests to subordinate their loan without question. However, there is a danger in executing a subordination agreement that most servicers do not adequately consider: intervening liens.

"One who subordinates a first lien to a third lien makes his lien inferior to both the second and third liens." *Old Stone Mortgage & Realty Trust v. New Georgia Plumbing, Inc.*, 239 Ga. 345, 236 S.E.2d 592 (1977). Or, stated another way: "if a senior security deed becomes inferior to a junior security deed and the junior deed is inferior to a materialman's lien, then the senior security deed is inferior to the materialman's lien." *Id.* Courts have described this rule as being necessary to avoid destroying the rights of intervening lienholders. *Padgett v. City of Moultrie*, 229 Ga.App. 500, 494 S.E.2d 299 (1997). A lender that agrees to subordinate its loan to a subsequent loan may find that it has inadvertently subordinated its loan to any number of intervening liens.

There are simple things a servicer can do to avoid this problem:

1. The servicer can require a title search on the property at issue prior to agreeing to subordinate. If the title search reveals no intervening liens, the servicer can safely agree to the subordination. If the title search reveals that there are intervening liens, the servicer can refuse to subordinate or require that the intervening liens be satisfied before it will subordinate.
2. Additionally, the servicer can place language in its subordination agreement which makes its agreement to subordinate ineffective if there are intervening liens that would be elevated above its mortgage. See *Colorado National Bank v. F. E. Biegert Co.* 165 Colo. 78, 438 P.2d 506 (1968).

Use of these simple procedures when a subordination agreement is proposed can avoid large title problems down the road.