

## Second District Affirms Construction Mortgage's Priority Over Previously-Filed Mechanics' Liens

### BACKGROUND

Fifth Third Bank brought a foreclosure action against Dayton View Community Corporation. Dayton View previously hired Dayton Modulars, Inc. as a contractor to make improvements. In the foreclosure, Dayton Modulars asserted that its mechanics' liens had priority over Fifth Third's construction mortgage because its liens were recorded first. We were hired to establish the priority of Fifth Third's construction mortgage. The trial court ruled on summary judgment that Fifth Third had priority. Dayton Modulars appealed this decision.

### HOLDING

The issue on appeal was: Whether Fifth Third was entitled to priority over previously filed mechanics' liens if it substantially complied with section 1311.14 of the Ohio Revised Code. The Second District Court of Appeals upheld the trial court's ruling.

Ordinarily, a mechanics' lien has priority over liens recorded after it. Section 1311.14 is an exception to this rule, specifically protecting construction mortgages. In order to fit into this exception, however, the construction mortgage proceeds must be distributed according to certain procedures set out in this statute.

In this Case, the Second District agreed that Fifth Third substantially complied with section 1311.14, and its disbursements of \$252,440.60 were entitled to priority. While these types of cases are highly fact-specific, it was important for the court to apply the seldom-discussed "substantial compliance" doctrine. This means that while a bank does not have to strictly follow each particular requirement in section 1311.14, it must do the most important ones.

The key, then, is how much compliance is enough to fall under the statute. Both lenders, and the courts, will continue to define these boundaries in the future.

Havens Limited and its affiliate real estate companies have served the title insurance and real estate industry for the past 25 years. A full copy of the decision, Fifth Third Bank v. Dayton View Community Development Corp. (July 27, 2007), slip copy, 2007 WL 2164038 (2<sup>nd</sup> Dist. Ct. App.), can be found on our web site. See [Havenslimited.com](http://Havenslimited.com) "On Tract" or you can contact Jim Havens – [Jhavens@havenslimited.com](mailto:Jhavens@havenslimited.com), 141 East Town Street, Suite 200, Columbus, Ohio 43215. Phone (614) 228-6888.

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