IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION,

Appellant,

v.

IKON HOLDINGS, LLC, a Nevada limited liability company;

Respondent,

CASE NO. 63178

Dist. Ct. Case No. A-11-647850-B

RESPONDENT'S ANSWERING BRIEF & RESPONSE TO BRIEF OF AMICUS CURIAE

ADAMS LAW GROUP, LTD.
JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com

Attorneys for Respondent

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I. INTRODUCTION

Nevada Revised Statute 116.3116 is long, but clear. It is a precise roadmap that, if followed, leads the traveler to a singular destination. That destination is a definitive, monetary amount. That amount is what has been popularly described as the "super priority lien." NRS 116.3116(2) defines this "prioritized" portion of the general homeowners' association lien granted to homeowners' associations by NRS 116.3116(1). Thus, NRS 116.3116(1) grants the general assessment lien. However, NRS 116.3116(2) limits the extent of the prioritized portion of the general association lien that can remain after the foreclosure by the first security interest holder.

A. The General Homeowners' Association Lien Created by NRS 116.3116(1)

The general homeowners' association lien is defined in NRS 116.3116(1) and includes, "... any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due." NRS 116.3116(1). Also included in the general homeowners' association lien are, "... any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102...." In looking to NRS 116.3102, such charges are limited to:

(j) "... payments, fees or charges for the use, rental or operation of the common elements..."

(k) "... charges for late payment of assessments pursuant to NRS 116.3115..."[1]

(l) "... construction penalties when authorized pursuant to NRS 116.310305..."

(m) "... reasonable fines for violations of the governing documents of the

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[1] Pursuant to NRS 116.3115(3) interest is permitted on delinquent assessments 60 days or more past due at prime plus 2 percent.

association..."

(n) "... reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments...."[2]

It is with some interest that the phrase "costs of collecting," (with its own statutory definition under NRS 116.310313,) was not included in the language of NRS 116.3116(1) as being a part of the general homeowners' association lien. While the law allows a homeowners' association to charge such "costs of collecting" to the delinquent homeowner,[3] there is no statutory authority for a homeowners' association to include those "costs of collecting" in the actual lien. Indeed, the phrase "costs of collecting" or the statute permitting such costs (NRS 116.310313) or the regulation defining such costs (NAC 116.470) appear nowhere in NRS 116.3116. In fact, NRS 116.3116 makes specific reference only to other particular costs as listed in NRS 116.3102, not to any "costs of collecting" listed in NRS 116.310313 or NAC 116.470. This, one must presume, was an intentional act on the part of the legislature to limit the constituent elements of the lien to that which is clearly cited in NRS 116.3116, i.e., assessments, plus those costs as particularly listed in NRS 116.3102. "This court has, for more than a century, recognized that the Legislature's 'mention of one thing or person is in law an exclusion of all other things or persons.'" *Butler v. State*, 120 Nev. 879, 902, 102 P.3d 71, 87 (2004).

B. The Super Priority Lien Created by NRS 116.3116(2)

Regardless, NRS 116.3116(2) goes on to state that the general homeowners' association's lien defined in NRS 116.3116(1) is **NOT** prior to a first security interest

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[2] See NRS 116.3102(1).

[3] NRS 116.310313 - "An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation."

holder.[4] Thus, once a first security interest holder forecloses, the general homeowners' association lien as defined in NRS 116.3116(1) is extinguished.[5] However, as noted in NRS 116.3116(2), the entire lien is not extinguished. NRS 116.3116(2) reveals that there is a prioritized portion of the general homeowners' association lien that survives extinguishment by the foreclosure of the first security interest holder. This prioritized portion of the general homeowners' association lien has been dubbed the "super priority lien" and is generally, what concerns this appeal.

Appellant states that this action involves a dispute over the meaning of a statute (Appellant's Opening Brief, pg. 2). It is, therefore, odd that in Appellant's 48 page brief, it fails to reproduce the complete text of the very statute at issue. Nor does the Amicus Curiae offer the complete text of the statute. Appellant and the Amicus Curiae offer much discussion concerning the alleged unfairness (in this post-mortgage crisis era) of a statute limiting the super priority lien, without ever discussing the utterly logical utility of the statute when it was passed over 20 years ago in a booming Nevada real estate market. Most fundamentally, Appellant and the Amicus Curiae neglect to read the actual words of the statute to the Court. For when this it done (as it was done in the lower court via a power point presentation,) the traveler reaches his destination.

The super priority lien exists only, "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the

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[4] NRS 116.3116(2) - "A lien under this section is prior to all other liens and encumbrances on a unit **except**... (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...."

[5] "A lien that is first in time generally has priority and is entitled to prior satisfaction of the property it binds." *Federal Nat. Mortg. Ass'n v. Kuipers* 314 Ill.App.3d 631, 634, 732 N.E.2d 723, 726, 247 Ill.Dec. 668, 671 (Ill.App. 2 Dist.,2000). See also *Walker v. Shrake* 75 Nev. 241, 339 P.2d 124 (Nev.1959).

association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien." NRS 116.3116(2). As Appellant notes, most associations, like Appellant, do not accelerate the annual assessment payment in one, lump sum payment, but decelerate the annual payment and charge the homeowners in affordable monthly increments. Thus, what is the figure equaling 9 months of an association's un-accelerated monthly assessments as noted in its last periodic budget? It is the super priority lien amount.

In short, the super priority lien is nothing more that a figure equaling 9 months of an association's monthly assessment as noted in last periodic budget (not any other statute or document) adopted prior to the association's institution of an action to enforce its lien, unless Fannie Mae or Freddie Mac require a shorter period. If, for example, an association's monthly assessment per unit based upon its last budget prior to its institution of an action to enforce its lien was $100.00, then, after foreclosure of the unit by the first trust deed holder, the super priority lien would exist to the extent of 9 months of assessments at $100.00 per month (or a total of $900.00) plus external repair costs as permitted under NRS 116.310312. If the association never instituted an action to enforce its lien, no super priority lien would exist. It is that simple.

II. FACTUAL AND PROCEDURAL BACKGROUND

This appeal is simply about reading a clear statute and a contractual provision, both of which refer to the same homeowners' association lien, and applying said provisions to the facts of this case. Indeed, the undisputed facts of the case below reveal that a Notice of Delinquent Assessment Lien referring to a single lien was recorded by Appellant against the property of the Respondent. The Notice of Delinquent Assessment Lien stated:

> In accordance with the Nevada Revised Statutes **and** the Association's Declaration of Covenants, Conditions and Restrictions (CC&RS) recorded on July 06, 2005, as instrument number 0003420 Book 20050706, of the official records of Clark County, Nevada, the Horizons at Seven Hills **has a lien** on the following legally described property.
>
> The property against which **the lien** is imposed is commonly referred to as 950 Seven Hills Drive #141, Henderson, NV 89052 and more particularly legally described as: Horizons At Seven Hills Ranch, Plat Book 125, Page 58, Unit 1411, Bldg 14 in the County of Clark.[6]

It should be emphasized that although two legal basis are given for the single lien (one contractual and one statutory) the words "a lien" and "the lien" are contained in the Notice which evidence but a single lien, not multiple liens. Interestingly, Appellant argues, "Another key to resolving this case is whether the Unit was subject to one or two liens...." (Opening Brief, pg 39). However, the facts of the case below reveal that Appellant never filed or claimed two liens against Respondent's property (one based on the covenants, conditions and restrictions ("CC&RS") and one based on NRS 116.3116).[7] Nor were there any claims filed by Appellant asserting more than one lien.[8] Nor were there any declaratory relief claims by Appellant requesting a judicial declaration that NRS 116.3116 and the CC&RS permit two liens.[9] Nor did Appellant ever demand amounts of money for two separate liens.[10] The "two lien" theory was nothing more a mere fanciful argument of counsel mid-way through the

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[6] AA0266.

[7] AA0266.

[8] AA0099-0105.

[9] AA0099-0105.

[10] AA0268-0270, "Per your request the current balance for the above property is $6287.94."

litigation[11] which was unsupported by any evidence proffered to the lower court. Indeed, in the entire history of Horizon's at Seven Hills Homeowners' Association, and in the entire history of recorded homeowners' association liens in the State of Nevada, Appellant failed to cite for the lower court even a single instance where a homeowners' association ever filed one lien based upon statute, and another lien based upon the CC&RS.[12]

Regarding Appellant's "two lien" legal argument, the lower court reviewed the evidence before it and ruled, "Defendant maintains that NRS 116.3116(2) and Sections 7.8 and 7.9 are conceptually separate and, in effect, create two separate liens. The Court disagrees. There is but a single lien which is created, perfected and noticed by the recording of the CC&RS."[13] In short, the lower court had before it Appellant's Notice of Delinquent Assessment Lien which stated that Appellant claimed a single lien (albeit with two legal basis). Appellant produced no evidence that it claimed more than one lien. Thus, based upon the evidence proffered, the District Court found but a single lien.

On 7/6/2005 (14 years after NRS 116.3116 was adopted,) Appellant recorded its CC&RS.[14] Notably, when discussing its homeowners' association's lien, the CC&RS mirrored the language of NRS 116.3116,[15] made direct reference to NRS 116.3116, and stated that the Appellant's single lien was also "otherwise subject to

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[11] AA1668-1754.

[12] *See, generally*, Appellant's Opening Brief.

[13] *See* NRS 116.3116(4).

[14] AA0160-0208.

[15] Prior to October, 2009, NRS 116.3116(2) called for only 6 months of assessments as the super priority lien amount.

NRS 116.3116."[16]

> Section 7.9 Priority of Assessment Lien. Recording of the Declaration constitutes Record notice and perfection of a lien for assessments. **A lien for assessments, including interest, costs, and attorneys' fees, as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for:** (a) liens and encumbrances Recorded before the Declaration was Recorded; (b) **a first Mortgage Recorded before the delinquency of the assessment sought to be enforced (except to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien)**, and (c) liens for real estate taxes and other governmental charges, **and is otherwise subject to NRS § 116.3116**.[17]

Moreover, Section 7.8 of the CC&RS state, "**The lien of the assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit (except to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien)**".[18] Thus, Section 7.8 specifically quantified the super priority lien to only a figure equaling 6 months of assessments (immediately preceding institution of an action to enforce Appellant's lien).[19]

The undisputed facts further revealed that the subject property was purchased at a foreclosure auction of the prior owner's first mortgage lender ("6/28/2010 Foreclosure Auction")[20] and was located within the Appellant Association. The

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[16] AA0184, Section 7.9

[17] AA0184.

[18] AA0184.

[19] Prior to October 1, 2009, NRS 116.3116(2) limited the super priority lien to a figure equaling 6 months of assessments based upon the periodic budget.

[20] AA0069-0073.

property was then transferred to Respondent on July 14, 2010[21] whereupon on August 16, 2010, Appellant filed a Notice of Delinquent Assessment Lien against Respondent demanding $6,050.14.[22] Further, on October 18, 2010 Appellant sent Respondent a letter stating, "Per your request, the current balance for the above property is $6,287.94."[23] Pursuant to the spreadsheet of fees and costs attached to the 10/18/10 Collection Letter, the monthly assessments were only $190.00.[24]

Given undisputed fact that the Appellant's monthly assessments were $190.00, the task of the lower court was to determine the amount of the super priority lien which was owed by Respondent. Was it $1,710.00 (a figure equaling 9 months of assessments per NRS 116.3116(2))? Was it $1,140.00, (because Section 7.8 of the CC&RS only required a figure equaling 6 months of assessments).[25] It should be noted that Fannie Mae guidelines limit the super priority lien to only 6 months of assessments).[26] Or was it some undefined, limitless figure as argued by Appellant?

The lower court's ruling was clear. A homeowners' association lien is created, perfected and noticed by the recording of the CC&RS (See NRS 116.3116(4)). The prioritized portion of the lien exists " ... to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9

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[21] AA0075-0078.

[22] AA0082.

[23] AA0093.

[24] AA0094.

[25] AA0184 at Section 7.8 and 7.9

[26] "Fannie Mae allows up to six months of regular common expense assessments for a condo or PUD unit to have limited priority over Fannie Mae's mortgage lien." Relevant portions of the Fannie Mae Selling Guide, RA 0111.

months immediately preceding institution of an action to enforce the lien..." [which] means a maximum figure equaling 9 times the association's regular, monthly (not annual) assessments."[27] "The words "to the extent of' contained in NRS §116.3116(2) mean "no more than," which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded."[28] However, "To the extent that provisions of CC&RS call for a lesser amount for the prioritized portion of the assessment lien than does NRS 116.3116(2), the lesser amount shall be utilized as the prioritized portion of the lien."[29] The order of the lower court concerning the 9 month cap on the super priority lien is consistent with at least 15 different court rulings in the Nevada State Court[30] and at least 4 different rulings by the U.S. District Court in Nevada.[31]

III. ARGUMENT AT LAW

A. INTRODUCTION OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT & NRS 116

The Uniform Common Interest Ownership Act ("UCIOA") was originally promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws ("Uniform Law Commissioners" or "ULC").[32] In 1991, Nevada passed the UCIOA which is embodied in Nevada Revised Statutes §116. In a break with traditional lien priority law of "first in time, first in right,"[33] the UCIOA granted

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[27] AA0972.

[28] AA0972.

[29] AA2092.

[30] See Section E, *infra*.

[31] See Section E, *infra*.

[32] AA0275-0282.

[33] See fn 4 and 5.

homeowners' associations a lien priority over first mortgages recorded before any assessment delinquency. However, as shall be noted below, the associations' lien priority is only available to a certain and limited extent. While an underlying association general lien may have been for a higher amount (as against the defaulting homeowner), the only amount which could achieve "super priority" status over the first security interest holder, and thereby bind a new owner who obtained title through the foreclosure auction, was an amount equaling 6 months of assessments.

i. Intended as a Fixed Amount - Predictability Needed by All

Fundamentally, one of the principal tenets underling the super priority lien was the necessity for establishing a fixed amount, i.e., one that a lender could approximate prior to lending funds to a borrower who was purchasing within a common interest community. Predictability was required so that the lender could escrow, from the borrower's funds, the predetermined super priority lien amount in case the borrower failed to pay the assessments. Predictability was also ensured because the super priority lien was based on a multiple (6 months) of the assessment amount specifically found in an association's periodic budget. As noted in the comments section of the 1994 draft of the UCIOA:

> To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the six months' assessments demanded by the association rather than having the association foreclose on the unit. **If the lender wishes, an escrow for assessments can be required.**

(Comments, UCIOA 1994, page 159-160.)[34]

Thus, the drafters of the UCIOA concluded that secured lenders will most likely pay the six months' assessments rather than having the association foreclose on the unit. Indeed, because the lender would know what the monthly assessments were required prior to making its loan in an association, and since the lender would know based on §3-116 of the UCIOA that the super priority lien amount was limited to only 6 months of assessments, the lender could require the borrower to escrow, as a condition to making the loan, exactly that amount of funds for which the lender might be liable, if the borrower defaults.[35] The lender, therefore, could protect itself from borrower default if the lender was required to redeem the property and pay to an association the debt of the defaulting borrower. Accordingly, the association would be assured a payment of 6 months of assessments if the borrower/homeowner defaulted on his obligations to his association. This is the "equitable balance" that was reached between "the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders."[36] As one court determined, "What this statute does, by granting a six months priority to a condo association, is to accommodate the competing needs of a condo association faced with delinquent assessments, and a lender simultaneously seeking to protect the priority of its security interest." *River Glen Condominium Ass'n, Inc. v. Woulfe*, 1995 WL 243346 (Conn.Super.,1995).

ii. The Certainty of a Fixed Amount was Needed to Induce Lenders to Lend in Developers' New Communities

In the 1980's and 1990's, with property prices generally increasing and developers building common interest communities in many of the states, it made

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[34] AA0284-0296.

[35] AA0293-0294

[36] AA0293-0294

abundant sense to limit the super priority lien to a finite figure. Indeed, during the time of residential real estate expansion, developers of residential communities crafted "lender friendly" mortgagee protection provisions into their CC&RS to ensure lenders would lend in the developer's community.[37] Without certainty of what the lender's liability was for a superior encumbrance over its first mortgage, lenders' reluctance to finance the purchase of new residential units in a common interest community might quell development and impede sales of units. This, of course, would stifle the developer's singular intention, i.e., to sell each and every residential unit within the community (and, presumably, the Nevada legislature's intention of making sure newly arriving residents would have an ample housing supply). To maximize liquidity and facilitate loans to buyers in these common interest communities declarants/developers expressly included in their CC&RS either total subordination provisions allowing for no super priority lien at all, or super priority liens limited to a finite figure of 6 months of common expenses as noted in the periodic budget.[38] Without guarantees of loan priority, or at least a definitive super priority lien amount, lenders may have been unwilling to lend to unit purchasers or would make the cost of such a loan prohibitively expensive. This would have not been in the interest of either the developer, or the unit purchaser.

Indeed, if the super priority lien statute called for a limitless superior lien, in loaning a borrower, for example, $100,000.00 for the purchase of a home, the lender could easily be hit with a super priority lien of $10,000 or $20,000 (i.e., a considerable percentage of the principal amount of the loan). Such a flexible and limitless statute could very possibly take every penny of profit the lender made from

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[37] *See e.g.* , Section 7.8 and 7.9 of CC&RS limiting super priority lien to 6 months of assessments at AA0184 and Article 12 at AA0193-0194.

[38] *See e.g.*, Section 7.8 and 7.9 of CC&RS limiting super priority lien to 6 months of assessments at AA0184.

the loan or result in irrational and unsustainable losses, thus having an enormous negative impact on both the primary and secondary mortgage markets regarding Nevada residential loans. The result of such a statute would likely be that no bank would lend money secured by residential mortgages in this State, nor would Fannie Mae, Freddie Mac or investors of private mortgage pooling trusts purchase such risky loans.

iii. The Recent Changing Economic Climate Does Not Alter the Original Policy of a Limited Super Priority Lien Amount

While the economic climate and housing market may have changed dramatically in the last 7 years, such a recent downturn cannot be considered in determining the meaning of a statute which was passed in 1991. Appellant and the Amicus Curiae advance the argument that the plain language of NRS 116.3116(2) is unfair or produces an absurd result because it only grants associations a limited super priority lien in an amount likely to be less that what is owed to them by the delinquent homeowner. However, this is an argument as to why the existing law may need to change in today's economy, not an argument as to why the law was written the way it was back at a time of residential real estate expansion (when developers needed banks to lend money to purchasers of units within the developments). Developers needed lenders, and lenders needed certainty regarding their downside liability. The equitable "deal" was made years ago and NRS 116.3116(2) does not change simply because present day economic circumstances have changed. With the limited and finite super priority lien contained in Section 3-116 of the UCIOA, the lenders and the associations each got what they needed... an "equitable balance."[39]

Ultimately, public policy arguments may give context to NRS 116.3116(2) and explain the reasoning behind why it is limited, but whether Appellant likes or dislikes the language of NRS 116.3116(2) is irrelevant. As courts have held regarding the

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[39] AA0293-0294 *Comments, UCIOA 1994, page 159-160.*

super priority lien, while parties may disagree with the equities of a statute, such matters are not for the judiciary, but rather for the legislature that enacted the statute. *Hudson House Condo. Ass'n, Inc. v. Brooks, 223 Conn. 610, 616, 611 A.2d 862, 865 (1992).* If Appellant believes that collection costs should be added on top of the super priority lien, it should lobby the legislature to change the existing law. Indeed, such proposals have been made in 2009, 2011 and 2013.[40] The Nevada legislature has rejected the proposals on each occasion.

It should be noted that in 2009, instead of changing NRS 116.3116(2) to allow for collection costs on top of the super priority lien, the legislature increased the super priority lien amount from a figure equaling 6 months of assessments based upon the periodic budget to a figure equaling 9 months of assessments based upon the periodic budget. In 2009, the legislature also added certain exterior unit repairs costs to the super priority lien (see NRS 116.3116(2) and NRS 116.310312). However, unlike the State of Connecticut which changed its super priority lien statute to include 6 months of assessments, "and (B) the association's costs and attorney's fees in enforcing its lien...."[41], the Nevada legislature specifically rejected such language.

iv. A Self Inflicted Problem

Despite the transparent legislative history of the UCIOA aimed at balancing the interests of lenders and associations, Appellant still posits that after a bank forecloses, the statute limiting the association's super priority lien to 9 months of assessments is absurd because the association is owed more than the 9 months of assessments by the underlying delinquent homeowner. In the face of an unambiguous statute, countless fairness and public policy arguments are advanced by Appellant to justify the growing of the association debt (by the addition of thousands of dollars of collection

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[40] See Section J, *infra.*

[41] C.G.S. Section 47-258(b) as amended by No. 91-359 of the Public Acts of 1991

fees) and making the lender (and Respondent) a *de facto* guarantor of that enhanced and bloated debt. However, why homeowners' associations decide to adopt a practice designed to bill thousands of dollars of collection and foreclosure related costs on already defaulting mortgagors and to permit years of assessment delinquencies to accrue without itself ever actually foreclosing on a unit is a mystery of epic proportions. First lenders commonly have already filed their notice of default pursuant to their promissory notes and deeds of trust. Associations have absolutely no purpose to compound additional collection fees and costs when the borrower is already in default and facing the loss of his home.

The associations generally advance the inequitable position that the addition of thousands of dollars of collection fees yield debtor compliance in the payment of a few hundred dollar assessment debt. The unfortunate truth is that association collection agencies (with permission of the associations) unilaterally grow what is normally a few hundred dollar homeowner delinquent assessment debt to thousands of dollars which include $150 collection demand letters, $400 single page Notices of Default, $325 single page Notices of Delinquent Assessment "liens," $275 single page Notices of Sale, $150 single page escrow demand letters, and countless hundreds of dollars of recording fees, postage fees, publication fees, and title search fees (all which are funneled to collection agents) (see NAC 116.470). To complain that associations' are damaged by not being able to collect collection costs (which they never actually pay to collection agencies in the first place)[42] when the

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[42] Collection agreements generally call for the collection agent to be paid by the homeowner, not the association. As explained by Andra Behrens, Vice President of Nevada Association Services, one of the largest association collection agents, "If you never worked with Nevada Association Services, you really have nothing to lose to give us a try. It's no cost to the association... You're signing a consent and authorization form, and that just allows us to collect on behalf of the association. It is not a contract." See http://www.youtube.com/watch?v=hcHf584gNq4. Further, as

associations and collection agents are aware of a first lenders' pending foreclosure is a self-created, self-inflicted and self-perpetuated problem.

B. NRS 116.3116(2) IS UNAMBIGUOUS, CLEAR AND PLAIN. COURTS SHALL NOT GO BEYOND THE LANGUAGE OF SUCH STATUTES

"[W]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark 116 Nev. 88, 94, 993 P.2d 50 (2000)*. Therefore, the first inquiry this Court shall presumably make is regarding the clarity of NRS 116.3116(2). If the statute is clear, no interpretation is permitted and the Court's inquiry ends. As the Colorado Court of Appeals has stated regarding its super priority lien statute (virtually identical to Nevada's):

> "If a statute is clear and unambiguous on its face, we need not look beyond the plain language and must apply the statute as written.... The [Super Priority Lien] Act is such a statute." *BA Mortg., LLC v. Quail Creek Condominium Ass'n, Inc.* 192 P.3d 447, 450 (Colo.App.,2008).

In so determining, the Colorado Appellate Court in *BA Mortgage* concluded, "... that the trial court did not err in concluding that upon foreclosure by the lender, the association's lien for unpaid assessments was senior to that of the lender's first deed of trust to the extent of six months of assessments." *BA Mortgage, LLC v. Quail Creek Condo. Ass'n, Inc.*, 192 P.3d 447, 451 (Colo. Ct. App. 2008). As shall be discussed below, Nevada and Colorado's super priority lien statutes are similar, are unambiguous, and should require a parallel application.

Ambiguity is defined as "doubleness of meaning.... duplicity" (Blacks Law Dictionary, 6th ed., pg. 79). "Only when the plain meaning of a statute is ambiguous will this court look beyond the language to consider its meaning in light of its spirit,

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noted on NAS' website, "This collection process is completed at no cost to the association, produces results usually within 30 days." See http://nas-inc.net/

subject matter, and public policy." *Butler v. State*, 120 Nev. 879, 893, 102 P.3d 71, 81 (2004). After a simple reading of the statute, this Court will conclude, as did the Colorado Court of Appeals and multiple Nevada State and U.S. District Court judges, that the words of NRS 116.3116(2) are elementary and unambiguous and clearly call for a cap to the super priority lien of a figure equaling 9 months of assessments based upon the periodic budget plus certain exterior repair costs permitted by NRS 116.310312 (as permitted by the 2009 amendment to NRS 116.3116).

A review and examination of the actual words of NRS 116.3116 illuminate the statute's clarity and, quite frankly, renders superfluous the vast majority of Appellant's and the Amicus Curiae's briefing regarding "public policy," and the perceived "absurd results" of applying a statute in 2013 that was passed 24 years ago at a time of vast real estate expansion in this State when hundreds of thousands of people were relocating to Nevada, seeking homes to buy in the bourgeoning common interest communities which could only be sold if a money supply were readily available. A money supply which could only be provided by lenders who, as the UCIOA's comments acknowledged had an, "obvious necessity for protecting the priority" of their security interests (Comments, UCIOA 1994, page 159-160).[43] Following is the text of the entire statute.

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[43] AA0284-0296

NRS 116.3116(1)

THE GENERAL ASSOCIATION LIEN

Actual Language of NRS 116.3116(1)	***Respondent's Comment***
1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.	*The **Association** (not a lender, not a mechanic, not a judgment creditor, etc.) has a lien for the following:* *Construction Penalties per NRS 116.310305* + *Assessments* + *Fines* *The lien begins from the time the penalties, assessments, or fines become due, but not before they become due.* *Also included in the general lien are:* *(j) - fees for the use of the common elements;* *(k) - charges for late payment of assessments pursuant to NRS 116.3115 (i.e., interest at prime plus 2%);* *(l) - construction penalties;* *(m) - fines for violations;* *(n) - charges for preparation and recordation of any amendments to the CC&RS or any statements of unpaid assessments.*[44] *Even though assessments are often paid monthly or quarterly, the entire annual assessment is included in the association's general lien against the unit...*

[44] It should be noted that the phrase "costs of collecting" or the statute permitting such costs (NRS 116.310313) or the regulation defining such costs (NAC 116.470) appear nowhere in NRS 116.3116.

NRS 116.3116(2)

THE GENERAL LIEN IS JUNIOR TO CERTAIN ENCUMBRANCES

Actual Language of NRS 116.3116(2)	***Respondent's Comment***
2. A lien under this section is prior to all other liens and encumbrances on a unit except:	*The Association's lien as described in NRS 116.3116(1) is prior to all other liens except the following...*
(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;	*The Association's lien is NOT prior to other liens recorded before the CC&R's were recorded*
(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and	*The Association's lien is NOT prior to the homeowner's first security interest holder, if the first security interest was recorded before the date the assessment became delinquent ...*
(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.	*The Association's lien is NOT prior to tax liens and other government assessments...*

NRS 116.3116(2)

THE LIMITED "PRIORITIZED" PORTION OF THE GENERAL LIEN

Actual Language of NRS 116.3116(2)	***Respondent's Comment***
The lien is also prior to all security interests described in paragraph (b)	*But...* *A limited portion of the association's general homeowners' association lien has PRIORITY over the first security interest...*
to the extent of	***TO THE EXTENT OF***
any charges incurred by the association on a unit pursuant to NRS 116.310312	*certain external repair costs pursuant to NRS 116.310312*
and	*and*
to the extent of	***TO THE EXTENT OF***
the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien...	*an amount equal to 9 months of the association's assessments for common expenses based on the association's periodic budget (not any other document or statute) which would have become due just before the association instituted an action to enforce its delinquent assessment lien.*

NRS 116.3116(2)

THE FANNIE/FREDDIE BENCHMARK

Language of NRS 116.3116(2)	***Respondent's Comment***
... unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien.	*However, if Fannie Mae or Freddie Mac require a shorter period for the super priority lien than 9 months of assessments...*
If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations,	*... then the Fannie Mae/Freddie Mac period is utilized in calculating the Super Priority Lien*
except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.	*but in no event can that period be less that 6 months of assessments from the date that the association filed a civil action*
This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.	

In short, as clearly described in the super priority lien formula contained in NRS 116.3116(2), after a foreclosure, the super priority portion of the lien can only consist of:

1. "Assessments";
2. However, not just any "assessments," but assessments for "common expenses";
3. However, not just any "common expenses," but "common expenses" that are based upon the association's "periodic budget" adopted pursuant to NRS 116.3115 (not based upon any other document or statute);
4. However, not just any "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115," but only those assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, "which would have become due in the absence of acceleration during 9 months immediately preceding institution of an action to enforce the lien".[45]
5. Unless Fannie Mae or Freddie Mac require a shorter period of time (which they do, i.e., 6 months of assessments).[46]

Therefore, when calculating the super priority portion of the lien, the Court is to take only those "assessments" for only those "common expenses" that are based upon the association's "periodic budget" which would have become due "during 9 months immediately preceding institution of an action to enforce the lien..." "unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien...."[47] Thus, presuming the association instituted an action to enforce its own lien, in determining what assessment figure is the benchmark upon which to calculate the super priority portion of the lien, the Court will just need to see the association's last

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[45] NRS 116.3116(2).

[46] Fannie Mae requires a shorter period of time for lien calculation, a figure equaling 6 months is the actual super priority lien cap. See RA0111.

[47] NRS 116.3116(2)

periodic budget before the Association's institution's action to enforce its lien. The assessment figure will be contained in that periodic budget for common expenses. Thus, the legislature has adopted a specialized formula to determine the prioritized portion of the Association's general lien. All portions of the delinquent homeowner's original lien which falls outside of this specialized formula constitutes the less prioritized portion of the lien which is junior to the first security interest holder and which is extinguished through the foreclosure auction.

In short, NRS 116.3116(2) is clear and unambiguous. The super priority lien is nothing more that a figure equaling 9 months of an association's assessments derived from its periodic budget plus certain external unit repair costs. If an association never instituted an action to enforce its lien, then no super priority lien can exist.

C. APPELLANT IMAGINATIVELY CREATES LANGUAGE WHICH IS NOT CONTAINED IN NRS 116.3116

Regarding NRS 116.3116(2), Appellant argues, "It is a look-back provision, designed to place the association in the same place as if there had been no default for the nine months preceding foreclosure." (Opening Brief, 21-22). "While this amount includes recovery of all unpaid assessments arising during the nine months prior to foreclosure, it also necessarily includes the collection fees and costs that were incurred by the association during that same period." (Opening Brief, 4-5). Several questions immediately arise.

1. Why does Appellant chose the time frame of the nine months "prior to foreclosure" of the first trust deed holder as its "look-back" period? NRS 116.3116(1) clearly states that associations have "a lien" on the unit owners' property for assessments and fines. The statute goes on to state that, "A lien under this section is prior to all other liens and encumbrances on a unit except... (b) A first security interest...." The statute then states, "The lien is also prior to all security interests

described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce **the lien**...." An action to enforce the association's lien is decidedly different from the first trust deed holder's foreclosure auction. Why "look-back" from the first trust deed holder's foreclosure auction when the statute calls for something entirely different? The correct analysis is to pin point the date of the association's institution of an action to enforce its lien. Then one looks to the "periodic budget" to determine what the assessments are "in the absence of acceleration during the 9 months immediately preceding the institution of an action to enforce the lien." Those are the exact words of the statute. There is no ambiguity. There is no mention of a "look back" period based upon a foreclosure auction of the first trust deed holder. There is no mention of including "costs of collection." One simply looks to the periodic budget for the assessment amount and then takes 9 months of those assessments as contained in the budget to determine the super priority lien amount. Appellant is simply making up its own statute based upon how it wishes NRS 116.3116 was written, not how it was written.

2. Why does the "look-back" period included "collection fees and costs" when the statute clearly states the super priority lien amount can only include, "... the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the

lien...."? It is assessment figure in the "periodic budget" which the statute directs the reader to look to in determining the super priority lien amount, not any other document, not the CC&RS, not the bylaws, not the collection policy, and not any other statute. A simple review of the periodic budget reveals the assessments for common expenses in the 9 months prior to the institution of an action to enforce the association's lien.

3. Why does Appellant argue (without cite) that NRS 116.3116 was "... designed to place the association in the same place as if there had been no default for the nine months preceding foreclosure...." when the legislative history clearly reveals that super priority lien was designed to strike, "... an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders."?[48]

In short, Appellant's liberal use of "statutory interpretation" does little to assist this Court in applying the actual and unambiguous words of the statute. First, the foreclosure of the first security interest holder is not the "institution of an action" to enforce the homeowners' association's lien. The foreclosure auction of the first security interest holder is an action to enforce the first security interest holder's lien, not the association's lien. Second, collection fees and costs have nothing to do with, "... the assessments for common expenses based on the periodic budget ...." The assessments for common expenses based on the periodic budget are contained in the periodic budget. The actual assessment amount is plainly written in the budget. In this case, there is no dispute that the amount was $190.00 per month. Third, there are competing interests between the association and the first security interest holder. The association wants every dollar it can get, but the first security interest holder wants

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[48] AA0293-0294.

to be certain of the extent of its liability so it may protect its large investment. Thus, the "... equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders...." was struck.[49] The traditional "first in time first in right" priority benefitting the first security interest holder was amended in the UCIOA to permit a limited "prioritized" lien to benefit the homeowners' associations. Thus, the homeowners' association received something (albeit not everything) that which the common law prohibited (a "prioritized" position over the first trust deed holder) and the lender received assurances of a defined and limited prioritized amount which it could demand the borrower escrow to prevent unsustainable losses to the lender. Ultimately, Appellant creates words in the statute that do not exist so it may tip the "equitable balance" grossly in favor of itself.

D. NECESSITY FOR THE INSTITUTION OF AN ACTION

As a condition precedent to the establishment of a super priority lien, homeowners' associations need to file "an action to enforce the lien...."[50] In citing nearly identical language as that of the Nevada statute, the Massachusetts courts have held that the institution of a lawsuit (i.e., a civil action) is a condition precedent for homeowners' associations achieving of super priority status for any portion of its lien amount. That is so because without the homeowners' association filing of an action to enforce its lien, a portion of the association's lien cannot achieve prioritized status. The Massachusetts courts have held:

> ... the institution of an action by a condominium association is a condition precedent to achieving "super-priority" status for the condominium lien. However, even when the association files such an action, the condominium lien is given a "super-priority" status only to the extent of unpaid condominium fees for the preceding six months....

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[49] AA0293-0294.

[50] NRS 116.3116(2).

> In this regard, M.G.L. ch. 183A, § 6(c) specifically provides that, without the commencement of an enforcement action by a condominium association, a lien for unpaid condominium fees is "prior" to all other liens and encumbrances "except ... (ii) a first mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent ..." (emphasis added). That exception makes the lien junior at least until an action is commenced. Indeed, if the lien was anything but junior to the first mortgage, there would be no reason to require that an action be filed in order to grant that lien super-priority status. *Trustees of MacIntosh Condominium Association v. F.D.I.C., et.al. 908 F.Supp. 58 at 63 (1995).*

Thus, as a "condition precedent" to elevate a portion of a homeowners' association's lien from "junior" status to "super priority" status, a homeowners' association must file an "action" to enforce the lien.

An "action" as that term is used in NRS 116.3116 means a "civil action," i.e., the filing of a complaint with a court. Nevada Rules of Civil Procedure 2 states, "There shall be one form of action to be known as 'civil action.'" Nevada Rules of Civil Procedure 3 states, "A civil action is commenced by filing a complaint with the court." Therefore, until a homeowners' association files a complaint with the court to enforce its lien, no amount of its lien can achieve "super priority" status. While the lien remains a lien on the owner's unit, it is in "junior" status to the first security holder's deed of trust. Thus, until the filing of a complaint with the court to enforce its lien, upon the first security interest holder's foreclosure, the association's junior lien is extinguished in its entirety. Judge Nancy Allf of the Eighth Judicial District Court ruled similarly[51] as did Judge David Barker.[52]

The requirement for an association to file a court action before obtaining "super priority" status of any portion of its original lien makes logical sense. The legislature and Uniform Act Commissioners clearly wanted to make an association take some

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[51] RA0313-0318, 0340-0345, 0490-0495

[52] RA0319-0324

form of affirmative action against the original homeowner to collect the delinquent assessments before burdening a lender, investor, Fannie Mae or Freddie Mac (who were not responsible for the non-payment of assessments by the original owner). Equity required the creditor (the association) to first proceed against the debtor (the homeowner) before proceeding against an innocent party (the foreclosure auction transferee). That is why the "institution of an action" language exists in the statute.

In addition, as the federal courts have recently ruled:

> The Court finds that, as a general rule, "bringing an action" means initiating a lawsuit...
>
> The phrase "bring an action" is defined as "to sue; institute legal proceedings." Black's Law Dictionary (8th ed.2004). Therefore, an action is "brought" when a plaintiff files a complaint, which is the first step that invokes the judicial process. See Fed.R.Civ.P. 3 ("A civil action is commenced by filing a complaint with the court."); id. Advisory Committee Note ("The first step in an action is the filing of the complaint."). *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia, --- F.Supp.2d ----, 2010 WL 2542177, W.D.Tex., 2010*

See also *Loeber v. Bay Tankers, Inc.*, 924 F.2d 1340, 1347 (5th Cir.1991) (finding no distinction between the definition of the terms "action" and "case," and observing that " '[i]n federal practice the terms refer to the same thing, i.e., the entirety of a civil proceeding" (emphasis added) (quoting *Nolan v. Boeing Co.*, 919 F.2d 1058, 1066 (5th Cir.1990)).

To punctuate the conclusion that a "civil action" in a court of law is a condition precedent to the existence of the super priority lien, in 2011, Senator Allison Copening proposed Senate Bill 174 which was an attempt to materially alter the existing provisions of NRS 116.3116. The amendment proposed to remove the language "institution of an action to enforce the lien" as the lynch pin to the existence of a super priority lien to "The association's mailing of a notice of delinquent assessment...." or, "... a trustee's sale of the unit under NRS 107.080 or a foreclosure

sale of the unit under NRS 40.430...."[53] Clearly, an attempt was made to change the requirement of filing a lawsuit as a condition precedent to the existence of a super priority lien to a different condition. The proposed legislation failed and the language of NRS 116.3116 remained intact. In short, the filing of civil action is necessary for the existence of the super priority lien. It is undisputed that Appellant did not file such an action, therefore, it cannot claim a super priority lien.

E. LOCAL AUTHORITIES ALL CONCLUDE THE SUPER PRIORITY LIEN IS LIMITED

In reading the clear language of NRS 116.3116(2), no less than 18 Nevada District Court rulings have declared that NRS 116.3116(2) limits the super priority lien to a figure equaling 9 months of an association's assessments as contained in the periodic budget (either through direct rulings or dicta).[54] Moreover, the U.S. District

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[53] AA0324.

[54] They are as follows:

1. Judge Elizabeth Gonzalez - Case No. A-11-636948-B. RA0205-0210.
2. Judge Mark Denton - Case No. A-12-647850. AA0967-0974.
3. Judge Jerry Tao - Case No. A677693. RA0263-0282.
4. Judge Abbi Silver - Case No. A-12-658044. RA0211-0217.
5. Judge Susan Scann - Case No. A-11-651107. RA0218-0224
6. Judge Abbi Silver - Case No. A675178. RA0477-0485
7. Judge Nancy Allf - Case No. A-12-666569. RA0246-0253
8. Judge Abbi Silver - Case No. A-12-660328. RA0254-0262
9. Judge David Barker - Case No. A-12-663304. RA0284-0288
10. Judge Doug Smith - Case No. A-12-664235. RA0289-0298
11. Judge Janet Berry - Case No. CV12-02254. RA0299-0304
12. Judge Stephany Miley - Case No. A-13-675032. RA0305-0312
13. Judge Nancy Allf - Case No. A-13-676349. RA0313-0318
14. Judge Nancy Allf - Case No. A-13-679289. RA0340-0345
15. Judge Kathleen Delaney Case No. A-13-681538. RA0328-0332
16. Judge Gloria Sturman - Case No. A-13-680828. RA0333-0339
17. Judge Nancy Allf - Case No. A-13-688919. RA0490-0495
18. Judge Susan Scann - Case No. A-12-669423. RA0486-0489

Court for Nevada has consistently ruled that the super priority lien is limited to a figure equaling 9 months of assessments.[55]

Moreover, in response to a Petition for Advisory Opinion filed by Prem Investments, LLC., with the Nevada Department of Business and Industry in 2010, NRED published an advisory opinion concluding that the super priority lien is limited to a figure equaling 9 months of an association's assessments.[56] It should be noted that in 2010 Prem Investments, LLC was not a party in any action before the District Court, or any administrative agency arbitration proceeding concerning NRS 116.3116, and, therefore, had an absolute legal right under NAC 232.040 to request the advisory opinion and declaratory order.[57] In response to the Petition, in December of 2012, Adv. Op. 13-01 was published by the Nevada Real Estate Division concluding the super priority lien is capped at a figure equaling 9 months of assessments.[58] Pursuant to NAC 232.030, the Department of Business and Industry may assign to any of its agencies the task of responding to such Petitions. Thus, it is most troubling that both Appellant and the Amicus Curiae represent to this Court that NRED's Advisory Opinion was issue "sua sponte" and "in the absence of any petition...." (Amicus Brief, pg. 12). The Petition is appended to these briefs and

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[55] See *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 2:13-CV-00164-RCJ, 2013 WL 2460452 (D. Nev. June 6, 2013) reconsideration denied, 2:13-CV-00164-RCJ, 2013 WL 3943915 (D. Nev. July 30, 2013). See also *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 2:13-CV-00506-PMP, 2013 WL 5780793 (D. Nev. Oct. 28, 2013). See also *First 100, LLC v. Wells Fargo Bank, N.A.*, 2:13-CV-431 JCM PAL, 2013 WL 3678111 (D. Nev. July 11, 2013). See also *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, 2:12-CV-00949-KJD, 2013 WL 531092 (D. Nev. Feb. 11, 2013).

[56] RA0225-0245

[57] NAC 242.040.

[58] RA0225-0245

presumably is in the possession of both Appellant and the Amicus Curiae.[59] In addition, NRED's Advisory Opinion has appended to it a letter from NRED to the petitioning party stating, "Enclosed, please find the Division's Advisory Opinon #13-01 issued in response to your request for an advisory opinion on the question posed concerning the super priority lien in NRS 116.3116.")[60]

The legislature has granted to NRED the authority to publish advisory opinions and declaratory orders pursuant to Nev. Rev. Stat. Ann. § 116.623 (West). Further, courts shall take "great deference" to agency interpretations of Nevada statutes over which they have jurisdiction. (*Imperial Palace v. State, Dep't Taxation*, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992); *Dep't of Taxation v. Daimler Chrysler*, 121 Nev. 541,549, 119 P.3d 135, 139 (2005); *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 101, 127 P.3d 1057, 1070 (2006). Also, this Court has recently ruled that NRED is the exclusive administrative agency to interpret NRS 116 and issue advisory opinions. *State, Bus. & Indus. v. Nev. Ass'n Servs.*, 57470, 2012 WL 3127275 (Nev. Aug. 2, 2012).

On December 12, 2012, NRED issued an Advisory Opinion which asked and answered the following question:

> QUESTION #2:
>
> Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, plus charges incurred by the association on a unit pursuant to NRS 116.310312?[61]

NRED's answer was as follows:

> SHORT ANSWER TO #2:

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[59] RA0050-0069

[60] RA0225

[61] RA0226.

> No. The language in NRS 116.3116(2) defines the super priority lien. The super priority lien consists of unpaid assessments based on the association's budget and NRS 116.310312 charges, nothing more. The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines, or interest. References in NRS 116.3116(2) to assessments and charges pursuant to NRS 116.310312 define the super priority lien, and are not merely to determine a dollar amount for the super priority lien.[62]

NRED's reasoning for the conclusion that the super priority lien is limited to a figure equaling 9 months of assessments (plus external unit repair charges permitted by NRS 116.310312) is well enunciated in its Advisory Opinion 13-01 and shall not be repeated here. As this Court has ruled, "We review issues pertaining to statutory construction *de novo*. We nonetheless defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Dutchess Bus. Servs., Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

In light of the overwhelming authority in support of the lower court's ruling, and in light of the clear and unambiguous language of NRS 116.3116(2), and in light of the deference to be given agency opinions over statutes within their jurisdictions, this Court should affirm the lower court's ruling that the super priority lien is limited to a figure equaling 9 months of assessments as contained in its period budget (provided the institution of an action has been commenced) plus external repair costs provided by NRS 116.310312.

F. THE CCICCH'S "ADVISORY OPINION" IS A FUGITIVE DOCUMENT, VOID OF LEGAL FOUNDATION, PUBLISHED WITHOUT LAWFUL PETITION, AND AUTHORED BY THE CHAIRMAN OF THE CCICCH WHO WAS ALSO THE ATTORNEY FOR THE COLLECTION AGENCY THAT REQUESTED THE ADVISORY OPINION

Appellant and the Amicus Curiae rely heavily upon an Advisory Opinion

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[62] RA0227.

published by the Commission for Common Interest Communities and Condominium Hotels ("CCICCH") and drafted by it Chairman, attorney Michael Buckley, Esq. Appellant argues that the "lower court gave absolutely no consideration-much less deference to an Advisory Opinion rendered by the CCICCH ("CCICCH Opinion") on this very point. On that basis alone, the lower court committed reversible error." (Opening Brief, 33). However, the lower court did consider the CCICCH Opinion. Indeed, as was argued in the lower court:

a. The CCICCH Opinion did not directly opine upon issue that was actually before the lower court (is there a cap on the super priority lien);

b. The CCICCH Opinion was procured through an apparent conflict of interest (the Chairman was the attorney for the collection agency requesting the Opinion) and in violation of NAC 262.040(4) as the collection agency was a party to two litigations concerning the issues contained in the CCICCH Opinion at the time it requested the Opinion;

c. There is no evidence that the collection agency ever drafted and filed with the Department of Business and Industry a Petition for Advisory Opinion violating the Nevada Administrative Code;

d. The CCICCH had no statutory authority to issue advisory opinions.[63]

i. The CCICCH's Advisory Opinion is Not Relevant

Most fundamentally, the CCICCH Opinion is not relevant to and did not opine upon the issue of whether there is a cap on the super priority lien pursuant to NRS 116.3116(2) (the issue before the lower court and this Court). The CCICCH Opinion opined upon a completely different legal issue than was before the lower court.

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[63] AA0767-0769.

Specifically, the Opinion asked the following question:

> May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?[64]

The CCICCH Opinion answered the question by stating that an, "... association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313."[65] Of great note, the CCICCH only answered the question as to what the super priority lien may include (or consist of,) not whether there is a cap on the super priority lien of a figure equaling 9 months of assessments plus external repair costs. The latter issue is the matter currently on appeal. Indeed, what the constituent elements of the super priority lien are is currently being litigated in NRED's and the FID's suit against various collection agencies (State of Nevada v. Nevada Association Services).[66] Department 29 is due to rule upon that issue in the months to come. However, the present appeal does not concern that inquiry. Here we ask what is the limit of the super priority lien, not of what does it consist.

ii. The CCICCH Advisory Opinion was a Result of an Apparent Conflict of Interest

On December 8, 2010, the CCICCH published the CCICCH Opinion which was requested by RMI Management,[67] a large association collection agency which also happened to be a client of the Jones Vargas law firm[68] whose partner, Michael

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[64] AA0455.

[65] AA0455.

[66] RA0346-0370.

[67] See Minutes of CCICCH December 8, 2010 hearing RA0383-0388, at 0385.

[68] See Minutes of CCICCH December 8, 2010 hearing RA0383-0388, at 0385.

Buckley, Esq., also happened to be the Chairman of the CCICCH and the author of the Advisory Opinion in question (he wrote the Opinion, but abstained from voting on it).[69] Also, at the time of the request for the CCICCH Opinion, RMI was a Respondent in NRED ADR No. 10-87 which concerned the issue of whether the super priority lien was capped[70] and RMI also happened to be a Plaintiff in the case of RMI Management v. State of Nevada (Case No. A630298) which concerned similar issues. NAC 262.040(4) was blatantly violated because at the time RMI requested the CCICCH Opinion, RMI was engaged in litigation against a group of investors over the issues related to collection costs and the super priority lien.[71] This put RMI's and Commissioner Buckley's actions in requesting and publishing the CCICCH Opinion in direct contravention to NAC 232.040(4) and quashes any argument that the Opinion was lawfully obtained. NAC 232.040(4) states, "An interested person may not file a petition for a declaratory order or an advisory opinion concerning a question or matter that is an issue in an administrative, civil or criminal proceeding **in which the interested person is a party**." Thus, in the case where the petitioner is a party to an administrative, civil or criminal proceeding concerning the subject of the petition, the petitioner is precluded from requesting an advisory opinion or declaratory order. Utterly disregarding NAC 262.040(4), litigant RMI requested the advisory opinion right in the middle of litigations concerning the very issue contained in the advisory opinion.

iii. RMI did Not File a Petition for Advisory Opinion with the Director of Department of Business and Industry or the Chief of NRED

NAC 232.040(1) and (2) were also violated because RMI did not file a petition

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[69] See Minutes of CCICCH December 8, 2010 hearing RA0383-0388, at 0385.

[70] RA0112-0116, ADR 10-87.

[71] NRED ADR No. 10-87 (which is still ongoing) and which is the subject of another Nevada Supreme Court Appeal (Case No. 60000).

for advisory opinion with the Director of Business and Industry or the Chief of NRED, but simply requested the CCICCH (whose Chairman was its lawyer) to issue such an Opinion.[72] In fact, there is no evidence that RMI filed any petition with anyone. It merely requested to be put on the CCICCH's agenda one day, and the CCICCH Opinion was published the next day. Interestingly, in mistakenly asserting that NRED's Advisory Opinion was issued without a Petition, the Amicus Curiae is quick to argue therefore that, "... the Division exceeded its statutory authority when it issued an advisory opinion on this topic." (Amicus Brief, pg. 12). While the Petition for Advisory Opinion which prompted NRED's Advisory Opinion is appended hereto (RA0050-0069), it is with some irony that the CCICCH Opinion was published with absolutely no known Petition and, applying the Amicus Curiae's own argument, the CCICCH exceeded its authority in so publishing the CCICCH Opinion.

iv. No Legal Authority Exists for the CCICCH to Issue Advisory Opinions

There is no legal authority for the CCICCH to publish advisory opinions. What governmental agencies can issue advisory opinions regarding NRS 116? It is Real Estate Division of the Department of Business and Industry. The law is specific on this issue.

> The Division shall:
>
> (a) Respond to a petition filed pursuant to this section within 60 days after the date on which the petition is submitted for consideration; and
>
> (b) Upon issuing its declaratory order or advisory opinion, mail a copy of the declaratory order or advisory opinion to the petitioner. Nev. Rev. Stat. Ann. § 116.623 (West)

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[72] NAC 232.010 Definitions. (NRS 233B.040) As used in NAC 232.010 to 232.140, inclusive, unless the context otherwise requires:

1. "Chief" means the chief of a division of the Department.
2. "Department" means the Department of Business and Industry.
3. "Director" means the Director of the Department.

Conspicuously absent from NRS 116.623 is any reference to the CCICCH. In short, unlike the clear authorization for NRED to issue advisory opinions, Nevada has no statute or regulation specifically authorizing the CCICCH to issue advisory opinions. It is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over that which applies only generally. *Andersen Family Associates v. Hugh Ricci*, P.E., 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008). NRED has issued its advisory opinion in the form of Adv.Op. 13-01 declaring the super priority lien capped at 9 months of assessments and declaring that no collection costs may be included in a homeowners' assessment lien.[73]

It is also important to note that in response to the CCICCH's own request to the Attorney General for an opinion on whether the CCICCH has authority to publish advisory opinions, the Attorney General has cited NRS 116.623 and has advised the CCICCH, "NRS 116.623 imposes the specific duty on, and gives sole authority to, the Division, not the Commission, to respond to petitions for declaratory orders and advisory opinions... Pursuant to NRS 116.623, the Division, not the Commission, has the sole authority to issue advisory opinions as to the applicability of any statutory provision, agency regulation, or decision related to the Uniform Common-Interest Ownership Act."[74]

In addition, while Appellant is correct that the CCICCH may determine how much a homeowners' association may charge a homeowner for the collection of delinquent assessments,[75] the CCICCH has no authority to determine what can be included in a homeowners' association's lien. There is no statute or regulation

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[73] RA0225-0245

[74] RA0496-0499

[75] NRS 116.310313, "The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section."

permitting the CCICCH to set the amounts or constituent elements of association liens. That issue has already been determined by statute (NRS 116.3116). Pursuant to NAC 116.470, the CCICCH has defined what an association can charge a homeowner in the collection of delinquent assessments. However, NRS 116.3116(1) defines of what the homeowners' association's lien may be composed, and in the event of the foreclosure of a first security interest holder, NRS 116.3116(2) prioritizes that amount to the extent of a figure equaling 9 months of an association's assessments based upon its periodic budget plus certain statutorily permitted external repair costs. In short, the CCICCH was only tasked with determining what a homeowners' association may charge a homeowner for the costs of collection,[76] not what may be included in the general or super priority lien. Regardless, the issue on appeal is not what are the constituent elements of the super priority lien, but it is whether the super priority lien is capped. This Court should no deference to a CCICCH Opinion which did not answer the question before this Court, which was procured through an apparent conflict of interest, which was procured in violation of NAC 262.040(4), which has no authority under law to be published, and wherein no petition was ever actually filed with the Department of Business and Industry. Rather, this Court should look to NRED's Advisory Opinion which was properly petitioned for and lawfully issued.

G. PRECEDENT FROM OTHER STATES CONFIRM THE SUPER PRIORITY LIEN IS LIMITED

In 1991, both Nevada and Colorado adopted the UCIOA with language mirroring UCIOA Section 3-116 (1982 version). As noted by the Colorado Supreme Court, "The Colorado Common Interest Ownership Act was originally adopted in 1991.... to provide stability to the finances of common interest communities by granting them a super-lien for unpaid assessments, and to provide uniformity and

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[76] NRS 116.310313.

predictability to lenders in order to promote the availability of financing." *BA Mortg., LLC v. Quail Creek Condominium Ass'n, Inc. 192 P.3d 447, 450 (Colo.App.,2008).*

The Colorado Court of Appeals concluded that the super priority lien is limited to a finite number of months of assessments.

> The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" **merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien**. *First Atlantic Mortg., LLC v. Sunstone North Homeowners Ass'n 121 P.3d 254, 255 -256 (Colo.App.,2005).*

Thus, the words "to the extent of" (found in both Nevada's and Colorado's §3-116) limit the maximum amount of all assessments and charges which can comprise the super priority lien to an amount which does not exceed 9 times (6 times in Colorado) the association's monthly assessment amount. The Colorado Appellate Court affirmed its ruling in *First Atlantic* in its 2008 case of *BA Mortg., LLC v. Quail Creek Condominium Ass'n, Inc.* 192 P.3d 447, 450 (Colo.App.,2008).

Therefore, so long as the total of all assessments and permissible charges do not exceed the limit of an amount equal to 9 months (6 months in other states) of assessments, the super priority lien cap is not exceeded. The Colorado Appellate Court, applying Colorado Code Section 38-33.3-116 (which is very similar to Nevada's NRS 116.3116,) made clear that the 6 or 9 month assessment total is a super priority limit which cannot be exceeded. This was "... to provide uniformity and predictability to lenders in order to promote the availability of financing." *Id.*

Law professors who have written on this subject agree. The super priority lien is limited. Professor James Winokur (quoted by the Colorado courts,)[77] in his treatise, "Meaner Lienor Community Associations: The "Super Priority" Lien and Related

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[77] *First Atlantic Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005)

Reforms Under the Uniform Common Ownership Act," *27 Wake Forest L. Rev.353*, states as follows:

> In its most heralded break with traditional law, UCIOA grants the association a lien priority over first mortgages recorded before any assessment delinquency "to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding an action to enforce the lien...."
>
> The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come within the Prioritized Lien. *(James Winokur, Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act, 27 Wake Forest L. Rev.353.)*[78]

Professor Winokur authored another article in 1998 wherein he affirmed the clear language of the super priority lien statutes as mandating "limited" liens. He wrote, "The special priority accorded by UCIOA to a portion of association assessment liens is limited to the extent it is based on such a [periodic] budget." *Critical Assessment: The Financial Role of Community Associations, James L. Winokur, 38 Santa Clara L. Rev. 1135, 1151 (1998)*. "These "super priority" lien provisions provide a limited first priority for up to six months of unpaid assessments over almost all other liens, including "a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent." *Id.*, 1157. More recently, Professor Andrea Boyack, Visiting Professor of Law at Fordham University Law School and former Visiting Professor of Law at George Washington University Law School wrote concerning the super priority lien limit:

> The drafters of the Uniform Common Interest Ownership Act ("UCIOA"), recognizing that assessment liens would ordinarily be junior in priority to individual first mortgage

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[78] AA0397-0434

> liens, crafted an "innovative" solution to the problem of assessment nonpayment during mortgage default: the six-month "limited priority lien." The UCIOA model, which has been adopted by eight states to date, provides that an assessment lien, which is normally subordinate in priority to first mortgages on units, is given limited priority upon foreclosure of the first priority mortgage lien "to the extent the common expense assessments based on the periodic budget adopted by the association . . . would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien." Thus, **an association under UCIOA would have a priority position arising at a mortgage foreclosure sale for unpaid assessments up to an amount equal to six months of regular-assessment assessments.** *Community Collateral Damage: A Question of Priorities, Andrea J. Boyack, Loyola University Chicago Law Journal [Vol. 43, 2011]*[79]

Thus, in conformity with all published opinions on the matter, legal scholars agree that the super priority lien is capped. Indeed, courts from around the country which have addressed the issue of the super priority lien have consistently ruled that the super priority lien is capped at a figure equaling 6 months of assessments (9 months in Nevada).[80] Unless a specific statutory amendment provides otherwise (for example, Connecticut's 1991 amended law stating, "**and (B) the association's costs and attorney's fees in enforcing its lien**." C.G.S.A. § 47-258, see below), the super priority portion of an association's lien that can survive extinguishment by a foreclosing first security interest holder is limited.

H. THE 1991 CONNECTICUT AMENDMENT AND THE 2008 UCIOA AMENDMENT

In 1991, Nevada and Colorado adopted the UCIOA with language mirroring UCIOA Section 3-116 (1982 version). Connecticut also adopted a version of the UCIOA, but with a significant and fundamental amendment to §3-116. This

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[79] RA 0117-0204

[80] *Hudson House Condo. Ass'n, Inc. v. Brooks*, 223 Conn. 610, 616, 611 A.2d 862, 865 (1992); *Connecticut Nat. Bank v. Ridgeway* 1990 WL 284007, 2 (Conn.Super.) (Conn.Super.,1990); *Trustees of MacIntosh Condominium Ass'n v. F.D.I.C.* 908 F.Supp. 58, 63 (D.Mass.,1995)

amendment was adopted by Connecticut in 1991 (see C.G.S. Section 47-258(b) as amended by No. 91-359 of the Public Acts of 1991).

NV Super Priority Language	**CT Super Priority Language**
The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.	The lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of (A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection **and (B) the association's costs and attorney's fees in enforcing its lien.**

As can be observed, Connecticut added a new provision to UCIOA's Section 3-116, which Nevada did not adopt.[81] While in 1991 Nevada's super priority lien was limited to the extent of an amount equal to just 6 months of assessments only, the Connecticut legislature intentionally permitted adding the association's costs and attorney's fees on top of the 6 month assessment figure. Along with the six months of assessments, Connecticut added to the super priority statute, "... **and (B) the association's costs and attorney's fees in enforcing its lien.**"[82] This is a fundamental distinction between Connecticut's law, and the laws of the state of Nevada. It should be noted that in 2008, the UCIOA was amended to conform to

[81] NRS 116.3116

[82] C.G.S. Section 47-258(b)

Connecticut's amended language.[83] Although the Nevada legislature had multiple opportunities to amend NRS 116.3116 to conform to Connecticut's amended statute and the newly amended 2008 UCIOA, it chose not to on each such occasion.[84]

I. APPELLANT BADLY MISCONSTRUES THE HOLDING IN THE CONNECTICUT CASE OF *HUDSON HOUSE*. THERE IS NO CASE LAW IN ANY STATE THAT SUPPORTS APPELLANT'S POSITION

As their sole, published, case law for the proposition that the super priority portion of an association's lien can consist of both 9 months of assessments plus the addition of collection costs on top of the 9 month figure, Appellant and the Amicus Curiae cite *Hudson House Condominium Association v. Brooks, 223 Conn. 610, 611 A.2d 862 (1992)*. A case decided prior to Connecticut's unique statutory amendment allowing for attorney's fees in addition to the 6 month assessment figure, Appellant claims that the Supreme Court of Connecticut ruled that attorneys' fees/costs must be included in the super priority lien amount in addition to, not capped by, the applicable period of common expense assessments. This is a gross misinterpretation of the holding of *Hudson House*, a case which wholly and completely supports the conclusion that the super priority lien is capped at a finite figure.

In the Connecticut case, the plaintiff, Hudson House Condominium Association, Inc. ("HHCA,") began a civil foreclosure action at the trial court level to foreclose its statutory lien for delinquent common expense assessments which were due on a condominium unit owned by the named defendant, Michael B. Brooks ("Brooks"). *Id.*, at 612. HHCA's monthly assessments were only $95. *Id.*, at 613. However, HHCA calculated Brooks' delinquent debt at a total of $1,995.00 plus attorneys' fees and costs of collection. *Id.* The trial concluded that only six months of common expense assessments, i.e., $570, together with interest, were entitled to the statutory priority over the first mortgage. *Id.* In addition, even though HHCA

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[83] RA0030-0049, 2008 Amended UCIOA at RA0038

[84] See Section J.

filed a "civil action," the trial court refused to include HHCA's attorney's fees and costs in the amount entitled to priority. *Id.*

Even though HHCA argued that it was unjust to limit the super priority lien to only 6 months of assessments as against the first security interest holder (HHCA being damaged more than that by Brooks, the borrowers/owner,) the Connecticut Supreme Court upheld the lower court's ruling regarding the super priority lien limit and stated:

> HHCA further argues that CHFA [the first security interest holder] will be unjustly enriched if we interpret § 47–258 to limit the priority lien to six months of common expense assessments. In construing a statute, "we follow the 'golden rule of statutory interpretation' ... that the legislature is presumed to have intended a reasonable, just and constitutional result." [cite omitted] When the statute is clear, however, the appropriate rule is that one cannot be unjustly enriched by a statutory enactment. 66 Am.Jur.2d 946, Restitution and Implied Contracts § 3. While the plaintiff may disagree with the equities of limiting the § 47–258(b) priority to six months of common expense assessments, this is a matter not for the judiciary, but rather for the legislature that enacted the statute. We conclude that the trial court correctly determined that HHCA's priority debt was limited to the common expense assessments that accrued in the six months immediately preceding the commencement of the foreclosure. *Hudson House Condo. Ass'n, Inc. v. Brooks*, 223 Conn. 610, 615-16, 611 A.2d 862, 865 (1992)

Thus, contrary to Appellant's and the Amicus Curiae's reading of the *Hudson House* case, the Connecticut Supreme Court upheld the lower court's ruling that the super priority lien is capped at 6 months of assessments. So then how is it that the Connecticut Supreme Court overturned the trial court's ruling that attorney's fees and costs should not be granted to HHCA?

The answer is simple. The Connecticut Supreme Court held that pursuant to another provision of Connecticut law (Section 47-258(g)), when as association obtains a judgment, (as in a judgment in a judicial foreclosure action in a court of law) only then can an association obtain both 6 months of assessment plus fees and

costs. Nevada has the same law codified at NRS 116.3116(8) ("A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party."). In overturning the trial court's refusal to award fees and costs pursuant to HHCA's judicial foreclosure action, the Connecticut Supreme Court stated:

> Section 47–258(g) provides that a "judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party." It is undisputed that HHCA, as the plaintiff and the party in whose favor the trial court rendered judgment, is the prevailing party in this, its own foreclosure action. *Hudson House Condo. Ass'n, Inc. v. Brooks*, 223 Conn. 610, 616, 611 A.2d 862, 866 (1992)

Thus, pursuant to the statute that permits fees and costs to a prevailing party in a court action, the Connecticut Supreme Court overturned the trial court's denial of such fees and costs to HHCA (it did prevail at trial, at least to the extent of 6 months of assessments). For if after expending fees and costs in obtaining a judgment in a court of law, the lower court concludes that it should not award attorneys' fees and costs even though Section 47-258(g), mandates such an award to a prevailing party in that civil action, it would be like "fashioning a bow without a string or arrows." *Id.*, at 617. In short, nowhere did the Connecticut Supreme Court hold that an association can obtain both collection costs and 6 months of assessments as a matter of course, without first obtaining a judgment. In fact, in applying the original UCIOA that Nevada adopted, no Supreme Court or Appellate Court anywhere has ever so held. There is simply no question that in Connecticut (and Nevada) if an association obtains a judgment against the lender, and the lender retakes the property through foreclosure, that attorney's fees and costs may be added to the 6 (or 9) month assessment figure as against the foreclosing lender. Indeed, there is a specific statute that allows for it. However, the obvious distinction between the case at bar and *Hudson House* is the fact that in *Hudson House*, the homeowner's association obtained a judgment allowing it to get attorney's fees and costs under Section 47-

258(g), and in this case Appellant did not received any judgment whatsoever. Therefore, pursuant to both Connecticut's statute as originally adopted (before the amendment) and Nevada's current statute, if Appellant obtained no judgment against the lender or investor, then no collection or attorney's costs can added on top of the 6 or 9 month cap. In no uncertain terms, the *Hudson House* court specifically held the super priority lien is limited to 6 months of assessments, unless an association obtains a civil judgment. Appellant and the Amicus Curiae fundamentally misinterpreted the holding in *Hudson House* and misinforms this Court as to its holding.

Ultimately, the Connecticut legislature changed its super priority statute to allow for both 6 months of assessments plus attorney's fees and costs (adding the words 6 months of assessments "... and (B) the association's costs and attorney's fees in enforcing its lien."[85] Of course, Nevada has not amended its super priority lien statute to allow for both 9 months of assessments plus collection costs even though it had 3 successive opportunities to do so.

J. IN 2009, 2011 AND 2013, PROPOSALS WERE INTRODUCED TO AMEND NRS 116.3116 TO ALLOW FOR COLLECTION COSTS ON TOP OF THE SUPER PRIORITY LIEN, BUT LEGISLATIVE PROPOSALS WERE REJECTED ON ALL OCCASIONS

It is important to note that the UCIOA was amended in 2008 so that, "... reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien...." would be added on top of the 6 month cap.[86] Nevada never adopted that change although it had multiple opportunities to do so.

In Nevada, prior to October 1, 2009, the super priority portion of an association's lien was limited to a figure equaling just 6 months of assessments. On October 1, 2009, NRS §116.3116(2) was amended by the Nevada legislature in two

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[85] C.G.S. Section 47-258(b)

[86] RA0030-0049, 2008 Amended UCIOA at RA0038

important ways. First, it increased the super priority portion of the lien to a figure equaling 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS §116.3115 (see Nevada Assembly Bill 204). Also, in calculating the super priority portion of the lien, it allowed to be added any charges incurred by the association on a unit pursuant to NRS §116.310312 (repair expenses of a unit) (see Nevada Assembly Bill 361).

Previously, however, in March of 2009, an attempt was made to change Nevada's super priority lien law to be the same as Connecticut's amended super priority lien statute and that of the 2008, revised UCIOA (which now allows in the super priority portion of the lien both six months of assessments plus attorney's fees and costs). The law firm of Holland & Hart introduced a new legislative amendment in the Seventy Fifth Session of the Assembly Committee on Judiciary. In a letter from Holland & Hart was the proposed wording of the legislative amendment lobbied for by Attorney Buckley and Holland & Hart.[87] Following is the language of the proposed amendment to NRS 116.3116 (which was **not adopted** by the Nevada legislature). The bold portions are the additions sought by Holland & Hart:

> ***3. A*** ~~The~~ lien ***under this section*** is also prior to all security interests described in paragraph (b) ***of subsection*** 2 to the extent of ***both*** the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 1 16.3 1 15 which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien ***and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.***[88]

The obvious question raised by the above proposed revision to NRS 116.3116 is this: **why would an amendment allowing the super priority portion of the lien to equal 6 months of assessments plus attorneys fees and costs be needed if the current law already allowed for it?** Indeed, if NRS 116.3116(2) stated that costs can be

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[87] AA0519-0520

[88] AA0521.

added on top of the super priority lien, the statutory amendment allowing for the addition of costs would not have been needed. In 2009, the Nevada legislature rejected the proposed amendment. Instead, the Nevada legislature increased the super priority lien cap to an amount equal to 9 times the association's monthly assessments, up from 6 times, and also added unit repairs costs under NRS §116.310312 to the super priority lien.

In 2011, Senator Allison Copening proposed Senate Bill 174 which largely attempted the same thing. In the proposed legislation, Senator Copening wanted the Super Priority Lien to equal 9 months of assessments, "**and fees not to exceed $1,950 to cover the cost of collecting a past due obligation which are imposed pursuant to NRS 116.310313...**"[89] Again, the obvious question raised by the proposed revision to NRS 116.3116(2) is this: **why would an amendment be needed to add collection fees on top of the Super Priority Lien if the existing law already allowed for it**? As in 2009, the proposed changes were rejected. Finally, in 2013, an amendment was proposed to NRS 116.3116(2) to permit the super priority lien to be raised from the limit of 9 months of assessment to also include, "... fees not to exceed the amounts set forth in NRS 116.310313 to cover the cost of collecting the past due obligation...."[90] For a third time, the legislature rejected such an amendment. In short, unlike the State of Connecticut and the Amended 2008 UCIOA, Nevada has never amended NRS 116.3116 to permit costs of collection to be added on top of the limited super priority lien. Instead, in 2009, it increased the limited 6 month figure to 9 months and permitted certain external repair costs. Based on the plain language of NRS 116.3116, legislative intent, and the comments to the UCIOA, Nevada's super priority lien is limited to a figure equaling 9 months of assessments based upon its period budget (presuming it instituted an action to enforce its lien) and exterior repair costs

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[89] AA0324.

[90] AA0324

pursuant to NRS 116.310312.

K. APPELLANT'S CITE TO REGULATION NAC 116.470 ALLOWING HOMEOWNERS' ASSOCIATIONS TO CHARGE HOMEOWNERS COLLECTION COSTS OF $1,950.00 IS A RED HERRING

A "Red Herring" has been defined as "something intended to divert attention from the real problem or matter at hand; a misleading clue." (See Dictionary.com). Appellant's cite to a 2011 CCICCH regulation which caps the amounts and defines the types of collection costs which can be charged to a homeowner by a homeowners' association is a Red Herring. This regulation has nothing to do with whether the super priority lien is capped pursuant to NRS 116.3116(2). In fact, it does not even state that collection costs can be included in the general homeowners' association's lien pursuant to NRS 116.3116(1). It merely defines how much a homeowners' association can charge a homeowner for the "costs of collecting."

Indeed, prior to 2011, a homeowners association could charge whatever collection costs it decided to charge (as permitted by its CC&RS). Regardless, whether a homeowners' association can charge its homeowners $1.00 or $5,000.00 in collection costs, once a first mortgage holder forecloses on the homeowner's property, NRS 116.3116(2) is triggered and the super priority lien cap must be applied. In short, it makes no difference what an association charges in collection costs to the homeowner, once the home is foreclosed upon by the first security interest holder, the association's lien is extinguished but for a figure equaling 9 months of assessments plus certain external repair costs (see NRS 116.3116(2)).

Therefore, the lower court did not ignore NAC 116.470 (Opening Brief, pg. 16). The lower court merely recognized that the collection costs referred to therein have nothing to do with the super priority lien calculation. Appellant asks a question at pg. 39 of its Opening Brief, "Why would the CCICCH have bothered to impose such a cap if there was already a strict 'nine times monthly assessment' numerical cap under NRS 116.3116(2)...?" The answer is simple. It is to define the amount of collection costs for which a homeowner would be liable to his association

if the association incurred costs in collection his delinquent assessments.[91] Whether these collection costs can be included in the general homeowner's association lien is another question. As noted above, there is no provision in NRS 116.3116(1) including "costs of collection" in the general lien. There is no reference to "costs of collection" or NAC 116.470 or NRS 116.310313 in the statute creating the lien (NRS 116.3116(1)). Certainly a homeowner may owe such costs to an association, but such costs do not become part of the general lien. Most importantly for this appeal, however, is NRS 116.3116(2). Regardless of what the constituent elements of the general homeowners' association lien are, the "super priority" portion of the lien is capped at a figure equaling 9 months of an association's assessments based on the periodic budget.

L. APPELLANT PROFFERED NO EVIDENCE OF TWO LIENS IN THE CASE BELOW AND THERE IS NO LEGAL SUPPORT FOR SUCH A WHOLLY UNSUBSTANTIATED LEGAL THEORY

Mid-way through the litigation, Appellant had a unique idea. Appellant raised a heretofore un-imagined legal argument, i.e., that there are two super priority liens against every homeowners' property, one *statutory* and one *contractual*.[92] Never mind that it did not claim two liens before this idea. Never mind that it could not produce two liens or two lien demands (one contractual and one statutory). Never mind that it produced no affidavit from anyone on the board of directors affirming an understanding that Appellant had claimed two liens. Never mind that the Notice of Delinquent Assessment Lien that Appellant filed referred to a only single lien (albeit

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[91] *See also* NRS 116.310313(1), "An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section."

[92] AA1668-1754.

with two legal basis.)[93] Appellant's argument was akin to arguing that since a homeowners' trust deed permits foreclosure of the lender's note under contract (i.e., under the promissory note and trust deed,) and also NRS Chapter 107 permits foreclosure of the lender's note, there must be two separate debts owing, and not one. The incredulity of this argument requires little response other than to say there is but one super priority lien, and two references to it.

As noted in the Factual and Procedural History Section of this brief, Section 7.9 of the CC&RS mirrored the language of NRS 116.3116, made direct reference to NRS 116.3116, and stated that the Appellant's single lien was also "otherwise subject to NRS 116.3116." Also as noted in Section 7.8 of the CC&RS, Appellant's general assessment lien, including interest and costs, is subordinate to the lien of any first mortgage holder but for an amount equal to 6 months of assessments.[94] Thus, Section 7.9 quantified the lien to only a figure equaling 6 months of assessments ("... immediately preceding institution of an action to enforce the lien") which was consistent with the version of NRS 116.3116(2) at that time.

Appellant argues that, "... to the extent the amended statute does not create a separate lien from the CC&Rs, there is an express conflict between the CC&Rs and Nevada law, which specifically directs seniority of the SPL for a nine month period, not six." (Opening Brief, pg. 47). In support of its proposition, Appellant cited NRS 116.1206 which states, "Any provision contained in a declaration, bylaw or other governing document of a common-interest community **that violates the provisions of this chapter**... (a) Shall be deemed to conform with those provisions by operation of law...." The Court should note that the term "violates" is used, not the term "conflicts" as argued by Appellant. In fact, this is a significant point as NRS 116.1206 was amended in 2003 to add the word "violates" and delete the word

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[93] AA0266.

[94] AA0184 at Section 7.8 and 7.9

"conform." The post-2003 version of NRS 116.1206 amended to read as follows (bold italics are additions, strikeouts are deletions):

> 116.1206 1. ***Any provision contained in a declaration***, bylaw or other governing document of a common-interest community ~~[created before January 1, 1992, that does not conform to]~~ ***that violates*** the provisions of this chapter shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.

Many CC&RS provisions may be deemed not to "conform" to NRS 116, but only very few could be deemed to "violate" NRS 116.

Certainly, a homeowners' association could contract with a homeowner (through its CC&RS) to require a lesser amount (or no amount at all) for its super priority lien. Such a provision would not "violate" NRS 116.3116's maximum cap of a figure equaling 9 months of assessments based upon the periodic budget. However, a homeowners' association would not have the right to contract with a homeowner for a higher amount for the super priority lien (for example, 12 months of assessments instead of 9 months of assessments). Such an action would "violate" NRS 116.3116's cap of 9 times the monthly assessments. A more illustrative example is as follows: one does not "violate" the speed limit of 55 mph by traveling at a rate of 45 mph. The driver is free to travel at a lesser speed and does violate the maximum limit by doing so. However, a driver who travels at 65 mph does "violate" the maximum speed limit. Likewise, a homeowners' association which requires a lesser amount (or no amount at all) for its super priority lien, does not "violate" NRS 116.3116's cap of 9 times the monthly assessments.

Appellant claims that despite the unambiguous language of Section 7.8 and 7.9 that caps the super priority lien amount to 6 months of assessments, that collection fees and other costs were never intended to be extinguished by a foreclosure auction of a first deed of trust. (Opening Brief, pg. 44-45). Appellant refers the Court to the affidavit of Lauren Scheer, Appellant's "property manager." While the Affidavit

lacks foundation (there is no evidence Ms. Scheer took part in the drafting of or deliberations over the CC&RS), the self serving affidavit directly contradicts the actual language of Section 7.9 and must be accorded little or no deference ("The lien of the assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit....").

Ultimately, regarding Appellant's "two lien" legal argument, the lower court reviewed the evidence before it and ruled that Appellant had but a single lien[95] "The district court's factual findings... are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence." *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). The lower court had before it Appellant's Notice of Delinquent Assessment Lien which stated that Appellant claimed a single lien (albeit with two references to it, one contractual and one statutory). Appellant produced no evidence that it claimed more than one lien. Thus, based upon the evidence proffered, the District Court found but a single lien.

M. FANNIE MAE AND FREDDIE MAC'S OFFICIAL POSITION IS THAT THE SUPER PRIORITY LIEN IS CAPPED, COLLECTION COSTS CANNOT BE INCLUDED IN THE SUPER PRIORITY LIEN AND 6 MONTHS OF ASSESSMENTS IS THE SUPER PRIORITY LIEN LIMIT

The lead General Counsel for the Federal Housing Finance Agency has specifically stated to Governor Sandoval's former counsel that Fannie Mae and Freddie Mac do not believe collection costs can be added on top of the super priority lien. Alfred M. Pollard, General Counsel to the FHFA wrote to the Governor's Office:

> I would note Fannie Mae and Freddie Mac have provided for reimbursement of six months of regular common expense unpaid assessments. They do not reimburse for collection costs or attorney's fees.[96]

Thus, regardless of any argument to the contrary, Fannie Mae and Freddie Mac do not

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[95] AA2092.

[96] AA0538-0539

accept that the super priority lien is without limit. As noted in fn 45, for the relevant time period herein, Fannie Mae permitted only a 6 months of assessments to equal the super priority lien cap. As NRS 116.3116(2) states, "If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations...."

CONCLUSION

Accordingly, and based on the foregoing, Respondent requests this Court affirm the lower court's rulings.

DATED this 24th day of February, 2014.

ADAMS LAW GROUP, LTD.

/s/ James R. Adams

JAMES R. ADAMS, ESQ.
Nevada Bar No. 6874
8010 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89117
(702) 838-7200
(702) 838-3636 Fax

PUOY K. PREMSRIRUT, ESQ., INC.
Puoy K. Premsrirut, Esq.
Nevada Bar No. 7141
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101
(702) 384-5563
(702)-385-1752 Fax
ppremsrirut@brownlawlv.com

Attorneys for Respondent

VERIFIED CERTIFICATE OF COMPLIANCE

STATE OF NEVADA

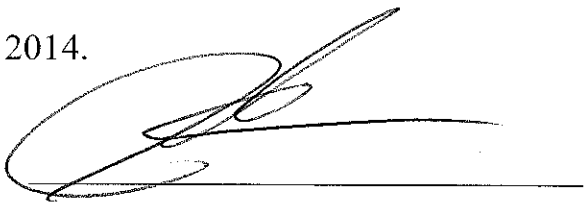
COUNTY OF CLARK

I, James R. Adams, being duly sworn, do hereby depose and say:

1. I am a partner with the Adams Law Group, Ltd., counsel of record for Appellant named in the foregoing Respondent's Brief.
2. I am licensed in the State of Nevada and competent to testify to the matters set forth in this Affidavit.
3. Pursuant to NRAP 28.2, I hereby certify that I have read Respondent's Brief, and to the best of my knowledge, information, and belief verify that the facts stated therein are true, and to those matters that are on information and belief, such matters I believe to be true.
4. I further certify that Respondent's Brief is not frivolous or interposed for any improper purpose and complies with the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page of the appendix where the matter relied on is to be found.
5. Respondent's Answering Brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii), in that it contains no more than 17,000 words. Further, the Brief complies with the formatting requirements of NRS 32(a)(4-6).
6. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

7. I make this verification on behalf of Respondent.

EXECUTED this 24th day of February, 2014.



James R. Adams, Esq.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing RESPONDENT'S ANSWERING BRIEF & RESPONSE TO BRIEF OF AMICUS CURIAE, with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's Efiling system on February 24, 2014. I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

Patrick Reilly, Esq.
Holland and Hart
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134

Kurt Bonds, Esq.
Alverson Taylor Mortensen and Sanders
7401 W. Charleston Blvd.
Las Vegas, NV 89117

J. Randall Jones, Esq.
Kemp, Jones & Coulthard, LLC
3800 Howard Hughes Pkwy, 17th Flr.
Las Vegas, NV 89169

/s/BrandonDalby
An Employee of Puoy K. Premsrirut, Esq. Inc.