

Case No. 63614

In the Supreme Court of Nevada

SFR INVESTMENTS POOL 1, LLC, a
Nevada limited liability company,

Appellant,

U.S. BANK, N.A., a national banking
association as Trustee for the
Certificate Holders of Wells Fargo
Asset Securities Corporation, Mortgage
Pass-Through Certificates, Series 2006-
AR4, a Nevada non-profit corporation,

Respondent.

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Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable SUSAN SCANN, District Judge
District Court Case No. A-13-678814-C

JOINT APPENDIX, VOLUME III

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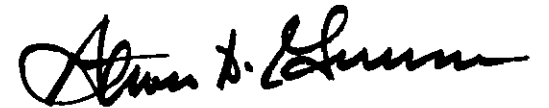
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a
Nevada limited liability company,

Plaintiff,

vs.

U.S. BANK, N.A., a national banking
association as Trustee for the Certificate
Holders of Wells Fargo Asset Securities
Corporation, Mortgage Pass-Through
Certificates, Series 2006-AR4 and LUCIA
PARKS, an individual, DOES I through X;
and ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No. A-13-678814-C

Dept. No. XVIII

**REPLY IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Hearing Date: May 16, 2013
Hearing Time: 8:15 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

An HOA Lien has priority over all encumbrances and liens on a property except those recorded before the HOA was formed and tax and other governmental liens. A first security interest may obtain priority over an HOA Lien by satisfying portions of the HOA Lien representing charges for abatement and 9 months of common assessments. US Bank did not do so in this case and its interest was extinguished by the HOA's foreclosure.

US Bank' borrower has not paid her mortgage on the Property, since November 1, 2009 and has been delinquent on her HOA assessments since before May of 2012. Rather than requiring the borrower to pay the HOA assessments or paying itself as allowed by the deed of trust, US Bank sat back and let the HOA flounder without assessments. US Bank waited almost four years to move forward with foreclosure and only did so after the HOA foreclosed on its lien.

NRS 116.3116(2) was enacted so that assessment-paying homeowners in an HOA community would not have to provide a private bailout to their delinquent neighbors or first security interest holders, like Defendant, who refuse to step up and take care of their collateral.¹ Plaintiff, a Nevada small business, is a bona fide purchaser that relied on the provisions of NRS 116.3116 that give an HOA lien super priority over a first security interest.² Defendant's attempts to demonize Plaintiff for purchasing properties at public auctions with goals of building a successful business while improving the community are unfounded and irrelevant to the statutory interpretation of NRS 116.3116.

Although NRS 116.3116(2) was adopted over 20 years ago, the Nevada Supreme Court has not yet been required to weigh in on how and under what circumstances the foreclosure of an HOA lien that includes super priority amounts affects a bank's first security interest. The current economic climate, along with the failure of banks to either enforce their deeds of trust or to maintain the community by covering the HOA's common assessments has forced struggling HOAs to foreclose on their liens to survive. This relatively new phenomenon of HOA foreclosures of HOA liens has brought the interpretation of the statute to the forefront and to this Court. The fact that for decades, the HOAs rarely exercised their power to foreclose has created the misconception that either no portion of an HOA lien has priority over a first security

¹ For a comprehensive overview of how and why HOA super priority liens were established James Winokur's *Meaner Lienor Community Associations: The Super Priority Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 366-69 (1992) (attached as **Exhibit 1**). Published shortly after the Legislature adopted the Uniform Common Ownership Interest Act ("UCIOA") in 1991, *Meaner Lienor* is considered the definitive law review article on the UCIOA. It is cited by almost every article that deals with the UCIOA and has been referenced multiple times by the Nevada Real Estate Division in its advisory opinions.

² SFR is investing in the community, cleaning up properties, taking care of HOA assessments, paying taxes and providing a valuable service that allows many Nevada residents to remain in their homes with an affordable rent.

interest or that an HOA cannot foreclose on that super priority amount.³ However, the passage of time has not diminished the HOAs statutory authority to enforce its lien through judicial or non-judicial foreclosure.

Plaintiff's request for injunctive relief should be granted because it has a reasonable probability of success on the merits based on the plain language of NRS 116.3116, especially when properly harmonized with the abatement lien provisions in NRS 116.310312 that clearly show the Legislative intent that the super priority amounts in an HOA Lien can extinguish a first security interest through non-judicial foreclosure.

II. LEGAL ARGUMENT

A. Plaintiff Has Demonstrated a Likelihood of Success on the Merits

1. *An HOA Lien with Super Priority Amounts Extinguishes a First Security Interest*

Defendant correctly states that "when a statute is clear on its face, a Court may not go beyond the language of the statute in determining the legislature's intent," but then goes on to cite only a portion of NRS 116.3116(2) to support its proposition that the entire HOA Lien was junior to US Bank' deed of trust. Opp'n 5:17-22. Defendant's analysis is faulty. Because there is no binding authority on this issue, this Court should perform a statutory analysis, beginning with the plain language of NRS 116, to test Defendant's claim that its security interest could not have been extinguished by the HOA foreclosure sale.

Pursuant to NRS 116.3116(1), an HOA has a statutory lien against a unit owner's real property for delinquent assessments. The recordation of the HOA's Declaration of Covenants, Conditions and Restriction (the "Declaration") "constitutes record notice and perfection of the lien." NRS 116.3116(4). As such, "[n]o further recordation of any claim for assessments [under 116.3116] is required." *Id.*

In addition to automatic perfection and notice, a lien for delinquent assessments is

³ The confusion caused by the delay in HOAs using their statutory power to foreclose has caused sales prices at HOA auctions to be artificially low. Once the law is clarified, the market will correct itself and properties will sell for market-rate instead of experiencing the discount caused by the knowledge that a purchaser at an HOA sale also purchases a lawsuit to quiet title.

entitled to priority over virtually all security interests in the Property, **including a first security interest,**

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** of 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.

The Nevada Legislature gave HOAs the power to non-judicially foreclose in NRS 116.31162(1) by following the procedures set forth in NRS 116.31162-31168. Nothing in NRS 116.3116(2) limits the HOA's ability to foreclose on the super priority portions of its lien or requires a first security interest holder to foreclose before an HOA can collect the super priority amounts from the first security interest holder.

In describing what title passed to the purchaser after an HOA foreclosure, the Nevada Legislature used the exact same language in NRS 116.31166(3) as is found in NRS 107.080(5) to describe the type of title passed to a purchaser at a bank foreclosure sale:

NRS 116.31166(3)	NRS 107.080(5)
The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the <u>title of the unit's owner without equity or right of redemption.</u>	Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the <u>title of the grantor and any successors in interest without equity or right of redemption.</u>

Both an HOA foreclosure and a bank foreclosure vest title of the previous homeowner in the purchaser "without equity or right of redemption."⁴ Further, it is axiomatic that the

⁴ According to the Nevada Supreme Court,

sales without equity or right of redemption vest the purchaser with absolute title:

[T]he law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence that the purchaser from him obtains an absolute legal title as complete, perfect and indefeasible as can exist or be acquired by purchase; and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court.

In re Grant, 303 B.R. 205, 209 (Bankr. D. Nev. 2003) (quoting *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867)) (emphasis added).

foreclosure of a superior security interest in real property extinguishes all junior interests. *See Erikson Construction Co. v. Nevada Nat. Bank*, 89 Nev. 350, 352, 513 P.2d 1236, 1238 (1973).

Neither NRS 116 nor NRS 107.080 state that foreclosure of the superior interest extinguishes all junior liens and transfers absolute title to the purchaser. But when a statute states that the foreclosure of superior lien vests in the purchaser title of the previous homeowner without equity or right of redemption, there may as well be bolded and capital letters stating that all junior liens are extinguished and the previous homeowner, together with junior lien holders have no claim to the property. Here, the HOA Lien included amounts that were superior to first security interest. The HOA foreclosure extinguished the first security interest and vested title in Plaintiff subject only to any tax liens or encumbrances recorded before the HOA was formed.

2. *Abatement Charges + 9 Months Delinquent Assessments Make Up the Super Priority Portion of an HOA Lien: NRS 116.3116 Must Be Harmonized with Abatement Provisions found in NRS 116.310312*

Nevada courts "will interpret a rule or statute in harmony with other rules and statutes," *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (quoting *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993)); see also *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) ("[T]his court considers the statute's multiple legislative provisions as a whole ... [and will] not render any part of a statute meaningless.").

Because the super priority provisions of NRS 116.3116 directly incorporate the abatement provisions found in NRS 116.310312, the plain language of NRS 116.3116 must be read in conjunction with the language found in NRS 116.310312.

Consistent with the super priority provision in NRS 116.3116(2), NRS 116.310312 allows an HOA to have a super-priority lien that may be non-judicially foreclosed for maintenance or abatement costs:

4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. **The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.**

5. A lien described in subsection 4 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.

6. Except as otherwise provided in this subsection, **a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116.** If the federal regulations of 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 and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.

NRS 116.310312(4)-(6) (emphasis added).

US Bank's interpretation of NRS 116.3116 that an HOA can never extinguish a first security interest through the non-judicial foreclosure of an HOA lien with super priority amounts renders the last sentence in NRS 116.310312(4) meaningless. Alternatively, US Bank's would require the same words in the same sentence of NRS 116.3116(2) to have two completely different meanings: **"also prior to all security interests described in paragraph (b)"** when referring "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312" would mean that an HOA has a super priority lien that is can foreclose and extinguish a first security interest. At the same time, "to the extent of the assessments for common expenses" would mean that the HOA is only entitled to be paid 9 months of assessments when a first security interest forecloses. This result was not intended by the Legislature.⁵

⁵ The priority language for delinquent assessments has been part of NRS 116.3116(2) since it was first adopted in 1991. See 1991 Nev. Stat., ch. 245, § 100, at 567-568. In 2009, the Legislature passed, and the governor signed into law, A.B. 361 as amended which became NRS 116.310312. See A.B. 361 as enrolled.

NRS 116.310312 was intended to provide HOAs with the power to enter the grounds of a unit to abate nuisances and to lien for the costs of abatement. In establishing an abatement lien's priority, the statute, in pertinent part, provides that **"[e]xcept as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116."** NRS 116.310312(6). The Legislature purposefully chose to borrow the language from NRS 116.3116 to establish an abatement lien's priority. See A.B. 361, Sec. 1, Subsec. 6.

When questioned about the provision that became 116.310312(6) during the Senate Judiciary Committee's hearing on A.B. 361, Michael Buckley, Chairman of the Commission for Common-Interest Communities and Condominium-Hotels, stated that "the intent was to follow the language in NRS 116.3116. . . ." Hearing on A.B. 361, before the Senate Judiciary Comm., 75th Leg. (Nev. May 11, 2009) (Assemblyman Richard McArthur, proponent of AB 361, stated that he "deferred a lot to Mr. Buckley in his technical changes [to the bill]." Hearing on A.B. 361 Before the Senate Judiciary Comm., 75th Leg. (Nev. May 6, 2009), at p. 18) During the hearings, the Committee Chair noted that he had received an e-mail asking why subsection (b) was not included in the types of interests to which the abatement lien would not be prior to, because **"[o]therwise, the HOA lien will take**

An HOA's lien includes two amounts entitled to super priority: charges for abatement and 9 months of common assessments. As shown above, the Legislature intended that both parts may be foreclosed and both parts could extinguish a first security interest. As such, Plaintiff is entitled to injunctive relief.

3. *The Legislature Knows How to Limit HOA Foreclosures; It Did Not Do So in NRS 116.3116*

If the Nevada legislature intended that super priority amounts could never be foreclosed, extinguishing any first security interest, it could have included a provision similar to NRS 116.31162(4) that prohibits an HOA from foreclosing on a lien based on a fine or penalty for violation of the CC&Rs:

The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:

- (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
- (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

The Nevada legislature put no such limitation on the super-priority lien. Nothing in NRS 116.3116, the legislative history, or the comments to the UCIOA mentions the foreclosure of a first deed of trust as being required for the HOA to obtain priority over a first security interest holder or prohibits foreclosure of a super priority lien.

4. *Comments to the Uniform Common Interest Ownership Act Support the Real Estate Division's Position*

If the provisions of NRS 116.3116(2) stating that portions of an HOA Lien are prior to first security interests are construed as ambiguous, then the Court may consider the legislative history, including the comments to the uniform act adopted by the Legislature. NRS 116.3116 is based on Section 3-116 of the Uniform Common Interest Ownership Act (UCIOA). Comment 1

_____ (continued)

precedence over the first security interest lien.” *Id.* The Legislature went on to specifically exclude subsection (b), thereby allowing the abatement charges to have super-priority over the first security interest. The Legislature knew that foreclosing on the abatement lien could extinguish the first security interest as a junior lien, **just like an assessment lien.** As discussed above, it also added language to NRS 116.3116(2) to harmonize the two statutes. The Legislature provided that the HOA super priority abatement amounts, like the super-priority assessment amounts, could be foreclosed by sale. *See* A.B. 361, as enrolled, at Sec. 1, Subsec. 4 (“The lien may be foreclosed under NRS 116.31162 to 116.31168 inclusive.”).

to Section 3-116 illustrates that an HOA can foreclose on its super priority lien, extinguishing a first security interest:

However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 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 6 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. Since the provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.**

See UCIOA (1982), Section 3-116, Comment 1, p. 155 (emphasis added) (attached in **Exhibit 2**).

First, if an HOA sale could never extinguish a first security interest; it does not make sense that "secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit." Similarly, if the holder of a first security interest was only liable for the super-priority amount when it foreclosed, creating an escrow account for HOA assessments, like ones used for taxes and insurance, would be unnecessary. Finally, the UCIOA comment would not warn states to evaluate the statute for conflict with provisions of other state statutes "which forbid some lending institutions from making loans not secured by first priority liens" if the super-priority amount was not actually superior to a first security interest. Most importantly, nothing in the comments suggests that an HOA's power to foreclose on the super priority amounts is limited. Defendant's argument that its security interest can never be extinguished is without merit.

5. The Real Estate Division's Interpretation is Consistent with the Legislative Counsel Bureau's Interpretation of the Effect of an HOA Foreclosure Sale

The Legislative Counsel Bureau confirmed in an opinion letter on December 7, 2012 that a purchaser at an HOA sale takes free and clear of security interests. See LCB Opinion Letter, attached as **Exhibit 3**. "[N]o part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under NRS 116.31164." *Id.* at p. 4. Plainly stated, after an HOA foreclosure sale, a first security interest holder's only recourse is

1 against its borrower personally. Its lien is extinguished and it may not proceed against the
2 property. Not surprisingly, the Legislative Counsel Bureau's interpretation is consistent with the
3 Nevada Real Estate Division's Advisory Opinion issued just days later on December 12, 2012.

4 At a hearing of the Nevada Senate Judiciary Committee on May 6, 2013, Gail Anderson,
5 Administrator of the Real Estate Division provided the following testimony confirming the Real
6 Estate Division's position that the non-judicial foreclosure of an HOA Lien containing super
7 priority amounts extinguishes a first security interest:

8 The super priority lien comes into play in two situations—when the association
9 forecloses ahead of a first security and when a first security forecloses ahead of
10 the association. If the first secured forecloses its lien ahead of the association, the
11 amount of the super priority lien would remain a lien on the unit. When the
12 association forecloses before the first security, the issue is whether the first
13 security is extinguished. **The Division believes the purpose of the super
priority lien is to give associations leverage over a first security. For that
reason, the Division takes the position that the association's foreclosure of its
super priority lien would extinguish the first secured if the first secured does
not pay the priority lien amount before the sale.**

14 Summary of NRED Advisory Opinion 13-01, Presentation to Senate Committee on
15 Judiciary, May 6, 2013, attached as **Exhibit 4**.

16 **6. Defendant Does Not Cite Any Binding Authority**

17 Defendant cites to cases, none of which are binding, to support its contention that its
18 failure to cure the super priority amounts of the HOA Lien had no effect when the HOA
19 foreclosed. *See* Opp'n, 9:24-15:6. The cases cited however, are materially distinguishable or the
20 analysis included in the orders is unpersuasive.

21 Defendant relies on the widely-cited decision by the Honorable Judge Dawson in
22 *Diakonos Holdings LLC v. MTC Financial Inc. et al*, Case No. 2:12-cv-00949-KJD-NJK.
23 Opp'n, 9:27-11:3. The order denying plaintiff's motion to remand and granting defendant's
24 motion to dismiss is not binding on this Court and is not particularly persuasive because it is
25 devoid of any statutory analysis. The *Diakonos* order fails to articulate which, if any, plain and
26 unambiguous provisions of NRS 116.3116 supported its dismissal of the complaint and
27 misstates the statutory language. It does not identify which, if any, ambiguous provisions of
28 NRS 116.3116 it interpreted in reaching its conclusion. Further, it does not address other
provisions of NRS 116, the legislative history, comments to the UCIOA, or the advisory opinion

regarding super priority liens issued by the Real Estate Division on December 12, 2012.

In addition, the plaintiff in *Diakonos* has filed a motion to alter or amend judgment so that the court can consider the Real Estate Division's December 12, 2012 Advisory Opinion and the December 7, 2012 Legislative Counsel Bureau's Opinion Letter which were not before the court when it issued its February 11, 2013 order. *See* Docket, *Diakonos Holdings LLC v. MTC Financial Inc. et al*, Case No. 2:12-cv-00949-KJD-NJK, attached as **Exhibit 5**. As such, this court should not rely on the *Diakonos* opinion.⁶

Defendant also contends the Court's ruling in *JPMorgan Chase Bank v. Countrywide Home Loans*, Case No. A-08-562678, Dept. XVI states that a junior assessment lien has only a limited priority over a first security interest. *See* Opp'n, 12:17-24. In *JPMorgan Chase*, the Honorable Judge Williams found that an HOA has a statutory super priority lien over a deed of trust holder pursuant to NRS 116.3116. Unlike this case, though, in *JPMorgan*, it was the lender, not the HOA which foreclosed on the property. As described above, when an inferior interest is foreclosed on, it takes title to the property subject to the superior interest. In *JPMorgan*, the parties litigated over the amount of the HOA's lien because the HOA's super priority lien survived the lender's foreclosure as the superior lien. As such, *JPMorgan* is factually dissimilar to the issue at hand, but still stands for the proposition that an HOA's assessment lien is superior to that of a first deed of trust.

Similarly, Defendant contends the court's decision in *Korbel Family Trust v. Spring Mountain Rance Master Association*, Case No. 06-A-523959-C, confirms that a first security interest is not eliminated by an HOA foreclosure sale. *See* Opp'n, 12:17-24. That is inaccurate. In *Korbel*, the Honorable Judge Glass also found that an HOA has a statutory super priority lien over a first position deed of trust holder pursuant to NRS 116.3116(2). Just like in *JPMorgan*, this case was decided when a lender foreclosed prior to an HOA foreclosure. Judge Glass expressly determined that the HOA's statutory super priority lien cannot be extinguished by a

⁶ Similar to the *Diakonos* order, the order in *Sanucci Ct. Trust v. Elevaso*, Case No. A-12-670423-C, Dept. 30 provides no substantive analysis of the statute and does not address the Real Estate Division's Advisory Opinion.

1 first deed of trust lender's foreclosure sale, when the lender forecloses first. It logically follows
2 that, if a lender forecloses prior to the HOA and the lender's foreclose does not legally
3 extinguish the HOA's super-priority claim, i.e. the property remains subject to the HOA's lien
4 after the lender's foreclosure, then the lender's lien is legally inferior to the HOA's super priority
5 lien. Since the first deed of trust holder has a lien that is legally inferior to the HOA's super
6 priority lien, it is a matter of law that a HOA's lien extinguishes the first deed of trust holder's
7 inferior lien, when the HOA forecloses first.

8 Defendant argues that the *Wingbrook* decision stands for the proposition that the HOA's
9 lien is junior to a first security interest. *See* Opp'n, 11:4-12:16. *Wingbrook* focuses on the
10 amount off the super-priority lien as opposed to the issue at hand in this case. However, as
11 Defendant recognizes, in *Wingbrook*, Judge Gonzalez ruled that pursuant to NRS 116.3116(2),
12 the HOA has a statutory lien which has priority over the First security interest on a homeowner's
13 unit.

14 In addition, Defendant argues that the court's decision in *Design 3.2, LLC* supports
15 Defendant's position that a HOA foreclosure sale does not extinguish a first position deed of
16 trust. *See* Opp'n, 13:20-14:15. However, a review of the pleadings and Judge Silver's minute
17 order reveals that the issue in this case was not fully briefed or argued in *Design 3.2, LLC*.
18 Therefore, the minute order cited by Defendant is not only non-binding, but is also unpersuasive.

19 Defendant also cites two other cases currently being appealed to the Nevada Supreme
20 Court. In *9320 Pokewood Ct. Trust v. Wells Fargo Bank of Nevada, N.A.*, Case No. A-13-
21 677406-C, the Nevada Supreme Court granted Appellant's emergency motion seeking a
22 temporary injunction to prevent respondents from conducting foreclosure sales of the subject
23 properties. Defendant's reliance on the Honorable Judge Nancy Allf's order in *SFR Investments*
24 *Pool 1, LLC v. U.S. Bank et al*, Case No. A-12-673671-C, is similarly misplaced. The Honorable
25 Judge Nancy Allf recently granted a preliminary injunction requested by Plaintiff based on a
26 similar factual pattern and the same legal arguments made by Plaintiff in this case. *See SFR*
27 *Investments Pool 1, LLC v. BAC Home Loans Servicing, LP*, Case Number A-13-679289-C.

Non-binding orders that contain limited or no statutory analysis should be disregarded, and Plaintiff's motion should be granted.

7. *The Non-Judicial Foreclosure Statutes Provide Due Process*

US Bank argues that to accept that a first security interest can be extinguished by the super priority portion of an HOA Lien "is to accept a violation of the contractual and due process rights of U.S. Bank." *See* Opp'n, 8:26-28. U.S. Bank claims that "[i]f the Legislature intended to allow an assessment lien to eliminate a first position Deed of Trust, then the Legislature would not have included N.R.S. 116.3116(2)(b) in the statute." Opp'n, 9:3-6. This assessment is inaccurate.

As explained above, an HOA Lien has priority over all encumbrances and liens on a property except those recorded before the HOA was formed and tax and other governmental liens. A first security interest may obtain priority over an HOA Lien by satisfying portions of the HOA Lien representing charges for abatement and 9 months of common assessments. US Bank did not do so in this case and its interest was extinguished by the HOA's foreclosure.

The Nevada legislature has chosen to adopt non-judicial foreclosure in the various contexts, including HOA liens. The non-judicial foreclosure requirements found in NRS 116.31162-116.31168 closely track the requirements of NRS 107.080 in place at the time NRS 116 was enacted and through 2005 when the Legislature began making significant changes to the requirements to address predatory lending and robo-signing by the banks.

As shown in the table below, the Legislature included almost the same requirements for an HOA non-judicial foreclosure sale as it did for non-judicial foreclosure sales by banks before banks were perceived to be abusing the system. The changes to NRS 107.080 since then include the implementation of the foreclosure mediation program, special requirements designed to give extra information to those in owner-occupied properties, and provisions to address concerns about which bank owns the note underlying the deed of trust being foreclosed.

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HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Delinquency by homeowner	NRS 107.080(1)
NRS 116.31162(1)(a)	Mail notice of delinquency to homeowner	No statutory requirement; generally required by terms of deed of trust
NRS 116.31162(1)(b)	Execute Notice of Default and Election to Sell (NOD) that describes deficiency in performance or payment	NRS 107.080(2)(b)
NRS 116.31162(1)(a)	Record NOD	NRS 107.080(3)
NRS 116.31162(2)(b)	Mail NOD by certified or registered mail, return receipt requested to homeowner	NRS 107.080(3)
NRS 116.31163 and NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to interested parties who request notice	NRS 107.090(3)(a)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to subordinate claim holders	NRS 107.090(3)(b)
NRS 116.31162(1)(c)	Failure to pay for 90 days after NOD is recorded and mailed	NRS 107.080(4)
NRS 116.311635(1)(a)	Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution/posting in a public place and on property	NRS 107.080(4)
NRS 116.311635(1)(a)(1)	Mail Notice of Sale (NOS) to homeowner	NRS 107.080(4)
NRS 116.311635(1)(b)(1) and NRS 116.311635(1)(b)(3)	Mail NOS to interested parties who request notice	NRS 107.090(4)
NRS 116.311635(1)(b)(1)	Mail NOS to subordinate claim holders	NRS 107.090(4)
NRS 116.311635(1)(b)(3)	Mail NOS to Ombudsman	No statutory requirement
NRS 116.311635(2)	Post NOS on property or personally deliver to homeowner	NRS 107.080(4)

Most importantly, the 1991 Legislature included specific language in NRS 116 stating that the noticing requirements of NRS 107.090 also apply an HOA foreclosure: **“The provisions of NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of trust were being foreclosed.” NRS 116.31168(1).** NRS 107.090 requires notice to all subordinate claim holders:

3. The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or

certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:

(a) Each person who has recorded a request for a copy of the notice; and

(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.

NRS 107.090(3)(a)-(b) (emphasis added).

Because a deed of trust is subordinate to at least a portion of the HOA's Lien, the HOA is required to give notice of the foreclosure. Here, US Bank does not allege that it did not receive notice of the HOA foreclosure. It does not allege that it attempted to obtain the super-priority lien payoff amount for this Property. US Bank does not allege that it tendered the super-priority amounts prior to the HOA foreclosure sale. Even if US Bank had alleged that it did not receive notice of the sale, it would still not affect Plaintiff's title to the Property because Plaintiff is a bona fide purchaser who in good faith and relying on NRS 116.⁷ US Bank' argument that its contractual and due process rights were infringed by the extinguishment of its first security interest is unsupported by legal authority or factual allegations. Accordingly, Plaintiff's motion for preliminary injunction should be granted.

8. *An HOA's Super-Priority Position Cannot Be Waived or Subordinated By The CC&Rs.*

Defendant argues that Sections 9.13 and 9.14 of the CC&Rs saves its priority over the HOA's Lien. *See* Opp'n, 17:7-18:21. First, no such clause would be necessary if, as Defendant argues, an HOA Lien pursuant to NRS 116.3116 cannot extinguish a first security interest. Second, despite Defendant's argument to the contrary, the CC&Rs cannot subordinate a first security interest to the super priority portion of an HOA's Lien. An HOA cannot waive its right to super priority amounts through its CC&Rs.

⁷ "The bona fide doctrine protects a subsequent purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance." *25 Corp., Inc. v. Eisenman Chem. Co.*, 101 Nev. 664, 675, 709 P.2d 164, 172 (1985) (citing 77 Am.Jur.2d Vendor and Purchaser § 633 at 754 (1975)). Nevada has long protected bona fide purchasers. *See, e.g., Moresi v. Swift*, 15 Nev. 215, 223 (1880) ("The rule that a man who advances money bona fide and without notice, will be protected in equity, applies equally to real estate, chattels, and personal estate.") internal citation omitted)). "A bona fide purchaser is one who pays value for property, without notice of any adverse interest **or of any irregularity in the sale proceedings.**" *Countrywide Home Loans, Inc. v. United States*, CV F 02 6405 AWI SMS, 2007 WL 87827 (E.D. Cal. Jan. 9, 2007), at *11 (emphasis added). In addition to having paid value without notice, the buyer must be acting in good faith to be a bona fide purchaser. *See Berge v. Fredericks*, 95 Nev. 183, 188, 591 P.2d 246, 249 (1979). The court in *Countrywide Home Loans, Inc. v. United States*, interpreted a statute with similar language found in NRS 116.31162 to determine that **any defects in the noticing of the sale do not void the sale to a bona fide purchaser.** CV F 02 6405 AWI SMS, 2007 WL 87827 (E.D. Cal. Jan. 9, 2007), at *11. Here, any defects in the sale proceedings would not void the sale to Plaintiff.

Pursuant to NRS 116.1104, the provisions of NRS 116 cannot be waived: “Except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived.” NRS 116.1104 (emphasis added). NRS 116.1206 further provides that any provision of an HOA’s CC&Rs that violates the provisions of NRS 116 “shall be deemed to conform” with NRS 116 and “[i]s superseded” by the provisions of NRS 116:

1. 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**, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.

(b) **Is superseded by the provisions of this chapter**, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated.

2. In the case of amendments to the declaration, bylaws or plats of any common-interest community created before January 1, 1992:

(a) If the result accomplished by the amendment was permitted by law before January 1, 1992, the amendment may be made either in accordance with that law, in which case that law applies to that amendment, or it may be made under this chapter; and

(b) If the result accomplished by the amendment is permitted by this chapter, and was not permitted by law before January 1, 1992, the amendment may be made under this chapter.

NRS 116.1206 (emphasis added).

The language of NRS 116.1104 is clear,⁸ the CC&Rs cannot waive the provisions of Chapter 116 unless expressly provided for by statute. The comments to the UCIOA Sec. 1-104, from which NRS 116.1104 is taken verbatim, provide the sections of the Act which permit variation, including, for example, Section 3-116 to the extent of treating fines, late charges, and other fees as assessments for lien purposes. *See* UCIOA, Comments to §1-104, attached in **Exhibit 2**. Conspicuous by its absence, is any reference to the ability to waive or alter the super-

⁸ Statutory interpretation begins with the plain language of the statute, and “[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go behind it.” *City Counsel of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P. 2d 974, 977 (1989); *see Carson- Tahoe Hosp. v. Bldg. & Constr. Trades*, 122 Nev. 218, 220, 128 P. 3d 1065, 1066-1067 (1006)(courts should look no further if the words have definite and ordinary meaning or it is clear the meaning is not intended); *City of Reno v. Bldg. & Constr. Trades*, 127 Nev. --,--, 251 P.3d 718, 722 (2011)(“When a statute uses words that have a definite and plain meaning, the words will retain that meaning unless it clearly appears that the Legislature did not intent such a meaning.”)

1 priority provisions § 3-116(2). *Id.* **Plaintiff is unaware of any statutory authority allowing**
 2 **the CC&Rs to waive the specific provisions of NRS 116.3116 at issue here—the right to a**
 3 **super priority lien.⁹ Similarly, the language of NRS 116.1206 requires the conflicting**
 4 **provisions of the CC&Rs be “deemed to conform: and that they are superseded by NRS**
 5 **116.3116.**

6 In *Boulder Oaks Cmty. Ass’n v. B & J Andrews Enterprises, LLC*, the Nevada Supreme
 7 Court held that when there are conflicts between CC&Rs and NRS 116, the statute controls and
 8 any conflicts will not be enforced. 125 Nev. 397, 406, 215, P.3d 27, 32-33 (2009)(“When NRS
 9 116.003 is read in context with the UCIOA, it is clear that when a term is definite in NRS
 10 Chapter 116, the statutory definition controls and any definition that conflicts will not be
 11 enforced.”) The Court explained, “any other reading of the statute would be contrary to the
 12 express purpose of NRS Chapter 116, which is to ‘make uniform the law with respect to the
 13 subject of this chapter among states enacting it.’” *Boulder Oaks Cmty. Ass’n*, 125 Nev. 397, 406,
 14 215 P.3d 27 at 33 (internal citations omitted); *see also Senior Futures, LLC v. Silvestri*, 2004 WL
 15 114456, *3 (Conn. Super. Ct. 2004)(unpublished opinion)(holding that [the HOA statute]
 16 prohibits any variation of the statute even by agreement or waiver).

17 For the CC&Rs to trump NRS 116.3116 and effectively subordinate the super priority
 18 amounts of an HOA’s lien, there must be one of two scenarios: either (1) NRS 116 would need
 19 to expressly provide for the waiver of the super-priority lien or (2) the HOA’s CC&Rs would
 20 need to have been adopted before January 1, 1992 and a waiver of the HOA’s lien priority was
 21 permitted by law at that time. Neither of those scenarios is present here.

22 Defendant does not point to the section of NRS 116 that expressly allows an HOA to
 23 waive the super priority portion of its lien. Defendant does not allege that the HOA’s CC&Rs
 24 were adopted before January 1, 1992 or that a waiver of the HOA’s lien priority was permitted
 25

26 ⁹ While the HOA may choose not to enforce its rights in any given circumstance, it may not waive them
 27 carte blanche in the CC&Rs. *See, e.g.* NRS 116.3102 (3)[Effective January 1, 2012] (granting the executive board
 28 the right to determine whether to commence an action for violating the CC&Rs depending on the specific facts and
 circumstances). Here, rather than elect to forego its rights, the HOA chose to act to enforce its statutory lien that
 contained super priority amounts.

by law at that time. In this case, the CC&Rs were adopted after January 1, 1992. The CC&Rs in this case simply do not control as to this issue. Any lender, like Defendant, who funded a loan and secured it with a deed of trust on a property after January 1, 1992 was on notice of the super priority lien and that no agreement in the CC&Rs would subordinate the HOA's super priority lien to a first deed of trust. Accordingly, the HOA foreclosure sale extinguished Defendant's first security interest, and Plaintiff is entitled to injunctive relief.

B. Plaintiff Will Suffer Irreparable Harm Without Injunctive Relief: the Property is a Unique Item that Cannot be Replaced

It is well-established that real property is unique and the loss of real property rights generally results in irreparable harm. *Dixon v. Thatcher*, 103 Nev. 414, 415-416 (1987). Plaintiff will suffer immediate and irreparable harm, including the loss of property and profits, if Defendant is allowed to sell the Property before the conclusion of this litigation. Instead of distinguishing the arguments and authority in Plaintiff's motion, Defendant hangs its hat on the argument that Plaintiff purchased the Property for what Defendant deems to be a nominal amount. *See* Opp'n, 21:24-27. The following two facts should be considered: (1) Plaintiff knew that it may be required to litigate its quiet title claim, which it included in its analysis of the Property's value; and (2) Defendant failed to attend the publically noticed auction to protect its interest. What Defendant fails to consider is that the confusion caused by the delay in HOAs using their statutory power to foreclose has caused sales prices at HOA auctions to be artificially low. Once the law is clarified, the market will correct itself and properties will sell for market-rate instead of experiencing the discount caused by the knowledge that a purchaser at an HOA sale also purchases a lawsuit to quiet title.

As discussed in detail above, Plaintiff owns the Property free and clear of Defendant's lien. Here, Plaintiff had the winning bid at a publicly-noticed and publicly-held foreclosure auction. It seeks a preliminary injunction so that it will not suffer the irreparable harm that would be caused by a bank foreclosure sale while its quiet title claim is litigated. Plaintiff's motion should be granted.

///

C. The Balance of Equities Favors Plaintiff's Interpretation of NRS 116 and Favors Staying Foreclosure Pending the Outcome of this Litigation

Defendant admits that the previous property owner defaulted on her mortgage in November of 2009. *See* Opp'n, 2:21-22. Yet, Defendant US Bank waited four years—until after its deed of trust was extinguished by the HOA foreclosure—before bothering to move forward with a foreclosure sale. Most importantly, Defendant could have stopped the HOA foreclosure sale altogether by paying the super priority portion of the HOA Lien. Alternatively, it could have attended the HOA foreclosure auction and bid on the Property. Instead, Defendant failed to require its borrower to pay HOA assessments. It failed to pay them itself, as allowed by the terms of its deed of trust. Defendant will not be any more injured by an injunction than it has been by its own inaction.

If, in the end, Defendant prevails, it will receive the Property, fully maintained and potentially more valuable than it is today. SFR, on the other hand, would suffer irreparable harm. If Defendant is allowed to sell or transfer the Property, SFR, when it prevails in the action, will have forever lost this unique Property, and in the meantime its business will be harmed. Equity favors granting the injunction.

Not granting injunctive relief would be against public interest: it would allow first security interest holders to further cloud title to the property by potentially adding additional third-party purchasers into the fray. It serves no public interest to encourage the possibility of adding additional litigants to this action.

D. A *De minimis* Bond is Sufficient

Defendant contends it is entitled to the amount owed on its security interest, \$381,598.31, Opp'n, 23:11-12. This request is excessive and unsupported by authority. As explained in Plaintiff's motion, and uncontradicted by Defendants, the purpose of posting a security bond is to protect a party from damages incurred as a result of a wrongful injunction, not from damages existing before the injunction was issued. *See* NRCP 65(c); *American Bonding Co. v. Roggen Enterprises*, 109 Nev. 588, 591 (1993) (emphasis added); *see also Glens Falls Ins. v. First Nat'l Bank*, 83 Nev. 196, 427 P.2d 1 (1967). In this case, the amount owed on the deed of trust is irrelevant, particularly because the loan amount used to calculate the payment far exceeds the

fair market value of the Property. If the injunction is found to be wrongful, Defendant is entitled to recover only the actual expense and loss occasioned by the injunction itself. *American Bonding Co.*, 109 Nev. At 591 (damages may include the costs of the injunction proceeding and reasonable counsel fees paid for setting aside the injunction)(emphasis added); *quoting Brown v. Jones*, 5 Nev. 374 (1870)(damages for wrongful issuance of an injunction are only damages that are the actual, natural and proximate cause result of the wrong). As such, the amount owed on the security interest cannot serve as a basis for determining a bond amount. Defendant is only entitled to damages, if any, caused by the delay in the foreclosure of the deed of trust. The few months that it will take to resolve this litigation are unlikely to negatively impact the amount it is likely to recover at a foreclosure sale.

Given Plaintiff's likelihood of success on the merits and lack of harm that will be sustained by Defendant should the preliminary injunction be issued, Plaintiff requests that the Court find the bond it posted for its temporary restraining order to be sufficient for a preliminary injunction. Alternatively, Plaintiff should be required to post a bond in an amount equal to the market rental value of the Property minus carrying and maintenance costs including, but not limited to HOA assessments, taxes, etc.

III. CONCLUSION

Plaintiff enjoys a likelihood of success on the merits of its quiet title claim and will suffer irreparable harm if US Bank is allowed to proceed with the foreclosure of the Property. Therefore Plaintiff requests that this Court grant its motion for preliminary injunction.

DATED May 13, 2013.

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EXHIBIT 1

MEANER LIENOR COMMUNITY ASSOCIATIONS: THE "SUPER PRIORITY" LIEN AND RELATED REFORMS UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT*

*James L. Winokur***

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INTRODUCTION

The Uniform Common Interest Ownership Act (UCIOA), promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws (Uniform Laws Conference), consolidates previously promulgated uniform acts which address condominiums,¹ planned communities² and cooperatives.³ The consolidation of acts regulating these three different ownership forms is based on the Uniform Laws Conference's accurate perception⁴ that, substantively, all three forms share a fundamental common trait: in all these forms unit owners beneficially⁵ own both their own units and the community's common elements, with a mandatory community association managing the common areas. Thus, common interest communities (CICs) regulated by UCIOA include all developments which have mandatory community associations responsible for managing common areas or assets, with funds assessed by the association against individual homeowners, and enforcing use restrictions throughout the

1. UNIF. CONDOMINIUM ACT, 7 U.L.A. 421 (1980) [hereinafter UCA]. The original act was adopted by the Uniform Laws Conference in 1977.

2. UNIF. PLANNED COMMUNITY ACT, 7B U.L.A. 8 (1980).

3. MODEL REAL ESTATE COOPERATIVE ACT, 7B U.L.A. 12 (Supp. 1991).

4. A prominent community associations attorney and author, Wayne Hyatt, recently broke ranks with the many association attorneys supporting UCIOA, and questioned UCIOA's premise that all three ownership forms are so essentially similar as to be properly subject to one integrated body of legislation. He asserts that UCIOA

does not mesh well with a large planned community built over a period of years requiring considerable developmental flexibility to meet changed circumstances and times. The legal requirements applicable to the creation of a condominium which usually comprises a single building with a shared infrastructure simply do not apply in most cases when dealing with . . . a master planned community of potentially hundreds or thousands of acres

Letter from Wayne S. Hyatt, Esq., to Cary S. Griffin, Esq., (Dec. 23, 1991) (on file with author). Hyatt concludes, however, that UCIOA could be effective if modified to provide additional developmental flexibility. Hyatt's concerns with UCIOA do not extend to the assessment lien provisions, which are drawn from the UCA, a statute he has supported. *Id.*

5. Legal ownership of units and common areas, as distinguished from beneficial ownership, varies among condominiums, planned communities and cooperatives. In the condominium form, each unit is owned outright by an owner who, by definition of the condominium, must also hold an undivided ownership interest in the common areas. In cooperatives, the cooperative corporation (i.e., per § 1-103(10), the "association" under UCIOA) typically owns both common areas and individual units, which are leased to residents who, in turn, own the corporation. A planned community is defined in UCIOA as a residual form, being any common interest community other than a condominium or cooperative. UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103(23), 7 U.L.A. at 242 (1982) [hereinafter UCIOA]. Most planned communities are developed under the zoning and subdivision classification "planned unit development, with common area ownership usually held by community association in turn owned by the unit owners." PREFATORY NOTE, UNIF. COMMON INTEREST OWNERSHIP ACT 5, 7 U.L.A. 231, 231 (1982). Another type of planned community covered by UCIOA, though not addressed in its commentary, is the "reciprocal easement" form, where the entire community is divided into privately owned lots subject to mutual reciprocal easements benefitting the individual lots. This form is more often used in commercial contexts, though it also appears in some high rise planned communities and in communities where private roads cross individual lots to reach the interior lots and the highway.

common interest community.⁶ Thus, CICs include condominiums, townhouses, free-standing single-family residences, cooperatives, and other planned unit developments.

CICs were relatively novel ownership forms only twenty-five years ago. Since then, they have proliferated, and now CICs account for a substantial portion of the entire United States housing stock. CICs currently include residences of approximately 30,000,000 people or more, including 12-17% of the U.S. population.⁷ While condominium development may have peaked temporarily in some areas,⁸ the overall number of common interest communities is expected to grow substantially again during the 1990s.⁹

One factor contributing to the recent growth of CICs is the affordability of clustered housing in which the crowding of individual homes is offset by substantial common areas and facilities, developer economies in overall acreage, construction of homes and infrastructure, and in provision of public service, where streets built for private maintenance are held to less exacting standards than the local governments would require if the same streets were dedicated over to public ownership and care. Furthermore, CIC developments have been the vehicle for privatization of a range of previously public services, including not only

6. Compare UCIOA § 1-103(7), which defines "common interest community" as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration." UCIOA § 1-103(7), 7 U.L.A. at 240 (1985). Common interest communities are those governed by UCIOA. UCIOA §§ 1-201, 1-204, 7 U.L.A. at 266 (1982).

7. COMMUNITY ASSOCIATIONS INSTITUTE FACTBOOK, 7-9 (1988) [hereinafter CAI FACTBOOK], (estimating 29,640,000 CIC residents some four years ago, which CAI considered to be 12.1% of population). Higher estimates exist, See Mike Bowler & Evan McKenzie, *Invisible Kingdoms*, 5 CAL. LAW. DEC. 1985, at 55. A 1987 California study estimates there were then between 13,000 and 16,000 owners' associations in that state alone. S. BARTON AND C. SILVERMAN, COMMON INTEREST HOMEOWNERS' ASSOCIATIONS MANAGEMENT STUDY: REPORT TO THE CALIFORNIA DEPT. OF REAL ESTATE 2 (1987) [hereinafter BARTON & SILVERMAN CALIFORNIA STUDY]. For extensive review of the emergence of restrictive promissory servitudes as a judicially favored legal device, see generally James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity*, 1989 WIS. L. REV. 1 (1989) [hereinafter Winokur, *Mixed Blessings*].

8. See *Apartment/Condominium Market*, 27 NAT'L REAL EST. INVESTOR, 53, 60 (1986).

9. CAI estimates new common interest associations are being created at the rate of approximately 4,000-5,000 per year. In each of the 50 largest metropolitan areas throughout the U.S., well over 50% of all new housing has for several years now been in CIC housing. CAI FACTBOOK, *supra* note 7, at inside front cover. Estimates exist for the growth of CICs nationally. See, e.g., Howe, *California's Homeowner Wars*, S.F. CHRON., July 3, 1989, at C-1; Homeowners' Association Task Force Report to Montgomery County Council, Rockville, Maryland (1989) at 12 (concluding that "virtually all subdivisions of 50 units or more are being developed as common interest communities and . . . in the near future the vast majority of our citizens will live under these quasi governments"); Stephen E. Barton & Carol J. Silverman, *The Political Life of Mandatory Homeowners' Associations*, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 31, 34 (U.S. Advisory Commission on Intergovernmental Relations, 1989) (noting servitude regimes account for over 90% of all new housing in San Jose, California).

maintenance of facilities, but also services such as trash collection, snow removal, street maintenance and cleaning,¹⁰ with community associations both obligated and empowered to perform them or contract for their performance.¹¹ Planned Unit Developments (PUDs) have allowed local planning commissions to save local governments money by requiring that streets, other infrastructure or mandatory amenities such as drainage basins or parks be provided by the subdivision developer rather than the municipality, and then maintained privately by an association so that the public government avoids maintenance responsibilities.

I. ASSESSMENT DELINQUENCIES AND CIC FINANCIAL WEAKNESS: THE NEED FOR REMEDIAL LEGISLATION

In carrying out their crucial responsibilities for preservation and maintenance of community infrastructure and common assets such as building exteriors, associations vary greatly as to their financial strength,¹² and the financial and personal management experience of their

10. *New Jersey State League of Municipalities v. New Jersey*, No. BUR-L-790-90 (Nov. 5, 1990) (recognizing such services as essentially public services, for which CIC residents are in effect double taxed, but holding New Jersey statute mandating reimbursement unconstitutional for failing to equally protect tenant victims of similar double taxation).

11. See, e.g., DOWDEN, *COMMUNITY ASSOCIATIONS: A GUIDE FOR PUBLIC OFFICIALS*, 7-13 (1980); Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 9, 18, 45, 47 (U.S. Advisory Commission on Intergovernmental Relations, 1989); *Brentwood Subdivision Road Ass'n, Inc. v. Cooper*, 461 N.W.2d 340, 342 (Iowa Ct. App. 1990); 61 Op. Cal. Att'y Gen. 466 (1978); Kenney, *Dictators of Taste*, *EASTSIDE WEEK*, October 2, 1991 (Seattle).

12. Although most associations, in a recent California study, believed their reserves were adequate to avoid large special assessments, a third of them had no completed study of their reserve needs on which to base their optimism. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 21. To similar effect, see also STEVEN A. WILLIAMSON AND RONALD J. ADAMS, *DISPUTE RESOLUTION IN CONDOMINIUMS: AN EXPLORATORY STUDY OF CONDOMINIUM OWNERS IN THE STATE OF FLORIDA* 58 (1987) [hereinafter WILLIAMSON & ADAMS FLORIDA STUDY] (reporting only two-thirds of association officers questioned as being aware of any financial reserves maintained by the board). Suggesting a possible lack of adequate reserves, 30% of all associations in the California study had called for special assessments within the past two years. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 20. About two-thirds of residents in the Florida study had already paid at least one special assessment in an average of about four and a half years of ownership. WILLIAMSON & ADAMS FLORIDA STUDY, at 52, table 30. In California, only 28% of the associations whose responses included reserve figures reported reserves at least equaling the 75% of annual expenses recommended by some industry experts. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 20. Compare COMMUNITY ASSOCIATIONS INSTITUTE RESEARCH FOUNDATION, *RESERVE TO PRESERVE* (1984) [hereinafter RESERVE TO PRESERVE] (declining to set forth any general numerical guidelines, and suggesting that each association's ideal reserves amount would vary with, e.g., the remaining useful life of major common assets, their replacement costs, each association's size, etc.).

From a reserves survey of CAI member associations, RESERVE TO PRESERVE also reports that 4% of surveyed associations lacked any reserves, with an additional 4% having added nothing to their reserves in the immediately prior year. These figures represented improvements from five years earlier. The report praises the average responding associations as having both increased median reserves per association by 40%, and doubling reserves per unit

elected officers.¹³ The main source of financial and interpersonal strain on association boards is the association's inability to collect assessments.¹⁴

Contributing to many associations' financial weakness, the collection of delinquent assessments has been an extremely inefficient and often frustrating process. In hard economic times, assessment collection typically becomes both more important and less effective. Traditionally, CIC declarations, and many state statutes,¹⁵ have provided that the association holds a lien against each unit to secure payment of owner assessment obligations. There is common law authority¹⁶ that these assessment liens

between 1979 and 1982. *RESERVE TO PRESERVE*, at 29. Figures for recent condominium conversions of older buildings were particularly troubling. Also, the report characterizes as a "serious financial management deficiency" that fewer than a third of all responding associations report having any written investment policy. Further, only 13% of volunteer self-managed associations have such a policy. *Id.* at 29. The 524 associations responding to this survey are likely unusually active in seeking training and in managing the associations, so that these results might understate reserves inadequacies in 1982. Arguably, reserves inadequacies will have become worse during the recessionary years since *RESERVE TO PRESERVE* was published. For additional recent expression of concern regarding adequacy of association reserves generally, see also *RCA Characteristics and Issues, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 9-18 (U.S. Advisory Commission on Intergovernmental Relations, 1989).

13. While some association leaders are sophisticated and dedicated volunteers, or rely upon well qualified management companies, other boards are led by amateurs ill-equipped to provide the necessary financial management. The Barton & Silverman California Management Study portrays many board members as "not thoroughly knowledgeable about their own associations," and "mistaken as to the contents of their association documents." *BARTON & SILVERMAN CALIFORNIA STUDY*, *supra* note 7, at 12. Barton and Silverman give examples of a board member mistakenly believing a controversial city parking rule to be an association-administered rule and an association committee chairman unaware of the committee's task. *Id.* See also *WILLIAMSON & ADAMS FLORIDA STUDY*, *supra* note 12, at 68 (reporting 61.7% of responding condominium residents either "strongly agreeing" or "agreeing" that "[m]ost condominium officers lack the technical training to be effective managers"). See also *CARL NORCROSS, TOWNHOUSES & CONDOMINIUMS: RESIDENTS' LIKES AND DISLIKES* 80-85 (Urban Land Institute, 1973) [hereinafter *NORCROSS*]; Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 290 (1976-1977) [hereinafter *Residential Private Governments*] (noting resident dissatisfaction with failure of developers to train association boards).

14. See also *BARTON & SILVERMAN CALIFORNIA STUDY*, *supra* note 7, at 22.

15. See, e.g., ARIZ. REV. STAT. ANN. § 33-1256 (1989); CAL. CIV. CODE § 1367 (Deering 1990); FLA. STAT. ch. 718.116 (1989); GA. CODE ANN. § 44-3-109 (Michie 1989) (requiring some perfection for the association lien to be valid); HAW. REV. STAT. § 514A-90 (1990); I.R.S. 55-1518 (1988); MICH. COMP. LAWS § 559.208 (1990); N.Y. REAL PROP. LAW § 339-2 (McKinney 1989); OHIO REV. CODE ANN. § 5311.18 (Anderson 1988); OR. REV. STAT. § 94.709 (1989); VA. CODE ANN. § 55-516 (Michie 1990); WIS. STAT. § 703.16 (1987-88).

16. Assuming no applicable provisions in either CIC declarations or state CIC statutes modify the result, the association's lien for assessments would normally take priority over interests recorded subsequently to the CIC declaration under the common law and the state recording acts. See, e.g., *Mendrop v. Harrell*, 103 So. 2d 418, 424 (Miss. 1958); *Prudential Ins. Co. v. Wetzel*, 248 N.W. 791, 793 (Wis. 1933). This conclusion focuses on the recorded declaration as having created the association's assessment lien at an earlier date than mortgages against individual units.

have priority over all unit mortgages.¹⁷ However, state statutes¹⁸ and declaration provisions¹⁹ have typically been effective to relegate this assessment lien to junior priority relative to at least some mortgages against the same unit. Therefore, associations typically compete unsuccessfully for foreclosure sale proceeds with lenders who hold mortgages on CIC units. Typically, the foreclosure sale bid will equal no more than the foreclosing lienor's debt,²⁰ leaving no foreclosure sale proceeds remaining to pay any of the association's lien.²¹ In a weak market, where the unit's value would

17. For convenience, discussion of issues in this article potentially relating to both mortgages and deeds of trust will be discussed in terms of mortgages alone, with the understanding that the same substantive points made about mortgages are equally applicable to deeds of trust. For an overview of similarities and differences between deeds of trust and mortgages, *see, e.g.*, GRANT S. NELSON AND DALE A. WHITMAN, *REAL ESTATE FINANCE LAW*, § 1.5 (2d ed. 1985) [hereinafter NELSON & WHITMAN].

18. Statutes still following § 23(a) of the Federal Housing Administration Form # 3285: Model Statute for Creation of Apartment Ownership (FHA Model Act) (reprinted with commentary in NORMAN PENNEY, RICHARD BROUDE, ROGER CUNNINGHAM, *LAND FINANCING: CASES & MATERIALS*, 580-592 (3d ed. 1984) [hereinafter PENNEY]) provide that the association lien is subordinate to any "first mortgage of record." *See, e.g.*, VA. CODE § 55-79.85 (Michie 1990) (limiting subordination to first mortgages of institutional lenders). *See generally* NELSON & WHITMAN, *supra* note 17, § 13.5 at 965. Some other statutes place all mortgages ahead of the association assessment lien. *See, e.g.*, UTAH CODE ANN. § 57-8-20 (1990); *Brask v. Bank of St. Louis*, 533 S.W.2d 223 (Mo. Ct. App. 1975). For a state statute subordinating association assessment liens to all mortgages recorded before a given assessment, *see* OKLA. STAT. ANN. tit. 60, § 524 (West 1970).

19. Having been drawn up by developers with an eye toward assuring the future availability of financing, most declarations alter the common law/recording act priority by subordinating the assessment lien to first mortgages on individual units, and sometimes to all unit mortgages. Some declarations do so by providing that the assessment lien and its priority both date from an assessment's due date or from notice of an assessment default. *See, e.g.*, *St. Paul Fed. Bank for Sav. v. Wesby*, 501 N.E.2d 707, 711-12 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 736 (Ill. 1987). Other declarations simply state the conclusion that association assessment liens are subordinate to first mortgages, so that the timing and recordation of the competing interests is not prerequisite to the priority result. *See, e.g.*, *Damen Sav. & Loan Ass'n v. Johnson*, 467 N.E.2d 1139 (Ill. 1984) (construing such a declaration). *See generally* ROBERT NATELSON, *LAW OF PROPERTY OWNERS ASSOCIATIONS* §§ 6.3.2, 6.3.3 (1989) [hereinafter NATELSON].

20. *See* BAXTER DUNAWAY, *THE LAW OF DISTRESSED REAL ESTATE* 13-12 (1987); ALLAN AXELROD, CURTIS BERGER & QUENTIN JOHNSTONE, *LAND TRANSFER AND FINANCE: CASES AND MATERIALS* 267, 269 (3d ed. 1986).

21. The foreclosure of a lender's senior lien usually wipes out the association's assessment lien. The lender who typically purchases at the sale will have no responsibility for any assessments which accrued prior to foreclosure. *See, e.g.*, *First Fed. Sav. Bank of Georgia v. Eaglewood Court Condominium Ass'n*, 367 S.E.2d 876, 880 (Ga. 1988). For a discussion of the lender who typically purchases at the sale, *see infra* note 29 and accompanying text. Assessments coming due during the foreclosure are unlikely to be collected from either the owner or lender, perhaps until the new unit owner receives the sheriff's deed at the close of any statutory redemption period. *See* *Newport Condominium Ass'n v. Talman Home Fed. Sav. & Loan Ass'n*, 545 N.E.2d 136 (Ill. App. Ct. 1988), *app. denied* 550 N.E.2d 558 (Ill. 1990). Astonishingly, recent authority is divided on whether a purchaser who does not expressly assume the assessment obligation—such as a foreclosure sale purchaser—becomes liable for assessments by virtue of its ownership, as with covenants running with the land generally. *Compare* *Chateaux Condominiums v. Daniels*, 754 P.2d 425, 427 (Colo. Ct. App. 1988) (purchaser on constructive notice becomes liable) *with* *Century Park Condominium*

be lower than the amount of the senior mortgage, the association lien's junior priority is particularly devastating. Since any assessment lien foreclosure purchaser would have to buy subject to a mortgagee lien greater than the entire current property value, foreclosure of the junior association lien becomes a worthless remedy.

In evaluating the policy of according unit mortgagees priority over association assessment liens, it would be folly to ignore the needs of mortgage lenders, whose CIC investments have from the start been crucial to the emergence of these new ownership forms.²² On the other hand, the financial strength of an association often bears strongly on the value of the housing units in which both lenders and residents have invested. Indeed, as assessments on some properties in a community become uncollectible, the CIC unit lender is itself damaged by increasing assessments and decreasing values for other properties it may hold as security.²³

Associations in weak financial condition cannot always justify incurring the costs involved to pursue collection efforts for unpaid assessments actively, especially when they are unsure of the ultimate results of the enforcement effort. When CIC assessments go uncollected, however, the defaulting homeowner's share of community costs to maintain common elements currently falls on those least responsible for the default—neighboring homeowners who regularly pay their assessments, remain in good standing, and constitute the community association.²⁴ As their assessments rise, these owners face greater pressure to default if they cannot afford the assessment increases, and lower valuations of their homes should they opt to sell in order to escape unanticipated assessment costs.²⁵

Faced with this dilemma, some associations attempt to defer the

Ass'n v. Norwest Bank Bismark, N.A., 420 N.W.2d 349 (N.D. 1988) (no assumption by foreclosure sale purchaser, no liability).

22. See Kleine, *Interagency Condominium Task Force*, 1 SYMPOSIUM ON UNIFORM MULTIPLE OWNERSHIP ACTS 10-11 (Community Ass'ns Inst. Research Found., Joint Editorial Bd. for Real Property Acts of the Am. Bar Ass'n & Uniform Laws Conference, 1991) [hereinafter MULTIPLE OWNERSHIP ACTS SYMPOSIUM] (noting Federal Housing Authority's support for condominium financing beginning in 1961; Veterans Administration's support for PUDs beginning in 1968, and for condominiums in 1974; Federal National Mortgage Association's (FNMA) and the Federal Home Loan Mortgage Corporation (Freddie Mac) support for PUDs and condominium financing markets beginning around 1975).

23. See Zinman, *Condominium Investments and the Institutional Lender—A Review*, Symposium on the Law of Condominiums, 48 ST. JOHN'S L. REV. 749, 754 (1974) (commenting on extra burden mortgagees face when they acquire units in foreclosure and find themselves now bound as owners by assessments that have become excessive). See also NELSON & WHITMAN, *supra* note 17, at 965.

24. Henry L. Judy and Robert A. Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437, 481 (1978) [hereinafter Judy and Wittie]. See also John W. Walbran, *Condominium: Its Economic Functions*, 30 MO. L. REV. 531, 554-55 (1965); Phillip J. Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189, 204 (1963). See also, Inwood N Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).

25. Judy and Wittie, *supra* note 24, at 482 (arguing that disproportionate burdening of a decreasing base of solvent owners itself threatens ability of those owners to meet higher assessment bills, leading to increasing foreclosures).

problem by leaving assessments artificially low for a period during which the association operates on a shoestring, cutting back on maintenance and other services. But this strategy also overburdens the owners in good standing. It hastens the decline of the common facilities and the need for major repairs or replacements of community assets. These impacts will also inexorably lower the market value of homes in the CIC.

This syndrome of disproportionately burdening owners in good standing—whose resulting assessment defaults further burden a shrinking group of owners still paying—is greatly exacerbated in hard economic times; foreclosures and abandonment of CIC units severely deplete the assessment base and property values within these communities.²⁶ As the assessment base dries up, it is difficult for association leadership to maintain common elements. As a result, CICs will face the quandary of either heavily assessing the decreasing number of remaining solvent residents, often in excessive amounts, or deferring needed maintenance facilities as basic as the roofing over individual units, only to be later forced to higher assessments as deferred maintenance takes its toll. As CICs age further and require more substantial maintenance, these problems will become more and more acute. Considering that most presently existing associations are less than 20 years old,²⁷ the worst CIC maintenance crises lie ahead.²⁸

When a homeowner defaults on a mortgage loan outside community association developments, the lender assumes substantial financial responsibility for the property. At least pending foreclosure, the lender—who will likely own the home after foreclosure²⁹—will typically undertake to protect its security.³⁰ The lender may often find it unfeasible to care for the property by possessing it. However, where the borrower has become irresponsible, the lender will often pay costs of casualty insurance, security, physical maintenance of the exteriors of homes and landscaping.³¹ Prominent among these burdens is the payment of prop-

26. *Id. See, e.g., House of Cards: The Rise and Fall of Denver's Housing Market; Recovery To Be Slow, Painful*, ROCKY MTN. NEWS, Nov. 12, 1989, at 22-23. Among the spill-over consequences from the cycle of rising assessments and rising assessment defaults is the impact on public governments who have increasingly shifted their traditionally public governmental responsibilities to the community associations. Judy and Wittie, *supra* note 24, at 483.

27. *See* CAI FACTBOOK, *supra* note 7, at 7, 9 (estimating that 500 community associations existed in 1962, 20,000 in 1975, 55,000 in 1980 and 130,000 in 1988).

28. *See* RESERVE TO PRESERVE, *supra* note 12, at 30 (reporting in 1982 that average association was seven years old and already needing to consume reserves at rate of a dollar spent for each two dollars set aside for reserves in same year). Condominium conversion projects were using reserves even earlier in their existences, perhaps foreshadowing difficulties as other common interest communities age.

29. *See, e.g.,* ROBERT LIFTON, PRACTICAL REAL ESTATE: LEGAL, TAX AND BUSINESS STRATEGIES, 262, 263 (1979) [hereinafter LIFTON]; William C. Prather, *A Realistic Approach to Foreclosure*, 14 BUS. LAW. 132, 135 (1958).

30. *See, e.g.,* MICHAEL MADISON AND ROBERT ZINMAN, MODERN REAL ESTATE FINANCING 985 (1991); LIFTON, *supra* note 29, at 257.

31. *See* BAXTER DUNAWAY, *supra* note 20, at §§ 7.01, 7.02 (1987).

erty taxes. In this era of privatized public services, with private associations rather than public governments collecting trash, maintaining roads and parks, and the like, association assessment charges have become more and more analogous to property taxes, liens which receive priority over virtually all others.

This norm of lender responsibility for insurance, maintenance, and property taxation costs after default should also apply to CIC homes. Imposing lender responsibility for security preservation costs it would bear in other, non-CIC communities is appropriate because—as in those other communities—this obligation would merely call upon the lender to protect its own security, albeit partly in the form of assessment responsibility in a CIC. Furthermore, the lender is able to protect itself against losses on its loan in ways community associations cannot.³² Unlike most associations,³³ the lender can investigate and disapprove a homebuyer borrower's credit. It can control its risk by varying the loan size relative to value of the security or by requiring the escrow of funds to cover priority claims. Furthermore, the lender can obtain mortgage insurance.³⁴ These safeguards are not available to community associations.³⁵ As the unit owner's involuntary creditor, a community association exercises no discretion over whether to rely on a particular debtor for its income stream.³⁶

UCIOA's provisions delineating the respective creditor rights of community associations and mortgage lenders grow out of recognition of the harsh realities of community associations' economics, the nature of mortgage lenders' risk and risk avoidance mechanisms in CICs, and the impor-

32. See NATELSON, *supra* note 19, at § 6.3.3; Judy and Wittie, *supra* note 24, at 496.

33. Notable exceptions include cooperatives and some condominiums, where their documentation requires association pre-approval of unit purchasers. Such restraints on alienation of units based on financial and sometimes compatibility criteria are often upheld if the creating documentation of the cooperative or condominium provide for such restraints. See, e.g., *Weisner v. Park Ave. Corp.*, 160 N.E.2d 720, 723 (N.Y. 1959). For a review of authorities, and a spirited argument favoring the validity of restraints against the sale of condominium and cooperative units, see VINCENT DI LORENZO, *THE LAW OF CONDOMINIUMS AND COOPERATIVES*, § 6-1-30 (1990). Arguments favoring such restraints, and the likelihood of the creating documentation containing such restraints, are stronger in the cooperative setting, where financial interdependence is often even greater than in condominiums due to the cooperative corporation's blanket mortgage, and where each resident owns a leasehold rather than fee estate. See NATELSON, *supra* note 19, 594-608.

Restraints on alienation of unit ownership are also more readily upheld when structured as a right of first refusal than as a flat prohibition. See, e.g., *Aquarian Found., Inc. v. Shalom House, Inc.* 448 So. 2d 1166, 1169 (Fla. Dist. Ct. App. 1984); GARY A. POLIAKOFF, *THE LAW OF CONDOMINIUM OPERATIONS* §§ 4-74 to -78, -81, -82 (1988). While the right of first refusal better protects the economic position of the restricted owner, exercising it can be prohibitively expensive for the association where alternate buyers are not readily available. *Aquarian Found.*, 448 So. 2d at 1169. However, some courts are willing to allow the association to screen a potential purchaser before having to purchase (or provide another purchaser) under a right of refusal. See, e.g., *Coquina Club, Inc. v. Mantz*, 342 So. 2d 112, 115 (Fla. Dist. Ct. App. 1977).

34. Judy and Wittie, *supra* note 24, at 496.

35. *Id.* at 494.

36. *Id.* at 475-76.

tance of lenders' continued CIC investment. These realities require financially solvent community associations, which operate more efficiently in collecting and managing assessment revenues. In that sense, what is required are "meaner, leaner" economic units, which can be relied upon by both CIC investors and the community at large to effectively perform the maintenance functions they were created to undertake.³⁷ Consequently, UCIOA enables more efficient collection of common assessments from all unit residents.³⁸ Where recovery from some unit owners is thwarted, UCIOA imposes a significant but limited portion of the unpaid assessment burden on the defaulting unit owners' lenders, whose security is enhanced with those very assessment dollars.³⁹

This article will examine and critique the assessment collection remedies created by UCIOA, focusing primarily on the super priority accorded to the new statutory assessment lien. First, the article details an association's collection remedies. It includes an analysis of the split priority whereby delinquencies up to six months of assessments take priority over first mortgages on CIC properties, with the remainder of those delinquencies taking priority over only liens and encumbrances other than first mortgages. The article next addresses troublesome questions regarding applicability of the super priority to CICs in existence before UCIOA's enactment, and the priority of the association lien relative to mechanics' liens. Then, the principles of the new lien priority concepts are applied in a sketch of foreclosure and redemption strategies. A separate section then analyzes several other UCIOA reforms aimed at regularizing financial management of community associations, and supporting UCIOA's assessment collection process. Finally, the article responds to several prophecies of doom if UCIOA becomes law, reviewing available evidence as to the actual impact of the statute where it has been in force.

37. This article's endorsement of financially stronger community associations is not intended to endorse giving additional muscle to associations in their regulatory role of enforcing use restrictions within CICs. To the contrary, this author has written extensively on the harmful effects of aggressively enforcing such CC&Rs (covenants, conditions, and restrictions) in community associations. *See generally* Winokur, *Mixed Blessings*, *supra* note 7, at 48-75. For a discussion of community associations as unbridled and often abusive "shadow governments," see JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 185-208 (1991).

In addition to strengthening associations' financial management, UCIOA imposes on CICs lacking architectural review restrictions a requirement that associations approve all changes to the external appearance of any unit. UCIOA § 2-111(2), 7 U.L.A. at 297 (1982). Such a statutory imposition of association control on individual unit owners is bad public policy. Even where architectural review provisions are expressed in CIC declarations, many homebuyers purchase units unaware of this limitation on their control of their own homes. *See* Winokur, *Mixed Blessings*, *supra* note 7, at 59 n.246. UCIOA's provision would potentially add to the number of surprised homebuyers even the relatively small segment of homebuyers who actually read declarations before buying into a common interest community. Accordingly, the new Colorado Common Interest Ownership Act omits this provision. *Compare* COLO. REV. STAT. § 38-33.3-211(b) (Supp. 1991).

38. UCIOA § 3-115, 7 U.L.A. at 525 (1982).

39. NATELSON, *supra* note 19, at 238-39; Judy and Wittie, *supra* note 24, at 482.

II. UCIOA'S RESPONSE: TOUGHENING ASSESSMENT COLLECTION REMEDIES FOR COMMUNITY ASSOCIATIONS

A. *Recovery of Collection Costs*

UCIOA contains several measures to strengthen association collection powers as a means to increase community associations' financial viability. UCIOA supplements existing community association rights by authorizing the association to "impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules and regulations of the association."⁴⁰ This bolsters a community association's "'governmental' functions as the ruling body of the common interest community,"⁴¹ but it would be far more effective if it also addressed the often paralyzing specter of attorney fees for enforcement of assessment obligations.⁴² With public hostility toward lawyers running high, attorneys fees legislation could be controversial. However, since individual delinquencies are often small components of a substantial total of assessments owed by all residents in a community, enforcement of assessment delinquencies will often not take place if the association lacks recourse to recover its expenses. The importance of enabling associations to collect attorneys fees for enforcement of assessments, whether by lien foreclosure or personal suit, cannot be overemphasized. Association fees⁴³ for late payment of assessments, as authorized by UCIOA, will cover only a small fraction of enforcement expenses.

B. *Association Lien with Split Priority*⁴⁴

To further support collection of CIC assessments, the UCIOA creates a perpetually renewable association lien for unpaid assessments or fines,

40. UCIOA § 3-102(a)(11), 7 U.L.A. at 326 (1982).

41. UCIOA § 3-102 cmt. 5, 7 U.L.A. at 326 (1982).

42. See the Colorado Common Interest Ownership Act, which includes within the association's powers recovery "of reasonable attorneys fees and other legal costs for collection of assessments and other actions to enforce the power of the association, regardless of whether or not suit was initiated." COLO. REV. STAT. § 38-33.3-302(1)(k) (1991). More generally, the Colorado Common Interest Ownership Act provides rights to collection costs and attorneys fees caused by violation of UCIOA, or applicable declaration, bylaws, rules and regulations, with an award of collection costs and attorneys fees to the prevailing party on each such claim. COLO. REV. STAT. § 38-33.3-123 (1991).

43. Unlike fees, fines for violation of the declaration can be imposed only after notice and an opportunity to be heard. UCIOA § 3-102(11), 7 U.L.A. at 326 (1982). Therefore, associations governed by UCIOA will likely address lateness problems with standard fees rather than fines.

44. For reference, the text of UCIOA § 3-116(a) to -116(j)(4) is as follows:

Section 3-116. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is paya-

“from the time the assessment or fine becomes due” or, where an assess-

ble in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) 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, (ii) 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 owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above 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 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 under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and courtesy, or other exemptions]).

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within (3) years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are

ment is due in installments, "from the time the first instalment [sic] thereof becomes due."⁴⁵ Subject to any contrary language in the declaration, the "assessments" for which UCIOA's lien is provided includes not only regular monthly dues, but also fees or charges for the use of common facilities or for association services, late charges and fines, and interest.⁴⁶

The UCIOA assessment lien is given statutory priority over all liens and encumbrances on each unit, with the limited exceptions of interests recorded before the declaration, liens for taxes or other public governmental charges, and first mortgages recorded before any assessment delinquency.⁴⁷ In its most controversial provision, UCIOA grants the

personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

UCIOA § 3-116, 7 U.L.A. at 351-52 (1982).

45. *Id.* § 3-116(a), 7 U.L.A. at 351 (1982). In the case of assessments payable in installments subject to the super priority, which will affect no more than six months of assessments and charges where only later installments are defaulted, the priority of the association lien—as distinct from the moment the lien first attaches—will focus on the timing of the assessment delinquency. Therefore, accelerated installment payments will relate back to the date of the first default on an installment, and not to the date the first assessment is due. *Id.* § 3-116(b)(ii), 7 U.L.A. at 351 (1982). *See also* 1 GURDON H. BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-120 (1991).

UCIOA's installment provision threatens association recovery of assessments in the case where the lien for an assessment payable in installments is extinguished by foreclosure before all of the installments become due. Suppose, for example, a first mortgagee forecloses on a unit with a hitherto good assessment record, which has just recently become subject to an installment assessment obligation stretching over the coming 12 months. There already is a lien in the amount of the full 12-month installment assessment, pursuant to § 3-116(a)'s installment language. The mortgage foreclosure can thus extinguish whatever portion of this lien is not prioritized by § 3-116(b) as it would any junior lien. If the unit owner later defaults on several installments of the installment assessment, no statutory lien would remain available to support collection. On the other hand, where an early installment is in default, acceleration of assessments can be very valuable in affording the association a worthwhile recovery for enforcing after a relatively small default. *See* COMMUNITY ASSOCIATIONS INSTITUTE, COLLECTING ASSESSMENTS: AN OPERATIONAL GUIDE 11 (GAP Report 10, 1988).

Associations governed by UCIOA's § 3-116(a) should thus weigh carefully the pros and cons of levying assessments in installments. Unfortunately, some declaration provisions eliminate the choice by mandating that general assessments be levied as annual assessments payable in equal monthly assessments. Though the UCIOA's installment language may afford the association some advantage where it accelerates an installment assessment obligation, on balance the ability to enforce short-lived delinquencies might not be worth the potential loss of lien for later missed assignments. Arguably, UCIOA might better protect association interests by dating the lien from the date assessments, including installment payments, become due. *See, e.g.,* WASH. REV. CODE § 64.34.364(1) (1990).

46. UCIOA § 3-116(a), 7 U.L.A. at 351 (1982). Some state adoptions of § 3-116(a) expressly include attorneys' fees. *See, e.g.,* COLO. REV. STAT. § 38-33.3-316 (1) (1991); CONN. GEN. STAT. § 47-258 (1991).

47. UCIOA §§ 3-116(b)(i)-(iii), 7 U.L.A. at 527 (1982).

assessment lien a further limited priority over such first mortgages.⁴⁸ The lien and its statutory priority may not be waived.⁴⁹

1. *Super priority versus first mortgages*

In its most heralded break with traditional law,⁵⁰ 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."⁵¹ Any excess of total assessment defaults, in addition to other lienable fines or costs over this six-month ceiling remains a lien on the property. The portion of the association lien securing this excess will be junior to the first mortgage on the unit, but senior to other mortgages and encumbrances not recorded before the declaration. Thus, although the association's lien is a single lien, its varying priority effectively separates the association's rights in a given unit into what may be conceived of as two liens,⁵² which are hereinafter referred to as the "Prioritized Lien" and the

48. *Id.*

49. *Id.* § 1-104, 7 U.L.A. at 250 (1982).

50. The "super priority" lien for assessments over first mortgages and deeds of trust has thus far been adopted as part of the UCIOA in the following states: Alaska, ALASKA STAT. § 34.08.470 (1990); Colorado, COLO. REV. STAT. § 38-33.3-316 (1991); Connecticut, CONN. GEN. STAT. § 47-258 (1989); Nevada, NEV. REV. STAT. § 116.3116 (1991); West Virginia, W. VA. CODE § 36B-3-116 (1986). Essentially the same statutory lien priority provision has been adopted as part of the Uniform Condominium Act (UCA), applicable only to condominiums, in the following states: Pennsylvania, PA. CONS. STAT. ANN. § 5-3101 to -3414 (1990), Rhode Island, R.I. GEN. LAWS § 34-36.1-1.01 to 34-36.1-4.20 (1982). *But see* Act of March 9, 1992, ch. 8, 1992 R.I. PUB. LAWS 8 (recently amending R. I. GEN. LAWS §34-36.1-3.16 (1991), cutting back the super priority from five years of assessments to six months) *Compare* WASH. REV. CODE § 64.34.364(3) (1991) (providing for the limited six-month assessment lien priority, except that (1) a mortgagee may reduce the six-month priority by up to three months of delay in the association's provision of a notice of delinquency where the mortgagee has previously asked for such notice from the association); WASH. REV. CODE § 64.34.364(4) (1991); WASH. REV. CODE § 64.34.364 (1991) (providing that the super priority for any portion of the lien is waived if it is foreclosed by non-judicial foreclosure). Washington, D.C. has adopted the super priority for assessment liens as part of a sweeping revision bringing its statute fairly closely in line with the UCA. *See* D.C. CODE ANN. § 45-1853 (1991). Several states have adopted the UCA without incorporating the "super priority" lien provisions. *See, e.g.,* ARIZ. REV. STAT. ANN. § 33-1201 (1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (West 1988 & Supp. 1991); MO. ANN. STAT. §§ 448.1-101 to 448.1-120 (Vernon 1986); NEB. REV. STAT. §§ 76-801, 76-874 (1990); N.M. STAT. ANN. §§ 47-7A-1 to 47-7D-20 (Michie Supp. 1991).

51. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

52. The concept of splitting a single lien into two liens holding varying priority is not new to the law of land security. *See, e.g.,* National Bank of Washington v. Equity Investors, 506 P.2d 20, 23 (Wash. 1973), *appeal after remand*, 518 P.2d 1072, (Wash. 1974), *appeal after remand*, 546 P.2d 440 (Wash. 1976) (construction loan lien, securing future optional advances held partially senior and partially junior to intervening materialman's lien, based on which advances were made before materialman's lien attached); Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass'n, 96 Cal. Rptr. 338, 341 (Dist. Ct. App. 1971) (subordina-

"Less-Prioritized Lien."

A careful reading of the quoted language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies,⁵³ enforcement and attorney fees. 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"⁵⁴ 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.⁵⁵ So, for example, if a unit owner fell three months behind in assessments, the Prioritized Lien might include—in addition to the three months of arrearages—the other fees, charges, costs, etc. enforceable as assessments under UCIOA.⁵⁶ However, for any assessments or other charges to be included within the Prioritized Lien, there must have been a properly adopted⁵⁷ periodic budget promulgated "at least annually" by the association from which the appropriate six months assessment ceiling can be computed.

UCIOA's specification of "the 6 months immediately preceding an

tion of seller's trust deed to construction loan lien deemed conditional, so that only part of construction lien takes priority).

53. See *supra* note 46.

54. UCIOA § 3-116(b), 7 U.L.A. at 527 (1982).

55. On this point, the Colorado statute prioritizes attorneys fees and enforcement costs, keeping them separate from, and unlimited by, the six-months assessment ceiling. COLO. REV. STAT. § 38-33.3-316 2(b)(II) (1991).

56. See *supra* text accompanying note 45. An interesting issue is posed by Denis Caron, whose treatise *Connecticut Foreclosures* (2d ed. 1989) is quoted in Anderson, *Collection of Common Charges in Connecticut Common Interest Communities: An Analysis of the Application of the Super Priority Lien and Related Collection Remedies*, 6-8 (1991) (unpublished paper). Assume a mortgage foreclosure is commenced with all assessments on the subject unit current. However, during the foreclosure the owner ceases all assessment payments. Eight months of assessment defaults follow. Are any of these delinquencies within the Prioritized Lien despite the fact that they involve assessments following commencement of foreclosure, in contrast to the "six months immediately preceding an action to enforce the lien" spoken of in § 3-116(b)? Because this reference to 6 months preceding foreclosure is merely a measure of the maximum Prioritized Lien, any and all assessment delinquencies regardless of when the assessment came due qualify for inclusion in the Prioritized Lien, as do other fines, charges, etc., but all only "to the extent of . . . assessments based on the budget . . . which would have become due in the absence of acceleration during the 6 months immediately preceding an action to enforce the lien." UCIOA § 3-116, 7 U.L.A. at 351 (1982). In her paper, Anderson reports that Connecticut courts, unsympathetic with lender arguments that no super priority attaches in this situation, acknowledges the approach sketched above, and incorrectly concludes herself that the association would receive a priority equal to six months of the actual missed assessments, regardless of the timing of the filing of the actions or the assessments budgeted before that action. Anderson, *Collection of Common Charges in Connecticut Common Interest Communities: An Analysis of the Application of the Super Priority Lien and Related Collection Remedies*, 8 (1991) (unpublished paper).

57. The UCIOA mandates a budgeting process in § 3-103(c), UCIOA § 3-103(c), 7 U.L.A. at 304 (1982). For a discussion of the budgeting process, see *infra* notes 150-54 and accompanying text.

action to enforce the [association's] lien"⁵⁸ as the Prioritized Lien's measuring stick leaves unclear the consequences of an association's non-judicial foreclosure and of a mortgagee's foreclosure to which the association lien is subject. In both these cases, it may be argued that there has been no "action to enforce the [association's] lien,"⁵⁹ and therefore there is no prioritized lien.

A less restrictive reading of section 3-116(b) would suggest, first, that a non-judicial foreclosure is an "action" as contemplated by UCIOA. After all, if section 3-116 is adopted with its optional authorization for non-judicial foreclosure of the association lien, it would seemingly serve no purpose to deny the association super priority when the association elected the option this very statute provides. This argument is particularly strong in states where non-judicial foreclosures have mandatory judicial components, thereby more closely resembling a judicial "action."⁶⁰ Where the association is party to a judicial foreclosure initiated by a first mortgagee, the association can reasonably argue that the action initiated by the mortgagee has, by joinder of the association, also become an action to enforce the association's lien.⁶¹

58. UCIOA § 3-116(b), 7 U.L.A. at 527 (1982).

59. *Id.*

60. See, e.g., COLO. REV. STAT. § 838-38-105 (Supp. 1991). But see WASH. REV. CODE § 64.34.364 (1991) (summarized *supra* in note 50).

61. See, e.g., BAXTER DUNAWAY, *supra* note 20, at 12-9 (1991). See also Marion A. Marquis, *Statutory Redemption Rights*, 3 WASH. L. REV. 177, 185-86 (1928) (addressing the rule that a creditor may not exercise rights of statutory redemption after "his own" foreclosure sale)

[W]here a plaintiff by his complaint, and defendant or intervenors by cross-complaints, in one suit, seek foreclosure and execution sale in satisfaction of their mortgages or liens, and obtain a decree adjudging the amount due each, fixing the order of priority, ordering the property sold and distribution among the parties in the order of their rank, the sale is for and on behalf of each and all . . . even though the proceeds of the sale may be insufficient to pay the full amount due some.

See *id.* at 187-88, cited with approval in *Seattle Medical Ctr. Inc. v. Cameo Corp.*, 339 P.2d 93, 96 (Wash. 1959). By this analysis, for the mortgagee's foreclosure to become the junior lienor's, action may require the junior answering the foreclosure complaint by a cross-claim praying foreclosure of their own lien. See *id.* Focusing on the form of a junior lienor's answer to being joined in the senior's foreclosure should be irrelevant, considering that the substantive results of the foreclosure will be unchanged regardless of whether the junior lienor actively cross-claims for foreclosure or merely appears and asks for application of the sale proceeds to its lien. Rather, all junior lienors participating in senior lienor foreclosures—including community associations holding junior assessment liens—should be treated as in an action to enforce their lien. Given the cited authority, however, associations might as well honor the formal distinction in their pleadings.

Rather than relying on such esoteric distinctions, however, UCIOA's § 3-116(b) should be clarified. Washington has a provision measuring the six months from the date of: a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a non-judicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.

WASH. REV. CODE § 64.34.364(3) (Supp. 1991). By measuring the six months from the date of a foreclosure sale, the Washington statute has the additional advantage of including within

Because of lender fears that the amount of the Prioritized Lien could balloon in any given year, the Colorado version of the super priority subjects the Prioritized Lien to an additional maximum: six times 150% of the average monthly assessment during the association's immediately preceding fiscal year.⁶² While limiting the senior lender's exposure for sudden, short-lived assessment increases, this provision still allows assessments to grow quite substantially over time.

2. *Limits on applicability of UCIOA "super priority" for assessment liens*

UCIOA's provisions on association assessment liens, including the grant of the "super priority" to a portion of that lien, are among relatively few sections⁶³ of the Uniform Act expressly singled out for application to associations existing before enactment of UCIOA.⁶⁴ UCIOA limits applicability of these substantive sections: "those sections apply only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities."⁶⁵ Clearly, new CICs created after enactment of UCIOA in a given state will be generally subject to UCIOA, including its lien assessment provisions.⁶⁶

In communities predating enactment of UCIOA,⁶⁷ UCIOA's associa-

the lien priority an important period of frequent assessment delinquency.

In considering whether junior liens are being enforced in senior lienor foreclosure actions, see 4 AM. LAW OF PROP. § 16.191 (Casner ed., 1952). Here, the late Professor Osborne's treatment reflects that the purposes of including a junior lienor in a senior lienor's foreclosures include allowing such junior to realize on its security much like the senior, except with a lower priority claim to the sale proceeds.

62. COLO. REV. STAT. ANN. § 38-33.3-316 2(b)(I) (Supp. 1991).

63. Other UCIOA sections treated as automatically applicable to existing associations include Separate Titles and Taxation (§ 1-105), Applicability of Local Ordinances, etc., (§ 1-106), Eminent Domain (§ 1-107), Construction and Validity of Declaration and Bylaws (§ 2-103), Description of Units (§ 2-104), Merger or Consolidation of CICs (§ 2-121), Powers of the Unit Owner's Association (§ 3-102(a)(1)-(6), (11)-(16)), Tort and Contract Liability (§ 3-111), Association Records (§ 3-118), Resale of Units (§ 4-109) and Effect of Violations of Rights of Action (§ 4-117). The definitions section is also applicable to the extent necessary in construing the applicable substantive provisions.

64. UCIOA § 1-204, 7 U.L.A. at 266 (1982).

65. *Id.*

66. UCIOA § 1-201, 7 U.L.A. at 264 (1982).

67. UCIOA § 1-206 leaves it unclear whether a preexisting CIC can elect to be treated as fully subject to UCIOA, as if it were a new CIC. UCIOA § 1-206, 7 U.L.A. at 269 (1982). The language of § 1-206 appears to permit such an election, if only by an amendment to the declaration incorporating the full UCIOA statute into the declaration. *Id.* However, Comment 6 to § 1-206 explicitly concludes that this section does not permit a preexisting community to elect to come entirely within the provisions of the Act. UCIOA § 1-206 cmt. 6, 7 U.L.A. at 269 (1982). The comment may be distinguishing between amendment of internal governance documents versus choice of applicable public law. However, it is unclear why an amendment incorporating the statute, or even a UCIOA variant, should not be permissible under UCIOA § 1-206. Comment 6 does suggest a daunting alternative—terminating the CIC under preexisting law and creating a new, post-UCIOA CIC. The biggest drawback to this suggestion is that, until UCIOA has become applicable, termination would require a

tion lien provisions also govern the respective priorities of an association lien and a first mortgage, but only where both the lien and the mortgage arise after UCIOA's enactment.⁶⁸ Applying the statute to pre-UCIOA mortgages would likely violate UCIOA's restriction on its applicability to events and circumstances occurring after the effective date of UCIOA. However, where a post-UCIOA mortgage is given on the unit in a preexisting CIC, the events and circumstances at issue—the mortgage and any assessment delinquency—will have occurred after UCIOA's effective date.

This analysis is fairly straightforward where the declaration is silent regarding lien priorities, perhaps relying on existing statutory law to resolve the priorities. Applicability of the "super priority" lien also seems appropriate where the declaration provides that priority of the assessment lien will be pursuant to priority imposed in a generically defined, state condominium or CIC statute.⁶⁹ By effectively amending the statute, UCIOA would change the substantive content of the declaration's priority provision.

However, in the many cases where the association declaration expressly provides that first mortgages take priority over the assessment lien,⁷⁰ UCIOA's applicability to new financing in preexisting CICs is threatened. First, mortgagors likely will argue that conferring UCIOA's "super priority" upon the assessment lien in the face of a subordination

unanimous vote of unit owners unless the declaration authorized termination of the CIC upon a lesser vote. See GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, § 11.03 (1990). UCIOA replaces the unanimity requirement for termination with an 80% requirement. UCIOA § 2-118, 7 U.L.A. at 483 (1982).

Neither of these approaches for bringing a preexisting CIC under UCIOA triggers the rule that UCIOA's sections apply "only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats and plans] of those common interest communities." UCIOA § 1-204, 7 U.L.A. at 266 (1982). That limiting language appears only in § 1-204 regarding applicability to preexisting CICs that have not opted in to UCIOA coverage. In these cases, UCIOA's "super priority" lien could arguably apply to preexisting loans secured by mortgages of units in CIC units which elect by amendment to be covered under UCIOA. Although application of the super priority in such circumstances might prove constitutional, the contrary argument would be far stronger where lenders unaware of UCIOA made loans in reliance on senior priority. For a discussion of the constitutionality, see *infra* notes 79-87 and accompanying text. Further, the fairness of so imposing the super priority against pre-UCIOA loans would certainly be questionable.

In Colorado, preexisting associations are afforded a statutory formula for electing treatment under the Colorado Common Interest Ownership Act. COLO. REV. STAT. § 38-33.3-118 (Supp. 1991). While the election, modelled after an analogous election in Colorado's non-profit corporation law, is far easier to accomplish than a full scale amendment of the declaration, its impact is expressly restricted. Specifically, the Colorado Act applies "only with respect to events and circumstances occurring on or after July 1, 1992, the effective date of this Act, and does not invalidate provisions of any [declaration, bylaws, or plats and plans] of those common interest communities." COLO. REV. STAT. § 38-33.3-118(5) (Supp. 1991).

68. UCIOA § 3-116(b), 7 U.L.A. at 351 (1985). For a discussion of priorities, see also *supra* note 51 and accompanying text.

69. For a discussion of priority imposed in condominium statutes, see *supra* note 50.

70. In at least some parts of the United States, these provisions appear frequently. For examples of types of such provisions, see *supra* note 18 and *infra* note 72.

provision in the declaration "invalidates" the declaration's subordination provision in violation of UCIOA's applicability section.⁷¹ Preexisting associations, on the other hand, will seek at least limited application of the new "super priority" lien over first mortgages within their communities. Applicability of the "super priority" lien to new loans in their own community may well have been the basis for CIC's initial support of UCIOA's enactment.

In constructing an argument for application of the "super priority" lien in preexisting communities with subordination provisions, the threshold issue must be interpretation of the declaration's subordination language. Associations may argue that the assessment lien referred to in this contractual subordination referred only to the assessment lien *created by the same declaration*. Of course, this interpretation would rely heavily on the specific subordination language. If the contractual subordination is narrowly drawn to subordinate only "*the assessment provided for herein*,"⁷² the lien of the UCIOA statutory lien could be portrayed by the association as distinct from the contractual lien created by declaration. As a statutory lien under a statute not even in existence when the declaration was drafted, the UCIOA lien could not have been in the contemplation of the declaration's drafter. Thus, the association would argue, the UCIOA lien is unaddressed and unaffected by the declaration's assessment lien subordination.⁷³

Among the virtues of this narrow interpretation is its faithfulness to the literal language of the declaration's subordination clause. A first mortgagee would argue that the subordination clause be read more freely, as subordinating any assessment lien—even the UCIOA assessment lien, which did not exist when the provision was drafted—to first mortgages.

71. UCIOA § 1-204, 7 U.L.A. at 266 (1982).

72. Where a subordination exists, its wording is frequently drawn from HUD-FHA Form 1400 Series, HUD-FHA Handbook 4135.1 Declaration, Article IV, Covenant for Maintenance Assessment, "Section 9. Subordination of the Lien to Mortgages" (REV 2 1981): "The lien of any assessment provided for herein shall be subordinate to the lien of any first mortgage." This language expressly limits the subordination to "the assessment provided for herein," and strengthens the argument that it would not address subordination of a UCIOA statutory assessment.

By contrast, language drawn from FHA 4150 (Rev.-1), Declaration, II (4) is more sweeping, and less helpful to the association in this context: "The lien of any assessment is subordinate to the lien of any first mortgage." Likewise, language drawn from VA Guideline 7(b) and VA Form 26-8201 contains language which likely includes the UCIOA assessment lien: "The lien of any assessment levied by the HOA must be subordinate to the lien of a first mortgage."

73. An analogous issue is created where a CIC's declaration expressly provides that notice of assessment liens shall be afforded by recording notices of default whenever a unit owner fails to pay assessments. This requirement is far more burdensome than the UCIOA requirement that "recording of the declaration constitutes record notice and perfection of the lien." UCIOA § 3-116(d), 7 U.L.A. at 351 (1982). Recording requirements applicable to the UCIOA statutory assessment lien are discussed *infra* in text accompanying notes 135-41. As suggested by the immediately preceding discussion of the priority provision in many CIC declarations, however, it will often be arguable that the perfection requirement applied only to the lien created by the declaration, and not to the UCIOA lien.

Even if the declaration's subordination is interpreted as intended to cover all assessment liens, contractual and statutory, the association may argue that UCIOA overrides the subordination by expressly subjecting preexisting communities to section 3-116.⁷⁴ The association should prevail, and the "super priority" lien provisions will govern priority of assessment liens versus new mortgages, unless application of the super priority provisions is seen as "invalidating" the preexisting CIC declaration's subordination in violation of section 1-204.

UCIOA's section 1-204 declares that, as applied to preexisting communities, the statute may "*not invalidate* existing provisions of the [declaration]."⁷⁵ By the better view, according "super priority" to the association lien over a post-UCIOA mortgage would limit, but not "invalidate,"⁷⁶ the declaration's subordination of the assessment lien. Far from

74. UCIOA § 1-204, 7 U.L.A. at 266 (1982).

75. *Id.*

76. The Random House Dictionary of the English Language defines "invalidate" as "to render invalid; to discredit; to deprive of legal force or efficacy; nullify." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1003 (2d ed. 1987). *But see* UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1982) (embodying UCIOA's drafter's conservative position on UCIOA applicability). In contrast to the more limited "invalidation" language of the statute itself, Comment 3 states, "[M]oreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments." UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1985). Use of the ambiguous term "invalidate" is one of several weaknesses in UCIOA's scheme for applying its terms to preexisting CICs. Another interpretive problem is determining the consequence of a UCIOA section being omitted from § 1-204's listing of sections applicable to preexisting communities. Thus, for example, even where the declaration of a pre-existing CIC is silent on the subject of insurance, a possible reading of § 1-204 is that the insurance requirements of § 3-113 are inapplicable. Section 1-204, Comment 2 suggests this result: "[O]ld law remains applicable to previously created common interest communities where not automatically displaced by [§ 1-204 of] the Act [U]nder § 2-106, owners of 'old' common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by 'old' law" UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1982). *See also* UCIOA § 1-204, 7 U.L.A. at 266 (1985) (relocation of boundaries per § 2-112 permitted only if association so amends its declaration). But as now drafted, no UCIOA language supports UCIOA's conservative comment by clearly mandating § 3-113's inapplicability, leaving a gap likely to generate litigation. Such drafting ambiguity should be eliminated by express specification of the consequences of omission of a section from § 1-204's list.

Another fundamental issue is whether constitutional considerations on the minds of the UCIOA drafters mandate that much of UCIOA should be inapplicable to preexisting associations—even with regard to post-UCIOA events and circumstances, and even where the declaration is silent. Granted, UCIOA's example of redrawing boundaries involves so tangible a change of property rights as to raise troubling questions of unconstitutional interference with contracts or property. But applying to preexisting associations corporate-regulatory sections like those addressing insurance, *supra*, executive board membership (§ 3-103), and meeting quorums (§ 3-108), arguably pose few constitutional problems. Indeed, even in the face of express provisions in the declaration, one might argue the validity of applying such corporate-regulatory provisions to preexisting associations.

Though incorporated associations differ in important respects from the classic for-profit corporation, *see, e.g.*, NATELSON, *supra* note 19, at 66-67, the validity of applying corporate-regulatory provisions of UCIOA to incorporated associations can be reinforced by reference to reserved corporate power provisions in state constitutions and statutes, which allow fu-

invalidated, the subordination will still apply. First of all, it will give a post-UCIOA first mortgage priority over any excess beyond the limited amount of the Prioritized Lien. Also, the subordination will remain wholly effective as against all pre-UCIOA mortgages, because such mortgages would not be "events and circumstances occurring after the effective date of [UCIOA]."⁷⁷

This result is only fair. The priority of association liens on units in preexisting associations with declaration subordination provisions should properly depend on whether competing first mortgages were prior or subsequent to the enactment of UCIOA. Mortgagees making CIC loans after the enactment of UCIOA should reasonably be held to be on notice⁷⁸ that they take subject to the "super priority" lien. With such notice available to lenders, there is little reason to deprive preexisting associations of this important benefit of the new legislation which these associations particularly need. Older associations are particularly likely to encounter physical decay of common improvements. Association solvency is crucial in order to repair or replace these aging common improvements. Also, older associations formed when experience with CICs was very limited are the most likely to have relatively primitive documentation, providing inadequate collection remedies for the association, and specifying less realistic mechanisms for amendment of their documentation to add efficient remedies.

In preexisting CICs, recognizing the association's Prioritized Lien as senior to a post-UCIOA mortgage and overriding the declaration's contractual subordination should be permissible under the U.S. Constitution's contracts clause.⁷⁹ That clause is the principal reason UCIOA's impact was so narrowly limited in its application to preexisting common interest communities.⁸⁰ The only parties in preexisting contractual relationships addressed by this application of UCIOA are associations seeking

ture changes in corporate regulations as part of the contract creating the corporation. *See, e.g.,* *Brundage v. New Jersey Zinc Co.*, 226 A.2d 585 (N.J. 1967); *McNulty v. W. & J. Sloane*, 54 N.Y.S.2d 253 (N.Y. Sup. Ct. 1945). *See generally* HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS*, 953-55 (1983). Therefore, in considering adoption or amendment of the statute, section-by-section review of the applicability provisions will likely generate several candidates for broader applicability than now provided in UCIOA.

For discussion of the constitutionality of applying § 3-116 to "new" mortgage loans in "old" common interest communities, see *infra* notes 79-87 and accompanying text.

77. UCIOA § 1-204, 7 U.L.A. at 250 (1982).

78. Formally, notice to lenders derives from the new statute plus recorded declarations which UCIOA gives greater effect as imparting notice. As a practical matter, the lending and title communities will very likely become actually aware of UCIOA's lien priority provisions—including the new import of recorded declarations, and the lack of necessity for recorded delinquencies—during the legislative process. At the latest, lenders will learn of the new provisions when they begin transacting under the new statute. On the other hand, notice to new mortgagees of properties in preexisting CICs could be further clarified by use of more precise language for resolving differences between UCIOA's provisions and those of declarations in communities where new loans are made.

79. The contracts clause states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.

80. *See* UCIOA § 1-204, cmt. 3, 7 U.L.A. at 250 (1982).

broad application of the UCIOA lien provisions, and the unit owners who are the declaration's constituent parties. Overall unit owner liability is unchanged by UCIOA's alteration of lien priorities.⁸¹ The parties burdened by the "super priority" lien are those mortgage lenders whose mortgage contracts with unit owners were created after enactment of UCIOA.⁸² Therefore, UCIOA's impact on these mortgage contracts is not retroactive, as required for violation of the U.S. Constitution's "contract clause."⁸³ Regardless of the lenders to which it is applied, the "super priority" lien's constitutionality is further bolstered by its relatively insubstantial,⁸⁴ remedial⁸⁵ impact requiring merely the prioritizing of six months' worth of assessments. This is a very narrowly tailored⁸⁶ method of addressing "a broad, generalized economic or social problem."⁸⁷

3. *Priority versus mechanics' liens*

In language which may prove ambiguous, UCIOA also expressly avoids changing governing state law regarding attachment and priority of mechanics' and materialmen's liens.⁸⁸ Under most states' mechanics' and

81. It has been argued in other contexts that enactment of UCIOA's "super priority" lien would prejudice unit owners' ability to obtain financing. This argument appears to be without merit. *See infra* text accompanying note 155. It might also be asserted that unit owners' relationships with their mortgage lenders are of greater personal importance to the owners because such lenders influence availability of future credit. Therefore, the unit owners might have an interest in their mortgage lender holding top priority so that they are most likely to be paid in hard times. This interest seems far too tenuous and subjective to render application of the UCIOA lien priority scheme unconstitutional. *Id.*

82. As noted above, mortgage lenders whose loans precede the enactment of UCIOA will not be subject to the "super priority" lien under the conservative applicability provisions of § 1-204. If UCIOA's drafters had attempted to bind such pre-UCIOA lenders, they might well have been successful. Granted, in that case, the pre-UCIOA lenders could have a somewhat stronger claim for invalidating application to them of UCIOA's "super priority" lien. Arguably, CIC declaration provisions addressing lender rights (to priority; to notice of delinquency; to notice of proposed declaration amendments, etc.) create third party beneficiary rights, vested in each mortgagee from the moment it takes CIC property as security in reliance on the declaration. *See generally* E.A. FARNSWORTH, *CONTRACTS* 709-44 (1982). However, even with retroactivity established, it is questionable whether UCIOA's "super priority" lien's impact would be deemed sufficiently substantial to violate the U.S. Constitution's contracts clause. *See supra* notes 79-80 and accompanying text.

83. *See, e.g.,* JOHN NOWAK AND RONALD ROTUNDA, *CONSTITUTIONAL LAW* 404 (4th ed. 1991).

84. *See Texaco, Inc. v. Short*, 454 U.S. 516, 529 (1982); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45, *reh'g denied*, 439 U.S. 886 (1978).

85. *See, e.g.,* *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 59 (1935). *See also* NOWAK AND ROTUNDA, *supra* note 83, at 405-06.

86. *See Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470, 503 (1987).

87. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250, *reh'g denied*, 439 U.S. 886 (1978). The broad, generalized economic or social problem requiring a remedial approach such as UCIOA's "super priority" lien are addressed *supra* at notes 22-37.

88. Useful discussion of these priority questions in the context of the Uniform Condominium Act appears in Judy and Wittie, *supra* note 24, at 501. *See also* the FHA Model Act, *supra* note 18, on which many state statutes were based, providing the association lien priority over all liens but first liens, presumably including mechanics' liens. These genera-

materialmen's lien statutes, certain workers and suppliers otherwise unsecured claims for work performed on real estate are accorded a statutory lien which, once perfected by proper filing, relate back for priority purposes to the commencement of work on a project or some other date preceding perfection of the lien.⁸⁹ Where such a mechanics' or materialmen's lien is competing with an association assessment lien, the result will turn on the date as of which the association assessment lien came into existence.

By the language of section 3-116(a), the assessment "is a lien from the time the assessment or fine becomes due." The assessment due date, therefore, is likely, the critical comparison date for prioritizing the assessment lien versus a mechanics' lien under section 3-116's present language.

On the other hand, in setting priorities between the association assessment lien and first mortgages,⁹⁰ section 3-116(b) compares perfection (recordation) of the mortgage with the date the assessment became delinquent.⁹¹ Perhaps the moment of assessment delinquency is the critical date for comparison with relation back date of mechanics' or materialmen's lien, just as with priority competition between the assessment lien and the first mortgage.⁹² After all, regardless of UCIOA's language dating the lien from the due date, delinquency is prerequisite to having an enforceable lien.

Yet another, somewhat less likely comparison date would be the date of the declaration creating the CIC. Under the general rule of section 3-116(b), liens and encumbrances recorded before the recordation of the declaration are the only interests taking priority over the association assessment lien. However, section 3-116(b) seems clearly to except mechanics' or materialmen's liens from that general rule.⁹³ Therefore, the use of its comparison date would seem contrary to the drafters' intentions.

lized condominium statutes may be expressly superseded in the adoption of UCIOA. This might be less likely with respect to those state statutes specifically according mechanics' liens priority over assessment liens. See IDAHO CODE § 55-1518 (1989); N.C. GEN. STAT. § 47A-22(a) (1991); WIS. STAT. ANN. § 703.23(1)(a) (1991).

89. Useful general discussion of attachment and priority of mechanics' liens appears in NELSON & WHITMAN, *supra* note 17, at § 12.4.

90. The priority setting discussed here is for the Less-Prioritized Lien, and not for the Prioritized Lien.

91. The due date and delinquency date will often be virtually the same date, as where an assessment due on the first of each month becomes delinquent that night at midnight. However, some declarations contain provisions postponing delinquency until later in the month when payment was first due.

92. Like a first mortgage, a mechanics' or materialmen's lien also is excepted from the general rule of assessment lien priority relating back to filing of the declaration. So, analyzing assessment lien priority similarly as against both mechanics' liens and first mortgages echoes a theme already sounded in § 3-116.

93. See NELSON & WHITMAN, *supra* note 17, at 955 n.50, for the contrary view that, under UCIOA, a mechanics' lien's priority would depend on comparison of the relation-back date of the mechanics' lien with the date the declaration was recorded.

C. Foreclosure and Redemption Options

UCIOA provides that the association lien may be foreclosed "in like manner as a mortgage on real estate"⁹⁴ or, pursuant to optional language, by power of sale.⁹⁵ However, power of sale foreclosure is unavailable in many states.⁹⁶ Some others with provision for non-judicial foreclosures have nonetheless adopted UCIOA, requiring that the assessment lien can be foreclosed only by judicial foreclosure as a mortgage.⁹⁷

The distinction between judicial and power of sale foreclosure, important in all foreclosure settings,⁹⁸ is particularly crucial in foreclosures of CIC association assessment liens, where assessment defaults continue to mount during the pendency of foreclosure proceedings. Given the relatively small dollar amount of assessment arrearages, especially those holding super priority under UCIOA, extension of foreclosure from the few months or less required for non-judicial foreclosure to the one and one-half to two years required for judicial foreclosure⁹⁹ can generate additional assessment defaults several times the amount of the assessment default first foreclosed upon.¹⁰⁰ The relatively small stakes in an assessment foreclosure may also generate a hostile judicial response to devoting court time to such cases.¹⁰¹ On the other hand, a statutory grant of power of sale foreclosure authority raises several problems,¹⁰² among which would be the more likely application of constitutional due process safeguards to

94. UCIOA § 3-116(j), 7 U.L.A. at 352 (1982).

95. UCIOA § 3-116 (j)(1) (2), 7 U.L.A. at 352 (1982). Excepted from this treatment are cooperatives where the unit owners' interests are personalty. UCIOA § 1-105, 7 U.L.A. at 253 (1982). As to such cooperatives, foreclosure is governed by Article 9 of the Uniform Commercial Code. For cooperatives treated as real estate under UCIOA § 1-105, optional UCIOA § 3-116(k) sets forth a speedier foreclosure method, patterned after the Uniform Land Transactions Act, available as an alternative to each state's power of sale statute. See UCIOA § 3-116, cmt 4, 7 U.L.A. at 354 (1982).

96. Perhaps slightly more than half the states have statutes permitting foreclosure by power or, in a few cases, even statutorily creating the power of sale. Jack Jones and J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 TENN. L. REV. 279, 293-94 (1984). However, the power of sale foreclosure predominates only in about 18 states. See LIFTON, *supra* note 29, at 263; PENNEY, *supra* note 18, at 413. Though few state statutes actually prohibit the power of sale foreclosure, this more efficient method appears only to be used where a regulatory statute is applicable to legitimate the process, and the resulting title. *Id.*

97. See, e.g., COLO. REV. STAT. § 38-33.3-316(11)(a) (Supp. 1991); COLO. REV. STAT. § 38-39-101 (1982 & Supp. 1991).

98. Power of sale foreclosure has been shown to cost substantially less in time and money than judicial foreclosure. See, e.g., Josephine McElhone & Randall P. Cramer, *Loan Foreclosure Costs Affected by Varied State Regulations*, MORTGAGE BANKER, Dec. 1975, at 41; *The Costs of Mortgage Loan Foreclosure: Some Recent Findings*, 8 FED. HOME LOAN BANK Bd. J. No. 6, at 7 (June, 1975).

99. See Judy and Wittie, *supra* note 24, at 516.

100. *Id.* at 515.

101. See Anderson, *supra* note 56, at 5.

102. Power of sale foreclosures tend to produce less stable titles. Compare NELSON & WHITMAN, *supra* note 17, at §§ 7.18, 7.20. For an example, in the context of CICs, of title uncertainties leading to unavailability of title insurance, see Jackson, *Homeowners Associations: Remedies to Enforce Assessment Collections*, L.A. BAR J. 423, 434 (1976).

a power of sale created by statute than to one privately conferred.¹⁰³ On balance, however, it is excessively burdensome to restrict associations to judicial foreclosures in a state where power of sale foreclosure is permitted.¹⁰⁴ UCIOA should be adopted including the optional language of section 3-116(j)(1) and (2) permitting associations foreclosure by non-judicial foreclosure.

Whatever the foreclosure process permitted in a given UCIOA state, an association could act on its Prioritized Lien by initiating foreclosure against a unit in assessment default. Along with the unit owner, the association would join the holders of any mortgages, deeds of trust, or other interests junior to the Prioritized Lien as necessary parties to a judicial foreclosure. In non-judicial foreclosure, these same parties would be formally notified of the sale. Under either method of foreclosure, holders of junior interests would stand to receive the excess, if any, of the foreclosure sale price over the amount of the Prioritized Lien, in the order of their priorities. The association's Less-Prioritized Lien would be among those junior interests.

The process would vary considerably if, instead, the party seeking foreclosure were the holder of a first mortgage on a CIC unit. Regardless of whether the first mortgagee's loan is in payment default, default on the association assessment is also likely an event of default under the mortgage, allowing its holder to initiate foreclosure. If a Prioritized Lien were outstanding against the unit, the mortgage and its foreclosure would be subject to the association's Prioritized Lien. As a senior interest, the association's Prioritized Lien could probably not be forced into the mortgage foreclosure.¹⁰⁵ The Prioritized Lien can receive no portion of the foreclo-

103. See, e.g., *Northrip v. Federal Nat'l Mortgage Ass'n*, 527 F.2d 23, 24 (6th Cir. 1975).

104. Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments Under the Uniform Acts*, MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 171, 174 (noting importance of supporting association's lien priority by "an effective, low cost remedy," and calling right to enforce its lien through power of sale "potentially the most important remedy for the association"). See also, Judy and Wittie, *supra* note 24, at 516.

105. One conceptual difficulty in forcing the Prioritized Lien into the first mortgagee's sale would be that, technically, there is no way to calculate the amount of the Prioritized Lien until an action to enforce the assessment lien has been commenced. See *infra* text at note 120. Though UCIOA's language is less than clear on this point, the first mortgagee's foreclosure should also be considered an action to enforce the assessment lien, once any portion of the assessment lien (here, the Less-Prioritized Lien) has been included in the foreclosure. See *supra* text at note 61.

Even assuming that the Prioritized Lien is in existence for a sum certain, foreclosing junior liens generally have no power to force foreclosure upon holders of senior liens. See generally NELSON & WHITMAN, *supra* note 17, at § 7.14. An exception to the senior's right to stay out of the junior's foreclosure permits joinder of the senior for the informational purposes of determining the amount and priority of his lien. *Id.* Where, as here, the debt secured by the senior lien is already due and payable, some authority would allow the junior lienor to force the senior lienor in on the theory that the foreclosure will effect a redemption of the senior lien from the proceeds of the junior lienor's foreclosure sale. *Id.* at 516. However, the better view is that the senior "should be allowed to exercise his own judgment as to

sure sale proceeds without participating in the foreclosure. However, payment of the Prioritized Lien—which, unlike the Less-Prioritized Lien, should survive this foreclosure¹⁰⁶ as a senior interest—will be necessary to clear title for resale of the unit, or often for presentation of mortgage insurance or guaranty claims to the FHA¹⁰⁷ or VA.¹⁰⁸

If the association wished to include its Prioritized Lien in a foreclosure initiated by the mortgagee, an additional problem might arise where the association lien must be foreclosed judicially in a state which otherwise recognizes power of sale foreclosure.¹⁰⁹ In that case, if the association is to be included in the foreclosure, the first mortgagee might instead need to yield and use judicial foreclosure. But the mortgagee would presumably resist switching from the more efficient non-judicial foreclosure to the slower, more expensive judicial proceeding.

Ironically, the burdensome requirement that the association foreclose judicially could increase the association's leverage over a first mortgagee foreclosing by power of sale. In suing to foreclose on its senior Prioritized Lien, even after a power of sale foreclosure has been commenced by the

the time to foreclose." EDGAR DUFFEE, CASES ON SECURITY 204 (1951). Compare NELSON & WHITMAN, *supra* note 17, with GRANT NELSON & DALE WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT: CASES & MATERIALS (3d ed. 1987) (the casebook suggesting weaker authority for the view that the senior can be forced in). For a recent argument that the junior should be permitted to force in senior interests, see David G. Carlson, *Simultaneous Attachment of Liens on After-Acquired Property*, 6 CARDOZO L. REV. 505, 530-34 (1985).

106. "Survival" of the Prioritized Lien assumes it has come into existence by inclusion of the Less-Prioritized Lien in the first mortgagee's foreclosure, arguably an "action to enforce" the association's lien. UCIOA § 3-116(b), 7 U.L.A. at 3512 (1982). See *supra* notes 61, 105, and *infra* text at note 120. If the Prioritized Lien is interpreted as not having come into existence at the time of the foreclosure, all assessment delinquencies would fall into the Less-Prioritized Lien, which is not limited to any period before commencement of any assessment lien foreclosure. See UCIOA § 3-116, 7 U.L.A. at 351-54 (1982).

Just in case its Prioritized Lien did not come into existence by virtue of the junior mortgagee's foreclosure, the association can be sure it has a Prioritized Lien to be paid off upon resale by triggering a Prioritized Lien, initiating its own foreclosure action even after the first mortgagee's foreclosure extinguishing the Less-Prioritized Lien. Since UCIOA does not limit the Prioritized Lien securing delinquent assessments except by the six-month measurement, delinquencies secured by the Less-Prioritized Lien extinguished in the earlier foreclosure and left unpaid by that foreclosure would be eligible for inclusion on the Prioritized Lien activated by the association's action to enforce its lien. See UCIOA § 3-116, 7 U.L.A. at 351-54 (1982). Despite initial appearances, this would not give the association too many chances to realize on security for its assessments. Because of statutory technicalities in defining the Prioritized Lien, the super priority rendered artificially unavailable at the first mortgagee's foreclosure finally would be recognized as available at the subsequent association foreclosure.

107. See 24 C.F.R. § 200.155 (1991).

108. See 38 C.F.R. § 36.4320 (h)(5) (1991).

109. It generally causes no problem if the foreclosing lienor wishes to include in the foreclosure a *junior* lien which would normally be required to foreclose under a different method. See, e.g., COLO. REV. STAT. ANN. § 38-38-103 (Supp. 1991) (permitting joinder of mortgages in foreclosure of senior deeds of trust despite the fact that, per COLO. REV. STAT. ANN. § 38-39-101 (Supp. 1991), mortgages in Colorado can otherwise only be foreclosed judicially). However, such statutes typically make no provision for participation by *senior* lienor in a junior lienor's foreclosure.

mortgagee, the association will have to join as necessary parties the first mortgagee, the owner, and all other junior interests—all holders of parts of the equity of redemption vis a vis the association's lien.¹¹⁰ With these necessary parties also standing to be extinguished in the mortgagee's power of sale foreclosure, pursuit of the association's foreclosure lawsuit should require suspension of the non-judicial foreclosure, in order to allow the judicial foreclosure to go forward with the mortgagee and all other necessary parties participating.¹¹¹ If the association can predictably accomplish suspension of the power of sale foreclosure, enforcement of the association's lien will threaten substantial delays to the secured lender.

Those who drafted UCIOA's "super priority" lien provisions appear to have been fixated on foreclosure. This fixation is quite understandable since a primary and favorable impact of the "super priority" lien will be to allow aggressive associations to bring units with defaulted assessments into foreclosure. Without UCIOA in effect, lenders holding defaulted mortgages on CIC property have often felt little motivation to foreclose for extended periods until they have finally worked out some disposition for the property. This delay can mean the difference between financial life and death for the many CICs in economically depressed markets, where a single lender holds defaulted mortgages on a substantial number of units which have either insolvent or abandoning owners. With UCIOA's "super priority" lien in effect, the lender is vulnerable to the association's foreclosure—which may be especially costly where the association has no access to an otherwise available non-judicial foreclosure process¹¹² and must foreclose itself by judicial process. To retain control over any foreclosure, the lender may agree to pay delinquent assessments to the association as necessary, even including new assessments pending completion of foreclosure, for which the lender is technically not liable.¹¹³ But the more important goal of the association in foreclosure will be to speed the time when the unit is owned by an entity, probably the lender purchasing at foreclosure, which will pay assessments regularly in the future. If the lender holds multiple properties in a CIC, the resulting assessment income can be very substantial.

110. See, e.g., NELSON & WHITMAN, *supra* note 17, § 7.12.

111. See, e.g., *Boulder Lumber Co. v. Alpine of Nederland, Inc.*, 626 P.2d 724, 728 (Colo. Ct. App. 1981) (affirming injunction prohibiting public trustee from proceeding with deed of trust foreclosure where mechanics' lien holder was seeking judicially to foreclose against same security, and where priority disputes among lienors left respective parties' rights particularly unclear).

Even where priorities are clear, however, the simultaneous pursuit of a judicial and a non-judicial foreclosure against the same land will produce confusing results, considering the overlap of parties with interests standing to be extinguished in both proceedings. For an example of the type of confusion resulting from dual foreclosures, see the classic decision in *Murphy v. Farwell*, 9 Wis. 102 (1859).

112. For a discussion of a foreclosing junior mortgagee's vulnerability to a senior lienor's judicial foreclosure, see *supra* note 111 and accompanying text.

113. For the lender's position, see *supra* note 21 and accompanying text.

Facing the threat of even a relatively efficient foreclosure,¹¹⁴ the first mortgagee holding subject to a potential Prioritized Lien will consider paying the association the portion of the unit owner's debt secured by the Prioritized Lien. Mortgagee payment of the Prioritized Lien was the lender response envisioned by UCIOA's drafters.¹¹⁵ Such payment might also seem attractive where an assessment default is not accompanied by a default in mortgage payments. According to provisions in most mortgages, the lender's payment to the association of its borrower's delinquent assessments can be added to the secured debt.¹¹⁶

By payment of the delinquent assessments, the mortgagee might be contemplating a result analogous to that triggered by the equitable redemption from mortgages generally—acquiring the senior lien by paying it off.¹¹⁷ As a result of UCIOA's fixation on foreclosure, however, the parties' respective lien rights under section 3-116 are less clear in pre-foreclosure settings than once foreclosure is commenced. Also, UCIOA's perpetually renewable, statutory lien works differently in several respects from a mortgage securing a fixed or decreasing debt, so that payment of the Prioritized Lien at any given moment cannot permanently eliminate the senior lien as a threat to the first mortgage, which is normally the goal of redeeming from a senior mortgage.

One difference between the UCIOA lien and an ordinary mortgage is that the Prioritized Lien and the Less-Prioritized Lien are both parts of the same lien, with varying priorities. A mortgagee seeking literally to equitably redeem the Prioritized Lien would thus face the all-or-none rule, requiring redemption of all or none of the lien, here both the Prioritized and Less-Prioritized Liens, unless the senior lien holder otherwise elects to accept a partial redemption.¹¹⁸ On the other hand, the mortgagee seeking redemption would have no right to redeem an interest junior to its mortgage,¹¹⁹ arguably including the Less-Prioritized Lien. The mortgagee can probably solve these problems by requesting to pay the entire assessment delinquency, as secured by both Prioritized and Less-Prioritized Lien. The association would have little motive in rejecting such an offer. However, following such payment, any new delinquency would again be secured by the UCIOA lien, with its super priority for the first dollars of

114. The threat of judicial foreclosure in states making nonjudicial foreclosure unavailable to the association would be particularly worrisome to a mortgagee. *See supra* note 96.

115. Comment 1 to UCIOA § 3-116 predicted: "As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit." *See also* Judy and Wittie, *supra* note 24, at 484.

116. *See, e.g.,* Judy and Wittie, *supra* note 24, at 481.

117. *See, e.g.,* Shipp Corp. v. Charpillioz, 414 So. 2d 1122, 1123 (Fla. Dist. Ct. App. 1982), where the court explained: "When the phrase ['right of redemption'] is used with reference to a junior mortgagee, it refers to his right to satisfy a prior mortgage by payment of the debt it secures and thereby become equitably subrogated to all rights of the prior mortgagee."

118. *See* NELSON & WHITMAN, *supra* note 17, § 7.3.

119. *Id.* § 7.2.

delinquency up to the six-month maximum. UCIOA's lien covers all assessments, with no language suggesting that payment of earlier delinquencies leaves later assessments unsecured. Nor does the super priority provision contain language suggesting any reduction of the amount prioritized based on payment of previously prioritized amounts.

A second difference between ordinary mortgagee redemption of a senior mortgage and attempting redemption of the Prioritized Lien is in computing the amount necessary to redeem. The maximum amount for Prioritized Lien is potentially changing at all times as new assessments are levied and some or all go unpaid, as is the amount of the total UCIOA lien. Each assessment default increases the overall association lien. Meanwhile, the maximum size of the Prioritized Lien, "*the common expense assessments . . . which would have become due . . . during the 6 months immediately preceding institution of an action to enforce the lien*"¹²⁰—remains unknowable (except by approximation). This is true until an action to enforce the lien is instituted, pinning down which six months of assessments are to be used to compute the maximum. By floating the potential Prioritized Lien maximum by reference to changing assessment figures, UCIOA continually redefines the Prioritized and Less-Prioritized Lien, portions of the total overall assessment lien flowing into the Prioritized Lien any time the Prioritized Lien total falls below its maximum, and flowing back to the Less-Prioritized Lien any time the applicable maximum decreases. As a result, until an action to enforce the UCIOA lien is initiated, there is literally no proper amount to be paid in order for a mortgagee to redeem the lien.

Put another way, under the current language of section 3-116(b), there is *no Prioritized Lien until* the moment *foreclosure* is initiated.¹²¹ So there is no lien to redeem, even though one will materialize instantaneously upon initiation of foreclosure.

Even more fundamentally, a mortgagee permanently redeeming either the Prioritized Lien or the entire association lien—so that uncured or future delinquencies could not come within protection of such lien—would be inconsistent with the perpetually renewable nature of the UCIOA lien. UCIOA accurately contemplates ongoing extensions of credit by the association to the unit owner. It also provides that unit owner's assessment obligations shall all be secured with at least some priority over competing encumbrances. Just as the association cannot really limit its own extension of credit, the statute contemplates no limit on the overall assessment lien in dollars or time. While the super priority provision contemplates a six-month maximum at any given moment, it contemplates no limit over time.¹²² Whatever happens to the six months of assessments prioritized by initiation of a foreclosure action in the middle of year one, a Prioritized Lien of up to six months assessments exists if another enforcement action is initiated in year three—or at *any* future

120. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

121. *Id.*

122. *Id.*

time.¹²³

A first mortgagee seeking protection from the Prioritized Lien by paying off the assessments it secures (or even paying off all overdue assessments) might seek to document its payment as a purchase of association rights to foreclose on any Prioritized Lien—including one consisting of new delinquencies—for some time into the future.¹²⁴ Phrased, differently,¹²⁵ the mortgagee could describe the deal as an assignment to the mortgagee of the association's Prioritized Lien. Under an assignment, the mortgagee/assignee would intend for the lien to remain alive and still securing the amount the mortgagee paid for it. So long as the Prioritized Lien now held by the mortgagee/assignee remained alive and unforced, no additional delinquencies could gain the benefit of the super priority.

From a public policy perspective, the advantage of honoring this "assignment" approach is in creating an incentive for first mortgagees to pay the association the Prioritized Lien.¹²⁶ However, even if a court would seriously consider recognizing assignment of a lien which does not and may never exist, such an assignment of the Prioritized Lien should violate the UCIOA's prohibition against waiver or variation by agreement of UCIOA-created rights.¹²⁷ To allow the mortgagee to purchase this lien, so

123. *Id.* § 3-116(e), 7 U.L.A. at 351 (1985).

124. A puzzling problem for this strategy is to determine how long the agreement not to foreclose the Prioritized Lien should last. Any finite time shorter than the remaining term of the first mortgage would leave that mortgage potentially susceptible to future foreclosure by the senior Prioritized Lien. A duration running until foreclosure of the first mortgage could leave the association without a crucial assessment remedy for a very long time, assuming there was still a substantial term remaining on the first mortgage.

125. The "assignment" characterization, with the notion of thereby keeping the Prioritized Lien alive, is the suggestion of Professor Dale Whitman. See Letter from Professor Dale A. Whitman (Feb. 5, 1992) (on file with author).

126. On the other hand, non-recognition of such an assignment might well create a more desirable incentive for the lender to pay off the entire assessment lien.

127. UCIOA § 1-104, 7 U.L.A. at 250 (1982). In so broadly prohibiting waiver or variation by agreement, § 1-104 stands in contrast to many statutes governing commercial transactions, where waiver is often expressly permitted at least under circumstances suggesting legitimate bargaining between the parties. Compare, e.g., UNIF. LAND TRANSACTIONS ACT, § 1-103 (1977), and UNIF. COM. CODE, § 1-102(3) (1991) (allowing variation by agreement of the parties from the UCC's terms, except where specifically prohibited, so long as duties of good faith, diligence, reasonableness and care are not disclaimed). See also RESTATEMENT (SECOND) OF PROPERTY, § 5.6 (1977) (permitting variation even of lessor's habitability obligations, depending on both procedural and substantive fairness, and consistency with applicable statute's underlying public policy). Considering the regularity with which legislatures, the Uniform Laws Conference and Restatements permit variation by agreement, UCIOA's contrasting provision in § 1-104, once adopted legislatively, should be strictly interpreted as consciously intended to prohibit variation of UCIOA rights, thereby to protect the fundamental policies underlying UCIOA.

In the case of an attempted purchase of the Prioritized Lien, the mortgagee could argue that the variation in rights under § 3-116 was valid because it had been purchased for adequate consideration. However, the term "agreement" itself, describing a prohibited transaction under § 1-104, seems to contemplate consideration paid and that such payment would not validate a waiver or variation of UCIOA's terms. Compare *Shearson American Express*,

that the association would relinquish its prioritized security for all future assessments, either permanently or for some extended period, would fly in the face of UCIOA's statutory scheme. It would be as if a governmental taxing authority were to give up its future power to attach prioritized tax liens for new defaults whenever one deficiency were cured. In levying assessments, the association is somewhat analogous to a governmental authority¹²⁸ levying taxes. Like the government, it must collect assessments from its residents to perform critical functions which clearly resemble governmental responsibilities.¹²⁹ Like the government, the association has

Inc. v. McMahon, 482 U.S. 220, 230 (1987) (interpreting in dictum the anti-waiver provisions in § 29(a) of Federal Securities and Exchange Act to prohibit negotiation of commission reduction for waiver of disclosure protection of Exchange Act even when customer does so voluntarily and knowingly, and emphasizing irrelevance of evenness of such bargain). A variant of the mortgagee's adequate consideration argument would be that no UCIOA right had been varied; rather a right, the Prioritized Lien, had been purchased. As noted in the text, however, the Prioritized Lien would technically not yet exist at the time the mortgagee purported to purchase it. Practically speaking, what would be purchased under such an assignment arrangement would be not only the association's ability to collect on delinquencies currently secured by the Prioritized Lien, but also its right to future lien priority for assessments on into the future. Taking that right from the association, even for substantial consideration, could vary UCIOA's basic assessment collection mechanism on a semi-permanent basis. UCIOA § 1-104 could not have meant to permit such disruption of the statutory scheme.

Purchase of an assignment of the perpetually renewable Prioritized Lien also raises very difficult problems of valuing the lien for purposes of determining adequacy of consideration. After all, such valuation would come at a time when the immediate amount of Prioritized Lien is unknown. Likewise, because the assignment of lien would run over time, during which the lien in the association's hands would have been renewable, a valuation would need to take into account what would have been changing amounts for the Prioritized Lien, and the possibility of the Prioritized Lien being used to recover varying sums in foreclosure several different times. Even if value could be determined, these elements of value would clearly total a sum well in excess of the approximate amount of the Prioritized Lien at the one time the mortgagee was seeking to acquire an assignment.

128. The analogy made here between community associations and public governments in the limited realm of assessment collection is not intended to suggest a broader analogy between associations and public governments in general. One consequence of such a general analogy would be application of the Constitution to the actions of community associations. While the application of some constitutional safeguards to associations might be wise, such as protection of free speech from association interference, others such as one person one vote, would upset the fundamental structure of community associations as we know them. At best, such changes would require very careful consideration, and would generate very substantial difficulties in determining new association governance rules and in protecting owners' reliance interests. Accordingly, my recommendation has been for states to select the constitutional protections they consider appropriate to apply in community associations, and to provide for such protections statutorily. For further discussion, see Winokur, *Mixed Blessings*, *supra* note 7, at 65 n.271, 88.

129. See *supra* notes 10-11 and accompanying text. Community association's expenses are often even more varied than those of public municipalities, including not only municipal-type expenses (like private road maintenance) and otherwise essential expenses (like casualty insurance premiums), but also expenses which seem neither municipal-like nor essential (such as some recreational expenses)—nor necessarily entitled to priority over all other liens. However, these classifications are fraught with definitional ambiguity, as in the case of expenses to maintain a swimming pool, which is arguably both recreational and municipal-like. Because of the definitional complexities in distinguishing between more crucial

the option neither to deny extending more and more credit over time to unit owners nor to withhold performance of its responsibilities to maintain the community physically. And like government, its ability to function in socially critical arenas depends on renewable, prioritized lien protection of its assessment income.

An additional analogy supports the association's continued entitlement to perpetually renewable security for all future assessments, and priority for a substantial portion of those assessments, even after past defaults have been cured. In a very real sense, the association is like the senior lienor holding a mortgage which secures obligatory future advances. As Henry Judy and Robert Wittie have observed, the CIC is, in effect,

an *involuntary* creditor which becomes obligated to advance services to unit owners in return for a promise of future payment. Such payments are much like the loans made by a mortgagee under an obligatory mortgage future advances clause, but with only the most rudimentary controls upon the amount and timing of loan advances, the terms of the loan, and the continuing credit worthiness of the borrower.¹³⁰

Clearly, the UCIOA lien secures future advances in the sense of continually accruing assessment obligations, with the association obligated continually to pay out maintenance and operational costs for the entire community regardless of its receipt of payment. Lenders financing the purchase of CIC units can reasonably be held to realize that these costs and debts must, by their very nature, persist into the future regardless of the association's preferences, and to understand that assessments and defaults will change over time.

Like the holder of a mortgage securing obligatory future advances,¹³¹ the association's priority for its lien should not be limited at some amount or point in time while the association's obligation to make advances persists. Rather, new advances, costs covered by assessments, should relate back and receive the same priority accorded to the original association lien (under UCIOA, holding a split priority) relative to intervening liens like the first mortgagee. With a senior mortgage to secure obligatory future advances, no one's payment of a past advance blocks inclusion of future obligatory advances in the priority lien. The same result should hold for community associations and their prioritized statu-

and less crucial expenses, the drafters of UCIOA opted to include all duly levied CIC assessments, regardless of purpose, within the limited lien priority afforded to assessment liens by § 3-116. See generally Judy and Wittie, *supra* note 24, at 484-88. Similarly, the assessment and lien provisions do not inquire beyond the general budgeting process into the details of association governance or possibly poor association judgment in levying a particular judgment. Rather than examine each of these subtle variables in each case, § 3-116 begins with the fundamental compromise of limiting the association's priority to six months worth of assessments rather than giving the association first priority for all its assessments as municipal taxes receive.

130. Judy and Wittie, *supra* note 24, at 475.

131. See NELSON & WHITMAN, *supra* note 17, § 12.7.

tory lien.

Despite the unavailability of protection fully analogous to that afforded by equitable redemption, first mortgagees whose own loans are not in payment default may very well elect to pay assessment defaults in order to eliminate the present threat of foreclosure by the association.¹³² While such mortgagees will remain vulnerable to future defaults gaining priority over them, those defaults will hopefully take some time to rise to a level where association foreclosure would become worthwhile. Indeed, at least where generalized economic conditions are not severe, the first mortgagee can often persuade the unit owner to cure its assessment default and keep its assessments current in the future.¹³³ In weaker economies, however, the lender may decide to refrain from paying assessment delinquencies until the lender obtains title to the unit in foreclosure, after which payment is far more likely.¹³⁴

III. STREAMLINING INTERNAL ASSOCIATION FINANCIAL MANAGEMENT

The lien priority provisions of UCIOA are integrally bound up with a series of additional measures designed to strengthen associations financially, by regularizing association management not only in the collection of assessments but also in budgeting and record keeping generally. In addition to their direct impacts on availability of the UCIOA "super priority" for association liens, these provisions aim to discipline and streamline association management to create financially stronger, more decisive—"meaner, leaner"—associations.

A. Recording the Assessment Lien

First, UCIOA provides that recording the CIC declaration itself constitutes record notice and perfection of the lien for assessments.¹³⁵ In many states, recording of a delinquency notice has been deemed necessary to perfect any lien for unpaid assessments.¹³⁶ But the burden of recording individual delinquencies, unit by unit, can be overwhelming and unnecessary for associations, especially when their management consists of amateurs. Attorneys attempting perfection by recording delinquencies

132. For a discussion of first mortgagees paying assessment defaults, see *supra* notes 112-17 and accompanying text.

133. Buck, *Super Priority Liens for Community Associations*, 1 SYMPOSIUM ON UNIFORM MULTIPLE OWNERSHIP ACTS, *supra* note 22, at 153, 155: "From our own practical experience in dealing with the 'super priority' lien in Connecticut, collections have indeed been much easier. Lenders have paid the assessments. More often, lenders have made the delinquent owner pay the assessments." Mr. Buck also notes that the onset of economic depression in the northeast U.S. has left lenders more reluctant to pay the Prioritized Lien. *Id.*

134. See *supra* text accompanying *supra* note 107.

135. UCIOA § 3-116(d), 7 U.L.A. at 351 (1982).

136. In some states, the perfection requirement is expressed statutorily. See, e.g., N.C. GEN. STAT. § 47C-3-116(a) (1984). See also GARY POLIAKOFF, LAW OF CONDOMINIUM OPERATIONS ASSOCIATIONS § 5.26 (1988). Elsewhere, perfection has evolved as a rule of practice, with trial courts occasionally insisting upon it.

have varied in opinion as to whether each successive default on a given unit must be recorded, or whether recording one delinquency on a unit will perfect the lien as to subsequent delinquencies as to the same unit.¹³⁷ In place of requiring recording of individual delinquencies, UCIOA requires recording of only the declaration¹³⁸ and a formalized assessment status reporting system.¹³⁹ Under UCIOA's language, the statutory lien is based on the association's existence and not on its declaration's content. Thus, there is no requirement in UCIOA that the declaration contain a provision creating an assessment lien.¹⁴⁰

Desirable though it may be to require recordation of only the declaration, the present language without more may leave a community association in some states off the list of parties receiving notice of any senior mortgage foreclosure against a unit in their CICs. Some state statutes confine their list of parties to whom notice foreclosure must be provided to holders of interests "recorded subsequent to the [mortgage or] deed of trust being foreclosed and before recordation of the notice of sale."¹⁴¹ Because the declaration was likely recorded before recordation of the mortgage or deed of trust being foreclosed upon, the association might not be entitled to notice of foreclosure of such a mortgage or deed of trust, even though its Less-Prioritized Lien would stand to be extinguished in such a sale. Recording delinquency notices could cure this problem. Preferably, UCIOA should be amended to clarify that recordation of the declaration,

137. This issue becomes even more slippery where a recorded delinquency is cured, but the unit owner becomes delinquent again. Will the first notice perfect the lien as to the later delinquency which should, in fairness, have been cancelled on the record but which may not have been?

138. Declarations sometimes supplement their assessment lien provisions with language requiring perfection of the assessment lien by filing individual unit delinquencies. In the case of associations in existence before enactment of UCIOA, conservative association counsel may elect to follow the dictates of the declaration regardless of the liberating provisions of UCIOA. However, it is at least arguable that such provisions in the declaration would be inapplicable to control UCIOA's statutory lien. See *supra* note 73 and accompanying text.

139. This assessment status reporting system is described and critiqued *infra* notes 142-49.

140. The required contents of a declaration are set forth in UCIOA § 2-105, which does not require any provision for either assessments or assessment liens. UCIOA § 2-105, 7 U.L.A. at 280 (1982). Assessments are restricted by UCIOA § 3-115. UCIOA § 3-115, 7 U.L.A. at 349 (1982). Many pre-UCIOA association declarations do contain express association lien provisions, which may subordinate the association lien's priority to one or more mortgages, and which may specify perfection of the association lien by recording unit delinquencies. For a discussion of the consequences of these provisions in jurisdictions enacting the UCIOA, see *supra* notes 71-74 and accompanying text.

141. WASH. REV. CODE ANN. § 61.24.040(1)(a)(ii) (1990). Compare COLO. REV. STAT. 38-38-101(7)(a) (Supp. 1991) (similar notice requirements). Beyond the notice of foreclosure provided for in COLO. REV. STAT. § 38-38-101, however, the Colorado statutory scheme also provides for an additional notice of right to cure and right to redeem to all parties holding such rights. COLO. REV. STAT. § 38-38-103 (1990). The right to cure extends to parties such as "any holder of an interest junior to the lien being foreclosed by virtue of being a lienor . . . under a recorded instrument." COLO. REV. STAT. § 38-38-104 (1990). The Washington deed of trust foreclosure scheme apparently contains no analogous provision.

even though predating recordation of a first mortgage or deed of trust, would entitle the association to notice of foreclosure in these cases.

B. Assessment Status Inquiries

As an efficient substitute for recording separate notices of delinquencies against each unit owing unpaid assessments, UCIOA codifies each unit owner's ability to obtain from the association verification of the status of any unpaid assessments charged against the unit.¹⁴² Within ten business days after receiving the owner's written request, the association is obligated to provide a recordable assessment status certificate binding on the association, the board and all unit owners in the CIC. The statement can then be presented to other interested parties, such as a mortgagee or potential buyer. Furthermore, it can be placed on the public record.

This provision for assessment status reports codifies what had become standard practice in many communities that had no statute mandating provision of such "estoppel statements." As a precondition to some contemplated transactions, buyers, lenders and title insurers regularly insist on proof that assessment delinquencies do not encumber the unit. In expressly obligating the association to respond to these requests, however, UCIOA increases the unit owner's leverage in seeking a response from a recalcitrant board. Further, the information contained in the statement required by UCIOA is more precise and reliable than a simple recorded notice of delinquency, which will often point to a single default, without revealing whether subsequent defaults have increased the size of the assessment lien.

Nonetheless, the UCIOA provision could be strengthened in several respects. Most importantly, the statute should ideally specify the consequences of an association's failure to respond to a request for an assessment status report. Such a non-response is a particularly troubling risk with weakly managed association boards unaware of their obligations or of how precisely to fulfill them.¹⁴³

Arguably, the consequence of a non-response and a late response should be the equivalent of a response that there are no assessment delinquencies chargeable against the unit. Thus, any delinquencies outstanding at the time of an unanswered status report request would become wholly unenforceable, by either foreclosure or personal action on the assessment debt. In this same strict spirit, late responses might be treated as no response at all. A more moderate approach to the association's failure to timely respond could trigger loss of the association's entire statutory lien¹⁴⁴ for assessments then outstanding, but without affecting the

142. UCIOA § 3-116(h), 7 U.L.A. at 352 (1982).

143. For a discussion of management problems, particularly with amateur association boards lacking financial and business expertise, see *supra* note 13 and accompanying text.

144. This would include both the Prioritized and the Less-Prioritized Lien.

association's unsecured claim against the unit owner.¹⁴⁵ An even milder remedy where no timely response is forthcoming would entail merely loss of super priority for the unreported assessments then outstanding; the unreported delinquencies would remain secured by the association's Less-Prioritized Lien.¹⁴⁶ Of course, if delinquencies continue to mount, the new delinquencies would become part of a renewable¹⁴⁷ Prioritized Lien and the earlier loss priority would be nullified. In selecting from these potential sanctions, the goal should be not only to motivate a response once a request is received, but also to encourage the association more generally to undertake management practices necessary to enable prompt responses to all requests.

An ideal assessment status report statute should also clarify who can receive assessment inquiries for the association. With informal association organizations and changing citizen leadership, the inquiring unit owner could well encounter the objection of having asked the wrong party. Colorado addresses this problem by requiring that the inquiry be addressed to the association's registered agent.¹⁴⁸ Associations may wish to appoint their management company, if any, or their attorney as the appropriate agent. Designation of an association officer runs a far greater risk that the

145. A unit owner's personal liability for unpaid assessments due during that owner's ownership of a unit is well established. See NATELSON, *supra* note 19, at 222. It is also implicitly recognized in UCIOA's grant of power to the association "to collect assessments . . . from unit owners." UCIOA § 3-102(2), 7 U.L.A. at 326 (1982). See also THE HOMES ASSOCIATION HANDBOOK, TECH. BULL. 50, 324-27 (Urban Land Institute, 1964) (extensive though inconclusive argument that personal assessments should be available); PENNEY, *supra* note 18, at 541; FHA Form 1401 (VA Form 26-8201), HUD-FHA Handbook 4135.1 § 1; COLO. REV. STAT. § 38-33.3-315(6) (Supp. 1991) (clarifying that unit owner's liability for payment of assessments persists despite any waiver of use of common elements or abandonment of unit). But see Century Park Condominium Ass'n v. Norwest Bank Bismark, 620 N.W.2d 349, 352 (N.D. 1988) (no personal liability or assumption of assessment obligations by foreclosure sale purchaser). Generally, liability of a unit owner should not extend to assessments coming due after a unit owner transfers title to the unit to a successor. But see NATELSON, *supra* note 19, at 222; RESTATEMENT OF PROPERTY, § 538 (1944) (continuing obligation of promisor after parting with land ownership depends on intention manifested in making covenant); Korngold, *supra* note 67, at 331.

146. Compare Colorado's recently adopted version, which provides vaguely that, when the association fails to respond to a proper request for an assessment status report, "it shall have no right to assert a priority lien upon the unit for unpaid assessments which were due as of the date of the request." COLO. REV. STAT. § 38-33.3-316(8) (1991) (emphasis added). The term "priority lien" leaves unclear whether it is merely the Prioritized Lien which no longer secures the unreported assessments, or whether these assessments have also lost the security of the Less-Prioritized Lien. Since even the Less-Prioritized Lien does have statutory priority under UCIOA over mortgages junior to the first mortgage but filed after the declaration, this Less-Prioritized Lien could conceivably be within the term "priority lien." This unfortunate language was the product of last-minute, political compromise.

147. For a discussion of the perpetually renewable Prioritized Lien, see *supra* text following note 117.

148. *Id.* To assure that each association has a registered agent, and to encourage what many practitioners consider good practice, Colorado's entire lien for assessments provision is conditioned on the association being incorporated. COLO. REV. STAT. § 38-33.3-316(1) (Supp. 1991).

individual designee will change without all members of the community realizing the change has occurred.

Finally, the statute could also specify how inquiries or responses under this section can be later proven, when one of the parties disagrees over who did what when. Thus, Colorado's provision specifies use of "certified mail, first class postage prepaid, return receipt requested,"¹⁴⁹ for these inquiries and responses, so that proof of either the request or the response will be readily available.

C. Budgeting

To focus the association's internal financial planning, UCIOA also requires annual association budgeting once the first association assessment has been made.¹⁵⁰ Availability to the association of the Prioritized Lien also depends on adoption of such an annual budget, because the assessments used to measure the six-month super priority must be based on such a budget.¹⁵¹ Once the association board adopts a proposed budget, UCIOA requires notice to the community of the budget proposal and of an opportunity to meet and review the proposal.¹⁵² However, regardless of actual attendance at the announced budget meeting, the budget is considered automatically accepted unless a majority of all homeowners, or any larger percentage specified in the declaration, objects. If the budget is rejected, the previous budget in effect for the association continues until a new proposal successfully survives this process.

The UCIOA budget provision draws fire from some community association officers as generally too burdensome, and as opening the floodgates to paralyzing dissent on budget issues which must be efficiently resolved. However, the UCIOA procedure strikes a remarkably good balance between insisting on methodical financial planning by associations¹⁵³ and allowing boards leeway to govern without fruitless disruption by unrepresentative, disgruntled residents.¹⁵⁴

IV. PROPHETS OF DOOM: FEARS OF THE "SUPER PRIORITY" LIEN

In the various jurisdictions which have considered UCIOA, opposition to the legislation has focused primarily on the "super priority" lien for associations collecting defaulted assessments. In addition to lender interests, opposition has come from several other constituencies whose positions on the "super priority" lien have varied from state to state.¹⁵⁵

149. COLO. REV. STAT. § 38-33.3-316(8) (Supp. 1991).

150. UCIOA § 3-115(a), 7 U.L.A. at 349 (1982).

151. UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

152. UCIOA § 3-103(c), 7 U.L.A. at 328 (1982).

153. Regarding the need for better financial planning by many community associations, see *supra* note 12 and accompanying text.

154. For authorities reporting outrageous and disruptive behavior by community association members, see, e.g., Winokur, *Mixed Blessings*, *supra* note 7, at 63 n.263.

155. For example, in Colorado the realtors and developers supported enactment of the statute, including the "super priority" lien while title insurers and the Real Estate and Ti-

Though the arguments over UCIOA's "super priority" lien varied from state to state, certain themes emerged—often focusing on fears that the new "super priority" lien would foul up existing real estate, lending or insurance markets. Several such prophecies of doom are recounted and addressed below.

A. Marketability of CIC Mortgages on Secondary Market

Among the arguments often made against adoption of the "super priority" lien is that this priority would impair sale of mortgages on the secondary market because of government requirements that such mortgages be first liens.¹⁵⁶ This, in turn, would dry up mortgage funds to CIC unit owners in states imposing the "super priority" lien for assessments, interfering with sales of CIC properties. However, the same Fannie Mae and Freddie Mac regulations which require lenders to receive first liens expressly contemplate acquisition of mortgages subject to the uniform acts' six month assessment lien priority on the same basis as first liens on other residential property.¹⁵⁷ Lenders' and developers' attorneys in states

ties Section of the Colorado Bar Association opposed its enactment. In Connecticut and Washington, the Bar supported the legislation. Realtors in Colorado and Alaska supported enactment of UCIOA, but Realtors opposed enactment in Connecticut. Lenders were part of the coalition which supported enactment in Connecticut, as indeed the Federal Home Loan Mortgage Corporation had helped sponsor development of the UCIOA "super priority" lien in the first place. Note, for example, that Henry Judy (whose article so strongly supporting "super priority" lien is cited throughout this Article) was and remains Freddie Mac General Counsel and was Advisor to the Special Committee drafting the UCIOA. However, lenders specifically opposed the "super priority" lien in Colorado, even succeeding in having it temporarily removed from the bill before the Colorado Senate voted to specifically add the lien provisions back into the bill.

156. FEDERAL NATIONAL MORTGAGE ASSOC. SELLING GUIDE, Part VIII, ch. 6, § 608.02 (Rev. June, 1990); 1 FEDERAL HOME LOAN MORTGAGE CORP. SELLERS SERVICERS' GUIDE, § 2003(c), 2005(c). As noted in Comment 1 to UCIOA § 3-116, there has also been some concern that the "super priority" lien would run afoul of state regulations restricting lending institutions to mortgages which are "first" liens. See, e.g., CAL. FIN. CODE § 7102 (Deering 1989); N.Y. BANKING LAW § 380(4) (Consol. 1990); TEX. REV. CIV. STAT. ANN., art. 852(a), § 5.05 (West 1964 & Supp. 1992). See also Alfred V. Contarino & Richard O. Kiner, *Control and Management of Common Elements by Covenant*, 14 HASTINGS L.J. 309, 314 (1963); Russell R. Pike, *The Condominium as a Mortgage Investment*, 14 HASTINGS L.J. 282, 286 (1963). To date, such statutes have not been asserted to inhibit mortgage loans secured by CIC units—perhaps following the lead of federal regulators and recognizing how widespread the market is in which the six-month super priority is recognized.

157. The FNMA provision is limited to situations where the declaration requires that assessments be paid monthly. FEDERAL NATIONAL MORTGAGE ASSOC. SELLING GUIDE, Part VIII, ch. 6, § 608.02 (Rev. June, 1990). The Freddie Mac provision contemplates that a mortgagee who obtains title to a unit will be liable for up to 6 months of assessments. 1 FEDERAL HOME LOAN MORTGAGE CORP. SELLERS SERVICERS' GUIDE, §§ 2003(c), 2005(c). As discussed in *supra* notes 107-10 and accompanying text, mortgagee payment of the six-month delinquency is likely at this stage anyway.

The contrast between the Fannie Mae and Freddie Mac provisions on acceptability of mortgages subject to the "super priority" lien echoes the contrasting positions of the Department of Housing and Urban Development and the Veterans Administration on whether mortgagee payment of the six-month delinquency will be covered under claims under HUD

where the uniform acts' "super priority" lien is in effect report that these provisions have in no way discouraged secondary purchase or sale of CIC mortgages subject to such priority.¹⁵⁸

B. Escrows of Assessments

An additional argument against the "super priority" lien has been that lenders facing a loss of priority would demand that each new homebuyer escrow six months assessments to protect lenders against the risk of having to pay defaulted assessments. Since developers may be unit owners well into the life of a CIC, during which time the allocation of assessment responsibility may not discriminate in favor of the developer, the aggregate of assessment escrows faced by developers owning multiple units could become quite substantial.¹⁵⁹ By this view, such an escrow requirement would inappropriately increase development costs and home purchase costs to potential buyers already coping with high housing costs and, more recently, a troubled economy.

The drafters of the "super priority" lien shared this concern and fully expected that first mortgagees would require that unit owners establish escrows in the amount of the Prioritized Lien.¹⁶⁰ The expectation of

mortgage insurance or the VA. While HUD has taken the position that such payments are covered, the VA contends that they are not, citing its statutory restriction of VA loans to first liens only. See FEDERAL NATIONAL MORTGAGE ASSOCIATION MEMORANDUM TO ALL FHA/VA SELLER/SERVICERS (West Va.) (Nov. 18, 1980). FNMA, however, assures that VA guaranteed mortgages may be subject to the "super priority" lien provided adequate assurance is provided to FNMA that it will be held harmless with respect to prioritized assessments. *Id.*

There is some current concern regarding whether these various agencies might change their view on the acceptability of first mortgages subject to the "super priority" assessment lien. See, e.g., Buck, *Super Priority Liens for Community Associations*, 1 MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 157; Buck, *1991-92 Legislative Update*, in 13TH ANNUAL COMMUNITY ASSOCIATION LAW SEMINAR MATERIALS, 384, 395 (CAI, 1992). However, the number and size of jurisdictions with versions of the "super priority" lien now in effect may, as a practical matter, effectively mandate continuation of the agencies' present acceptance of this limited super priority.

158. See Buck, *Super Priority Liens for Community Associations*, 1 MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 156 (developers' and association attorney addressing experience both in Connecticut and nationally); Letter from Norman H. Roos, Connecticut Mortgage Bankers Association counsel to Charles H. Rhyne (regarding Connecticut experience) (on file with author); Letter from Robert M. Diamond, Esq., Virginia developers' counsel to Gurdon H. Buck (Feb. 26, 1991) (regarding Virginia experience); Telephone Interview with Mary Burt, Manager of State Relations, Government & Industry Relations, Federal Home Loan Mortgage Corporation (March 16, 1992). See also letter from Mary Burt, Manager of State Relations, Government & Industry Relations, Federal Home Loan Mortgage Corporation, to Hon. Bruce G. Sundlun, Governor of Rhode Island (Oct. 18, 1991) (arguing for repeal of Rhode Island's 1991 passage of a five-year super priority for association liens, and impliedly accepting and advocating the six-month super priority provisions of the Uniform Acts as in keeping with Freddie Mac's nationwide uniform standards) (on file with author).

159. UCIOA § 2-107(b), 7 U.L.A. at 466 (1985); See also UCIOA § 3-115(a), 7 U.L.A. at 525-27 (1982).

160. Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments Under the Uniform Acts*, MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note

escrow requirements was one basis for limiting the Prioritized Lien to equal no more than six months assessments.¹⁶¹ However, some experience with the super priority lien suggests that lenders may not ordinarily impose any escrow requirement on CIC unit purchasers.¹⁶²

Even if escrows were routinely required, they would be forcing homeowners to pay costs which are, in any case, legitimate costs of CIC homeownership. UCIOA's correct premise is that these very real common costs must be recognized and borne by those who benefit from the maintenance and other services and the facilities generating the costs. With maintenance needs rising as the first large CIC generation ages,¹⁶³ we can no longer casually view community associations as a convenient place to transfer unwanted local governmental responsibilities¹⁶⁴ without also enabling associations to raise the funds necessary to meet those infrastructure responsibilities. The "super priority" lien should itself help assessment collections. If that boost is accompanied by the escrowing of a modest amount of assessments per unit, the escrowing should further help assure that CIC homeowners each pay their fair share. Furthermore, it would limit the risk faced by the most reliable homebuyers that, due to others' defaults in the same community, their own assessments may skyrocket while their home values plummet.¹⁶⁵ This lowered risk, in turn, should help CIC properties to hold their value.

C. Title Insurance Coverage

Title insurers have expressed fears of new claims against them under the UCIOA assessment lien priority. One argument is that the structure of the "super priority" lien would place title insurers in the position of insuring against an unforeseen future event, the Prioritized Lien fueled by a default subsequent to issuance of the title policy.¹⁶⁶ Such potential liability seems very far fetched under UCIOA and the standard language of the vast majority of title policies.

22, at 171, 173. See also UCIOA § 3-116 cmt. 1, 7 U.L.A. at 529 (1982).

161. Wittie, *supra* note 160, at 173.

162. Buck, *Super Priority Liens for Community Associations*, MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 155. In Connecticut, where UCIOA became effective January 1, 1984, Mr. Buck reports that escrows have been required only after the lender has already once been forced to pay off delinquent assessments in an enforcement action. *Id.* See also NELSON & WHITMAN, *supra* note 17, at 965-66 (suggesting as an explanation for their non-use that administration costs for assessment escrows are particularly high due to more frequent payouts than assessments for taxes and insurance, but nonetheless favoring their use). Compare THE HOMES ASSOC. HANDBOOK, *supra* note 145, at 232 (reporting long before Uniform Laws Conference promulgation of UCIOA or UCA that 21 of 71 associations questioned maintained assessment escrows).

163. For estimates of the age of community associations, see *supra* note 27.

164. For a discussion of the transfer of governmental responsibilities to community associations, see *supra* notes 11-12 and accompanying text.

165. For a discussion of the impact on neighboring CIC units of unpaid assessments, see *supra* notes 24-26 and accompanying text.

166. See Letter from Harry L. Paulsen, Exec. Dir. Land Title Assoc. of Colorado, to Senator Bill Schroeder (March 7, 1991) (on file with author).

UCIOA clearly provides that, although filing of the declaration is prerequisite to the statutory assessment lien's existence, the lien itself dates not from filing of the declaration but only "from the time the assessment or fine becomes due."¹⁶⁷ Given this language, a subsequently arising lien, triggered only upon a default subsequent to issuance of the title policy, would clearly be within the American Land Title Association standard owner's and lender's form Exclusions from Coverage. Absent any contrary endorsement to the standard policy, these exclusions from coverage include "liens, [etc.] attaching or created subsequent to Date of Policy (except [mechanics liens for labor or materials furnished before policy issuance])."¹⁶⁸

In condominium and planned unit development title policies, there is often added an endorsement which provides the unit owner various assurances about the legality of the condominium's or PUD's documentation, existence and operation under applicable law.¹⁶⁹ These standard endorsements have also traditionally provided coverage against priority of assessment liens over mortgage liens. Thus, the traditional condominium endorsement (ALTA Form 4) adds coverage: "against loss or damage by reason of . . . [t]he priority of any lien for charges and assessments provided for in the condominium statutes and condominium documents over the lien of any insured mortgage identified in Schedule A."¹⁷⁰ The traditional PUD endorsement (ALTA Form 5) adds coverage: "against loss or damage by reason of . . . [t]he priority of any lien for charges and assessments in favor of any association of homeowners which are provided for in any document referred to in Schedule B over the lien of any insured mortgage identified in Schedule A."¹⁷¹

Read literally, these traditionally standard endorsements¹⁷² could conceivably be taken to insure against the super priority of a statutory assessment lien even though the lien arises subsequent to issuance of the title policy as a result of a later default. After all, UCIOA's super priority

167. UCIOA § 3-116(a), 7 U.L.A. at 351-52 (1985).

168. See American Land Title Association (A.L.T.A.) Residential Owners Policy, Form B (1970), Exclusion 3 (D); A.L.T.A. Loan Policy, Form 1970, Exclusion 3 (D). The same exclusion in Plain Language Form P-1979 makes clear the title insurance company's liability for mechanics' liens for work and materials prior to issuance of the policy. When addressing individual cases in Connecticut (a UCIOA state), and not the merits of UCIOA as legislation, title companies have themselves asserted this same argument: "that creation of the lien is a post-policy occurrence and not covered." See letter from Gurdon H. Buck, Esq., to James L. Winokur (Jan. 3, 1992) (on file with author). Though Mr. Buck does not consider this conclusion to be "self-evident," he reports title companies generally succeed in so denying liability for assessment defaults occurring after issuance of a title policy. *Id.* Mr. Buck's concern is apparently based in the Form 4 (and Form 5) endorsements. *Id.*

169. A.L.T.A. Condominium Endorsement Form 4; A.L.T.A. PUD Endorsement Form 5.

170. A.L.T.A. Condominium Endorsement Form 4.

171. A.L.T.A. PUD Endorsement Form 5.

172. The PUD endorsement is a bit less susceptible to this reading because, unlike the condominium endorsement, it does not expressly include within its coverage an assessment lien created by statute.

is accorded literally to "a lien for charges and assessments" and is priority over a mortgage which will be listed in Schedule B. However, such a literal reading of this endorsement flies in the face of the fundamental nature of title insurance which—unlike casualty, health, fire, and other types of insurance—"insure[s] against past risks and excludes [from coverage] future risks."¹⁷³

To clarify this important limitation on coverage against assessment lien priority, the standard ALTA endorsements should be refined. Gurdon Buck has proposed that the relevant paragraph of Form 4 (and presumably Form 5) be altered to limit coverage supplied by the endorsement to: "The priority of any Common Expense assessments, including special assessments, due against the Unit identified in Schedule A and unpaid as of the date of the policy."¹⁷⁴ This endorsement would leave the insurer responsible only for defaulted assessments from before issuance of the title policy. To obtain information about such past delinquencies, the insurer need only obtain the binding assessment status statement required under UCIOA.¹⁷⁵ Inquiries into assessment status have long been standard procedure for many title insurers, but without any statutory provision to back up the request with the force of law. Under the current ALTA policy, with a properly tailored CIC endorsement, title insurance coverage will not extend to a lien arising only upon a later default. If a title company wished to provide such coverage, it could of course elect to do so in its own business judgement, either as a special service to a good client or for an additional fee.¹⁷⁶

CONCLUSION

The UCIOA "super priority" lien for assessments is a fundamentally sound response to the difficulties community associations have experienced in collecting the assessments which enable performance of association responsibilities. With these associations providing more and more critical, previously public services in our society, and housing some 15% of our population, preserving the lifeline of assessment dollars is a matter of urgent necessity. The UCIOA lien promises to at least substantially improve the financial strength of associations while leaving other secured lenders reasonably well protected and unit owners relatively unburdened by extra payments beyond those previously required. UCIOA accomplished this result by carefully compromising interests represented by associations with those of lenders and unit owners, providing a six-month assessment priority rather than the much larger priorities suggested by some advocates, or by strict adherence to analogies to public government

173. D. BARLOW BURKE, *LAW OF TITLE INSURANCE* 83 (1986). "[T]he insurer will indemnify the policy holder only if the title is otherwise than as stated as of the date of issuance. Both on-record and off-record risks arising after that date are not covered by the policy." *Id.*

174. 1 GURDON BUCK, *CONDOMINIUM DEVELOPMENT* § 8:66, at 8-117 (1991).

175. See *supra* text at notes 142-49.

176. Cf. 1 GURDON BUCK, *CONDOMINIUM DEVELOPMENT* § 8:66, at 8-121 (1991).

or private lenders with mortgages securing obligatory future advances.

The UCIOA lien provisions can make our sometimes enfeebled community associations "meaner" in the sense of power to be reckoned with by other foreclosure claimants. The supporting financial management provisions can also make them "leaner" by requiring that association budgeting, responsiveness to inquiries, and documentation duties become more focused and streamlined. These sections of UCIOA create some technical issues which further drafting can resolve. Nonetheless, these financial management reforms support the lien provisions, and UCIOA wisely makes them dependent on each other.

As good as the UCIOA "super priority" lien is from a policy perspective, the Uniform Act version is riddled with technical problems which will hinder its functioning. For example, why should the lien provisions focus so exclusively on foreclosure rights at a time when our society is beginning to turn away from litigation toward less adversarial resolution of conflict? Why not count the six month priority from a date other than commencement of foreclosure? Even if foreclosure must remain the focus, why phrase the statute to even possibly suggest that the only foreclosure which creates the super priority is judicial foreclosure by the association?

More difficult questions are posed by UCIOA's applicability rules as applied to the UCIOA lien. With many association declarations containing express subordination of association liens to first mortgages, associations in existence before enactment of UCIOA could arguably lose perhaps UCIOA's strongest benefit, which even UCIOA itself first purports to give to existing associations (by expressly listing section 3-116 as applicable to preexisting communities¹⁷⁷) before arguably taking it away later in the same sentence with its unwillingness to "invalidate" provisions of existing declarations.

The Joint Editorial Board of the American Bar Association and the Uniform Laws Conference is currently considering adjustments to the Uniform Multiple Ownership Acts. With due reflection, careful tinkering, and the great imagination which has characterized their past work, we can hope for the transformation of a very good remedial innovation to a truly excellent one.

177. UCIOA § 1-204, 7 U.L.A. at 266 (1985).

EXHIBIT 2

UNIFORM COMMON INTEREST OWNERSHIP ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIRST YEAR
IN MONTEREY, CALIFORNIA
JULY 30-AUGUST 6, 1982

WITH PREFATORY NOTE AND COMMENTS

UNIFORM COMMON INTEREST OWNERSHIP ACT (1982)

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UNIFORM COMMON INTEREST OWNERSHIP ACT (1982)

PREFATORY NOTE

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

The explosive rise in land costs during the 1960s and 1970s, coupled with the desire of many consumers to own housing and recreational amenities which they could not afford except when owned with others, led to an extraordinary development of various forms of shared or “common” ownership of real estate. The three most common forms of common ownership have been condominiums, cooperatives, and so-called “planned unit developments,” or cluster housing projects. Each of these forms typically includes creation of a mandatory owners association to manage and maintain common amenities, while separate portions of the real estate—units—are occupied for individual use.

Title to the common amenities, or common elements, typically rests in varying entities depending on the form of ownership—they are owned on an undivided interest basis by the unit owners in condominiums, while the association “owns” the common elements in the case of cooperatives and PUDS. Similarly, legal title to the units lies with the unit owners in condominiums and PUDS, but with the association in the case of cooperatives. In all forms, however, the beneficial interest in both the common elements and the units lies with the unit owners, while management of the common elements is performed by the association.

While this common scheme is shared by all 3 forms, the legal consequences flowing from the choice of form differ substantially. Typically, condominiums are a highly regulated form of ownership under statute, often with consumer protection provisions in the statute. Cooperatives and PUDS are significantly less regulated. Moreover, when comparing laws between states, the statutes or common law governing condominiums, cooperatives, and planned communities use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of project documents and of financing arrangements in those states. Finally, the varying statutes, and case law creating different “bundles of rights” for purchasers of common interest communities in the various states, make it difficult for the increasingly mobile consumer to become educated in this very complex area.

UCIOA represents the culmination of the Conference’s 9-year effort to offer comprehensive legislation to the States which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership.

DEVELOPMENT OF THE ACT

Condominiums

The first Uniform Act in the field was the Uniform Condominium Act (UCA), adopted by the Conference in 1977.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and many present state statutes are patterned after that 1958 statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have enacted more detailed and comprehensive “second generation” statutes. Many actual or potential problems, however, involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, had not been satisfactorily addressed by any existing condominium statute. Moreover, the statutes differ widely from state to state. The Uniform Condominium Act was drafted primarily to resolve those various problems.

Planned Communities

The Uniform Planned Community Act (UPCA) was adopted at the 1980 Annual Meeting of the Conference.

While the historical development of condominiums can be traced to early statutory enactments at the state level supported by the conveyancing bar and national lending institutions, planned communities, historically, developed as a zoning concept at the local level. As single family subdivisions were increasingly supplanted in land planning theory by “clustering” to enhance the availability of shared open space, local governments required a zoning mechanism responsive to the implications of this new concept. That device, frequently, was the “planned unit development” or PUD zone, in which cluster housing could be built, at the same or greater density than the land in question would support as single family homes on individual lots. This zoning device typically permitted local zoning authorities wide discretion in reviewing and approving designs for the dwelling units as well as the common facilities.

The growing acceptance of PUD zoning techniques by local governments in turn created new interest in an old form of real estate ownership: the multi-unit residential “planned community” served by common area facilities owned and operated by a homeowners’ association. Although such developments are remarkably similar to condominiums, they have operated for years under the common law without the regulatory burdens and consumer protection benefits applicable to condominiums.

The homeowner associations that administer such common law planned communities

often perform exactly the same functions as the condominium associations that administer statutory condominium regimes. They derive their powers from a declaration of covenants, conditions and restrictions (CC&R declaration) which is recorded at the beginning of the project and which relies for its enforceability on the state common law governing covenants which “run with the land.” Not surprisingly, large portions of such CC&R declarations are indistinguishable from condominium declarations. The only basis on which CC&R regimes are exempted from state and local condominium regulation is that title to the common areas is held in the name of the homeowners’ association instead of being divided among the unit owners as tenants in common.

These common-law homeowner association regimes take many forms. They include not only planned residential developments, which follow the classic models described in the Homes Association Handbook promulgated in 1962 by the Urban Land Institute and which inspired FHA Form 1400, but also various forms of cooperative ownership based on corporate forms, some real estate, some trust, and many other combinations of real and personal property ownership. In addition, new communities now are being formed which contain multiple layers of community associations having, at different levels, condominium, PUD or master association governance in as many combinations as there are draftsmen and problems to be solved.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act. Ironically, however, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has focused on planned communities, except to the extent that they are swept up in general home warranty statutes, or addressed on an *ad hoc* basis by local zoning officials.

The Conference was also mindful of the increasing and understandable inclination of developers, in the face of changing condominium legislation, to choose these alternative forms of developing multi-owner projects. This avoidance process acknowledged the often superior multi-owner arrangements possible under a homeowner association structure that avoids fractionalizing ownership of the common elements. The process also represents, however, an economic decision by developers to avoid, when possible, additional costs imposed by condominium legislation in the form of disclosure, escrow requirements, or restricted practices. The Conference believed that the states should have available for their consideration a uniform act which reflected the same public policies as are contained the Uniform Condominium Act. In this way, a state could extend the same public policies reflected in UCA to this very common form of real estate development. This need for parallelism whenever appropriate was a major factor in the drafting of the Act as finally adopted.

The result of this process was a comprehensive Act which closely paralleled UCA, and thus would yield the same consumer protections, regulatory structure, and administrative benefits

to unit owners in most multi-owner developments, regardless of how title to the common elements had been treated.

The 1980 UCA Amendments

As a result of the legislative process in the various states considering UCA from 1977 to 1980, and after review of UCA by the Drafting Committee on UPCA, a substantial number of amendments to the 1977 UCA were proposed by the Conference.

Many of these amendments were adopted at the 1980 annual meeting of the Conference, and were included in the current version of UCA. Most of those amendments were of a minor, non-substantial nature; they were intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which resulted in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplified the structure and readability of the Act.

A second category of changes resulted from a decision of the Conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the future consolidation of the two Acts. This required a large number of textual changes with no substantive effect.

Real Estate Cooperatives

One year after adoption of UPCA and the UCA amendments, the Model Real Estate Cooperative Act (MRECA) was adopted at the 1981 Annual Meeting of the Conference. It closely tracked its two predecessor Acts, since consolidation of the three Acts was anticipated by the Conference. Accordingly, MRECA, like the other Acts, was designed principally to insure that, to the extent practicable and consistent with the differences inherent in the various forms of ownership, consumers, developers, and lenders would be able to identify a coherent and consistent pattern of rights and obligations applicable to all “common interest” developments, whether organized as condominiums, planned communities or cooperatives.

That Act contains comprehensive provisions designed to provide a unified and modern law applicable to the cooperative form of ownership of real estate. The Act has no applicability to the many cooperatives formed for such purposes as commodity marketing or consumer services. Moreover, while principally applicable to the ownership of residential real estate, a common form of ownership in many jurisdictions, the Act contemplates that, in appropriate cases, it may but need not be used for industrial or commercial real estate as well.

Real estate cooperatives are a very common form of apartment ownership in several jurisdictions; in other states, however, they are virtually unknown, save in areas where they have been created pursuant to a variety of low income housing programs sponsored by the United States Department of Housing and Urban Development. Although cooperatives are similar in a

number of ways to condominiums and other forms of multiply owned real estate regimes, they have operated for years under the corporate law without the benefit of specific statutory enablement, and in virtually all states, without the regulatory burdens and consumer protection benefits available to condominiums.

As with planned communities, the associations that administer such cooperatives often perform exactly the same functions as condominiums. They typically derive their powers from a declaration of covenants, conditions and restrictions or some familiar form of instruments, be it in an offering plan, bylaws of the corporation, or a proprietary lease between the corporation which holds title to the property, and the tenants of that corporation who in fact hold the beneficial interest in the corporation and the property which it owns. Commonly, but by no means uniformly, the instruments which create the cooperative form of ownership are not recorded, and the enforceability of the instrument depends principally on the law of landlord and tenant, state corporate trust law, or other law peculiar to the form under which the cooperative was organized. Not surprisingly, large portions of the instruments which create the cooperative are indistinguishable from similar provisions in condominium or planned community declarations, since the instruments are obliged to resolve many of the same issues which arise in those forms of ownership.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act and the planned community field by the Uniform Planned Community Act. Ironically, however, as in the case of planned communities, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has been focused on cooperatives.

THE UNDERLYING CONCEPT OF UCIOA

Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership simply by consolidating the three prior Acts of the Conference and adding a very few generic definitions. The principal new definition is “common interest community.”

Because of the use of consistent definitions and policies in the three Acts preceding UCIOA, consolidation of the three in the merged Act was a relatively simple task. The section numbering system of UCIOA is entirely parallel with the other 3 Acts, and the language of UCIOA tracks, as applicable, with the cognate sections of those 3 Acts. Differences in result between the 3 Acts are preserved where appropriate. At the same time, during the drafting of UCIOA, in a few instances, it became clear that some differences in result were of form rather than legitimate substance. In those cases, the substantive result of one or more of the 3 Acts was changed to reflect a policy generally applicable in all forms.

The result is that a state wishing to consider legislation in the common interest ownership field has a range of choices from which to select. Many states will wish to adopt comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights. In those states, the consolidated Act is a workable and desirable long-term solution. Other states may wish simply to adopt a modern condominium statute to replace an existing but plainly outdated, statutory structure. In those states, UCA alone is the obvious choice. Finally, in states where existing “second” or “third” generation condominium statutes are seen as satisfactory, but a need for additional certainty and structure is desirable for planned communities or cooperatives, the 2 Acts governing those forms of ownership are available. Following adoption of one of the 3 constituent Acts, it would be very feasible, by a few carefully considered amendments, to adopt UCIOA and thereby extend coverage to include all forms of ownership in the field.

The definition makes it clear that a declarant, so long as he owns units in a common interest community, is the unit owner of any unit created by the declaration, and is therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

In the special case of a cooperative, the declarant is treated as the owner of a unit or "potential unit" to which allocated interests have been allocated, until that unit is conveyed to another.

§ 1-104. Variation by Agreement

Except as expressly provided in this [Act], its provisions may not be varied by agreement, and rights conferred by it may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this [Act] or the declaration.

COMMENT

1. The Act is generally designed to provide great flexibility in the creation of common interest communities and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this Section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this Section forbids the use by a declarant of any device to evade the limitation or prohibition of the Act or of the declaration.

3. The second sentence of the section is an important limitation upon the rights of a declarant. Today it is the practice in many jurisdictions, particularly those proscribing expansion of a condominium or planned community by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium or planned community by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters. The Act bars this practice.

4. The following sections permit variation:

Section 1-103. (Definitions). All definitions used in the declaration and by-laws may be varied in the declaration, but not in interpretation of the Act.

Section 1-105. (Separate Titles and Taxation). This section permits the declarant of a cooperative to determine whether unit owners' interests are real or personal property.

Section 1-107. (Eminent Domain). The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Article I, Part II, *Sections 1-202, 1-203, 1-205, 1-206, and 1-207*, permit a variety of elections to declarants and unit owners with respect to applicability.

Section 2-102. (Unit Boundaries). The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. (Contents of Declaration). A declarant may add any information he desires to the required content of the declaration.

Section 2-108. (Limited Common Elements). The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109. (Plats and Plans). There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. (Alterations Within Units). Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112. (Relocation of Boundaries Between Adjoining Units). Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113. (Subdivision of Units). If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115. (Use for Sales Purposes). The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116. (Easement to Facilitate Exercise of Special Declarant Rights). Subject to the provisions of the declaration, the declarant and unit owners have easements for the purposes described.

Section 2-117. (Amendment of Declaration). The declaration of a non-residential common interest community may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118. (Termination). The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential common interest community, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

In a cooperative, upon termination, the declaration may specify that association creditors have priority over the rights of unit owners, and their creditors.

Section 2-119. (Rights of Secured Lenders). The declaration may require lender approval of specified actions of unit owners or the association.

Section 2-120. (Master Associations). The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.

Section 2-122. (Addition of Unspecified Real Estate). The declaration of a planned community may grant a declarant the right to add additional real estate to the project without stating the location of that real estate in the original declaration.

Section 3-102. (Powers of the Association). The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

Section 3-103. (Executive Board Members and Officers). Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. (Bylaws). Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

Section 3-107. (Upkeep of the Common Interest Community). Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108. (Meetings). The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.

Section 3-109. (Quorums). This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110. (Voting; Proxies). A majority in interest of the multiple owners of a single unit

determine how that units' vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.

Section 3-112. (Conveyance or Encumbrance of Common Elements). The declaration may vary the percentages of unit owners whose approval is required to convey or encumber common elements.

The declaration may also provide that a conveyance or encumbrance of common elements defeats prior encumbrances on those common elements.

Section 3-113. (Insurance). The declaration may vary the provisions of this section in non-residential common interest communities, and may require additional insurance in any community.

Section 3-114. (Surplus Funds). Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to their common expense liabilities.

Section 3-115. (Assessments for Common Expenses). To the extent provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 3-116. (Lien for Assessment). Unless the declaration provides otherwise, fines, late charges, and other fees are treated as assessments for lien purposes.

Section 4-101. (Applicability; Waiver). All of Article 4 is modifiable or waivable by agreement in a common interest community restricted to non-residential use.

Section 4-115. (Warranties). Implied warranties of quality may be excluded or modified by agreement.

Section 4-116. (Statute of Limitation on Warranties). The 6-year limitation may be modified by agreement of the parties.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, *see* Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. *See* Section 1-112. This Section derives from Section 1-102(3) of the Uniform Commercial Code.

§ 1-105. Separate Titles and Taxation

the early stages of project development, to pay all of the expenses of the common interest community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the common interest community, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision of units).

§ 3-116. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except

(i) 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, (ii) 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 owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above 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 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 under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [insert reference to state power of sale

statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

[(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non-payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, or the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

(i) the reasonable expenses of sale;

(ii) the reasonable expenses of securing possession before sale; holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record;

and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other

disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

COMMENT

1. 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 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 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 6 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. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(ii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

2. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal

priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

3. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in Subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the state as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers the state two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the state can choose the 2d alternative: power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owners' interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, the unit owner's interest in a cooperative will be real property or personal

property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various states as a permissible method of foreclosure in that housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the state rather than setting out a special faster method of foreclosure in the statute.

§ 3-117. Other Liens

(a) In a condominium or planned community:

(1) Except as provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment]], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(2) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community), becomes effective against two or more units, the unit owner of an affected unit may

EXHIBIT 3

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December 7, 2012

Senator Scott Hammond
8408 Gracious Pine Avenue
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Dear Senator Hammond:

You have asked this office certain questions relating to the foreclosure of liens under chapter 116 of NRS, the chapter which governs common-interest communities in this State. We will answer each of your questions separately below.

DISCUSSION

1. What ownership interest is obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, considering the language set forth in NRS 116.31164?

The provisions of NRS 116.31162 to 116.31168, inclusive, govern the foreclosure of a lien held by the association of a common-interest community. NRS 116.31164 sets forth the procedure for conducting the sale of real property by an association pursuant to the foreclosure of a lien on that property. With respect to the distribution and use of the proceeds of such a sale and the delivery of the property after the sale, subsection 3 of NRS 116.31164 provides:

3. After the sale, the person conducting the sale shall:
- (a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit;
 - (b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign; and
 - (c) Apply the proceeds of the sale for the following purposes in the following order:
 - (1) The reasonable expenses of sale;
 - (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the

extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;

(3) Satisfaction of the association's lien,

(4) Satisfaction in the order of priority of any subordinate claim of record;

and

(5) Remittance of any excess to the unit's owner.

(Emphasis added). Additionally, subsection 3 of NRS 116.31166 provides that "[t]he sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption."

In considering a provision of NRS, we are guided by several rules of statutory construction employed by the Nevada Supreme Court. As a general rule of statutory construction, a court presumes that the plain meaning of statutory language reflects a full and complete statement of the Legislature's intent. Villanueva v. State, 117 Nev. 664, 669 (2001). Therefore, when the plain meaning of statutory language is clear and unambiguous on its face, a court generally will apply the plain meaning of the statutory language and will not search for any meaning beyond the language of the statute itself. Erwin v. State, 111 Nev. 1535, 1538-39 (1995); McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986) (words in a statute "should be given their plain meaning unless this violates the spirit of the act").

Applying this rule of statutory construction stated above, the plain language of subsection 3 of NRS 116.31164 provides that when property is sold pursuant to an association's foreclosure of a lien, the purchaser obtains a deed without warranty which conveys to the purchaser, as the grantee of the warranty made, executed and delivered by the person conducting the sale, all title held by the previous owner.¹ In addition, subsection 3 of NRS 116.31166 provides that the interest vested in the purchaser is that of the previous owner's title without equity or right of redemption. Thus, these two provisions of NRS clearly and unambiguously establish that when real property is sold pursuant to the foreclosure of a lien on the property held by an association, the purchaser acquires the entirety of the title held by the previous owner of the property, and such title is not subject to any claim of equity or right of redemption by the previous owner.

2. Does the ownership interest obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, survive a subsequent foreclosure on a security interest, other than an association lien, on the same property?

The order of distribution of proceeds of a sale of real property made pursuant to an association's foreclosure of a lien on the property is set forth in subsection 3 of NRS 116.31164. The order of priority for satisfying a security interest other than an association lien on such property is also set forth in subsection 3 of NRS 116.31164. Subsection 3 of NRS 116.31164 provides that proceeds from the sale of a property must be applied to "[s]atisfaction in the order

¹ A deed without warranty, unlike a warranty deed which contains a covenant of title, may carry with it the risk of a defect in the title. 13 M.L.P. 2d Deeds § 3 (2012) (citing Corbett on Contracts § 387).

of priority of any subordinate claim of record" but only after these proceeds are first applied to: (1) the reasonable expenses of the sale; (2) the reasonable expenses of securing, maintaining and preparing the property for sale; and (3) the satisfaction of the association's lien.

Significantly, subsection 1 and 2 of NRS 116.31166 also provide that:

1. The recitals in a deed made pursuant to NRS 116.31164 of:
 - (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
 - (b) The elapsing of the 90 days; and
 - (c) The giving of notice of sale,are conclusive proof of the matters recited.
2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.

(Emphasis added).

Based on the plain language of subsection 2 of NRS 116.31166, the receipt for the purchase money contained in a deed without warranty delivered to a purchaser pursuant to NRS 116.31164 that includes the recitals described in subsection 1 of NRS 116.31166 serves to discharge the purchaser from any obligation to ensure the proper application of the purchase money paid by the purchaser.

In the event there are insufficient proceeds to satisfy a security interest, the holder of that security interest may be able to seek recourse by pursuing a deficiency judgment against the person who was the owner of the property at the time of sale under chapter 40 of NRS.² However, assuming the purchaser of the property obtains a deed containing the proper recitals described in subsection 1 of NRS 116.31166 and the receipt for purchase money described in subsection 2 of NRS 116.31166, there are no other applicable statutory provisions that would otherwise authorize the holder of a security interest to whom the previous owner of the property was obligated to seek a judgment against the purchaser of the property for any deficiency resulting from the distribution of proceeds. Accordingly, the ownership interest of a purchaser who obtains title through a deed properly containing the information described above is not subject to any claim made by the holder of a security interest who forecloses on an obligation after the purchase is made pursuant to NRS 116.31164.

² NRS 40.451 to 40.463, inclusive, establish procedures for the award of a deficiency judgment, and NRS 40.4631 to 40.4639, inclusive, set forth provisions relating to actions by holders of junior real mortgages after a foreclosure sale. It should be noted, however, that pursuant to Assembly Bill No. 471 of the 2009 Legislative Session (Ch. 310, Statutes of Nevada 2009, at p. 1328-31), a deficiency judgment on an obligation secured by a mortgage, deed of trust or other encumbrance on or after October 1, 2009, may not be awarded against a homeowner if certain criteria are met.

3. Can any part of an ownership interest vested in the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, be extinguished by a subsequent foreclosure on a security interest, other than an association lien, on the same property?

As explained above, any recourse sought by the holder of a security interest to whom the previous owner of the property was obligated is properly made against that previous owner and not the purchaser of the property. Therefore, no part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under NRS 116.31164.

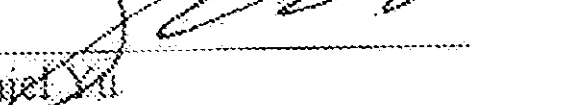
SUMMARY

Based on the reasoning set forth above, it is the opinion of this office that: (1) the purchaser of real property sold pursuant to the foreclosure of an association lien under the provisions of NRS 116.31162 to 116.31168, inclusive, obtains all title belonging to the previous owner; and (2) if certain recitals and the receipt for purchase money are properly contained in the deed conveying such title to the purchaser, the purchaser is discharged from any obligation relating to the application of proceeds from the sale of the property to satisfy the claims described in NRS 116.31164, including any claim that may be made by the holder of an interest secured by the same property but to whom the previous owner, and not the purchaser, was obligated.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By 
J. Daniel Yu
Principal Deputy Legislative Counsel

Bradley A. Wilkinson
Chief Deputy Legislative Counsel

DY:dtm

Encl.

Ref No. 12/205082833

File No. OP_Hammond12/205154959

EXHIBIT 4

Presentation to Senate Committee on Judiciary
 Real Estate Division Advisory 13-01
 By Gail J. Anderson, Administrator
 May 6, 2013

SUMMARY OF NRED ADVISORY OPINION 13-01

Advisory Conclusions:

- An association's lien does not include "costs of collecting" as defined by NRS 116.310313, so the super priority portion of the association's lien does not include "costs of collecting;"
- The super priority portion of the association's lien (the "super priority lien") consists of: (1) 9 months of assessments; and (2) abatement costs under NRS 116.310312;
- The assessment portion of the super priority lien consists of only "assessments", i.e. not late charges, fines or interest;
- The association must take action to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the foreclosure process set out in NRS 116.31162 to enforce its super priority lien.

The Division's advisory looks at the language of NRS 116.3116 to reach its conclusions.

NRS 116.3116 Liens against units for assessments.

1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310302, 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.

2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(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;

(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

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association for the unit pursuant to NRS 116.3102 and to the extent of the assessments for common expenses levied on the unit by the association pursuant to NRS 116.3102, except that the lien is not enforceable until the assessment is due.

3. The lien is enforceable by the association, 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. 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, 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. 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.

4. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

5. Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

6. A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due.

7. This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

7. A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.
8. The association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.
9. In a cooperative, upon nonpayment of an assessment on a unit, the unit's owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and:
- (a) In a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, the association's lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.
 - (b) In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien:
 - (1) May be foreclosed as a security interest under NRS 104.9101 to 104.9709, inclusive; or
 - (2) If the declaration so provides, may be foreclosed under NRS 116.31162 to 116.31168, inclusive.
10. In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.
- (Added to NRS by 1991, 567; A 1999, 390; 2003, 2243; 2007, 2272; 2009, 1010; 2011, 2448)

NRS 116.3102 Powers of unit-owners' association; limitations.

- 1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:
 - (a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.
 - (b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311393.
 - (c) May hire and discharge managing agents and other employees, agents and independent contractors.
 - (d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.
 - (e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.
 - (f) May regulate the use, maintenance, repair, replacement and modification of common elements.
 - (g) May cause additional improvements to be made as a part of the common elements.
 - (h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:
 - (1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and
 - (2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.
 - (i) May grant easements, leases, licenses and concessions through or over the common elements.
 - (j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.3102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
 - (k) May impose charges for late payment of assessments pursuant to NRS 116.3115.
 - (l) May impose construction penalties when authorized pursuant to NRS 116.310305.
 - (m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
 - (n) May impose reasonable charges for the preparation and reconciliation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.
 - (o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.
 - (p) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.
 - (q) May exercise any other powers conferred by the declaration or bylaws.
 - (r) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.
 - (s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:
 - (1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or
 - (2) Poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community.

(i) May exercise any other powers necessary and proper for the governance and operation of the association.

- Section 1 of NRS 116.3116 defines the lien an association has. Under NRS 116.3116(1) - associations have a lien on units consisting of: (1) Construction penalties; (2) Assessments; and (3) Penalties, fees, charges, late charges, fines and interest permitted by NRS 116.3102 (1)(j) to (n).
- Section 2 of NRS 116.3116 sets out the lien's priority. Subsection 2(b) says the lien is subordinate to the first security, but after subsection 2(c), the language [highlighted in green] allows for part of the association's lien to be prior to the first security.
- The Division interprets this language to allow for two parts of the lien described in Subsection 1 to be prior to the first secured: (1) Costs pursuant to NRS 116.310312 (which are typically called abatement charges); and (2) 9 months of assessments as reflected in the association's budget.
- The 9 months of assessments is a "look back period" from the association's "action to enforce the lien."
- This statute having come from the Uniform Common Interest Ownership Act was written for a judicial foreclosure process, hence the term "action." But since Nevada does not require a judicial foreclosure process, the Division interprets this language to mean any action pursuant to the non-judicial foreclosure process, i.e. the mailing of the notice of delinquent assessment under NRS 116.31162.
- An association could do a judicial foreclosure process, but they are not required to.

Issues with NRS 116.3116:

1. Can anything other than regular assessments (monthly assessments based on the periodic budget) be part of the super priority lien?
 - Is there a cap to the super priority lien?
 - How does the regulation in NAC 645.470 on costs of collecting fit in?
2. Can an association's foreclosure of its super priority lien extinguish the first security interest?
 - Is the language in NRS 116.3116 sufficient?
 - Is the language describing the foreclosure process under NRS 116.31162 to 116.31168, inclusive sufficient to extinguish a first security?

1. Can anything other than regular assessments be part of the super priority lien?

This issue comes down to whether or not the language in NRS 116.3116(2)(c) [highlighted in green] includes collection costs for an association, and if so, is there a cap on the total super priority lien. The Division, as previously explained, reads this language to apply only to assessments provided in the association's budget that is limited to 9 months of regular monthly assessments.

Collection costs are not assessments provided in an association budget. The language of NRS 116.3116(2)(c) does not provide any mechanism for including collection costs within the priority lien.

Even more important to note, costs of collection are not referenced in the language of NRS 116.3116(1) that defines the association's lien. ***If costs of collection are not part of the lien, they cannot be part of the super priority portion of the lien.***

The concept of "costs of collecting" was first introduced to NRS 116 in 2009 with the adoption of NRS 116.310313. As is clear from the language of NRS 116.310313 an association may charge a unit's owner, but it does not say the charge can be liened on a unit.

NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.

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.

2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.

3. As used in this section:

(a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.

(b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

(Added to NRS by 2009, 2795)

(emphasis added)

NRS 116.310313 applies to the association's collection of any past due "obligation" as defined in the statute. It includes the collection of all amounts due to the association from an owner, i.e. fines and penalties, not merely assessments. The Commission for Common-Interest Communities and Condominium Hotels adopted NAC 116.470 with the authority provided in NRS 116.310313. It became effective May 5, 2011 on "the amount of the fees that an association may charge pursuant to this section."

NAC 116.470 Fees and costs for collection of past due obligations of unit's owner. (NRS 116.310313, 116.615)

1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 which exceed a total of \$1,250, plus the costs and fees described in subsections 2 and 4.

2. An association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 which exceed the following amounts:

(a) Demand or intent to lien letter.....	\$150
(b) Notice of delinquent assessment lien.....	325
(c) Intent to notice of default letter.....	90
(d) Notice of default....	400
(e) Intent to notice of sale letter.....	90
(f) Notice of sale.....	275
(g) Intent to conduct foreclosure sale.....	25
(h) Conduct foreclosure sale.....	125
(i) Prepare and record transfer deed.....	125

(j) Payment plan agreement - One-time set-up fee.....	30
(k) Payment plan breach letter.....	25
(l) Release of notice of delinquent assessment lien.....	30
(m) Notice of rescission fee.....	30
(n) Bankruptcy package preparation and monitoring.....	100
(o) Mailing fee per piece for demand or intent to lien letter, notice of delinquent assessment lien, notice of default and notice of sale.....	2
(p) Insufficient funds fee.....	20
(q) Escrow payoff demand fee.....	150
(r) Substitution of agent document fee.....	25
(s) Postponement fee.....	75
(t) Foreclosure fee.....	150

3. If, in connection with an activity described in subsection 2, any costs are charged to an association or a person acting on behalf of an association to collect a past due obligation by a person who is not an officer, director, agent or affiliate of the community manager of the association or of an agent of the association, including, without limitation, the cost of a trustee's sale guarantee and other title costs, recording costs, posting and publishing costs, sale costs, mailing costs, express delivery costs and skip trace fees, the association or person acting on behalf of an association may recover from the unit's owner the actual costs incurred without any increase or markup.

4. If an association or a person acting on behalf of an association is attempting to collect a past due obligation from a unit's owner, the association or person acting on behalf of an association may recover from the unit's owner:

- (a) Reasonable management company fees which may not exceed a total of \$200; and
- (b) Reasonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2.

5. If an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner is engaging in the activities set forth in NRS 116.31162 to 116.31168, inclusive, with respect to more than 25 units owned by the same unit's owner, the association or person acting on behalf of an association may not charge the unit's owner fees to cover the costs of collecting a past due obligation which exceed a total of \$1,950 multiplied by the number of units for which such activities are occurring, as reduced by an amount set forth in a resolution adopted by the executive board, plus the costs and fees described in subsections 3 and 4.

6. For a one-time period of 15 business days immediately following a request for a payoff amount from the unit's owner or his or her agent, no fee to cover the cost of collecting a past due obligation may be charged to the unit's owner, except for the fee described in paragraph (q) of subsection 2 and any other fee to cover any cost of collecting a past due obligation which is imposed because of an action required by statute to be taken within that 15-day period.

7. As used in this section, "affiliate of the community manager of the association or of an agent of the association" means any person who controls, is controlled by or is under common control with a community manager or such agent. For the purposes of this subsection:

- (a) A person "controls" a community manager or agent if the person:
 - (1) Is a general partner, officer, director or employer of the community manager or agent;
 - (2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the community manager or agent;
 - (3) Controls in any manner the election of a majority of the directors of the community manager or agent; or
 - (4) Has contributed more than 20 percent of the capital of the community manager or its agent.
- (b) A person "is controlled by" a community manager or agent if the community manager or agent:
 - (1) Is a general partner, officer, director or employer of the person;
 - (2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the person;
 - (3) Controls in any manner the election of a majority of the directors of the person; or
 - (4) Has contributed more than 20 percent of the capital of the person.

(c) Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised.

(Added to NAC by Comm'n for Common-Interest Communities & Condo. Hotels by R199-09, eff. 5-5-2011)

(emphasis added)

The regulation in NAC 116.470 cannot expand the statute; the regulation only establishes fees that can be charged pursuant to NRS 116.301313. There is confusion over whether the association's lien can include costs of collecting as a result of this regulation. The Division's position is that this regulation is limited to the authority granted by the statute; the statute does not allow an association to lien for costs of collecting.

The Commission's authority in NRS 116.310313 was to adopt a regulation establishing the fees that could be charged pursuant to NRS 116.310313. To make the costs of collecting part of an association's lien, NRS 116.310313 would have to say those costs can be part of the lien and that would have to be incorporated into NRS 116.3116.

When NRS 116.310313 was adopted in 2009, the Nevada Legislature also adopted NRS 116.310312. These costs in NRS 116.310312 – typically referred to as abatement charges – are specifically made part of the association's lien in NRS 116.310313 and they are incorporated into NRS 116.3116(1) by addition to NRS 116.3102(1)(j). If costs of collecting past due assessments are intended to be part of the super priority, lien specific language needs to be added to NRS 116.3116. It is not sufficient to refer simply to "costs of collecting" in NRS 116.3116, because as defined in NRS 116.310313, those costs apply to the collection of more than just assessments. For example, they apply to fines and penalties. Generally, a lien for fines cannot be foreclosed by an association – and would certainly not be part of the super priority lien.

2. Can an association's foreclosure of its super priority lien extinguish the first security interest?

The super priority lien comes into play in two situations – when the association forecloses ahead of a first security and when a first security forecloses ahead of the association. If the first secured forecloses its lien ahead of the association, the amount of the super priority lien would remain a lien on the unit. When the association forecloses before the first security, the issue is whether the first security is extinguished. The Division believes the purpose of the super priority lien is to give associations leverage over a first security. For that reason, the Division takes the position that the association's foreclosure of its super priority lien would extinguish the first secured if the first secured does not pay the priority lien amount before the sale.

While the Division believes an association's foreclosure should be able to extinguish a first secured, the Division also recognizes problems with the current law making that conclusion uncertain. For example, NRS 116.3116 comes from the Uniform Common Interest Ownership Act which was written to apply to a judicial foreclosure process. Nevada does not require that associations follow a judicial foreclosure process, which leads to confusion regarding the meaning of certain words within NRS 116.3116. Additionally, the foreclosure statutes (NRS 116.31162 to 116.31168, inclusive) do not mandate notice to the first secured unless the lender previously requested such notice. While the Division believes notice to the first secured is commonplace for association foreclosures, the absence of a required notice in the law is a problem. Ultimately, the state of the current law will be for the courts to decide.

It is preferred that the law be absolutely clear as to the effect of the association's foreclosure. If the law is clear that an association's foreclosure would extinguish a first secured, associations would be more likely to receive payment from a lender making a foreclosure by the association

unnecessary. And in the unlikely event that a lender would ignore an association's foreclosure action, the sale by an association would be more likely to generate a sales price far greater than the amount of the super priority lien. In that event, the lender would receive the excess up to the amount of its deed of trust.

In a case out of Washington (Summerhill Village Homeowners Association v Roughley et al, 166 Wash.App. 625, 270 P.3d 639) (289 P.3d 645), an association's foreclosure did in fact extinguish a first security. Under Washington law, however, an association must follow a judicial foreclosure process in order to extinguish the first secured. Under Washington State law, an association could foreclose non-judicially, but it would not extinguish the first secured. A judicial foreclosure process would ensure adequate notice to the lender and allow them to participate in the process. It would also reflect in the record whether or not the lender maintained its secured status by paying the super priority lien amount. In order to generate a fair market value, the buyer needs to know whether the lender has paid the super priority lien. This would ensure an appropriate sales price at the sale.

EXHIBIT 5

**United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:12-cv-00949-KJD-NJK**

Diakonos Holdings LLC v. MTC Financial Inc. et al

Assigned to: Judge Kent J. Dawson

Referred to: Magistrate Judge Nancy J. Koppe

Demand: \$75,000

Case in other
court: Ninth Circuit, 13-15470

8th Judicial District, Clark County, NV, A-12-
661854-C

Cause: 28:1332 Diversity-Petition for Removal

Date Filed: 06/05/2012

Date Terminated: 02/11/2013

Jury Demand: None

Nature of Suit: 220 Real Property:

Foreclosure

Jurisdiction: Diversity

Plaintiff

Diakonos Holdings LLC

Trustee

on behalf of

Coventry Green Trust

represented by **Ryan D Hastings**

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Defendant

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Systems, Inc.**

represented by **Kevin Hahn**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/05/2012	<u>1</u>	PETITION FOR REMOVAL from 8th Judicial District Court, Clark County, NV, Case Number A-12-661854-C, (Filing fee \$ 350 receipt number 0978-2394424), filed by MTC FINANCIAL INC. dba TRUSTEE CORPS. Proof of service due by 9/13/2012. Certificate of Interested Parties due by 6/15/2012. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Civil Cover Sheet) (Reynolds, Richard) (Entered: 06/05/2012)
06/05/2012	<u>2</u>	CERTIFICATE of Interested Parties filed by MTC FINANCIAL INC. dba TRUSTEE CORPS. There are no known interested parties other than those participating in the case. (Reynolds, Richard) (Entered: 06/05/2012)
06/05/2012	<u>3</u>	STATEMENT of Corporate Disclosure by Defendant MTC FINANCIAL INC. dba TRUSTEE CORPS. (Reynolds, Richard) (Entered: 06/05/2012)
06/06/2012		Case assigned to Judge Kent J. Dawson and Magistrate Judge Robert J. Johnston. (SLR) (Entered: 06/06/2012)

06/06/2012	<u>4</u>	NOTICE PURSUANT TO LOCAL RULE IB 2-2: In accordance with 28 USC § 636(c) and FRCP 73, the parties in this action are provided with a link to the "AO 85 Notice of Availability, Consent, and Order of Reference - Exercise of Jurisdiction by a U.S. Magistrate Judge" form on the Court's website - www.nvd.uscourts.gov . Consent forms should NOT be electronically filed. Upon consent of all parties, counsel are advised to manually file the form with the Clerk's Office. (no image attached) (SLR) (Entered: 06/06/2012)
06/06/2012	<u>5</u>	MINUTE ORDER IN CHAMBERS of the Honorable Judge Kent J. Dawson, on 6/6/2012. Statement regarding removed action is due by 6/24/2012. Joint Status Report regarding removed action is due by 7/9/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 06/06/2012)
06/06/2012	<u>6</u>	(1st Notice) NOTICE: of Non-Compliance with Special Order 109: that <u>Ryan D Hastings</u> is in violation of Special Order 109 and Local Rule IA 10-1. After review of the Courts records, we could not find any record of you being admitted to practice before this Court and that you have not registered for CM/ECF. You are required to become a member of the U.S. District Court's Bar prior to registering for the Courts Case Management and Electronic Case Filing (CM/ECF) program and the electronic service of pleadings. Upon completion of the admission requirements, please visit the Courts website www.nvd.uscourts.gov , then select CM/ECF Info, to register the Attorney(s). (no image attached) (RFJ) (Entered: 06/06/2012)
06/12/2012	<u>7</u>	ANSWER to Complaint re <u>1</u> Petition for Removal,, filed by MTC Financial Inc.. Certificate of Interested Parties due by 6/22/2012. Discovery Plan/Scheduling Order due by 7/27/2012.(Reynolds, Richard) (Entered: 06/12/2012)
06/12/2012	<u>8</u>	CERTIFICATE of Interested Parties filed by Diakonoss Holdings LLC. There are no known interested parties other than those participating in the case. (Anderson, Sean) (Entered: 06/12/2012)
06/19/2012	<u>9</u>	STATEMENT RE: REMOVAL filed by Defendant MTC Financial Inc.. (Reynolds, Richard) (Entered: 06/19/2012)
06/20/2012	<u>10</u>	AMENDED COMPLAINT <i>for Quiet Title and Declaratory Relief</i> against All Defendants, filed by Diakonoss Holdings LLC. Adds new parties. Proof of service due by 10/18/2012. (Anderson, Sean) (Entered: 06/20/2012)
07/03/2012	<u>11</u>	PROPOSED SUMMONS to be issued, filed by Plaintiff Diakonoss Holdings LLC. (Attachments: # <u>1</u> Summons)(Anderson, Sean) (Entered: 07/03/2012)
07/03/2012	<u>12</u>	ANSWER to <u>10</u> Amended Complaint filed by MTC Financial Inc..(Reynolds, Richard) (Entered: 07/03/2012)
07/05/2012	<u>13</u>	Summons Issued as to Bank of America, Inc., Mortgage Electronic Registration Systems, Inc. re <u>10</u> Amended Complaint. (SLR) (Entered: 07/05/2012)
07/05/2012	<u>14</u>	STATUS REPORT RE: REMOVAL filed by Plaintiff Diakonoss Holdings LLC. (Anderson, Sean) (Entered: 07/05/2012)
07/12/2012	<u>15</u>	PROPOSED SUMMONS to be issued <i>to Countrywide Home Loans, Inc.</i> , filed by

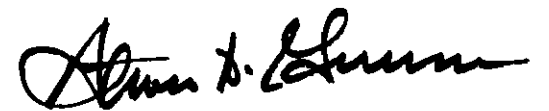
		Plaintiff Diakonos Holdings LLC. (Hastings, Ryan) (Entered: 07/12/2012)
07/13/2012	<u>16</u>	Summons Issued as to Countrywide Home Loans, Inc.. (ECS) (Entered: 07/13/2012)
07/16/2012	<u>17</u>	MOTION to Dismiss Amended Complaint; filed by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. Responses due by 8/2/2012. Certificate of Interested Parties due by 7/26/2012. Discovery Plan/Scheduling Order due by 8/30/2012. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5 - 8)(Hahn, Kevin) Modified text on 7/17/2012 (SRK). (Entered: 07/16/2012)
07/16/2012	<u>18</u>	REQUEST for Judicial Notice re <u>17</u> MOTION to Dismiss ; by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. (Hahn, Kevin) (Entered: 07/16/2012)
07/16/2012	<u>19</u>	CERTIFICATE of SERVICE re <u>17</u> MOTION to Dismiss, <u>18</u> Request for Judicial Notice ; by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. (Hahn, Kevin) <u>Event type corrected on 7/17/2012</u> (SRK). (Entered: 07/16/2012)
07/17/2012		NOTICE of Docket Correction to <u>19</u> Declaration: ERROR : Wrong event selected. CORRECTION : Court modified entry as <u>19</u> CERTIFICATE of SERVICE, which is located under the "Initial Pleadings and Service" section, then "Service of Process" category. (no image attached) (SRK) (Entered: 07/17/2012)
07/20/2012	<u>20</u>	JOINDER to <u>17</u> MOTION to Dismiss Amended Complaint ; filed by Defendant MTC Financial Inc. (Reynolds, Richard) (Entered: 07/20/2012)
08/02/2012	<u>21</u>	STIPULATION FOR EXTENSION OF TIME (First Request) to Respond to <u>17</u> Motion to Dismiss Amended Complaint filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 08/02/2012)
08/03/2012	<u>22</u>	ORDER ON STIPULATION Granting <u>21</u> Stipulation For An Extension of Time to Respond to <u>17</u> MOTION to Dismiss Amended Complaint. Responses due by 8/9/2012. Signed by Judge Kent J. Dawson on 8/3/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 08/06/2012)
08/09/2012	<u>23</u>	RESPONSE to <u>17</u> MOTION to Dismiss Amended Complaint, filed by Plaintiff Diakonos Holdings LLC. Replies due by 8/19/2012. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K, # <u>12</u> Exhibit L, # <u>13</u> Exhibit M, # <u>14</u> Exhibit N, # <u>15</u> Exhibit O)(Anderson, Sean) (Entered: 08/09/2012)
08/09/2012	<u>24</u>	Counter MOTION to Remand to State Court by Plaintiff Diakonos Holdings LLC. Responses due by 8/26/2012. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K, # <u>12</u> Exhibit L, # <u>13</u> Exhibit M, # <u>14</u> Exhibit N, # <u>15</u> Exhibit O)(Anderson, Sean) (Entered: 08/09/2012)
08/27/2012	<u>25</u>	RESPONSE to <u>24</u> Counter MOTION to Remand to State Court, filed by Defendant MTC Financial Inc.. Replies due by 9/6/2012. (Reynolds, Richard) (Entered: 08/27/2012)
08/30/2012	<u>26</u>	STIPULATION FOR EXTENSION OF TIME (First Request) For Scheduling Rule 26(f) Conference and Subsequent Circulation of Discovery Plan and Scheduling Order

		filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 08/30/2012)
09/06/2012	<u>27</u>	REPLY to Response to <u>24</u> Counter MOTION to Remand to State Court filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 09/06/2012)
09/07/2012	<u>28</u>	ORDER ON STIPULATION Denying <u>26</u> Stipulation to Continue Time for Scheduling Rule 26(F) Conference and Subsequent Circulation of Discovery Plan and Scheduling Order. The Parties are to proceed with the submission of a discovery plan and scheduling order as required by LR 26-1. Signed by Magistrate Judge Robert J. Johnston on 9/7/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 09/07/2012)
10/10/2012	<u>29</u>	PROPOSED Discovery Plan/Scheduling Order filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 10/10/2012)
10/25/2012	<u>30</u>	SCHEDULING ORDER Denying <u>29</u> Proposed Discovery Plan and Scheduling Order. Discovery due by 12/31/2012. Motions due by 1/31/2013. Proposed Joint Pretrial Order due by 1/31/2013. Signed by Magistrate Judge Robert J. Johnston on 10/25/2012. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 10/25/2012)
10/31/2012	<u>31</u>	Interim STATUS REPORT by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 10/31/2012)
12/11/2012	<u>32</u>	STIPULATION FOR EXTENSION OF TIME (First Request) re: Discovery Deadlines by Plaintiff Diakonos Holdings LLC. (Hastings, Ryan) (Entered: 12/11/2012)
12/13/2012	<u>33</u>	STIPULATION FOR EXTENSION OF TIME (First Request) re: Discovery Deadlines by Plaintiff Diakonos Holdings LLC. (Hastings, Ryan) (Entered: 12/13/2012)
12/21/2012	<u>34</u>	ORDER ON STIPULATION Granting <u>33</u> Stipulation to Extend Deadlines. Discovery due by 3/1/2013. Motions due by 4/1/2013. Proposed Joint Pretrial Order due by 4/30/2013. Signed by Magistrate Judge Robert J. Johnston on 12/21/12. (Copies have been distributed pursuant to the NEF - MMM) (Entered: 12/21/2012)
12/21/2012	<u>35</u>	MINUTE ORDER IN CHAMBERS of the Honorable Judge Kent J. Dawson, on 12/21/2012. The Court Orders Defendants to file a reply to Plaintiff's opposition (#23) to Defendants' Motion to Dismiss(#17). Defendants' reply is due no later than January 13, 2013. Defendants should address Summerhill Village Homeowners Ass'n v. Roughley in their reply. (no image attached) (Copies have been distributed pursuant to the NEF - TKF) (Entered: 12/21/2012)
01/07/2013	<u>36</u>	MINUTE ORDER IN CHAMBERS of the Honorable Chief Judge Robert C. Jones, on 1/7/2013. IT IS ORDERED that this case is reassigned to Magistrate Judge Nancy J. Koppe for all further proceedings. Magistrate Judge Robert J. Johnston no longer assigned to case. All further documents must bear the correct case number 2:12-CV-0949 KJD-NJK. (no image attached) (Copies have been distributed pursuant to the NEF - ECS) (Entered: 01/07/2013)
01/11/2013	<u>37</u>	REPLY to Response to <u>17</u> MOTION to Dismiss Amended Complaint and JOINDER to Response to <u>24</u> Counter MOTION to Remand to State Court filed by Defendants Bank of America Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc. (Attachments: # <u>1</u> Certificate of Service)(Hahn, Kevin) (Entered: 01/11/2013)
01/14/2013	<u>38</u>	REPLY to Response to <u>17</u> MOTION to Dismiss Amended Complaint and <u>24</u> Counter

		MOTION to Remand to State Court filed by Defendant MTC Financial Inc. (Attachments: # <u>1</u> Exhibit A, B, C, and D)(Reynolds, Richard) (Entered: 01/14/2013)
01/17/2013	<u>39</u>	NOTICE of Change of Address by Richard J. Reynolds. (Reynolds, Richard) (Entered: 01/17/2013)
02/11/2013	<u>40</u>	ORDER Granting <u>17</u> Motion to Dismiss. Denying <u>24</u> Counter-Motion to Remand to State Court. Signed by Judge Kent J. Dawson on 2/11/2013. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 02/11/2013)
02/11/2013	<u>41</u>	CLERK'S JUDGMENT in favor of Bank of America Inc., Countrywide Home Loans, Inc., MTC Financial Inc., Mortgage Electronic Registration Systems, Inc. and against Diakonos Holdings LLC. Signed by Clerk of Court, Lance S. Wilson on 2/11/2013. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 02/11/2013)
02/14/2013	<u>42</u>	MOTION to Substitute Attorney on behalf of Defendant MTC Financial Inc. (Reynolds, Richard) (Entered: 02/14/2013)
02/15/2013		NOTICE of Docket Correction to <u>42</u> NOTICE of Change of Attorney. CORRECTION: Document filed using the wrong event by attorney <u>Richard Reynolds</u> . CORRECTION: Court modified event as <u>42 MOTION to Substitute Attorney</u> . (no image attached)(ASB) (Entered: 02/15/2013)
02/15/2013	<u>43</u>	ORDER Granting <u>42</u> Motion to Substitute Attorney Burke, Williams & Sorensen, LLP in place and stead of Turner, Reynolds, Greco, & O'Hara for MTC Financial, Inc. Signed by Magistrate Judge Nancy J. Koppe on 2/15/2013. (Copies have been distributed pursuant to the NEF - SLR) (Entered: 02/19/2013)
03/11/2013	<u>44</u>	MOTION to Amend/Correct <u>41</u> Clerk's Judgment,. by Plaintiff Diakonos Holdings LLC. Responses due by 3/28/2013. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit)(Hastings, Ryan) (Entered: 03/11/2013)
03/13/2013	<u>45</u>	NOTICE OF APPEAL as to <u>40</u> Order on Motion to Dismiss, Order on Motion to Remand to State Court by Plaintiff Diakonos Holdings LLC. Filing fee \$ 455, receipt number 0978-2738840. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Attachments: # <u>1</u> Exhibit)(Hastings, Ryan) (Entered: 03/13/2013)
03/14/2013	<u>46</u>	ORDER for Time Schedule as to <u>45</u> Notice of Appeal, filed by Diakonos Holdings LLC. USCA Case Number 13-15470 . (MMM) (Entered: 03/15/2013)
03/28/2013	<u>47</u>	RESPONSE to <u>44</u> MOTION to Amend/Correct <u>41</u> Clerk's Judgment,. , filed by Defendant MTC Financial Inc.. Replies due by 4/7/2013. (Reynolds, Richard) (Entered: 03/28/2013)
03/28/2013	<u>48</u>	RESPONSE to <u>44</u> MOTION to Amend/Correct <u>41</u> Clerk's Judgment,. , filed by Defendants Bank of America Inc., Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc.. Replies due by 4/7/2013. (Hahn, Kevin) (Entered: 03/28/2013)
04/08/2013	<u>49</u>	REPLY to Response to <u>44</u> MOTION to Amend/Correct <u>41</u> Clerk's Judgment,. filed by Plaintiff Diakonos Holdings LLC. (Anderson, Sean) (Entered: 04/08/2013)
04/10/2013	<u>50</u>	ORDER of USCA, Ninth Circuit, as to <u>45</u> Notice of Appeal, filed by Diakonos Holdings LLC. USCA Case Number 13-15470 . The notice of appeal is therefore ineffective until entry of the order disposing of the last such motion outstanding.

		Accordingly, proceedings in this court shall be held in abeyance pending the district court's resolution of the pending motion. (MMM) (Entered: 04/12/2013)
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TAB 24



CLERK OF THE COURT

1 **NEO**
HOWARD C. KIM, ESQ.
2 Nevada Bar No. 10386
E-mail: howard@hkimlaw.com
3 DIANA S. CLINE, ESQ.
Nevada Bar No. 10580
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Telephone: (702) 485-3300
8 Facsimile: (702) 485-3301
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

11 SFR INVESTMENTS POOL1, LLC a Nevada
limited liability company,

12
13 Plaintiff,

14 vs.

15 U.S. BANK, N.A., a national banking
association as Trustee for the Certificate
16 Holders of Wells Fargo Asset Securities
Corporation, Mortgage Pass-Through
17 Certificates, Series 2006-AR4 and LUCIA
PARKS, an individual; DOES I through X;
18 and ROE CORPORATIONS I through X,
inclusive,

19
20 Defendants.

Case No. A-13-678814-C

Dept. No. XVIII

CERTIFICATE OF SERVICE

21
22 I HEREBY CERTIFY that on this 14th day of May, 2013, pursuant to NRCP 5(b), I
23 served the following parties listed below by depositing via U.S. mail first class a true and correct
24 copy

25 ///

26 ///

27 ///

28 ///

HOWARD KIM & ASSOCIATES

400 N. STEPHANIE ST, SUITE 160

HENDERSON, NEVADA 89014

(702) 485-3300 FAX (702) 485-3301

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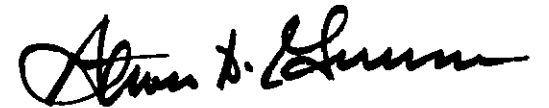
of the foregoing **Reply in Support of Motion for Preliminary Injunction**, postage prepaid and
addressed to:

Chelsea Crowton
Wright, Finlay, & Zak
5532 S. Fort Apache Rd.
Las Vegas, NV 89148

D. Chris Albright
Albright Stoddard Warnick & Albright
801 S. Rancho Dr., Suite D-4
Las Vegas, NV 89106

/s/ Tommie Dooley
An employee of Howard Kim & Associates

TAB 25



CLERK OF THE COURT

OPP

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a
Nevada limited liability company,

Plaintiff,

vs.

U.S. BANK, N.A., a national banking
association as Trustee for the Certificate
Holders of Wells Fargo Asset Securities
Corporation, Mortgage Pass-Through
Certificates, Series 2006-AR4 and LUCIA
PARKS, an individual, DOES I through X;
and ROE CORPORATIONS I through X,
inclusive,

Defendants.

Case No. A-13-678814-C

Dept. No. XVIII

**OPPOSITION TO MOTION TO EXPUNGE
LIS PENDENS**

Hearing Date: May 16, 2013
Hearing Time: 8:15 a.m.

Plaintiff SFR Investments Pool 1, LLC ("SFR") hereby opposes Defendant U.S. Bank, N.A.'s ("U.S. Bank's") motion to expunge lis pendens ("Motion") recorded by Plaintiff on . Plaintiff's Opposition is based on the following memorandum or points and authorities, the pleadings and papers on file herein, and any oral argument entertained by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After obtaining the Property by bidding at a public HOA auction, Plaintiff SFR filed its complaint to quiet title against both U.S. Bank and former homeowner, Lucia Parks. As required by NRS 14.010(1), Plaintiff recorded a notice of lis pendens on the Property after it filed its complaint. As discussed in detail in Plaintiff's briefing in its motion for preliminary injunction, Plaintiff has a fair chance of success on the merits and will be injured by any transfer of interest in the Property before the litigation is concluded. Because Plaintiff's complaint states viable claims relating to real property against both U.S. Bank and Lucia Parks, Defendant's motion to expunge lis pendens should be denied. Expunging the lis pendens prematurely, as Defendant urges, would deny future purchasers or encumbrancers of the Property notice that the Property's title is in dispute. Defendant's motion should be denied.

II. LEGAL ARGUMENT

Defendant's motion to expunge lis pendens should be denied because Plaintiff has at least a fair chance of success on the merits and the injury sustained to Plaintiff outweighs any potential hardship to Defendant if the lis pendens remains in place. Nevada law requires a plaintiff to file a lis pendens whenever it files an action affecting title or possession of real property at the time of filing its complaint. *See* NRS 14.010. The purpose of this requirement is to give notice to future purchasers or encumbrancers that title to the property is the subject of litigation. NRS 14.010(3) ("From the time of recording only . . . the pendency of the action is constructive notice to a purchaser or encumbrancer of the property affected thereby.").

Citing NRS 14.015, Defendant claims that the lis pendens in this case should be removed because "Plaintiff has failed to state a single viable claim in the Complaint with regards to an extinguishment of U.S. Bank's Lien [.]” *See* Motion, 6:2-3. **First**, Defendant does not dispute that Plaintiff has stated a viable claim related to the Property against Lucia Parks. On that basis alone, its motion should be denied. **Second**, as discussed in detail in Plaintiff's briefing in its

1 motion for preliminary injunction, Plaintiff has a fair chance of success on the merits and will be
2 injured by any transfer of interest in the Property before the litigation is concluded.¹

3 The standard to keep a lis pendens on a property is similar to that of a preliminary
4 injunction, but less stringent. NRS 14.015 sets forth the requirements for maintaining a lis
5 pendens on a property. The relevant portion of the statute provides:

6 2. Upon 15 days' notice, the party who recorded the notice of pendency of
7 the action must appear at the hearing and, through affidavits and other evidence
8 which the court may permit, establish to the satisfaction of the court that:

9 (a) The action is for the foreclosure of a mortgage upon the real property
10 described in the notice or **affects the title or possession of the real**
11 **property** described in the notice;(b) The action was **not brought in bad**
12 **faith** or for an improper motive; (c) The party who recorded the notice
13 **will be able to perform any conditions precedent** to the relief sought in
14 the action insofar as it affects the title or possession of the real property;
15 and (d) The party who recorded the notice **would be injured by any**
16 **transfer of an interest in the property** before the action is concluded.

17 3. In addition to the matters enumerated in subsection 2, the party who recorded
18 the notice must establish to the satisfaction of the court either:

19 (a) That the party who recorded the notice is **likely to prevail in the**
20 **action**; or (b) That the party who recorded the notice **has a fair chance of**
21 **success on the merits** in the action and the **injury described in**
22 **paragraph (d) of subsection 2 would be sufficiently serious that the**
23 **hardship** on him or her in the event of a transfer would be **greater than**
24 **the hardship on the defendant** resulting from the notice of pendency,
25 and that if the party who recorded the notice prevails he or she will be
26 entitled to relief affecting the title or possession of the real property.

27 NRS 14.015 (emphasis added).
28

29 A court should not expunge a lis pendens when a complaint states viable claims
30 concerning real property. *Zhang v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 120
31 Nev. 1037, 1043, 103 P.3d 20, 24 (2004), abrogated on other grounds by *Buzz Stew, LLC v. City*
32 *of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). Further, a potential loss of a transaction

33 ¹ Plaintiff hereby incorporates by reference its motion for preliminary injunction filed on March
34 27, 2013 and its reply in support of its motion for preliminary injunction filed on March 14,
35 2013.

with another buyer does not outweigh the risk of a party that has expended time and money on the property. *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1163-64, 946 P.2d 163, 171 (1997).

Here, Plaintiff meets all of the requirements. **First**, the action indisputably affects title or possession of the real property. **Second**, Plaintiff has not brought the action in bad faith or for an improper motive—it just seeks to obtain declaratory relief related to title of a property it purchased at a public auction. While Defendant cites California cases that discuss improper use of *lis pendens* to force settlement, it does not make any factual allegations that could be construed as bad faith by Plaintiff. *See* Motion, 5:17-27. There is no controlling case law from the Nevada Supreme Court relating to the application of NRS 116.3116. Based on the plain language of NRS 116.3116, the legislative history of related statutory sections, the interpretation of the statute by several Nevada courts and the agency charged with interpreting NRS 116.3116, Plaintiff’s complaint cannot be considered the type of groundless or malicious suit referenced by Defendant.

Third, Plaintiff is unaware of any conditions precedent to the relief it seeks. **Fourth**, as fully explained above and in its motion for preliminary injunction, Plaintiff will be injured by a transfer of interest in the property before the litigation is concluded. Also as explained above and in its motion for preliminary injunction, Plaintiff enjoys a substantial likelihood of success on the merits. But to maintain a *lis pendens* on the Property, Plaintiff only need show a “fair chance” of success of the merits and that the injury to Plaintiff will suffer injury that is “sufficiently serious” or that Plaintiff’s injury will be greater than the hardship on Defendant. If Defendant is able to sell the Property during the litigation, Plaintiff will lose the Property whereas Defendant’s only hardship will be its inability to sell the Property without notice to potential purchasers that litigation regarding title to the Property is ongoing. This Court should deny the request to expunge the *lis pendens*.

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III. CONCLUSION

Plaintiff has stated a claim relating to real property against both U.S. Bank and former homeowner, Lucia Parks. It enjoys a likelihood of success on the merits of its quiet title claim and will suffer irreparable harm if US Bank is allowed to proceed with the foreclosure of the Property. Therefore Plaintiff requests that this deny U.S. Bank's motion to expunge lis pendens.

DATED May 15, 2013.

HOWARD KIM & ASSOCIATES

/s/ Diana S. Cline

Howard C. Kim, Esq.

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May, 2013, pursuant to NRCP 5(b), I served via first class U.S. Mail, postage prepaid, the foregoing **OPPOSITION TO MOTION TO EXPUNGE LIS PENDENS**, to the following parties:

D. Chris Albright, Esq
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorney for Plaintiff

Chelsea A. Crowton, Esq.
Wright, Finlay & Zak
5532 S. Fort Apache Rd.
Las Vegas, NV 89148
Attorney for US Bank

/s/ Sarah Felts

An Employee of Howard Kim & Associates

TAB 26

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Title to Property

COURT MINUTES

May 17, 2013

A-13-678814-C SFR Investments Pool 1, LLC, Plaintiff(s)
vs.
US Bank, Defendant(s)

May 17, 2013 8:33 AM **Decision: Pltf's Motion for Preliminary Injunction & Deft.
Lucia Parks' Notice of Joinder in Pltf's Motion for
Preliminary Injunction**

HEARD BY: Barker, David

COURTROOM: RJC Courtroom 11B

COURT CLERK: April Watkins

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- The Court FINDS that the Plaintiff has not established a likelihood of success on the merits in this action, therefore it is hereby ORDERED that the Plaintiff s Motion for a Preliminary Injunction is DENIED.

The Court FURTHER ORDERS a STAY of this determination for THIRTY (30) days from the notice of entry of order, during which time Defendant U.S. Bank, its successors, assigns and agents are restrained and enjoined from foreclosing on, selling, transferring, or otherwise conveying the real property commonly known as 2270 Nashville Avenue, Henderson, Nevada 89052, Parcel No. 178-19-712-012.

FURTHER ORDERED, Deft. Lucia Parks' Notice of Joinder GRANTED.

Defendant U.S. Bank is to prepare and submit an order consistent with this determination.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: Diana S. Cline, Esq., (Kim & Assoc); Chelsea A. Crowton, Esq., (Wright F & Z) and D. Chris Albright, Esq., (Albright

PRINT DATE: 05/17/2013

Page 1 of 2

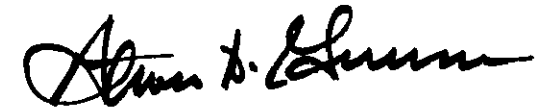
Minutes Date: May 17, 2013

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A-13-678814-C

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TAB 27



CLERK OF THE COURT

RPLY

WRIGHT, FINLAY & ZAK, LLP

Christopher L. Benner Esq.

Nevada Bar No. 8963

5532 South Fort Apache Road, Suite 110

Las Vegas, NV 89148

(702) 475-7964; Fax: (702) 946-1345

cbenner@wrightlegal.net

Attorney for Defendant,

U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities

Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4

DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL, LLC, a Nevada
limited liability company

Plaintiff,

vs.

US BANK, N.A., a national banking association
as Trustee for the Certificate Holders of Wells
Fargo Asset Securities Corporation, Mortgage
Pass-Through Certificates, Series 2006-AR4,
and LUCIA PARKS, an individual; DOES I
through X, and ROE CORPORATIONS I
through X, inclusive.

Defendants.

Case No.: A-13-678814-C

Dept. No.: XVIII

REPLY IN SUPPORT OF DEFENDANT,
U.S. BANK, N.A.'S, MOTION TO
EXPUNGE LIS PENDENS

The Defendant, U.S. Bank, N.A., as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4 (hereinafter "U.S. Bank"), by and through their attorney of record, Chelsea A. Crowton, Esq. and Christopher L. Benner of the law firm of Wright, Finlay & Zak, LLP, hereby submits its Reply in Support of the Motion to Expunge Lis Pendens.

///

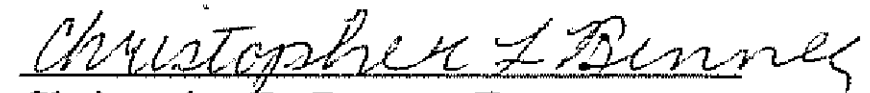
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1 This Motion is based on the attached Memorandum of Points and Authorities, all papers
2 and pleadings on file herein, all judicially noticed facts, and on any oral or documentary
3 evidence that may be presented at a hearing on this matter.

4 DATED this 23 day of May, 2013.

5 WRIGHT, FINLAY & ZAK, LLP

6 

7 Christopher L. Benner, Esq.

8 Nevada Bar No. 8963

9 5532 South Fort Apache Road, Suite 110

10 Las Vegas, NV 89148

11 *Attorney for Defendant, U.S. Bank, N.A., as Trustee*
12 *for the Certificate Holders of Wells Fargo Asset*
13 *Securities Corporation, Mortgage Pass-Through*
14 *Certificates, Series 2006-AR4*

15 MEMORANDUM OF POINTS AND AUTHORITIES

16 I. INTRODUCTION

17 The continued existence of the lis pendens on this property harms Defendant. Plaintiff is
18 unlikely to prevail on the merits, as this Court and other courts decisions have made abundantly
19 clear. Allowing Plaintiff to continue to cloud title with the lis pendens works solely to the
20 detriment of Defendant; Plaintiff's interest in the property is *de minimus*. The Court is very
21 familiar with the underlying theories and facts of this matter, thus Defendant will not repeat the
22 prior arguments, and focus solely upon the additional arguments raised by Plaintiff.

23 II. LEGAL ARGUMENT

24 On May 17, 2013, this Court found that the Plaintiff has not established a likelihood of
25 success on the merits in this action, and therefor denied Plaintiff's Motion for a Preliminary
26 Injunction. Thus, the first and second points raised in Plaintiff's Opposition are matters already
27 decided by this Court, refuted, and therefore no longer relevant. Plaintiff contends that the
28 current litigation was not brought in bad faith; this is most likely true at the time that the
litigation was originally brought before this Court. However, this Court and many other Nevada
courts have had ample opportunity to evaluate matters similar to the current matter in the
intervening months. N.R.S. § 116.3116 does not support Plaintiff's claims to priority. Plaintiff

1 does not enjoy the requisite "fair chance" of success on the merits, as evidenced by this Court's
2 May 14 decision, and by the numerous decisions of other Nevada district courts.

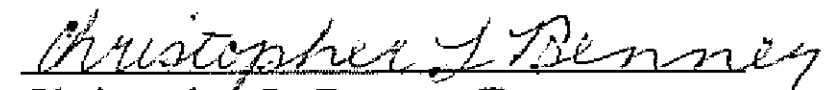
3 Finally, Plaintiff alleges that Defendant will suffer no damages by permitting the lis
4 pendens to remain in place. Defendant continues to protect the property from true super-priority
5 interests by paying the assessed taxes. Defendant will continue to be harmed by the lis pendens
6 as long as it is forced to protect the property from a tax lien, insure the property, and otherwise
7 incur costs related to the property, while being unable to market the property. While the lis
8 pendens is in place, Plaintiff shifts these burdens onto Defendant, and escapes responsibilities
9 which are part of having a first priority position in real property. Should the Court be inclined to
10 reverse its prior rulings in this matter, and find that Plaintiff does have a "fair chance" of success
11 on the merits, then the Court should Order Plaintiff to shoulder the responsibility for protecting
12 and preserving the property.

12 III. CONCLUSION

13 Plaintiff has failed to state a claim to the real property against either U.S. Bank or the
14 former homeowner, and does not enjoy a likelihood of success on the merits, nor will Plaintiff
15 suffer irreparable harm if U.S. Bank is permitted to proceed with the foreclosure of the property
16 after the expungement of the lis pendens. Based on the above, the Defendant, U.S. Bank,
17 respectfully requests that the Court grant the Defendant's Motion to Expunge Lis Pendens.

18
19 DATED this 23 day of May, 2013.

20 WRIGHT, FINLAY & ZAK, LLP

21 

22 Christopher L. Benner, Esq.

23 Nevada Bar No. 8963

24 5532 South Fort Apache Road, Suite 110


25 Las Vegas, NV 89148

26 *Attorney for Defendant, U.S. Bank, N.A., as Trustee*
27 *for the Certificate Holders of Wells Fargo Asset*
28 *Securities Corporation, Mortgage Pass-Through*
Certificates, Series 2006-AR4

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The undersigned does hereby affirm that the preceding **REPLY IN SUPPORT OF**
DEFENDANT, U.S. BANK, N.A.'S, MOTION TO EXPUNGE LIS PENDENS filed in Case
No. A-13-678814-C **does not** contain the social security number of any person.
DATED this 23 day of May, 2013.

WRIGHT, FINLAY & ZAK, LLP


Christopher L. Benner, Esq.
Nevada Bar No. 8963
5532 South Fort Apache Road, Suite 110
Las Vegas, NV 89148
*Attorney for Defendant, U.S. Bank, N.A., as Trustee
for the Certificate Holders of Wells Fargo Asset
Securities Corporation, Mortgage Pass-Through
Certificates, Series 2006-AR4*

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing REPLY IN SUPPORT OF DEFENDANT, U.S. BANK, N.A.'S, MOTION TO EXPUNGE LIS PENDENS was made on the 23rd day of May, 2013, by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

Howard C. Kim, Esq.
Diana S. Cline, Esq.
Victoria L. Hightower, Esq.
HOWARD KIM & ASSOCIATES
400 N. Stephanie St., Suite 160
Henderson, NV 89014
Attorneys for Plaintiff

An Employee of WRIGHT, FINLAY & ZAK, LLP