

UNIFORM COMMON INTEREST OWNERSHIP ACT
(As Amended in 2014)

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 ONE-HUNDRED-AND-SEVENTEENTH YEAR
IN BIG SKY, MONTANA
JULY 18 – 25, 2008

SECTION 3-116 ONLY
AMENDMENTS SHOWN IN STRIKE AND SCORE

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE ON AMENDMENTS TO UNIFORM COMMON INTEREST
OWNERSHIP ACT (2014)**

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AMENDMENTS TO UNIFORM COMMON INTEREST OWNERSHIP ACT

SECTION 3-116. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.

(a) The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. Any priority accorded to the association's lien under this section is a priority in right and not merely a priority in payment from the proceeds of the sale of the unit by a competing lienholder or encumbrancer. Unless the declaration provides otherwise ~~provides~~, reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due. [A lien under this section is not subject to [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

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

(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances that the association creates, assumes, or takes subject to;

(2) except as otherwise provided in subsection (c), 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;

(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative; and

(4) mechanics' or materialmen's liens to the extent that law of this state other than this [act] gives priority to mechanics' or materialmen's liens.

(c) A lien under this section also has priority over ~~is also prior to~~ a security interest ~~all security interests~~ described in subsection (b)(2), but only to the extent of:

(1) the unpaid amount of assessments for common expenses, not to exceed six months for each budget year of the association, as based on the periodic budget adopted by the association under Section 3-115(a) for the applicable year; and

(2) reasonable attorney's fees and costs incurred by the association in enforcing the association's lien. ~~both 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 institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien. Subsection (b) and this subsection do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [A lien under this section is not subject to [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]~~

(d) 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.

(e) 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.

(f) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien

are instituted within [three] years after the full amount of the assessments becomes due.

(g) This section does not prohibit an action by an association against a unit owner to recover past due sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

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

(i) The association upon request made in a record 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.

~~(j) 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. On nonpayment of an assessment on a unit, the association is entitled to obtain possession of the unit under [insert reference to forcible entry and detainer act of this State].~~

(k) The association's lien may be foreclosed as provided in this subsection and subsection

(p):

(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, 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 (1)]; [and]

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

[(4) in a foreclosure under [insert reference to state power of sale statute], the association shall give the notice required by statute or, if there is no such requirement, reasonable notice of its action to all lien holders of the unit whose interest would be affected].

[(l) If the unit owner's interest in a unit in a cooperative is real estate, the following requirements apply:

(1) The association, upon nonpayment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation and at any time, date, and place. The association shall give to the unit owner and any lessee of the unit owner reasonable notice in a record of the time, date, and place of any public sale or, if a private sale is intended, of the intention of entering into a contract to sell and of the time and date after which a private disposition may be made. The same notice must also be sent to any other person that has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record seven weeks before the date specified in the notice as the date of any public sale or seven 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. A sale may not be held until five 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 unit owner is liable for any deficiency in a

foreclosure sale.

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

(A) the reasonable expenses of sale;

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

(C) satisfaction of the association's lien;

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

and

(E) 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 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 the person after a foreclosure of the association's lien by power of sale and that the person 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 nonpayment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of the 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 and costs of the creditor.]

(m) In an action by an association to collect assessments or to foreclose a lien on a unit under this section, the court may appoint a receiver to collect all sums alleged to be due and owing to a unit owner before commencement or during pendency of the action. The receivership is governed by [insert state law generally applicable to receiverships]. 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 Section 3-115.

(n) An association may not commence an action to foreclose a lien on a unit under this section or to evict a unit owner under subsection (j) unless:

(1) the unit owner, at the time the action is commenced, owes a sum equal to at least [three] months of common expense assessments based on the periodic budget last adopted by the association pursuant to Section 3-115(a) and the unit owner has failed to accept or comply with a payment plan offered by the association; and

(2) the executive board votes to commence a foreclosure action specifically against that unit or to evict the unit owner.

(o) Unless the parties otherwise agree, the association shall apply any sums paid by unit owners that are delinquent in paying assessments in the following order:

(1) unpaid assessments;

(2) late charges;

(3) reasonable attorney's fees and costs and other reasonable collection charges;

and

(4) all other unpaid fees, charges, fines, penalties, interest, and late charges.

(p) If the only sums due with respect to a unit are fines and related sums imposed against the unit, a foreclosure action may not be commenced against the unit unless the association has a judgment against the unit owner for the fines and related sums and has perfected a judgment lien against the unit under [insert reference to state statute on perfection of judgments].

(q) Every aspect of a foreclosure, sale, or other disposition under this section, including the method, advertising, time, date, place, and terms, must be commercially reasonable.

[(r) Foreclosure of a lien under this section does not terminate an interest that is subordinate to the lien to any extent unless the association provides notice of the foreclosure to the record holder of the subordinate interest.]

Legislative Note: In a state that permits only judicial foreclosure of an association's lien, subsection (r) should be omitted. In a state that permits nonjudicial foreclosure, but by statute provides that a foreclosure sale does not extinguish a subordinate lien unless the subordinate lienholder was provided notice of the sale, subsection (r) should be omitted.

Comment

1. Section 3-116(a) was amended in 1994 to delete the language "from the time the assessment or fine becomes due." The deleted clause was intended to make clear that the lien was enforceable at the time the assessment became due. Commentators have observed, however, that the language caused confusion with respect to priority issues. The intention of the statute, as demonstrated by the Comments, was that the inchoate statutory lien was the functional equivalent of real estate taxes except with respect to the special priorities identified in subsection (b) of the section. The deletion of the language as suggested makes clear that the lien arises immediately upon the effective date of the statute for old common interest communities and upon recording of the declaration for new common interest communities.

As a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for common charges, a title insurer would be liable for post-insurance

obligations which have a priority established prior to the time the policy was issued. This, however, is no different than in other inchoate liens such as real estate taxes and mechanics liens, all of which have become standard exceptions in the title industry.

2. 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 (except as provided in subsection (c), as described below). ~~However, as to prior first security interests the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the six months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. 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.~~

As originally promulgated in 1982, subsection (c) provided that the association's lien did have priority to the extent of six months of unpaid common expense assessments, based on the association's periodic budget. In 2008, subsection (c) was amended to extend this limited priority to include the cost of the association's reasonable attorneys' fees and court costs.

The six-month limited priority for association liens constituted a significant departure from pre-existing practice, and was viewed as striking an equitable balance between the need to enforce collection of unpaid assessments and the need to protect the priority of the security interests of lenders in order to facilitate the availability of first mortgage credit to unit owners in common interest communities. This equitable balance was premised on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessments (up to six months' worth) to the association to satisfy the association's limited priority lien. This was expected to permit the mortgage lender to preserve its first lien and deliver clear title in its foreclosure sale — a sale that was expected to be completed within six months (in jurisdictions with nonjudicial foreclosure) or a reasonable period of time thereafter, thus minimizing the period during which unpaid assessments would accrue for which the association would not have first priority. Likewise, it was expected that in the typical situation, a unit would have a value sufficient to produce a sale price high enough for the foreclosing lender to recover both the unpaid mortgage balance and six months of assessments.

The real estate market facing common interest communities post-2007 is substantially different from the one contemplated by the drafters of the original UCIOA. Many units are "underwater," with values below the outstanding first mortgage balance. More significantly, long delays have developed in the completion of foreclosures. In states permitting only judicial

foreclosures, these delays were often beyond lender control. In many situations, however, mortgage lenders strategically delayed the institution or completion of foreclosure proceedings on units affected by common interest assessments. When a lender acquires a unit at a foreclosure sale by way of a credit bid, it becomes legally obligated to pay assessments arising during the lender's period of ownership. Some lenders have chosen to delay scheduling or completing a foreclosure sale, fearful that they may be unable to resell the unit quickly for an appropriate return in a depressed market. During this period of delay, neither the unit owner nor the mortgage lender is paying the common expense assessments — the unit owner is often unable or unwilling to do so, and the mortgagee is not legally obligated to do so prior to acquiring title. In the meantime, the association (and the remaining unit owners) bear the full financial consequences of this situation, because the association must either force the remaining owners to bear increased assessments to meet budgeted expenses or reduce expenditures for (or the level of) community maintenance, insurance and services.

If other unit owners have to pay the burden of increased assessments to preserve community services or amenities, the delaying lender receives a benefit in that the value of its collateral is preserved while the lender waits to foreclose. Yet this preservation comes through the community's imposition of assessments that the lender does not have to pay or reimburse. This benefit constitutes unjust enrichment of the mortgage lender, particularly to the extent that the lender enjoys this benefit by virtue of a conscious decision to delay completing a foreclosure sale.

In addition to its inadequacy to protect the legitimate financial interests of community residents, the language used to create the limited priority lien in subsection (c) has also prompted a number of interpretive disputes. For example:

First, there has been a developing split of judicial authority as to whether subsection (c) creates in the association a true lien priority or merely a payment priority. For example, suppose that a condominium association forecloses its lien and conducts a sale following a unit owner's default in assessment payments, and the first mortgage lender does not participate in the sale. As originally drafted, subsection (c) was intended to create a true lien priority, and thus the association's foreclosure properly should be viewed as extinguishing the lien of the first lienholder (to the same extent that foreclosure of a real estate tax lien would extinguish an otherwise-first mortgage lien). See, e.g., SFR Investments Pool 1, LLC v. U.S. Bank, N.A., ___ Nev. ___ (Nev. 2014); Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A., ___ A.3d ___, 2014 WL 4250949 (D.C. Ct. App. 2014); 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., ___ F.Supp.2d ___, 2013 WL 5780793 (D.Nev.2013); Summerhill Village Homeowners Ass'n v. Roughley, 270 P.3d 639 (Wash.Ct.App. 2012). Nevertheless, several trial court decisions have held that an association's nonjudicial foreclosure of its assessment lien does not extinguish the lien of the first mortgage lender. See, e.g., Weeping Hollow Ave. Trust v. Spencer, 2013 WL 2296313 (D.Nev. May 24, 2013); Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2013 WL 531092 (D. Nev. Feb. 11, 2013).

Second, a split of authority has developed as to whether the association may extend its six-month lien priority by filing successive lien foreclosure actions at six month intervals.

Compare Drummer Boy Homes Ass'n v. Britton, 2011 Mass. App. Div. 186 (2011) (UCIOA lien priority cannot be extended beyond six months through repetitive foreclosure actions by association) with Bank of America, N.A. v. Morganbesser, No. 675-10-10 (Vt. Super. Ct. Jan. 18, 2013) (recognizing continuation of association's priority for assessments accruing during pendency of association foreclosure, even beyond six months, because subsection (c) would allow repetitive actions every six months).

For the reasons discussed above, subsections (a), (b) and (c) are amended to clarify the scope of the association's limited lien priority, as follows:

First, subsection (a) affirms the result in Summerhill Village Homeowners Ass'n v. Roughley, 270 P.3d 639 (Wash.Ct.App. 2012), and makes clear that the association's lien has true priority over the lien of an otherwise first mortgage lender to the extent of the amount specified in subsection (c). Thus, if the association conducts a foreclosure sale of its association lien and the otherwise first mortgagee does not act to redeem its interest by satisfying the association's limited priority lien, the mortgagee's lien would be extinguished.

Second, subsection (c) makes clear that the association's lien is not capped at only six months of unpaid common expense assessments. Instead, the association's lien is entitled to priority under subsection (c) to the extent of six months of unpaid common expense assessments each year, based on each year's periodic budget as adopted by the association for the applicable year.

By allowing the association to extend its priority for six months per year throughout any period of delay by a foreclosing lender, subsection (c)(1) strikes a more appropriate and equitable sharing of the costs of preserving the value of the mortgagee's security. The following illustrations demonstrate the application of subsection (c):

Illustration 1. Owner owns a unit subject to a first mortgage held by Bank (but no other liens). Owner fails to pay any assessments during either 2012 or 2013. In December 2013, the association conducts a foreclosure sale (having given proper notice of the sale to both Owner and Bank). Based on the association's annual budgets, assessments were \$100/month for 2012 and \$125/month for 2013. The unpaid balance of Owner's assessments was thus \$2,700, and the association incurred an additional \$1,000 in reasonable attorney fees and costs in enforcing its lien. Under subsection (c), the association's lien would be entitled to priority over Bank's mortgage to the extent of \$2,350, which represents (1) six months of unpaid 2012 assessments (a total of \$600), (2) six months of unpaid 2013 assessments (a total of \$750), and (3) \$1,000 in attorney fees and costs. The association's foreclosure sale extinguishes Bank's mortgage lien. The association receives the first \$2,350 in sale proceeds for application to Owner's unpaid assessments. The sale proceeds would next be applied to the balance secured by Bank's mortgage. If there remained any surplus sale proceeds following the satisfaction of Bank's mortgage, those proceeds would be applied to the remaining balance of the Owner's unpaid assessments.

Illustration 2. Owner owns a unit subject to a first mortgage held by Bank (but no other liens). In December 2013, the association conducts a foreclosure sale (having given proper notice of the sale to both Owner and Bank). Based on the association's annual budgets, assessments were \$100/month for 2012 and \$125/month for 2013. At the time of the sale, Owner had neither paid assessments for March and April of 2012 (a total of \$200) nor for the period March-December 2013 (a total of \$1,250). The unpaid balance of Owner's assessments was thus \$1,450, and the association incurred an additional \$1,000 in reasonable attorney fees and costs in enforcing its lien. Under subsection (c), the association's lien would be entitled to priority over Bank's mortgage only to the extent of \$1,950, which represents (1) two months of unpaid 2012 assessments (a total of \$200), (2) six months of unpaid 2013 assessments (a total of \$750), and (3) \$1,000 in attorney fees and costs. The association's foreclosure sale extinguishes Bank's mortgage lien. The association receives the first \$1,950 in sale proceeds for application to Owner's unpaid assessments. The sale proceeds would next be applied to the balance secured by Bank's mortgage. If there remained any surplus sale proceeds following the satisfaction of Bank's mortgage, those proceeds would be applied to the remaining balance of the Owner's unpaid assessments.

Illustration 3. Owner owns a unit subject to a first mortgage held by Bank (but no other liens). In December 2013, the association schedules a foreclosure sale (having given proper notice of the sale to both Owner and Bank). Based on the association's annual budgets, assessments were \$100/month for 2013, and Owner had not paid any assessments for 2013. The unpaid balance of Owner's assessments was thus \$1,200, and the association incurred an additional \$1,000 in reasonable attorney fees and costs in enforcing its lien. Just prior to the scheduled foreclosure sale, however, Bank paid the association a total of \$1,600, which represents (1) six months of unpaid 2013 assessments (a total of \$600) and (2) \$1,000 in the association's attorney fees and costs. Bank's payment extinguishes the priority that the association's lien would otherwise have had pursuant to subsection (c); therefore, if the association proceeds with its foreclosure sale, the sale will not extinguish Bank's mortgage lien, and the buyer at the sale will take the unit subject to Bank's mortgage lien.

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)(2) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

3. 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 (d) 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.

4. Subsection (g) 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.

5. Subsection (j) originally provided an additional remedy for cooperative associations dealing with defaulting or recalcitrant unit owners. 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. For this reason, subsection (j) provided that ~~The act provides in subsection (i) that~~ upon nonpayment the cooperative unit owner could ~~may~~ be evicted in the same manner as an unlawfully holding over commercial tenant. ~~These 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 (k)(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 of the lien on cooperative units, the State can choose the 2d alternative: power of sale under subsection (l) of this section.

Subsection (l), 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.

As originally promulgated, subsection (j) only authorized a possessory remedy prior to foreclosure for cooperatives. Subsection (j) did not extend such a possessory remedy to an association in a condominium or planned community, on the theory that a unit owner's failure to pay assessments on a timely basis would have less significant consequences and that the association's foreclosure remedy was sufficient.

By contrast, Illinois has adopted procedures that allow a condominium association to use forcible entry and detainer to obtain possession of a unit from a defaulting owner, and to lease the unit to a tenant and apply the rents toward the satisfaction of unpaid assessments. 735 ILCS 5/9-111. Upon recovering possession of the unit, the association has the power (though not the obligation) to lease the unit to a tenant for a period not to exceed 13 months; if the association so leases the property, the association must apply rents collected to unpaid assessments, fines, and ongoing assessments as they come due, with any surplus returned to the unit owner. 735 ILCS 5/9-111.1. Once the unit owner has paid off the unpaid assessments and becomes current on its obligations to the association, the unit owner may obtain an order vacating the judgment; if the premises are being leased by the association as described above, the judgment would be vacated effective at the end of the lease term. 735 ILCS 5/9-111.

The Illinois statute discourages strategic default by underwater unit owners in possession of their units (defaults which can place a serious financial burden on the association and other unit owners). The potential benefit of such a remedy is additionally magnified in jurisdictions (such as Illinois) that permit only judicial foreclosure. In those states in which a year or longer might elapse before an association could complete a judicial foreclosure of its assessment lien, and there is a viable market for rental of such units, this possessory remedy would enhance the ability of the association to reduce the assessment delinquency (and thereby help meet its budgeted expenses) pending completion of the foreclosure of the association lien.

As a result, subsection (j) is amended to extend a comparable remedy to all associations. A state that adopts amended subsection (j) may need to consider conforming amendments in its forcible entry and detainer statute that are similar in character to the provisions in the Illinois statute, 735 ILCS 5/9-111 and 9-111.1. ~~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.~~

6. ~~New subsection~~ Subsection (m) makes clear that the courts have authority to appoint receivers upon request by associations to aid in collection of common charges.

7. Few issues are more contentious in common interest communities than the prospect of unit owners losing their homes as a consequence of non-payment of common charges – and the loss of all or most of their equity – when the association forecloses. The reaction in state legislatures in recent years has been widespread.

At the same time, it is crucial that the association be able to secure timely payment of common charges in order to provide services to all the residents of the common interest community.

In an effort to balance these competing interests, the 2008 amendments provided additional safeguards governing foreclosure of liens for unpaid common charges. These ~~new~~ procedures may be summarized as follows:

First, Section 3–116(n) bars foreclosure for sums that are less than 3 months of common charges. Likewise, subsection (n) also bars the association from pursuing a possessory remedy against a defaulting unit owner unless more than 3 months of common charges are unpaid.

Second, Section 3–116(n) also requires the association board, to first, offer the delinquent owner a payment plan which the owner rejects, and second, expressly approve each foreclosure action.

Third, Section 3–116(o) requires that payments of delinquent assessments be applied first to principal rather than to interest and fees, in order to avoid the usual practice of accruing additional interest and late charges as the monthly fees remain unsatisfied while the attorneys' fees and interest are paid first.

Fourth, Section 3–116(p) bars any foreclosure for fines alone unless the association first secures a personal judgment against the unit owner.

Finally, Section 3–116(q) requires that if a foreclosure does go forward, any sale of a unit must be commercially reasonable. In the first reported case of foreclosure arising in a state that has adopted this Act, the court required that the sale be reasonable. See *Will v. Mill Condominium Owners Association et al*, 176 VT 380, 848 A2d 336 [2004].

These special procedures would comprise an overlay on existing state foreclosure procedures, whether judicial or non-judicial. Taken together, they respond in a concise but responsible way to the widespread reports of abuses in this field. Hopefully, they will also be viewed by the various States as a responsible and balanced response to the issues confronting elected officials, defaulting unit owners and homeowners association directors with a fiduciary responsibility to maintain the property.

~~8. — Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:~~

~~First, subsection (a) is amended to add the cost of the association's reasonable attorneys' fees and court costs to the total value of the association's existing 'super lien'—currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b). The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state.~~

~~Second, subsection (f) has been amended to emphasize that the association has a variety of other remedies available against a unit owner in addition to the foreclosure remedy. In many cases, an action for sums due may be less costly, less disruptive and more efficient than a foreclosure action in collecting the funds properly due the association.~~

8. In states that permit an association to foreclose its association lien by nonjudicial foreclosure, questions may arise regarding the finality of a sale in which a person holding a subordinate lien did not receive notice of the nonjudicial sale. In some states, nonjudicial foreclosure procedures require notice to subordinate lienholders only when those lienholders have recorded a timely request for notice of sale on the real property records. There also is authority in some nonjudicial foreclosure states to the effect that a subordinate lien can be extinguished in favor of a bona fide purchaser at the sale even if the subordinate lienholder who had requested notice did not receive it. In other states, a subordinate lienholder that does not receive notice of a nonjudicial foreclosure sale does not have its lien extinguished by that sale. See, e.g., Wash. Rev. Code Ann. § 61.24.040(7).

The issue of notice to subordinate lienholders becomes more critical under this Act, given that subsection (c) gives the association a limited priority over the otherwise-first mortgage lender, thus rendering that lender a subordinate lienholder. It would be manifestly unfair for an association's foreclosure sale to extinguish the lien of the otherwise-first mortgage lender if the association did not in fact provide the lender with notice of that sale. For this reason, subsection (r) is added to make clear that the association's foreclosure does not terminate a subordinate lien unless the association provides notice of the foreclosure to the person that is the record holder of the subordinate interest.

Subsection (r) is not necessary in judicial foreclosure-only states, nor in states (such as Washington) that provide that a nonjudicial foreclosure can extinguish subordinate liens only if such lienholders were provided notice prior to the sale.

99. Section 3-116 rejects more extreme provisions favoring defaulting unit owners espoused in various forums. For example, extensive provisions were adopted by North Carolina regarding fines enforcement and collection which may pose significant impediments to the financial well-being of unit owner associations. See, e.g., 2205 North Carolina Session Act No. 422). Similarly, the section does not adopt the extensive borrower protections contained in the Uniform Non-Judicial Foreclosure Act. That act contains provisions dealing with repetitive and detailed default notices, mandated meetings before foreclosure, a period of limitation on foreclosures, mandated judicial supervision of foreclosures, extensive redemption rights after foreclosure, and the like. In those cases where foreclosure is supervised by a judge, those procedures are not likely to be of significant benefit to defaulting to unit owners, but will impose significant transaction costs on

associations in non-judicial foreclosure states; there is no reason to distinguish common interest community foreclosures from every other procedure.

10. The issue of how the association protects itself from non-payment of assessments may be of concern in a state with a homestead exemption. Either direct foreclosure of the association's statutory lien for unpaid assessments, or foreclosure of a perfected judgment lien which the association might have secured in lieu of foreclosure, may conflict with existing homestead statutes. Further consideration of this issue in those states, in order to reconcile conflicting statutes, would then be appropriate.

11. In requiring a delay for 3 months in commencement of a foreclosure proceeding, subsection 3-116(n)(1) imposes some risk on the association. Since the association's lien has only a limited priority over that of a first mortgage, anything which delays the commencement and completion of a foreclosure by the association, but does not result in the unit owner bringing his or her account current, may be seen as simply raising the cost to the association, and, therefore, to all of the other unit owners who are paying their common charges on time.

12. It may be that the reaction of some legislators to this Section will depend on the extent to which foreclosure actions in the respective states are subject to judicial supervision. In states where non-judicial foreclosure is either not available or not used in association lien foreclosures, the active role played by the court may minimize the need for certain of the borrower protections in this section.