

# NEVADA’S FORECLOSURE EPIDEMIC: HOMEOWNER ASSOCIATIONS’ SUPER-PRIORITY LIENS NOT SO “SUPER” FOR SOME

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## TABLE OF CONTENTS

INTRODUCTION.....	326
I. THE HISTORY AND RECENT ISSUES INVOLVING NEVADA’S HOA FORECLOSURE LAWS .....	329
A. <i>The Uniform Common Interest Ownership Act and Nevada             Revised Statutes Chapter 116</i> .....	329
B. <i>The Ambiguity of Nevada Revised Statutes Chapter 116</i> .....	333
II. THE RISE OF LITIGATION—COURTS PROVIDE CONFLICTING DECISIONS .....	335
A. <i>Statutory Interpretation</i> .....	336
B. <i>Legislative Intent and History</i> .....	337
C. <i>Nevada Real Estate Division Advisory Opinion</i> .....	341
D. <i>Out-of-State Authority</i> .....	342
E. <i>Policy Arguments</i> .....	343
F. <i>Supreme Court Ruling</i> .....	347
III. POTENTIAL SOLUTIONS.....	349
CONCLUSION.....	352

## INTRODUCTION

In the early 2000s, the Nevada housing market was in full swing until the real estate bubble popped in 2007, resulting in a recession.<sup>1</sup> Since the recession,

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<sup>1</sup> *Las Vegas Homes for Sale Shrinking in Inventory as Real Estate Investing Dominates the #1 Market in America According to LasVegasRealEstate.org*, iREACH (June 4, 2013),

Nevada has had one of the top unemployment rates in the nation;<sup>2</sup> thus, unsurprisingly, Las Vegas has been at the epicenter of the national housing crisis with one of the highest numbers of foreclosures in the country.<sup>3</sup>

The state's foreclosures began to drop in 2011 after the Nevada Legislature passed Assembly Bill 284 in response to allegations that banks were "robo signing" foreclosures.<sup>4</sup> The bill set forth requirements that lending institutions had to meet before they could initiate foreclosures.<sup>5</sup> This new law impeded the banks' foreclosure processes, consequently allowing homeowners to remain in their homes for "free" because they no longer had to pay their mortgages and, for those living in common interest communities, their homeowners' association ("HOA") payments.<sup>6</sup> Because HOAs stopped receiving compensation for unpaid assessments from the banks' foreclosures, the associations began to foreclose on homes themselves in order to stay in business and to prevent an increase in the dues of residents who were paying.<sup>7</sup>

Today, HOAs are making it a common practice to conduct nonjudicial foreclosures on homes.<sup>8</sup> This action does not require associations to go through state courts; instead, an HOA initiates a foreclosure by recording a notice of

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<http://www.ireachcontent.com/news-releases/las-vegas-homes-for-sale-shrinking-in-inventory-as-real-estate-investing-dominates-the-1-market-in-america-according-to-lasvegasrealestateorg-210072321.html>.

<sup>2</sup> *Nevada Legislators Considering Reform for HOAs*, KOLO 8 (Feb. 26, 2011, 10:40 AM), [http://www.kolotv.com/home/headlines/Nevada\\_Legislators\\_Considering\\_Reform\\_for\\_HOAs\\_116980213.html](http://www.kolotv.com/home/headlines/Nevada_Legislators_Considering_Reform_for_HOAs_116980213.html); see also *Current Unemployment Rates for States and Historical Highs/Lows*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/web/laus/lauhsthl.htm> (last visited Dec. 20, 2014) (showing Nevada's record-high unemployment rate of 13.9 percent in November 2010 as the fourth-highest record for any state, and highest in any state since 1983).

<sup>3</sup> Jennifer Robison, *Foreclosures Surge in August; Nevada Again No. 1 in U.S.*, LAS VEGAS BUS. PRESS, Sept. 11, 2013 (Housing); David McGrath Schwartz, *New Law Has Stalled, Not Stifled, Foreclosures*, VEGASINC (Jan. 29, 2012, 2:01 AM), <http://www.vegasinc.com/business/tourism/2012/jan/29/new-law-has-stalled-not-stifled-foreclosures/>.

<sup>4</sup> Letter from Michael E. Buckley, Co-Chair, Common Interest Comm., Real Prop. Section, State Bar of Nev., to Joint Editorial Bd. for Unif. Real Prop. Acts 9 (Oct. 31, 2013) [hereinafter Letter from Mr. Buckley], available at <http://www.uniformlaws.org/shared/docs/jeburpa/buckleynevadaUCIOAcomments.pdf> (discussing Assembly Bill 284).

<sup>5</sup> Schwartz, *supra* note 3; Hubble Smith, *Bill Tweaks "Robo-Signing" Law*, LAS VEGAS REV.-J., Apr. 3, 2013, at 1D ("The law currently requires lenders to provide a notarized affidavit of authority to exercise power of sale under a deed of trust. Anyone signing documents on behalf of a lender must have 'personal knowledge' of who owns the promissory note on the loan.").

<sup>6</sup> Andrew Doughman, *Higher Dues for Homeowners at Stake in HOA Legislation*, LAS VEGAS SUN, May 23, 2013 (Politics), available at <http://www.lasvegassun.com/news/2013/may/23/higher-dues-homeowners-stake-hoa-legislation/>.

<sup>7</sup> June Fletcher, *Foreclosures Close to Home*, WALL ST. J. ONLINE (Sept. 6, 2013, 3:35 PM), <http://online.wsj.com/news/articles/SB10001424127887323623304579059054191366482>.

<sup>8</sup> Colleen McCarty & Kyle Zuelke, *I-Team: HOAs Have Right to Foreclose for Delinquent Dues*, 8 NEWS NOW (May 22, 2013, 11:00 PM), <http://www.8newsnow.com/story/22401616/i-team-hoas-have-right-to-foreclose-for-delinquent-dues> (explaining that HOAs foreclosed on nearly 650 homes in 2012 alone).

default.<sup>9</sup> Subsequently, the association auctions the home at a foreclosure sale and usually sells it to a third-party bidder at a price well below its fair-market value.<sup>10</sup> Unfortunately for some buyers, many banks then foreclose on these recently purchased properties in an effort to collect on their original loans.<sup>11</sup> Customarily, HOA foreclosures did not affect banks because the third-party bidders acquired the properties' liens when purchasing the home.<sup>12</sup> However, this customary practice is no longer the case since third-party bidders have challenged Nevada State law due to its ambiguity; this issue has become the center of litigation in many of the state's courtrooms.<sup>13</sup>

Nevada's courts were faced with the difficult task of interpreting and applying Nevada Revised Statutes ("NRS") Chapter 116 to these issues regarding HOA foreclosure sales. The courts were to determine whether a foreclosure sale properly conducted pursuant to NRS Chapter 116 automatically extinguishes all prior encumbrances on the property, allowing a bona fide purchaser at an HOA foreclosure sale to obtain the property free and clear of all prior encumbrances or whether all prior encumbrances run with the property, transferring to the third-party buyer.<sup>14</sup> For a considerable length of time, Nevada's courts were split on this issue; however, in September 2014, the Nevada Supreme Court released its opinion regarding this matter.<sup>15</sup>

This Note seeks to address the issues involving Nevada's laws and HOA foreclosure sales. Part I begins with the history of Nevada's governing laws and then focuses on the problems that have recently plagued the state. Part II depicts the conflicting decisions in Nevada's courts, detailing the arguments from both sides, the reasoning behind the rulings, and the recent opinion issued by the Nevada Supreme Court. Finally, Part III discusses potential solutions to the HOA foreclosure sale crisis.

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<sup>9</sup> Amy Loftsgordon, *Nevada's Foreclosure Mediation Program*, NOLO: LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/nevadas-foreclosure-mediation-program.html> (last visited Nov. 30, 2014).

<sup>10</sup> Melissa Waite, *The HOA Foreclosure and Priority: Who Is in First?*, COMMUNIQUÉ (Clark Cnty. Bar Ass'n), Nov. 2013, at 26, 26 (2013) (stating that houses are auctioned for an average price of \$3,000–\$12,000).

<sup>11</sup> Amicus Curiae Brief of the Real Property Section of State Bar of Nevada in Opposition to U.S. Bank National Ass'n's Motion to Dismiss at 12, *SFR Invs. Pool 1, LLC v. U.S. Bank N.A.*, No. A-13-678858-C (Nev. Dist. Ct. Aug. 1, 2013) [hereinafter *Amicus Brief of Real Property Section*].

<sup>12</sup> Waite, *supra* note 10.

<sup>13</sup> *Id.* at 26–27.

<sup>14</sup> *First 100, LLC v. Burns*, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant's motion to dismiss at 4).

<sup>15</sup> Abran Vigil & Bruce F. Johnson, *Residential Lenders in Nevada Losing Out in HOA Lien Foreclosures*, BALLARD SPAHR LLP (March 19, 2013), <http://www.ballardspahr.com/alerts/publications/legalalerts/2013-03-19-residential-lenders-in-nevada-losing-out-in-hoa-lien-foreclosures.aspx>.

Fall 2014]

*HOA SUPER-PRIORITY LIENS*

329

I. THE HISTORY AND RECENT ISSUES INVOLVING NEVADA'S HOA  
FORECLOSURE LAWS

Although the laws governing HOA foreclosures are relatively recent, it is important to look to legislative history in order to understand fully the issues at hand. This Note not only discusses the issue involving the split in Nevada's courts regarding the interpretation of NRS 116.3116, but it also briefly addresses other issues involving NRS Chapter 116 to emphasize the urgent need for statutory change.

A. *The Uniform Common Interest Ownership Act and Nevada Revised Statutes Chapter 116*

The Nevada legislature adopted and modified the Uniform Common Interest Ownership Act ("UCIOA") in 1991.<sup>16</sup> The act was introduced as Assembly Bill 221, and, with its adoption, the legislature introduced NRS Chapter 116, often known as the Nevada Uniform Common Interest Ownership Act ("NUCIOA").<sup>17</sup> NRS Chapter 116 provides a set of laws to govern common interest communities.<sup>18</sup>

The section of the statute relevant to the HOA foreclosure issue is NRS 116.3116, which is almost identical to section 3-116 of the UCIOA; this section governs liens against units for assessments.<sup>19</sup> The Nevada Supreme Court has stated the following:

"[A] lien is a security device that binds property to a debt and puts a party on notice that someone besides the owner of the property has an interest in that property. It is 'a claim, encumbrance, or charge on property for the payment of some debt, obligation or duty.' Repayment of the debt evidenced by the lien does not occur until the property is sold or foreclosed upon."<sup>20</sup>

In part, NRS 116.3116 states the following:

2. A lien under this section is prior to all other liens and encumbrances on a unit except: . . . (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent 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; . . . .

The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS

<sup>16</sup> Proposed Brief of Legal Aid Center of Southern Nevada, Inc. as Amicus Curiae in Support of Respondents at 6, *Villa Palms Court 102 Trust v. Riley*, No. 62528, 2014 WL 5840154 (Nev. Sep. 3, 2013) [hereinafter Amicus Brief of Legal Aid].

<sup>17</sup> Waite, *supra* note 10; *see also First 100*, No. A677693 (order denying defendant's motion to dismiss at 8).

<sup>18</sup> Amicus Brief of Legal Aid, *supra* note 16, at 2.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> Amicus Brief of Real Property Section, *supra* note 11 (quoting *State Dep't of Human Res. v. Estate of Ullmer*, 87 P.3d 1045, 1051 (2004)).

116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . .<sup>21</sup>

Therefore, under NRS 116.3116, “a previously perfected first security interest retains its seniority over a subsequent lien asserted by a homeowners’ association *except* to the extent that the subsequent association lien is based upon unpaid regular periodic assessments for common expenses.”<sup>22</sup> Thus, a portion of the HOA’s lien—limited to nine months of unpaid assessments preceding the lien—is given priority over the bank’s first mortgage, creating a “super-priority” status.<sup>23</sup> In this case, the HOA’s lien is considered “senior” to the bank’s first deed of trust, which is often referred to as a “junior” security interest, even though the HOA lien was asserted subsequently in time.<sup>24</sup> However, any unpaid assessments over the nine-month period preceding the lien will be subordinate to previously perfected encumbrances.<sup>25</sup>

Throughout the years since the law’s adoption in 1991, the Legislature has made some changes and modifications. For example, one change particularly pertinent to today’s issues involving HOA foreclosures is the extension of the super-priority lien. Previously, super-priority liens were limited to six months of assessments as found in Section 3-116 of the Uniform Act.<sup>26</sup> However, in 2009, the Nevada legislature changed the “6 months” to “9 months” and added that the super-priority lien amount must include any abatement charges that are incurred.<sup>27</sup>

In recent years, the issue has become what expenses should be included as part of the super-priority lien for the nine-month period.<sup>28</sup> In 2006, the Court in *Korbel Family Trust v. Spring Mountain Ranch Master Ass’n* held that the super-priority lien included six months of unpaid assessments, including interest—this was prior to the 2009 change that extended six months to nine months—as well as collection costs that included legal fees and costs “that accrue prior to the date of foreclosure of the first deed of trust.”<sup>29</sup> Subsequently, some individuals raised claims of excessive collection costs, and the Legislature responded in 2009 by enacting a law that limited associations to the recovery of “reasonable fees to cover the costs of collecting any past due obliga-

<sup>21</sup> NEV. REV. STAT. § 116.3116(2) (2013).

<sup>22</sup> *First 100*, No. A677693 (order denying defendant’s motion to dismiss at 5); Amicus Brief of Legal Aid, *supra* note 16, at 6–7.

<sup>23</sup> Amicus Brief of Legal Aid, *supra* note 16, at 7.

<sup>24</sup> *First 100*, No. A677693 (order denying defendant’s motion to dismiss at 6).

<sup>25</sup> *Id.* (order denying defendant’s motion to dismiss at 5).

<sup>26</sup> The Super Priority Lien, Nev. Dep’t of Bus. & Indus., Real Estate Div. Advisory Op. No. 13-01, at 9–10 (Dec. 12, 2012) [hereinafter Advisory Op. No. 13-01].

<sup>27</sup> *Id.* at 10–11.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> Letter from Mr. Buckley, *supra* note 4, at 6 (quoting *Korbel Family Trust v. Spring Mountain Ranch Master Ass’n*, No. 06-A-523959-C (Nev. Dist. Ct. Dec. 2006) (order)).

tion.”<sup>30</sup> The new law also required the Commission to “adopt regulations ‘establishing the amount of the fees that an association may charge pursuant to this section.’”<sup>31</sup> In 2010, the Commission adopted a new regulation;<sup>32</sup> however, neither the new law nor the regulation addressed whether collection costs were included in the super-priority lien.<sup>33</sup>

The State of Nevada Department of Business and Industry, Real Estate Division (“NRED”), issued an Advisory Opinion on December 12, 2012, that addressed the issue of whether an HOA’s super-priority lien contains “costs of collecting” as defined by Nevada law. The Advisory Opinion states that NRS 116.3116 does not incorporate such costs in the association’s lien.<sup>34</sup> Furthermore, an HOA’s super-priority lien cannot exceed nine months of assessments.<sup>35</sup> When an HOA incurs fees and costs in the foreclosure process of the association’s lien, those expenses are the personal liability of the homeowner.<sup>36</sup> If the homeowner does not pay the association for the expenses, the association can only recover the cost from the association’s foreclosure sale.<sup>37</sup> Although some argued that the Advisory Opinion was not binding authority, the Nevada Supreme Court stated that the plain language of NRS Chapter 116 requires an interpretation by NRED to determine which fees are recoverable and to what extent.<sup>38</sup> Since the Court gave deference to the opinion, NRED’s Advisory Opinion was the most recent authority until the Court ruled on the issue in September 2014. Interestingly, both Legislative sessions in 2011 and 2013 failed to resolve this issue.<sup>39</sup> In the future, when the Legislature examines the costs of collecting, advocates suggest that the compensation of the super-priority lien should include “any amounts owed to the association that are a lien on the unit, including collection charges.”<sup>40</sup>

In addition to the costs-of-collecting issue, another recent assembly bill has also created a change in the housing market crisis. In 2011, the Nevada Legislature passed Assembly Bill 273 in response to banks selling their loans to companies at huge discounts when the same banks refused to give similar con-

<sup>30</sup> *Id.* (quoting NEV. REV. STAT. § 116.310313(1) (2013)).

<sup>31</sup> *Id.* (quoting § 116.310313(1)).

<sup>32</sup> *Id.* (explaining that the new regulation adopted by the Commission was Nevada Administrative Code 116.470).

<sup>33</sup> *Id.*

<sup>34</sup> Advisory Op. No. 13-01, *supra* note 26, at 6.

<sup>35</sup> Hubble Smith, *Ruling Spells Out Limits on HOA Superpriority Liens*, LAS VEGAS REV.-J., Dec. 15, 2012, at 2D, available at <http://www.reviewjournal.com/news/crime-courts/ruling-spells-out-limits-hoa-superpriority-liens>.

<sup>36</sup> *Real Estate Division Issues Super Priority Lien Advisory Opinion*, STATE OF NEV. DEP’T OF BUS. & INDUS. (Dec. 13, 2012), [http://business.nv.gov/News\\_Media/Press\\_Releases/2012/Real\\_Estate/Real\\_Estate\\_Division\\_Issues\\_Super\\_Priority\\_Lien\\_Advisory\\_Opinion/](http://business.nv.gov/News_Media/Press_Releases/2012/Real_Estate/Real_Estate_Division_Issues_Super_Priority_Lien_Advisory_Opinion/).

<sup>37</sup> *Id.*

<sup>38</sup> State Dep’t of Bus. & Indus. v. Nev. Ass’n Servs., Inc., 294 P.3d 1223, 1227 (Nev. 2012).

<sup>39</sup> Letter from Mr. Buckley, *supra* note 4, at 6.

<sup>40</sup> *Id.* at 14.

cessions to the debtors themselves.<sup>41</sup> AB 273 indicates a legislative concern that “a homeowner should not face the loss of his or her home through an association foreclosure during the time the homeowner is permitted to negotiate with the bank.”<sup>42</sup> Essentially, the bill requires that homeowners facing foreclosure be automatically enrolled into the State of Nevada Foreclosure Mediation Program upon filing of the Notice of Default.<sup>43</sup>

This change in the law has had a tremendous impact on HOA foreclosures, due to established deadlines that have delayed the foreclosure process.<sup>44</sup> Furthermore, the bill “prohibits an association from foreclosing its lien on the delinquent homeowner (a homeowner must occupy the home) while the homeowner is eligible to participate or is participating in the mediation program.”<sup>45</sup> Thus, HOAs are often required to wait for final dispositions in the mediation process before proceeding with foreclosures.<sup>46</sup> Although the bill states that a homeowner “must continue to pay any obligation other than past-due obligations” during the mediation process, the bill does not clarify what happens if the homeowner does not pay the regular HOA assessments during the mediation process.<sup>47</sup> Although more cases will be filed over this omission, the bill has ultimately allowed delinquent homeowners to delay foreclosure, while requiring the HOAs to wait even longer before they can be reimbursed for past assessments.<sup>48</sup>

Although the issues regarding “costs of collecting” and mediation programs still remain, the ambiguous language of the statute has caused a much bigger problem, resulting in a flood of litigation. The ambiguity pertains to whether a foreclosure sale, properly conducted pursuant to NRS Chapter 116, automatically extinguishes all prior encumbrances on the property, thereby allowing a bona fide purchaser at an HOA foreclosure sale to obtain the property free and clear of all prior encumbrances.<sup>49</sup>

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<sup>41</sup> Robert S. Larsen, *Nevada Gamble: Stacking the Deck for Debtors and Guarantors*, GORDON REES SCULLY MANSUKHANI LLP (Sept. 2011), <http://www.gordonrees.com/publications/2011/nevada-gamble-stacking-the-deck-for-debtors-and-guarantors>.

<sup>42</sup> Letter from Mr. Buckley, *supra* note 4, at 14.

<sup>43</sup> Ryan Devine, *Homeowners Facing Foreclosure Are Now Automatically Enrolled in Mediation*, COGBURN LAW OFFICES (Oct. 18, 2014), <http://cogburnlaw.com/blog/homeowners-facing-foreclosure-now-automatically-enrolled-mediation/>.

<sup>44</sup> Barbara Holand, *Recent HOA Laws Affect Foreclosures*, LAS VEGAS REV.-J. (Sept. 6, 2013, 11:20 PM), <http://www.reviewjournal.com/real-estate/recent-hoa-laws-affect-foreclosures>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *First 100, LLC v. Burns*, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 4).

*B. The Ambiguity of Nevada Revised Statutes Chapter 116*

Since the enactment of AB 284 in 2011, banks have slowed down their foreclosures; this delay has spurred HOAs to initiate foreclosures themselves.<sup>50</sup> In order for a foreclosure sale to be properly conducted under NRS Chapter 116, an association must take specific steps. The foreclosure process starts with a “notice of delinquent assessment” (“NDA”).<sup>51</sup> Associations are not required to record the NDA, but most do.<sup>52</sup> “Not less than 30 days after the mailing of the NDA, the association may record a ‘notice of default and election to sell the unit,’ i.e., an NOD.”<sup>53</sup> Ninety days after recording the NOD, the association must give notice of sale “in the manner and for a time not less than that required by law for the sale of real property upon execution.”<sup>54</sup> The foreclosure sale is a cash auction sale that “vests in the purchaser the title of the unit’s owner without equity or right of redemption.”<sup>55</sup> Once the HOA has received money for the property, it must apply the proceeds of the sale 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.<sup>56</sup>

<sup>50</sup> Fletcher, *supra* note 7.

<sup>51</sup> Letter from Mr. Buckley, *supra* note 4, at 12 (citing NEV. REV. STAT. § 116.31162(1)(a)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (quoting § 116.31162(1)(b)).

Under NRS 116.31163 notice of the NOD must be given to “Each person who has requested notice pursuant to NRS 107.090 or 116.31168” and “Any holder of a recorded security interest encumbering the unit’s owner’s interest who has notified the association, [thirty] days before the recording of the notice of default, of the existence of the security interest.” NRS 107.090(4) requires that notice of default and sale be given to “Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.” NRS 107.090(1) defines “person with an interest” as “any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated.”

*Id.* at 12 n.36.

<sup>54</sup> *Id.* at 12 (quoting NEV. REV. STAT. § 116.311635) (also citing § 116.31165).

The statute also requires that notice be given to “The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable.”

*Id.* at 12 n.38 (quoting § 116.311635(1)(b)(2)).

<sup>55</sup> *Id.* (quoting § 116.31166(3)).

<sup>56</sup> NEV. REV. STAT. § 116.31164(3)(c) (2013).

Soon after these HOA foreclosure auctions were initiated, litigation regarding these sales began to proliferate.<sup>57</sup> Typically, mortgage lenders often bring action because of their low priority in the order in which proceeds of the sales must be applied and the fact that the sale proceeds generally are far less than what is required to pay off all liens on the property.<sup>58</sup> Furthermore, many of the buyers at HOA foreclosure sales, as well as the first mortgage lenders and buyers at bank foreclosures, have filed quiet title actions in an effort to secure ownership of the property.<sup>59</sup> A recent trend has investors buying properties at HOA foreclosure sales and then filing for quiet title in an effort to wipe out the mortgage and other liens on the property.<sup>60</sup> While waiting on the mortgage holder to bring action or during court proceedings, many investors rent out the homes, often making more money than what they initially paid to obtain the property.<sup>61</sup> In addition to quiet title actions, associations have sought judicial determination of the rightful ownership of properties, dramatically increasing interpleader actions.<sup>62</sup>

With the increase of litigation, courts were left with the task of applying NRS Chapter 116 to such cases. However, the difficulty arose due to the ambiguous language of the statute that created one portion of the lien to be senior, while another portion was junior to the first priority deed of trust.<sup>63</sup> The statute includes three primary provisions creating the following: “(1) an omnibus HOA lien (NRS 116.3116(1)); (2) an exception to HOA lien priority for previously recorded deeds of trust (NRS 116.3116(2)(b)); and (3) an exception to the exception creating a ‘super-priority’ amount for 9 months of past-due HOA assessments (NRS 116.3116(3)).”<sup>64</sup>

Customarily, an HOA’s nonjudicial foreclosure of a lien did not carry the possibility of extinguishing a first lien, but, instead, created a back due of assessments that the purchaser acquired at an HOA foreclosure sale.<sup>65</sup> In other words, the purchaser would take the property subject to the first lien.<sup>66</sup> However, contrary to Nevada custom, some courts have recently held that the subordi-

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<sup>57</sup> Letter from Mr. Buckley, *supra* note 4, at 10.

<sup>58</sup> First 100, LLC v. Burns, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 7).

<sup>59</sup> Letter from Mr. Buckley, *supra* note 4, at 10.

<sup>60</sup> Vigil & Johnson, *supra* note 15.

<sup>61</sup> Hubble Smith, *Lien Auctions Paying Off*, LAS VEGAS REV.-J., Mar. 18, 2013, at 1A.

<sup>62</sup> Letter from Mr. Buckley, *supra* note 4, at 10.

<sup>63</sup> Amicus Curiae Brief of the Nevada Bankers Association in Support of Motion to Dismiss at 2, SFR Invs. Pool 1, LLC v. U.S. Bank N.A., No. A-13-678858-C (Nev. Dist. Ct. Aug. 1, 2013) [hereinafter Amicus Brief of Nevada Bankers].

<sup>64</sup> *Id.* at 1–2.

<sup>65</sup> Brett P. Ryan, *HOA Foreclosure, Nevada-Style*, SERVICING MGMT (March 2013), <http://www.mortgageorb.com/issues/SVM1303/index.html>.

<sup>66</sup> *Id.*

nate liens are extinguished by foreclosure sales.<sup>67</sup> The Nevada Supreme Court reaffirmed these holdings in 2014.

Thus, when the proceeds of a foreclosure sale were inadequate to satisfy all subordinate interests, the big questions for Nevada's courts became, do "those subordinate interests survive the foreclosure sale to the extent that they remain unsatisfied," or are they "extinguished by operation of law such that a bona fide third-party purchaser at the foreclosure sale takes the property free and clear of any unsatisfied subordinate encumbrances?"<sup>68</sup> Until the Nevada Supreme Court issued its opinion, Nevada courts were split on the answer to this question.

## II. THE RISE OF LITIGATION—COURTS PROVIDE CONFLICTING DECISIONS

Generally, proponents of HOAs and third-party buyers argued that all subordinate interests are extinguished when the property is sold at the HOA foreclosure sales.<sup>69</sup> On the other hand, those arguing in favor of the first mortgage lenders—usually banks—generally argued that the subordinate interests survive the HOA foreclosure sales because the interest remains unsatisfied from the proceeds of the sale.<sup>70</sup> Proponents of the banks believe that the third-party buyers of these properties acquire the properties "subject to those unsatisfied encumbrances" and that banks still have the right to foreclose upon the property.<sup>71</sup>

Because of the ambiguous language of Nevada's law, courts have interpreted the statute differently and were split as to the outcome of HOA foreclosures.<sup>72</sup> Clark County District Court Judge Jerry Tao illustrates this dilemma: "By my count, five Judicial Departments have ruled in the same manner as I have, while roughly the same number have reached the opposite conclusion."<sup>73</sup> Nevada's courts, both state and federal, interpreted the statutory language differently. When NRS Chapter 116 is read in its entirety, there is "no statutory provision that expressly states that an unsatisfied junior lien either is, or is not, extinguished by operation of law as a consequence of a foreclosure sale conducted pursuant to NRS 116.31164."<sup>74</sup> After having read the ambiguous language in the statute, many courts looked to legislative history of the statute and the intent of both the Legislature and the drafters of the UCIOA.<sup>75</sup> Again, this

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<sup>67</sup> First 100, LLC v. Burns, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant's motion to dismiss at 19).

<sup>68</sup> *Id.* at 7.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See Vigil & Johnson, supra* note 15.

<sup>73</sup> Letter from Mr. Buckley, *supra* note 4, at 13 (quoting Judge Jerry Tao).

<sup>74</sup> First 100, No. A677693 (order denying defendant's motion to dismiss at 7).

<sup>75</sup> *Id.* (order denying defendant's motion to dismiss at 9).

process established no definitive guidelines. Thus, the courts continued to disagree.<sup>76</sup>

After having considered many sources, some courts have held that the subordinate liens are extinguished after the property is sold at an HOA foreclosure sale. These courts are referred to as “Pro-HOA” and have often ruled in favor of HOAs and third-party buyers. Contrary to the Pro-HOA courts, other courts have held that the subordinate liens are not extinguished and survive the HOA foreclosure sale. These courts are referred to as “Pro-Bank” and have often ruled in favor of the banks or the first mortgage lenders. Proponents of each side have made various assertions to support their cases and the following sections discuss five of them and then consider the impact of a recent Nevada Supreme Court decision.

#### A. *Statutory Interpretation*

One of the first sources courts have looked to is the text of NRS 116.3116. Both Pro-HOA and Pro-Bank courts have made different arguments in regards to interpretations of the statute. For example, proponents of HOAs and third-party buyers have stated that:

The plain language of NRS 116.3116(4) grants an association lien priority from the date an association’s CC&Rs [Covenants, Conditions & Restrictions] are recorded, stating that the recordation of an association’s declaration of CC&Rs “constitutes record notice of perfection of the lien.” “No further recordation or any claim for assessments [under NRS 116.3116] is required.”<sup>77</sup>

In most cases, associations have already recorded their CC&Rs before a lender records its deed of trust; therefore, associations’ liens will more than likely be first in time and first in right.<sup>78</sup>

Additionally, some argued that NRS 116.3116(2)(b) limits the priority of a first security interest.<sup>79</sup> When there are delinquent assessments, the statute provides that the HOA’s assessment lien becomes prior to the first security interest.<sup>80</sup> Furthermore, if the super-priority portion of the lien is not paid before the HOA foreclosure, the lender loses its security interest.<sup>81</sup> Although HOA proponents have made many arguments, some Pro-HOA courts have simply claimed that, because there is no statutory provision in NRS Chapter 116 that expressly states whether unsatisfied junior liens are extinguished because of a foreclosure sale, the court must look to other sources.<sup>82</sup>

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<sup>76</sup> See Vigil & Johnson, *supra* note 15.

<sup>77</sup> Appellant’s Opening Brief at 14, SFR Invs. Pool 1, LLC v. Bank of America, N.A., No. 63313 (Nev. Dec. 10, 2013) (footnote omitted).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 15.

<sup>80</sup> *Id.* at 16.

<sup>81</sup> *Id.*

<sup>82</sup> First 100, LLC v. Burns, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 7–8).

While HOA proponents have argued that the statute supports extinguishment of the first security interest, proponents of lenders have argued otherwise. Supporters of banks have stated that “a first mortgage recorded before HOA assessments become delinquent is senior to an HOA lien, except to the extent of nine months of regular HOA dues immediately preceding the action to enforce the HOA lien.”<sup>83</sup> Pro-Bank courts have made the interpretation that the “first mortgage rule prevents a prior-recorded first mortgage from being extinguished by foreclosure of an HOA lien that contains a super-priority amount.”<sup>84</sup>

Thus, an HOA lien arising before a first mortgage is recorded is senior and acts as a traditional lien surviving a foreclosure of the first mortgage, and its own foreclosure extinguishes the first mortgage.<sup>85</sup> However, an HOA lien arising after a first mortgage is recorded does not act as a traditional lien.<sup>86</sup> Instead, the “super-priority amount is senior to an earlier-recorded first mortgage in the sense that it must be satisfied before a first mortgage upon its own foreclosure, but it is in parity with an earlier-recorded first mortgage with respect to extinguishment, i.e., the foreclosure of neither extinguishes the other.”<sup>87</sup> There are two options that arise under this interpretation: (1) if an HOA forecloses its lien, the first mortgagee’s lien survives the foreclosure and the first mortgagee may later foreclose against the HOA auction buyer if the lien is not satisfied, or (2) if a first mortgagee forecloses while an HOA lien exists, the super-priority amount of the HOA lien survives the foreclosure and the HOA may later foreclose against the buyer if the super-priority amount is not satisfied.<sup>88</sup> Furthermore, under both options, any subordinate amount of an HOA lien and other junior liens is extinguished, and it is the responsibility of the junior lien holders to pursue the defaulted party for any deficiencies.<sup>89</sup> Thus, the “foreclosure of neither a super-priority lien nor a first mortgage extinguishes the other.”<sup>90</sup>

#### B. Legislative Intent and History

After having read the text of NRS Chapter 116, some courts have looked to the legislative history of NRS 116.31164 and other similar statutes.<sup>91</sup> In 1991, when NRS Chapter 116 was adopted, the “super-priority” lien language was identical to the language in the statute today, with the exception of the change the Legislature made in 2009 by changing the super-priority lien limit from six

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<sup>83</sup> Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d. 1222, 1225 (D. Nev. 2013).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (emphasis omitted).

<sup>88</sup> *Id.* at 1226.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> First 100, LLC v. Burns, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 8).

to nine months of assessments.<sup>92</sup> In 1993, Assembly Bill 612 introduced numerous “technical amendments” to NRS 116.3116; however, none of the super-priority language was affected.<sup>93</sup> During that time, one of the drafters of the bill “expressly urged that the Nevada Legislature adhere as closely as practicable to the uniform version of the UCIOA.”<sup>94</sup> Subsequently, the Legislature enacted the super-priority language from the UCIOA into NRS 116.3116 without amendments or debate.<sup>95</sup> Unfortunately, the language of the statute did not resolve the issue, and courts constructed different theories in regards to the Legislature’s intent.

Pro-HOA courts have stated that the Legislature intentionally adopted the language of the UCIOA without any amendments to allow courts to “look to precedent in other uniform law jurisdictions as well as the background and explanatory comments accompanying the UCIOA in resolving questions relating to the scope and meaning of NRS 116.3116.”<sup>96</sup> In Official Comment 1, of Section 3-116 of the UCIOA (Comment 1), the drafters suggest that the holder of the first security interest could simply pay the unpaid assessments owed to the HOA in order to prevent the foreclosure and its interest from being extinguished.<sup>97</sup> However, the drafters make no mention of extinguishment of the first security interest if the holder does not pay the unpaid assessments.<sup>98</sup> Although no other comment or text of the UCIOA specifically answers the question of extinguishment, “Comment 1 suggests that the drafters . . . intended to leave this question to state law rather than establishing uniform national standards.”<sup>99</sup>

On the other hand, proponents of lenders have taken a different stance in regards to the UCIOA, and one proponent, Professor Andrea Boyack has provided an explanation.<sup>100</sup> Boyack opines that the drafters of the UCIOA recognized that HOA liens would ordinarily be junior in priority to first mortgage liens; thus, the drafters “crafted an ‘innovative’ solution to the problem of assessment nonpayment during mortgage default: the six-month ‘limited priority lien.’”<sup>101</sup> Furthermore, she states that the six-month, super-priority portion of the lien “does not have a true priority status under UCIOA since the six-month assessment lien cannot be foreclosed as senior to a mortgage lien.”<sup>102</sup> Further-

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (order denying defendant’s motion to dismiss at 9).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (order denying defendant’s motion to dismiss at 10).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Respondent’s Opening Brief at 12, *Villa Palms Court 102 Trust v. Riley*, No. 62528 (Nev. July 30, 2013).

<sup>101</sup> *Id.* at 13 (quoting Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53, 98 (2011)).

<sup>102</sup> *Id.* (quoting Boyack) (emphasis omitted).

more, Boyack claims that it instead, “either creates a payment priority for some portion of unpaid assessments, which would take the first position in the foreclosure repayment ‘waterfall,’ or grants durability to some portion of unpaid assessments, allowing the security for such debt to survive foreclosure.”<sup>103</sup> Therefore, proponents of lenders have used Boyack’s explanation to argue that the super-priority exception provides HOAs a “payment priority” not a “lien priority” over a first mortgage for a portion of the assessments.<sup>104</sup>

In addition to other arguments stated above, both sides have debated over a letter written by one of the UCIOA’s drafters. In 2013 the Common-Interest Committee of the Real Property Section of the Nevada State Bar (“Committee”) sought guidance from a drafter of the UCIOA, Carl H. Lisman.<sup>105</sup> Lisman wrote a letter to the Committee in response to their inquiry on whether an HOA foreclosure extinguishes a first security interest and other junior interests.<sup>106</sup> In his letter Lisman states, “[t]he association enjoys a statutory limited priority ahead of a first security interest similar to the priority given to property taxes and other governmental charges. Because of the statutory priority, foreclosure by the association extinguishes the first security interest and all other junior interests.”<sup>107</sup>

Although Lisman’s letter seems to be clear, proponents of lenders have argued that by relying on the Restatement of Property, Lisman “asserts that extinguishment is only appropriate if the lender is properly joined in the action or receives notice. But the Lisman Letter ignores the fact that under the Statute, there is no affirmative notice requirement to the lender. As such the Lisman Letter actually supports the [lender’s] position.”<sup>108</sup> Additionally, proponents of lenders have stated that the Lisman Letter directly conflicts with the “actual, written, commentary provided by the drafters of the Uniform Act” and should not be considered by courts.<sup>109</sup>

In addition to looking at the Legislative history of NRS 116.31164, courts have often looked to other similar statutes.<sup>110</sup> Proponents of HOAs and third-party buyers have claimed that foreclosures extinguish all junior interests under general Nevada law.<sup>111</sup> Their claim is substantiated in Restatement Third, Property (Mortgages) Section 7.1, which states as follows:

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<sup>103</sup> *Id.* (quoting Boyack) (emphasis omitted).

<sup>104</sup> *Id.*

<sup>105</sup> Letter from Carl H. Lisman, to Michael E. Buckley & Karen D. Dennison, Co-Chairs, Common Interest Comm., Real Prop. Section, State Bar of Nev. 1 (May 29, 2013), *available at* [https://www.nvbar.org/sites/default/files/RP\\_Lisman%20on%20Super%20Priority%20May%202013.pdf](https://www.nvbar.org/sites/default/files/RP_Lisman%20on%20Super%20Priority%20May%202013.pdf).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 7.

<sup>108</sup> Amicus Brief of Nevada Bankers, *supra* note 63, at 30.

<sup>109</sup> *Id.*

<sup>110</sup> First 100, LLC v. Burns, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 8).

<sup>111</sup> Amicus Brief of Real Property Section, *supra* note 11, at 4.

A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law. Foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed.<sup>112</sup>

Furthermore, the Nevada Supreme Court has confirmed this claim in *Brunzell* and *Erickson*, both of which involved statutory mechanics' liens.<sup>113</sup> These cases confirm the application of the general rule to security interests and statutory liens "which include not only mechanics' liens under NRS 108.221 *et seq.*, but also association liens under NRS 116.3116."<sup>114</sup> Therefore, if the HOA's lien is prior to the first deed of trust, the HOA's foreclosure sale extinguishes the first deed of trust.<sup>115</sup>

Moreover, Pro-HOA courts have stated that it is "well-settled that any foreclosure sale conducted pursuant to NRS 40.462, 107.080, or 107A.260 automatically extinguishes all junior security interests against the property."<sup>116</sup> Thus, if foreclosures conducted pursuant to NRS 116.3114 were different from other foreclosures in Nevada, then the Legislature would have indicated it in the legislative history or text of the statute.<sup>117</sup> However, the "complete absence of anything within NRS Chapter 116 regarding the question of extinguishment suggests that the Legislature intended that Chapter 116 foreclosures would be handled as any other type of foreclosure."<sup>118</sup> Furthermore, NRS 40.462 and NRS 107.080 were enacted before NRS 116.3116; therefore, the Legislature would have known that normally foreclosure sales result in automatic extinguishments of all junior liens, and, if the Legislature had intended NRS Chapter 116 to depart from the legal norms, it would have included such language in the statute.<sup>119</sup> Thus, "[w]here NRS Chapter 116 is silent, the Court must presume that the Legislature intended that the ordinary and established principles governing the conduct of foreclosure sales in Nevada apply to 'fill in the gaps.'"<sup>120</sup>

Although Pro-HOA courts have found that the legislative intent and history suggest subordinate liens at HOA foreclosure sales are extinguished, Pro-Bank

<sup>112</sup> *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.1 (1997)).

<sup>113</sup> *Id.* (citing *Brunzell v. Lawyers Title Ins. Corp.*, 705 P.2d 642, 644 (1985); *Erickson Constr. Co. v. Nev. Nat'l Bank*, 512 P.2d 1236, 1238 (1973)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *First 100, LLC v. Burns*, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant's motion to dismiss at 12). ("For example, the holder of a mortgage may initiate a judicial foreclosure via NRS 40.430 *et seq.* The holder of a deed of trust may initiate a non-judicial foreclosure (commonly known as a 'Trustee's Sale') pursuant to NRS 107.080 *et seq.* A landlord . . . may also seek the appointment of a receiver to initiate a foreclosure upon a security instrument pursuant to NRS 107A.260.")

<sup>117</sup> *Id.* (order denying defendant's motion to dismiss at 13).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (order denying defendant's motion to dismiss at 15).

courts have taken a different stance. Pro-Bank courts have stated that the “legislative intent was to ensure that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their security.”<sup>121</sup> Proponents of lenders have further argued that if the Legislature intended HOA foreclosures to extinguish an earlier recorded security interest, it would have avoided any ambiguity by omitting from the statute subsection 2(b), which creates an exception for the priority of an association’s lien.<sup>122</sup> Instead, proponents claim that the Legislature included the subsection to “provide an incentive for lenders to loan money to prospective home buyers in Nevada and to give confidence and security to lenders that their property interests would be protected.”<sup>123</sup> In addition to legislative intent and history, both sides have provided arguments in regards to other sources as well.

### C. Nevada Real Estate Division Advisory Opinion

Proponents of HOAs and third-party buyers have used NRED’s Advisory Opinion to support their cases. The Advisory Opinion states that “[t]he ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security.”<sup>124</sup> The Advisory Opinion also refers to comments in Section 3-116 of the UCIOA and mentions that the statute was adopted with the belief that the holder of the first security interest would pay the super-priority lien in order to avoid foreclosure by the association.<sup>125</sup>

Although the Advisory Opinion has provided proponents of HOAs and third-party buyers with a strong argument, Pro-Bank courts have rejected the Advisory Opinion’s interpretation of the statute.<sup>126</sup> These courts have emphasized the reference to the explanations in section 3-116 of the UCIOA and have stated that those comments still say nothing about extinguishment.<sup>127</sup> Furthermore, proponents of banks have argued that the Advisory Opinion is not binding authority and should have no legal effect on their cases. However, in a recent case the Nevada Supreme Court has held that the “plain language of the statutes requires that the CCICCH [Commission on Common Interest Commu-

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<sup>121</sup> Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d 1222, 1227 (D. Nev. 2013).

<sup>122</sup> Amicus Brief of Nevada Bankers, *supra* note 63, at 7.

<sup>123</sup> *Id.*

<sup>124</sup> Advisory Op. No. 13-01, *supra* note 26, at 9.

<sup>125</sup> *Id.*

<sup>126</sup> Bayview, 962 F. Supp. 2d at 1227.

<sup>127</sup> *Id.*

nities and Condominium Hotels] and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116.”<sup>128</sup>

*D. Out-of-State Authority*

In addition to the Advisory Opinion, proponents of both sides have often used out-of-state cases to support their arguments. Proponents of HOAs and third-party buyers have turned to *Summerhill Village HOA v. Roughly*, an opinion by a Washington State appellate court.<sup>129</sup> In *Summerhill Village*, the court interpreted a statute identical to the UCIOA and found that “a foreclosure based upon a ‘super priority’ lien extinguished a first security interest that was given notice of the pending foreclosure and yet chose not to participate.”<sup>130</sup> Although courts in Nevada have agreed with the Washington opinion, Pro-Bank courts have also cited recent Nevada opinions to reject the reasoning of *Summerhill Village*.<sup>131</sup>

In *Weeping Hollow Ave. Trust v. Spender*, for example, a Nevada trial court held that the “limited priority lien provision did not create a true lien priority, but instead merely provided that the association’s lien would continue to encumber the property following a foreclosure sale by the first mortgagee, to the extent of the assessments unpaid during the preceding nine months.”<sup>132</sup> Furthermore, proponents of lenders state that *Weeping Hollow* interprets NRS Chapter 116 to provide HOAs with two options: “(1) the HOA may initiate a non-judicial foreclosure to recover the delinquent assessments and the purchaser at the sale takes the property subject to the security interest; or, (2) initiate a judicial action to pursue the assessments.”<sup>133</sup> Although *Weeping Hollow* and other similar Nevada cases have provided support for lenders, proponents of banks also have used out-of-state authority to support their arguments.

Proponents of lenders often cited opinions from Massachusetts cases, such as *MacIntosh Condo. Ass’n v. FDIC*.<sup>134</sup> In *MacIntosh*, the court held that a condominium lien reaches super-priority over the first mortgage when the as-

<sup>128</sup> State Dep’t of Bus. & Indus. v. Nev. Ass’n Servs., Inc., 294 P.3d 1223, 1227 (Nev. 2012).

<sup>129</sup> First 100, LLC v. Burns, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 11) (citing *Summerhill Village HOA v. Roughly*, 270 P.2d 639 (Wash. Ct. App. 2012)).

<sup>130</sup> *Id.*

<sup>131</sup> Appellant’s Opening Brief, *supra* note 77, at 47; see *Weeping Hollow Ave. Trust v. Spender*, No. 2:13-CV-00544-JCM-VCF, 2013 U.S. Dist. LEXIS 74065, at \*16 (D. Nev. May 24, 2013); *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, No. 2:12-CV-00949-KJD-RJJ, 2013 U.S. Dist. LEXIS 18718, at \*6–7 (D. Nev. Feb. 11, 2013).

<sup>132</sup> Appellant’s Opening Brief, *supra* note 77, at 47 (quoting a 2013 report by the Joint Editorial Board for Uniform Real Property Acts, entitled *The Six-Month “Limited Priority Lien” for Association Fees Under the Uniform Common Interest Ownership Act* (citing *Weeping Hollow*, 2013 U.S. Dist. LEXIS 74065, at \*16)).

<sup>133</sup> *Weeping Hollow*, 2013 U.S. Dist. LEXIS 74065, at \*17.

<sup>134</sup> Respondent’s Opening Brief, *supra* note 100, at 19–20.

sociation institutes “an action to enforce the lien”; thus, the lien is prior to other mortgages with respect to association assessments due during the six months immediately preceding institution of an action to enforce the lien.<sup>135</sup> In other words, the condominium lien is given a super-priority status only for the unpaid fees for the preceding six months.<sup>136</sup> “It is uncontested by the parties that a lawsuit is required before a lien for unpaid condominium fees achieves a ‘super-priority’ status.”<sup>137</sup> Without a commencement of action to enforce such fees, a lien for the unpaid fees is prior to all other liens except “a first mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent.”<sup>138</sup> This exception makes the lien junior until an action is commenced.<sup>139</sup> “Indeed, if the lien was anything but junior to the first mortgage, there would be no reason to require that an action be filed in order to grant that lien super-priority status.”<sup>140</sup> Therefore, proponents of lenders have used *MacIntosh* to argue that HOAs must file an action for a super-priority lien to exist over a first position deed of trust.<sup>141</sup> While out-of-state opinions do not provide binding authority, both lenders and HOAs have found support for their arguments from these sources.

#### E. Policy Arguments

Next, the court has also considered policy arguments when determining the outcomes of HOA issues.<sup>142</sup> For example, proponents of HOAs have argued that because NRS Chapter 116 requires multiple notices be provided to lenders, there is sufficient time to secure their interest.<sup>143</sup> A lender does not lose its interest until the property is sold at an HOA foreclosure sale; therefore, lenders have ample time to cure delinquent assessments on the home.<sup>144</sup> In Nevada, a nonjudicial foreclosure under NRS Chapter 116 requires: (a) “thirty days between mailing the notice of delinquent assessments and recording and mailing of the notice of default and election to sell”;<sup>145</sup> (b) “ninety days between recording and mailing the notice of default and recording and mailing the notice

<sup>135</sup> *Id.* at 19 (citing *Trs. of MacIntosh Condo. Ass’n v. FDIC*, 908 F. Supp. 58, 63 (D. Mass. 1995)).

<sup>136</sup> *Id.* at 20.

<sup>137</sup> *Id.* (quoting *Trs. of MacIntosh*, 908 F. Supp. at 63) (“[T]he establishment of the lien is not dependent on the commencement of a lawsuit, which is only a step necessary to elevate the status of the lien to a position superior to other encumbrances, other than municipal liens and first mortgages.”).

<sup>138</sup> *Id.* (quoting *Trs. of MacIntosh*, 908 F. Supp. at 64).

<sup>139</sup> *Id.* (citing *Trs. of MacIntosh*, 908 F. Supp. at 64).

<sup>140</sup> *Id.* (quoting *Trs. of MacIntosh*, 908 F. Supp. at 64).

<sup>141</sup> *Id.* at 21.

<sup>142</sup> *First 100, LLC v. Burns*, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 16).

<sup>143</sup> Appellant’s Opening Brief, *supra* note 77, at 33.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 34 (citing NEV. REV. STAT. §§ 116.31162(1)(b)–(c), 116.31163, 116.31168 (2013)).

of sale”;<sup>146</sup> and (c) “twenty-one days notice between the notice of sale and the actual sale.”<sup>147</sup> Proponents of HOAs have argued “[e]ach of these mandated periods gives time for a party in interest to cure or seek judicial intervention, if necessary.”<sup>148</sup>

Furthermore, the HOA’s notices provide lenders with the sufficient information to protect their interests.<sup>149</sup> “The notices provide the *what, who, when,* and *where* necessary to meet the due process requirements for any affected party to stop the foreclosure sale, including the unit owner and all potential subordinate lienholders.”<sup>150</sup> For example, the Notice of Default and the Election to Sell provide an explicit and clear warning that a lender’s security interest is in jeopardy: “WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE.”<sup>151</sup>

Proponents of HOAs have argued that not only does a Notice of Default and the Election to Sell notify lenders, but the HOA’s Notice of Trustee’s Sale—an HOA’s foreclosure sale—also provides lenders with an additional warning and the HOA’s contact information<sup>152</sup>:

WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN’S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.<sup>153</sup>

In addition to using Nevada law and examples of notices to support their cases, proponents of HOAs also have argued that lenders are not being unfairly treated.<sup>154</sup> “Requiring the lenders to pay a nominal amount of assessment dues does not impose an unfair burden on the lenders.”<sup>155</sup> “Both Fannie Mae and Freddie Mac instituted policies requiring payment of the super-priority amount.”<sup>156</sup> Furthermore, “Fannie Mae’s servicing guidelines actually require servicers to protect its priority by paying the super-priority amounts in states

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<sup>146</sup> *Id.* (citing §§ 116.311635, 116.31163, 116.31168).

<sup>147</sup> *Id.* (citing §§ 116.311635(1)(a), 116.21.130(1)(c)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (emphasis added).

<sup>151</sup> *Id.* at 35.

<sup>152</sup> *Id.* at 36.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 49.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 49–50.

that grant super-priority liens to associations.”<sup>157</sup> Likewise, “Freddie Mac requires servicers to pay any association ‘assessments prior to the foreclosure sale date if they are, or may become, a First Lien priority on [the property].’”<sup>158</sup> In addition to both Fannie Mae’s and Freddie Mac’s policies, “Henry L. Judy, former General Counsel for Freddie Mac, expressly acknowledged that foreclosure, preferably by sale, of the super-priority lien extinguishes a first security interest.”<sup>159</sup>

However, proponents of banks have argued, for example, that it is simply unfair to allow a third-party buyer to obtain a property for \$2,000, while extinguishing a mortgage worth much more.<sup>160</sup> However, Pro-HOA courts have referred to Comment 1 and stated that the banks or lenders could have avoided the foreclosure and protected their interests from extinguishment by paying the assessments.<sup>161</sup>

Furthermore, “Nevada law requires that if two interpretations of an ambiguous statute are both potentially unfair to someone, an innocent third party should not bear the brunt of the harm.”<sup>162</sup> Essentially, it would be unfair to the third-party buyer who paid the association lien to obtain the property, only to have it taken away when the bank sold the property to another buyer.<sup>163</sup> Ultimately, this action would

achieve the perverse outcome of actually rewarding sloth and inaction on the part of the lender, who, as expressly recognized by Comment 1 to UCIOA Section 3-116, is the one party (other than the defaulting owner) in a position to stop the foreclosure, protect its own interests, and make the association whole by paying the assessments.<sup>164</sup>

The outcome would make both the bank and the association whole at the expense of the third-party buyer.<sup>165</sup>

On the other hand, proponents of banks have suggested that third-party buyers should have done their homework, realized the amount they were paying was not enough to pay off all the encumbrances on the property, and concluded they might lose it as a result.<sup>166</sup> However, Pro-HOA courts have reiterated that the lender is in a better position to protect its interest and any

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<sup>157</sup> *Id.* (citing Fannie Mae Servicing Guide Announcement SVC-2012-05 (Apr. 11, 2012))

<sup>158</sup> *Id.* (quoting Freddie Mac Bulletin, No. 2013-15 (Aug. 15, 2013)).

<sup>159</sup> *Id.* (citing Henry J. Judy & Robert A. Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437, 480, 484, 515–16 (1978)).

<sup>160</sup> *First 100, LLC v. Burns*, No. A677693 (Nev. Dist. Ct. May 30, 2013) (order denying defendant’s motion to dismiss at 16).

<sup>161</sup> *Id.*

<sup>162</sup> Appellant’s Opening Brief, *supra* note 77, at 50 (citing *NC-DSH Inc. v. Ganrer*, 218 P.3d 853, 859 (2009)).

<sup>163</sup> *First 100*, No. A677693 (order denying defendant’s motion to dismiss at 16).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (order denying defendant’s motion to dismiss at 17).

unfairness should not be placed on a bona fide third-party buyer.<sup>167</sup> Additionally, Comment 1 states two simple solutions lenders can use to ensure their interest is not extinguished.<sup>168</sup> As mentioned previously, one solution is that the lender can protect its interest by paying off the unpaid assessments before a foreclosure, thereby removing the super-priority lien and guaranteeing its interest is senior.<sup>169</sup> Another solution would require the lender to impound money in advance and pay the assessments itself, thus ensuring that a default or super-priority lien will never arise.<sup>170</sup>

Noticeably, some Pro-Bank courts have based their decisions regarding HOA foreclosures around other policy arguments. For example, one Pro-Bank Court stated that even if the statute were ambiguous, there is only one interpretation of the statute.<sup>171</sup> “A statute’s language should not be read to produce absurd or unreasonable results.”<sup>172</sup> The Court went on to say that, if an HOA foreclosure extinguished a first position deed of trust, it would produce absurd results for four reasons.<sup>173</sup>

First, the amount of the HOA delinquent assessment will almost always be a small fraction of the amount of the mortgage.<sup>174</sup> In addition, “Nevada is a race notice state” and “[p]ermitting an HOA super priority lien to wipe out a prior deed of trust contravenes the principles and purpose of a race-notice jurisdiction.”<sup>175</sup> Second, the reasoning of Pro-HOA courts that banks will be incentivized to foreclose at a faster pace in order to secure their interests misunderstands greater points.<sup>176</sup> Banks make thousands of loans in Nevada and, possibly, even across the country; whereas an HOA’s scope is limited to a neighborhood or two.<sup>177</sup> In addition to the banks having a much wider scope to monitor, courts should not incentivize banks to foreclose on homes at the first sign of distress; instead, banks should be encouraged to work with homeowners to help them stay in their homes and also to recoup as much of its loan as possible.<sup>178</sup> Third, an HOA’s lien should not be elevated over other liens because HOAs take the smallest amount of risk, compared to lenders, and provide the least amount of services to a homeowner.<sup>179</sup> “The services provided by an

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (order denying defendant’s motion to dismiss at 18).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, No. 2:13-CV-895-JCM, 2013 WL 4048573, at \*4 (D. Nev. Aug. 9, 2013).

<sup>172</sup> *Id.* (quoting *Leven v. Frey*, 168 P.3d 712, 716 (Nev. 2007); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 5.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

HOA are luxuries, not necessities.”<sup>180</sup> Finally, “it would be absurd to permit an HOA foreclosure to extinguish a bank’s deed of trust because it would risk plunging the local economy back towards a recession.”<sup>181</sup> “Banks will not lend money to buy houses when their deed of trust could be eliminated by HOA charges.”<sup>182</sup>

Despite the various sources used in this complicated matter—statutory interpretation, legislative intent and history, Nevada Real Estate Division Advisory Opinion, out-of-state authority, and policy arguments—the court still remained split in their pro-HOA and pro-lending institution positions. Because of the courts’ conflicting decisions, this HOA-versus-bank dilemma eventually reached the level of the Nevada Supreme Court.

#### F. Supreme Court Ruling

Finally, on September 18, 2014, the Nevada Supreme Court issued a long-awaited opinion.<sup>183</sup> The Court decided whether a foreclosure on an HOA’s super-priority lien extinguishes a first deed of trust on a property, and, if so, whether it can be foreclosed nonjudicially.<sup>184</sup> The Court answered both questions in the affirmative.<sup>185</sup>

When deciding the issue, the Court looked to the text of NRS 116.3116(2) and determined that an HOA lien is divided into two parts: “a superpriority piece” and a “subpriority piece.”<sup>186</sup> The superpriority piece is prior to a first deed of trust and consists of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges.<sup>187</sup> On the other hand, the subpriority piece is subordinate to a first deed of trust and consists of all other HOA fees or assessments.<sup>188</sup> The Court stated that “prior” refers to the lien, and not to payment priorities; thus, NRS 116.3116 establishes a true priority lien.<sup>189</sup> The Court also looked to the official comments of UCIOA and noted that the Legislature still enacted NRS 116.3116(2) with UCIOA § 3116’s superpriority provision intact.<sup>190</sup>

To further its holding, the Court discussed the Uniform Law Commission and its establishment of the Joint Editorial Board for Uniform Real Property Acts (“JEB”), which monitors all uniform real property acts, including the

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 6.

<sup>182</sup> *Id.*

<sup>183</sup> *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75 (2014).

<sup>184</sup> *Id.* at \*1.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at \*2.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at \*4.

<sup>190</sup> *Id.* at \*5.

UCIOA.<sup>191</sup> In 2013, JEB issued a report that addressed the foreclosure crisis, endorsed the decision in *Summerhill Village*, and criticized two Nevada Pro-Bank court decisions, stating that the courts “misread and misinterpret[ed] the Uniform Laws limited priority lien provision, which . . . constitutes a true lien priority, [such that] the association’s proper enforcement of its lien . . . extinguish[es] the otherwise senior mortgage lien.”<sup>192</sup> JEB’s 2013 report further explained that an HOA is usually limited to common assessments as a source of revenue; thus, an HOA’s ability to foreclose is essential for common-interest communities.<sup>193</sup> In addition, in a memorandum dated June 11, 2014, the JEB stated, “as originally drafted, § 3-116(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 otherwise first mortgagee.”<sup>194</sup>

Additionally, the Court expressed that U.S. Bank, as a junior lienholder, could have simply paid off the lien to avert loss of its security or it could have established an escrow for the HOA assessments to avoid having to use its own funds to pay delinquent dues.<sup>195</sup> Finally, after determining that NRS 116.3116(2) establishes a true superpriority lien, the Court looked to the text of the statute and further determined that such liens may be foreclosed nonjudicially and do not require judicial foreclosure.<sup>196</sup> However, three dissenting justices asserted that a civil judicial foreclosure complaint should be filed in order to extinguish a first deed of trust rather than a nonjudicial foreclosure.

Although the Court ruling provided some clarity for courts across the state, it left some issues unresolved. The first of these issues deals with notice. The banks have often contended that they had not received notice or, if they had, that the HOA had either closed communication lines or had demanded too much money. Unfortunately, the Court did not address whether an HOA foreclosure is invalid if the bank did attempt to pay off the lien and the HOA refused to cooperate.<sup>197</sup> Additionally, in the Supreme Court decision, the Court also failed to address whether action can be taken against bona fide purchasers—the third-party buyers who purchased the property in good faith. Because lenders will be left with an unsecured debt, they will most likely try to take ac-

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* (second, third, and fourth alterations in original) (quoting a 2013 report by the Joint Editorial Board for Uniform Real Property Acts, entitled *The Six-Month “Limited Priority Lien” for Association Fees Under the Uniform Common Interest Ownership Act*, at 10 n.9, stating that the *Weeping Hollow* and *Diakonos* cases were on the payment-priority side of the NRS 116.3116(2) split).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at \*6 (citing 7912 Limbwood Court Trust v. Wells Fargo Bank, NA, 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013)).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Abran Vigil & Matthew D. Lamb, *HOA Lien Extinguishes First Deed of Trust in Foreclosure, Nevada Supreme Court Holds*, BALLARD SPAHR LLP (Sept. 19, 2014), <http://www.ballardspahr.com/alertspublications/legalalerts/2014-09-19-hoa-lien-extinguishes-first-deed-of-trust-in-foreclosure-nevada-supreme-court-holds.aspx>.

tion against the third-party buyers or the original homeowners in an effort to secure those debts.

### III. POTENTIAL SOLUTIONS

With the plethora of litigation and confusion surrounding the HOA foreclosure issue, something must be done in order to solve this statewide dilemma. It is clear that the Nevada Legislature needs to make changes or clarifications regarding NRS Chapter 116. The question then becomes, “What modifications should be made to the statute in order to remedy one of Nevada’s most litigated issues?” Amidst the disputes, there have been some suggestions and comments as to how the Legislature should act in regards to NRS Chapter 116.<sup>198</sup>

In a letter discussing NRS Chapter 116, Michael E. Buckley provides some suggestions and recommendations as to how the statute should be changed.<sup>199</sup> Buckley first states that the Legislature should place a “cap” on the super-priority lien amount.<sup>200</sup> The cap—the amount of the super-priority lien—would depend on whether the foreclosure is made by an HOA or a bank.<sup>201</sup> If an HOA forecloses, there should be a specific number of months of common assessments as to the amount of the super-priority lien.<sup>202</sup> Buckley states that some individuals believe that an overall cap of twenty-four months is appropriate; however, if an HOA with a low monthly assessment is involved, some have argued that adjustments should be made. For example, the HOA should also be able to include its collection costs, in addition to the base monthly assessments.<sup>203</sup> Unfortunately, if a specific cap is set, there are some problems that may arise. For example, if there is a specific monthly cap on an HOA foreclosure, bank foreclosure remediation programs may have an effect on the HOA’s ability to proceed.<sup>204</sup> As noted above, the Legislature has stated that homeowners should not lose their homes through an HOA foreclosure when the homeowner is allowed to negotiate with the bank.<sup>205</sup>

In addition to a cap for HOA foreclosures, some believe a flexible cap should be applied to bank foreclosures as well.<sup>206</sup> A flexible cap would require the amount of the super-priority lien to fluctuate depending on the time it takes the bank to foreclose.<sup>207</sup> For example, if a bank completes its foreclosure in less than one year, it would be required to pay the HOA nine months of assessments; if the bank completes its foreclosure between one and two years, it

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<sup>198</sup> Letter from Mr. Buckley, *supra* note 4, at 13.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 14.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

would have to pay twelve months of assessments; if the foreclosure were completed between two and three years, the bank would pay the HOA eighteen months of assessments, and so on.<sup>208</sup> With a flexible cap, lenders may no longer have an incentive to delay foreclosure proceedings, and, if they do, HOAs will receive more money to compensate for the budget gaps caused by the foreclosures.<sup>209</sup> However, if a flexible cap that depends on different time periods is established, the time periods need to be easily ascertainable from the record in order to avoid questions of interpretation.<sup>210</sup>

Next, Buckley suggests that the Legislature must address the abundance of quiet title actions that have been filed in Nevada and that still remain undetermined. Some proponents of this request have argued that the UCIOA should be amended to include language that provides a clear explanation regarding the effect of an association lien foreclosure.<sup>211</sup> “Such amendments should be approved by and acceptable to the title insurance industry, so that a purchaser at an association foreclosure sale is able to obtain marketable and insurable title . . . .”<sup>212</sup>

Although Buckley provides suggestions addressing sections of the statute that need clarification, the Legislature should not only take those suggestions into consideration, but contemplate making more drastic changes to the law in order to resolve other facets of this ever-changing issue. For example, Daniel Goldmintz offers a solution to issues involving super-priority liens. Goldmintz suggests that super-priority liens should be eliminated and that associations should be given full priority over all mortgages in order to insure the financial stability of HOAs.<sup>213</sup> Giving associations full priority would allow HOAs to recover all back maintenance fees, to put their budgets back on track, and to eliminate the need to cut services, raise maintenance fees, or pursue any other necessary course of action.<sup>214</sup> Not only would this action help HOA’s maintain financial stability, but it would also place the burden on lenders who are better situated to protect themselves.<sup>215</sup>

Moreover, granting a full priority to associations thus incentivizes the further maximization of sale prices—in order to compensate for lost dollars given to the association—as well as the quick execution of foreclosure proceedings, since, the longer the bank waits, the more money [it will] have to pay to associations.<sup>216</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> Daniel Goldmintz, Note, *Lien Priorities: The Defects of Limiting the “Super Priority” for Common Interest Communities*, 33 *CARDOZO L. REV.* 267, 288 (2011).

<sup>210</sup> Letter from Mr. Buckley, *supra* note 4, at 14.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Goldmintz, *supra* note 209, at 289.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

Giving HOAs full priority would not only benefit associations, but lenders as well, because financially stable associations will impact the value and desirability of the properties. As a result of a more valuable and desirable properties, asset lenders will be able to sell the properties for a higher price at foreclosure sales and potentially make a profit or at least further close the gap between the money owed and that which was recouped.<sup>217</sup>

Although Goldmintz believes this proposal would solve the issues regarding HOAs, he states that the problem may require more than a simple legislative fix at a state level.<sup>218</sup> Because of their direct impact on the mortgage market, both Fannie Mae and Freddie Mac would also have to make changes to their guidelines.<sup>219</sup> Although Goldmintz's idea seems plausible and could help solve some problems, those working to solve the HOA crisis should use caution in giving HOAs more authority than necessary.

On the other hand, NRS Chapter 116 may be susceptible to constitutional challenges. Already, proponents of lenders have challenged the statute on due process grounds by arguing that the lenders' due process rights are being violated; the statute does not require that actual notice be given to the lender of the HOA lien unless the lender affirmatively requests notice from the HOA.<sup>220</sup> Pro-Bank courts have already stated that the extinguishment of the deed of trust "potentially violate[s] due process."<sup>221</sup> Furthermore, proponents of lenders have also made the constitutional argument that NRS Chapter 116 is an impermissible taking.<sup>222</sup> Additionally, another constitutional argument has the potential to invalidate the ambiguous statute in its entirety under the U.S. Constitution's Contract Clause:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.<sup>223</sup>

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<sup>217</sup> *Id.* at 290.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 292–93 ("Certainly, amending the guidelines to provide for an unlimited super-priority is within the interests of all parties involved.")

<sup>220</sup> Robin E. Perkins, *High Stakes in Nev.'s Lender vs. HOA Fight*, LAW 360 (Apr. 30, 2014, 12:34 PM), [http://www.swlaw.com/assets/pdf/news/2014/04/30/HighStakesInNevsLenderVsHOAFight\\_Perkins.pdf](http://www.swlaw.com/assets/pdf/news/2014/04/30/HighStakesInNevsLenderVsHOAFight_Perkins.pdf).

<sup>221</sup> *Id.* (citing *Premier One Holdings, Inc. v. BAC Home Loans Servicing LP*, No. 2:13-CV-895-JCM, 2013 WL 4048573, at \*4 (D. Nev. Aug. 9, 2013)).

<sup>222</sup> *Id.* (stating "that the government 'simply impos[ing] a general economic regulation' which 'in effect transfers the property interest from a private creditor to a private debtor' is a taking; and a 'takings analysis is not necessarily limited to outright acquisitions by the government for itself.'" (citing *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982))).

<sup>223</sup> U.S. CONST. art. I, § 10, cl. 1.

The clause prohibits states from enacting any law that retroactively impairs contract rights.<sup>224</sup> If NRS Chapter 116 extinguishes the first deed of trust after an HOA forecloses on a home, the statute essentially alters the contract between the lender and homeowner and is, in fact, a “Law impairing the Obligation of Contracts.”<sup>225</sup> On these grounds, NRS 116 is unconstitutional per the contracts clause of the United States Constitution. Proponents of lenders could argue that the entire statute is unconstitutional on its face. On the other hand, proponents of HOAs could argue that the Nevada Supreme Court would not have made its recent ruling if the statute were, indeed, unconstitutional.

Furthermore, in July 2014, the National Conference of Commissioners of Uniform State Laws approved amendments to the Uniform Common Interest Ownership Act Section 3-116 and recommended such amendments for enactment in all the states.<sup>226</sup> One such amendment, in subsection (r), states “Foreclosure of the 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 person that is the record holder of the subordinate interest.”<sup>227</sup> Further, the amendment includes a legislative note that states in part: “[I]n a state that permits nonjudicial foreclosure, but has a statute that provides that a foreclosure sale does not extinguish a subordinate lien unless the subordinate lienholder was provided notice of the sale, subsection (r) may be omitted.”<sup>228</sup> Thus, the amendments confirm that the drafters of the UCIOA intended to give HOA liens a true superpriority over a lender’s lien. Moreover, if the Nevada Legislature agrees with the recent Nevada Supreme Court ruling, the law-making body should consider enacting the July 2014 amendments to the UCIOA in order to clarify the language of the statute.

Although a few possible solutions to the HOA foreclosure issue are presented in this Note, the Legislature can choose from a range of endless possibilities to remedy this problem. Lawmakers must devise an immediate solution.

#### CONCLUSION

Over the past several years, Nevada’s courts have been flooded with litigation regarding NRS Chapter 116; a permanent solution to the problems resulting from this statute does not seem imminent. Prior to the recession and the downfall in the housing market, courts in Nevada did not see these types of issues involving HOA foreclosures. Now with the large volume of cases being filed regarding the state’s ambiguous statute, the Legislature must act to draw a clear line and to end the confusion. Specifically, Nevada’s law-making body

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<sup>224</sup> Elmer W. Roller, *The Impairment of Contract Obligations and Vested Rights*, 6 MARQ. L. REV. 129, 129 (1922).

<sup>225</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>226</sup> UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 (2014).

<sup>227</sup> *Id.* § 3-116(r).

<sup>228</sup> *Id.* (legislative note to § 3-116(r)).

Fall 2014]

*HOA SUPER-PRIORITY LIENS*

353

must make changes that provide clear answers to all of the issues regarding NRS Chapter 116 and eliminate any ambiguities that may arise. Most importantly, the Legislature must use caution in giving an HOA's lien true super-priority since this action could lead to absurd and damaging results, especially to lenders. With this in mind, the Legislature should also consider amending the State's existing law to clarify that a bank's lien cannot be extinguished by an HOA foreclosure. Unfortunately, with the current statutes in place, so many ambiguities exist that courts will continue to be overwhelmed with cases involving HOA foreclosures until specific actions are taken to clarify the law.