



October 31, 2013

Joint Editorial Board (JEB) for Uniform Real Property Acts
c/o R. Wilson Freyermuth, Executive Director
University of Missouri School of Law
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Transmitted via electronic mail: freyermuthr@missouri.edu

Dear Members of the Joint Editorial Board for Uniform Real Property Acts:

On behalf of the Community Associations Institute (CAI), I am pleased to submit the following comments to the JEB on the preparation of the proposed amendment to the Uniform Common Interest Ownership Act (UCIOA) Section 3-116, the six-month priority lien for common interest community association assessments.

CAI commends the JEB for the thought provoking white paper on the priority lien for common interest community assessments and applauds the JEB's interest in revising the priority lien language in UCIOA. The paper illustrates how the current laws and the language in UCIOA fail the 63 million people living in America's community associations, especially, given the housing market crash and record number of foreclosures that continue to have significant financial impact on communities throughout the country.

CAI's comments are evidence-based and result from analysis of existing – or lack of – state priority lien laws and their practical impact on common interest communities. Further our recommendations are realistic, rather than idealistic, and reflect the acceptance from other interest groups and federal authorities.

CAI urges the JEB to consider clarifying the intended scope of the priority lien and creating greater equity to the corporate entity – the common interest community. CAI offers the following alternative suggestions for revising Section 3-116:

1. **Complete Priority** – Common interest community association liens should enjoy complete priority over mortgages. The income created from the collection of common charges represents the life blood of the association and is used, for the most part, to protect the lender's security. Typically, the association has no other means of generating income. There is a detrimental impact on all of the other owners in the community who must pay more to make up the difference any time a common charge becomes uncollectible.

Unlike mortgage companies, associations have no way of screening homebuyers to ensure that they have the finances available to pay their debts, including the charges owed to the association. The mortgage companies choose to enter into debtor/creditor relationships with the homebuyer. On the other hand, the association is an unwilling creditor, who had no say in whether or not to engage in a relationship with the homebuyer. To a large extent there is no meaningful difference between the priority given to municipal taxes and the priority that ought to be given to common interest communities. Governmental entities have required developers to create common interest communities to undertake traditional municipal services (e.g. road maintenance, repair and replacement; snow removal from roads; storm water management maintenance, etc.), while the municipalities continue to enjoy total priority and common interest communities, which now provide those services, have, at best, limited priorities. It is time that the lien priorities of common interest



communities are given equal footing with the priority given municipal governments in recognition of the essential services each provides to benefit the homeowners and, as a byproduct, their lenders.

If the association's lien enjoys complete priority over the mortgage, then the association could more comfortably hold off from proceeding with a foreclosure, if the mortgage company was already proceeding with its own foreclosure. This would reduce the legal fees and costs incurred by the association and eventually paid by either the homeowner or the mortgage company.

2. Clearer Partial Priority with Notice to Lenders

- A. Perpetually Renewing Priority Liens** –CAI notes Section 3-116 is deficient for two reasons: (a) it fails to specifically state that the association is entitled to more than one priority lien for the life of the mortgage; and (b) it fails to provide necessary protections or means by which the lender can reduce the legal fees incurred by the association in the protection of its priority lien.

Proposed Solution - CAI urges the JEB to clarify the right for common interest communities to have successive or multiple liens over the life of the mortgage. The language must clearly state that the priority lien is applicable in each and every tax foreclosure, mortgage foreclosure, and association foreclosure, and that it is a perpetually renewing lien that cannot be forever satisfied by any single payment.

- B. Notice to Lenders to Help Mitigate Fees from Accruing and Increase Speed of Process:** CAI suggests the JEB amend Section 3-116 to allow a lender to stop legal fees from continuing to accrue, while obligating the lender to pay the association dues. Prior to foreclosing, the association must give notice to the first mortgage holder of the amount of the balance due and of the association's intent to proceed with legal action. The mortgage holder should have a period of time (30 to 45 days) to pay the amount due on behalf of the homeowner. If neither the homeowner nor the mortgage company pays the balance due, the association may proceed with its foreclosure. In giving this notice, the association may rely on the land records in identifying the name and address of the mortgage holder.

Both Massachusetts and Connecticut have enacted statutes that address this issue.

The Massachusetts Condominium Act states that the association shall take no action to enforce its priority liens if the first mortgagee agrees in writing that a priority lien exists and promptly pays: (1) six months' of regularly recurring budgeted common expenses preceding the notice of delinquency; (2) costs and reasonable attorney's fees incurred by the association at the time of lender's agreement to pay; and (3) all future common expenses, and special assessments (other than assessments for capital improvements) accruing from the date the lender agrees to pay until the mortgagee forecloses or otherwise no longer encumbers the unit.

The Connecticut Common Interest Ownership Act requires associations to provide to the holders of first and second mortgages with copies of demand letters sent to unit owners. At least 60 days before the association commences a foreclosure, it must send the holders of first and second mortgages notice of its intention to proceed with a foreclosure. This provides mortgage holders with an opportunity to repay the outstanding balance due without the association having to incur the expense of proceeding with a foreclosure. The Act expressly permits the association to rely on the land records in determining the identities and addresses of the mortgage holders.



The language of the Massachusetts and Connecticut statutes are attached hereto as Exhibits A and B, respectively.

Proposed Solution - CAI urges the Board to amend Section 3-116 (1) to allow a lender to stop legal fees from continuing to accrue by accepting responsibility, as part of the priority, to pay those legal fees, and (2) to obligate the lender to pay the association dues, by adopting language similar to that found in the attached exhibits.

CAI carefully selected these recommendations as practical solutions to safeguard the financial stability of community associations that are obligated to provide critical services to all homes or units within their boundaries. These services may include, but are not limited to storm water management, street maintenance, snow removal, facilities maintenance; including elevators, roofs, heating and cooling systems, trash and recycling removal, and other public services. There are devastating effects on communities when there are delinquencies and banks that foreclose on homes either delay foreclosure or do not pay the community assessments when ownership is taken. Pressure is put on neighbors whose assessment dues are in good standing who then end up paying more than their fair share to preserve the property values and financial security of the association.

CAI sincerely appreciates the opportunity to submit comments for consideration and applauds the work of the JEB on this very important issue.

If you have any questions or need additional information, please do not hesitate to contact us.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. David Ramsey".

J. David Ramsey, Esquire
Chair, CAI Government Affairs Committee

A handwritten signature in blue ink, appearing to read "Dawn M. Bauman".

Dawn M. Bauman, CAE
Senior Vice President, Government Affairs

About Community Associations Institute (CAI)

CAI is the only international organization dedicated to fostering competent, well-governed community associations that are home to approximately one in every five American households – 63 million Americans. For 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's members include community association volunteer leaders, professional managers, community management firms and other professionals and companies that provide products and services to associations.

Attachment: National Priority Lien Matrix (Hugh Lewis, Esquire)



EXHIBIT A

The Massachusetts Condominium Act, M.G.L. c. 183A, Section 6(c), provides as follows:

The organization of unit owners shall take no further action to enforce its priority liens against a particular unit for common expenses if the first mortgagee agrees in writing that a priority lien exists without the requirement of instituting an action, as to such enforcement and pays, within 60 days of said writing, the following prescribed amounts: (1) so much of any delinquent assessments on that unit for regularly recurring budgeted common expenses over a period for six months immediately preceding the notice of delinquency that would constitute a priority amount if an action had been commenced on the date the organization gives its delinquency notice to the mortgagee; (2) costs and reasonable attorney's fees incurred by the organization at the time of said writing by the first mortgagee to collect outstanding common expenses, including, but not limited to, costs and fees to ascertain the first mortgagee's identity, examine title, and prepare and send to the unit owner and mortgagee the notices referred to in this paragraph; and to pay within 30 days of their due date; (3) all future common expenses, and special assessments other than special assessments for improvements made pursuant to section 18, assessed against that unit from the date of said notice until such time as the mortgagee's mortgage is foreclosed or otherwise no longer encumbers the unit. The amount which the first mortgagee, if it so elects, would be required to pay to cause the organization not to proceed to enforce its priority liens shall not include any amounts attributable to late charges, fines, penalties, and interest assessed by the organization of unit owners and shall only include amounts attributable to special assessments due and payable after the giving of the delinquency notice pursuant to this paragraph, and then only to the extent the special assessment is not made with respect to any improvement authorized under section 18. If the amounts described in clauses (1) and (2) are not received within said 60 day period, or if the amount of any future assessments under clause (3) is not received within 30 days of their due date, the organization may proceed to take further action to enforce its liens without voiding the first mortgagee's obligation to pay as provided in this subsection. The agreement by the first mortgagee to make payments in the amounts and for the duration specified in this paragraph shall be binding upon its successors and assigns and the successful bidder at any foreclosure but no such successor, assign, bidder or purchaser shall have any liability by virtue of the first mortgagee's undertaking pursuant to this paragraph for any amount first arising, assessed or becoming due after the mortgage is foreclosed or otherwise no longer encumbers the unit. The first mortgagee shall not be liable for the amounts described in clauses (1), (2) and (3) which arise after the first mortgagee ceases to have an interest in the unit. Such amounts shall then become the obligation of the successors and assigns of the first mortgagee.



EXHIBIT B

Subsection 47-258(m) of the Connecticut Common Interest Ownership Act is as follows:

(m) (1) An association may not commence an action to foreclose a lien on a unit under this section unless:

(A) The unit owner, at the time the action is commenced, owes a sum equal to at least two months of common expense assessments based on the periodic budget last adopted by the association pursuant to subsection (a) of section 47-257;

(B) the association has made a demand for payment in a record and has simultaneously provided a copy of such record to the holder of a security interest described in subdivision (2) of subsection (b) of this section; and

(C) the executive board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit.

(2) Not less than sixty days prior to commencing an action to foreclose a lien on a unit under this section, the association shall provide a written notice by first class mail to the holders of all security interests described in subdivision (2) of subsection (b) of this section, which shall set forth the following:

(A) The amount of unpaid common expense assessments owed to the association as of the date of the notice;

(B) the amount of any attorney's fees and costs incurred by the association in the enforcement of its lien as of the date of the notice;

(C) a statement of the association's intention to foreclose its lien if the amounts set forth in subparagraphs (A) and (B) of this subdivision are not paid to the association not later than sixty days after the date on which the notice is provided;

(D) the association's contact information, including, but not limited to, (i) the name of the individual acting on behalf of the association with respect to the matter, and (ii) the association's mailing address, telephone number and electronic mail address, if any; and



(E) instructions concerning the acceptable means of making payment on the amounts owing to the association as set forth in subparagraphs (A) and (B) of this subdivision. Any notice required to be given by the association under this subsection shall be effective when sent.

(3) When providing the written notice required by subdivision (2) of this subsection, the association may rely on the last-recorded security interest of record in identifying the name and mailing address of the holder of that interest, unless the holder of the security interest is the plaintiff in an action pending in the Superior Court to enforce that security interest, in which case the association shall provide the written notice to the attorney appearing on behalf of the holder of the security interest in such action.

(4) The failure of the association to provide the written notice required by subdivisions (2) and (3) of this subsection prior to commencing an action to foreclose its lien shall not affect the priority of its lien for an amount equal to nine months common expense assessments, but the priority amount in such action shall not include any costs or attorney's fees.