

FENNEMORE CRAIG JONES VARGAS

Suite 1400 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 692-8000

Michael E. Buckley
Direct Phone: (702) 692-8006
Direct Fax: (702) 692-8086
mbuckley@fclaw.com

Law Offices

Denver (303) 291-3200
Las Vegas (702) 692-8000
Nogales (520) 281-3480
Phoenix (602) 916-5000
Reno (775) 788-2200
Tucson (520) 879-6800

October 31, 2013

*Via U.S. Mail
and*

Via e-mail: freymuthr@missouri.edu

Joint Editorial Board for Uniform Real Property Acts
c/o R. Wilson Freyermuth, Executive Director
University of Missouri School of Law
215 Hulston Hall
Columbia, MO 65211

Re: REQUEST FOR PUBLIC COMMENT REGARDING AMENDMENT
TO SECTION 3-116 OF THE UNIFORM COMMON INTEREST
OWNERSHIP ACT

Ladies and Gentlemen:

Each of the undersigned (collectively, the "*Nevada Responders*") is involved in some capacity with issues affecting common interest communities ("*CICs*") in the State of Nevada. This letter is an initial response to the request ("*Request*") and the accompanying Report of the Joint Editorial Board for Uniform Real Property Acts (the "*Report*") for comments regarding the proposed amendment to Section 3-116 of the Uniform Common Interest Ownership Act ("*UCIOA*"), enacted in Nevada in 1991 as Nevada Revised Statutes ("*NRS*") 116.3116.¹

¹ The numbering of NRS Chapter 116 generally follows UCIOA. Thus, for example, UCIOA 3-116 is NRS 116.3116. Nevada uses numbered subsections rather than UCIOA's lettered subsections and has also broken down several UCIOA sections into more than one section. In these instances more numbers are added to the base number. Thus, for example, UCIOA 3-104 becomes 116.3104 and 116.31043 and 116.31046. Legislative concern with particular CIC issues, especially those dealing with homeowner/board relations have also led to many non-uniform provisions.

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CIC Growth; Statutory Responses to CIC Issues. Nevada's population boomed over the past 20 plus years and CICs proliferated, particularly in metropolitan Las Vegas (Clark County).² Local governmental authorities increasingly required creation of associations, with many CIC purchasers, no doubt, unaware that associations may regulate conduct or foreclose an assessment lien. As a result, in 1997, the Nevada Attorney General required an information statement be given to purchasers, which includes answers to a number of questions, including: "BEFORE YOU PURCHASE PROPERTY IN A COMMON-INTEREST COMMUNITY DID YOU KNOW . . . YOU WILL HAVE TO PAY OWNERS' ASSESSMENTS FOR AS LONG AS YOU OWN YOUR PROPERTY? . . . IF YOU FAIL TO PAY OWNERS' ASSESSMENTS, YOU COULD LOSE YOUR HOME?"³

Also in 1997, in an effort to assist homeowners and their associations, the Legislature created the position of Ombudsman in the Nevada Real Estate Division ("NRED"), funded by a fee of \$3 per CIC unit. As CICs continued to grow and, with them, a concerned constituency of homeowners whose rights and obligations under Nevada UCIOA were largely self-policed, the 2003 Legislature created a five member Commission for Common Interest Communities (the "*Commission*") within NRED, with the power to sanction violations of Nevada UCIOA.⁴ During the same period a new licensing regime was enacted requiring those engaged in the management of a common interest community to be licensed as a "community manager" under NRS Chapter 116A, rather than as a real estate broker or property manager.

One of the missions of NRED and the Commission is to maintain statistics on the number of CICs within the State. NRED collects the \$3 per unit fee through a statutory requirement that each association register with the NRED. According to the statistics for the reporting period

Most of the 2008 UCIOA amendments were adopted in 2011. However, Nevada UCIOA provisions dealing with assessment liens, including the 2008 UCIOA amendment to 3-116(a) adding the words "reasonable attorney's fees and costs" to the association's lien, have remained unchanged, as a result of conflicting points of view, as will be noted herein.

² According to Clark County, the population of the "Las Vegas Valley Urban Area" increased from 764,464 in 1991 to 1,901,103 in 2011. www.clarkcountynv.gov/.../HistoricalCCLVVAveragePopGrowthRate.xls The Las Vegas Valley Urban Area includes the cities of Las Vegas, Henderson, North Las Vegas and Boulder City and unincorporated Clark County.

³ NRS 116.41095.

⁴ The original Commission included (i) a developer representative, (ii) a community manager, (iii) an accountant, (iv) an attorney and (v) a homeowner with board experience. In 2007, the name of the Commission was amended to include "and Condominium Hotels" and the number of Commissioners was increased to 7 with the addition of "Two members who are units' owners residing in this State but who are not required to have served as members of an executive board." NRS 116.600(2)(b).

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ending June 30, 2013, a total of 2,984 Nevada registered associations contain 498,926 units.⁵ Of the total number of associations, NRED lists 114 "master associations" or "SAM" ("same as master") and 565 sub-associations. Several communities in Clark County, including the Summerlin and Anthem communities are among the largest master planned communities in the country and operate within the framework of a large master association with multiple sub-associations.

Nevada Housing Market. The Nevada housing market has been severely affected by the economic downturn. As foreclosures surged, Nevada lawmakers responded with different ways to help homeowners. In 2009 these measures included: (i) The Nevada Foreclosure Mediation Program ("*FMP*"), (ii) Protection and, in some instances, elimination of personal liability for deficiency judgments and (iii) Extension of the association super priority lien from six months to nine months.⁶ In February 2012, Nevada Attorney General Masto announced mortgage servicing foreclosure settlements with the Bank of America defendants (the "*Bank of America Settlement*"), providing for additional homeowner assistance. In 2013 the Nevada Legislature enacted the Homeowner Bill of Rights, modeled after a similar law in California. Against this landscape, the number of foreclosures has ebbed and flowed. Nevada practitioners continue to debate the number of homes that remain subject to foreclosure, the so-called "shadow inventory." During this period the time to foreclose has greatly increased.

Because of the large number of CICs in Nevada, the intersection of Nevada UCIOA with the foreclosure crisis has created increased complexity. The ability of Nevada to increase the association's super priority lien from six months to nine months remained a matter of debate in light of Fannie Mae, Freddie Mac, VA and HUD lending rules, which themselves are not always clear.⁷ Delays in mortgage foreclosures led to increased numbers of unmaintained units in many CICs. The 2009 Nevada Legislature responded with AB 248 permitting associations to enter

⁵ The effect of the economy is reflected in statistics for the year 2007, the first year for which they are available on NRED's website. (<http://red.state.nv.us/CIC/stats.htm>) As of June 30, 2007, there were 2,962 associations and a total of 428,162 units, a growth of only about 70,000 units over the six year period.

⁶ (i) FMP is required by NRS 107.086 and the FMP rules adopted by the Nevada Supreme Court. (ii) Deficiency judgment protections are found in NRS 40.455 and 40.458. (iii) NRS 116.3116(2). The law increasing the amount of the association's priority lien also provides for a reduction to six months if required by Fannie Mae or Freddie Mac rules.

⁷ One of the issues which arose in Nevada was the extent to which Fannie Mae guidelines addressing association super priority related to the *qualification* of a loan for purchase by Fannie Mae versus the amount Fannie Mae would be willing to pay its originating lender upon a later foreclosure. In August 2012, however, Fannie Mae announced guideline B4-2.1-06, under which, "Fannie Mae allows the greater of six months of common expense assessments, or the maximum amount permitted under applicable state law, to have limited priority over Fannie Mae's mortgage lien if the condo or PUD project is located in a jurisdiction that has enacted [UCIOA]." Fannie Mae Announcement SEL-2012-07, August 21, 2012.

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upon properties in foreclosure to maintain the "exterior of the unit" or to "remove or abate a public nuisance on the exterior of the unit," with resulting expenses being accorded the same lien priority as the association's super priority lien.⁸ Without a doubt, in accord with the statements in the Request and the Report, Nevada associations have been severely affected by the loss of assessment income.⁹

According to a July 11, 2013 article in *Stateline, The Daily News Service of the Pew Charitable Trusts*, Nevada ranked second in the nation for the first half of 2013 with 1 in 71 housing units in foreclosure.¹⁰ In September 2013, *Vegas Inc.* noted that once again "Nevada's foreclosure rate was highest in the country last month."¹¹ The current status of foreclosures, is reported in an October 10, 2013 article in the *Las Vegas Review Journal* to be as follows:

Even as U.S. foreclosure starts fell to a seven-year low in the third quarter, default activity kicked into high gear in Clark County and across the Silver State, according to a report Wednesday from California research firm RealtyTrac. First-time foreclosure filings plunged 39 percent nationwide year over year in the three months that ended Sept. 30. The opposite happened in Nevada, where initial filings spiked 36 percent in the same period, RealtyTrac reported. September brought especially dramatic foreclosure gains in Nevada. Starts, or notices of default, nearly doubled year over year in the month, to 2,763 filings. Notices more than doubled in Las Vegas, jumping 109.3 percent, to 2,470 filings. RealtyTrac's analysis backs up recent findings from local real estate and mortgage experts, who reported Friday that local banks and title companies submitted nearly 1,000 notices of default on Sept. 30. That was a single-day record for foreclosure starts in Clark County. Industry observers trace the September surge in initial filings to the state's new Homeowners Bill of Rights law, which imposes new mandates on banks looking to foreclose. The law took effect Oct. 1, and first-time notices of

⁸ NRS 116.310312.

⁹ Under NRS 116.3115, Nevada associations must establish "adequate reserves" and include them in the association budget. It is believed that many Nevada associations may have been able to cushion their loss of assessment income by not funding required reserves. In the short run, this may a palatable (or necessary) solution. While this may have prolonged the financial stability of such associations, it will, of course, negatively affect those associations and their owners when required repairs or replacements of capital improvements are required in the future. Moreover, under NRS 116.3115 (2) a board may impose a reserve assessment without membership approval.

¹⁰ <http://www.pewstates.org/projects/stateline/headlines/foreclosures-down-35-percent-but-auctions-climb-85899489545>

¹¹ Eli Segal, Nevada foreclosure rate is back on the rise, report says. <http://www.vegasinc.com/news/2013/sep/11/nevadas-foreclosure-rate-back-highest-us-report-sa/>

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default swelled as banks tried to beat the deadline. Look for that trend to reverse: Filings fell precipitously the first two days in October, thanks in part to those new requirements. Banks now have to give homeowners 30 days' notice before starting foreclosure, and they have to tell owners about alternatives to default.¹²

Not surprisingly, many Nevada homes continue to be worth less than the amount of their mortgages. According to *Business Insider*, although home prices have been increasing, Nevada home prices remain "down 46.6% from 2007 to Q4 2012."¹³ More recently, the *Las Vegas Review Journal* reported on October 30, 2013 that "Prices in Las Vegas rose 29.2 percent from a year earlier, the fastest pace in the nation. But they still are 47 percent lower than they were before the housing market collapsed."¹⁴

Bank Foreclosures and Collection Costs. The tremendous increase in Nevada residential mortgage defaults at first resulted in many foreclosed homes being purchased by real estate investors rather than lenders. Because a high percentage of these homes were located in CICs, satisfaction of the association super priority lien by investor purchasers resulted in many associations recovering some part of their past due delinquencies, though not without controversy. Later, as new statutory protections for homeowners worked their way into the system, bank foreclosures slowed and the number of association foreclosures increased. While this later increase reflected the capital needs of associations, it also responded to the demands of real estate investors for bargain prices.

The first significant 3-116 issue concerned the actual amount of the super priority lien. Prior to October 1, 2009, Nevada followed UCIOA by providing for a super priority lien "to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien."¹⁵ While the priority of the six/nine months of base assessments went unchallenged by the purchasers at bank foreclosures, association demands for payment of collection costs before confirming satisfaction of the super priority lien faced challenges.

¹² Jennifer Robison, "Housing default activity shifts into high gear in Clark County and Nevada," October 10, 2013. http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_docid=149617B82F4EFA28&p_docnum=1

¹³ Mamta Badkar, The Foreclosure Problem Just Got Worse In Nevada And Florid, *Business Insider*, June 13, 2013. <http://www.businessinsider.com/nevada-foreclosure-starts-rise-2013-6>

¹⁴ Paul Wiseman, "LV leads home price surge," October 30, 2013. <http://www.reviewjournal.com/business/home-prices-rise-again-august-las-vegas-leads-nation>

¹⁵ NRS 116.3116(2). As noted above, in 2009 the priority period was increased to nine months.

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Korbel. Prior to the Recession, in December 2006, the Clark County District Court had issued an order in the case of *Korbel Family Trust v. Spring Mountain Ranch Master Association, et al.* (Case No. 06-A-523959, Department V), confirming the priority of the association's lien for six months of assessments, plus (i) six months of late fees, (ii) interest on the principal amount of six months of unpaid assessments, (iii) the association's costs of collection, including legal fees and costs "that accrue prior to the date of foreclosure of the first deed of trust" and (iv) "the transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust." *Korbel* came to be relied on by many associations and their collection agencies and counsel as legal support for the inclusion of collection costs in the amount of the super priority.

NAC 116.470. In 2009, responding to claims of excessive collection costs, the Legislature enacted NRS 116.310313, effective October 1, 2009, limiting associations to the recovery of "reasonable fees to cover the costs of collecting any past due obligation." The statute further required the Commission to adopt regulations "establishing the amount of the fees that an association may charge pursuant to this section." The regulation, Nevada Administrative Code ("NAC") 116.470, was adopted by the Commission in December 2010 and became effective May 5, 2011.¹⁶ (A copy of NRS 116.310313 and NAC 116.470 is attached as Exhibit A.) Neither the statute nor the regulation resolved the question of whether collection costs could be included as part of the super priority. Legislative efforts to resolve this issue failed in 2011 and 2013 and controversies over the amount of collection costs and their inclusion in super priority found their way into state and federal courts as well as state agencies.

Financial Institutions and Real Estate Divisions. Under NRS 649.020 (as amended 2005), associations must hire licensed collection agencies for the enforcement of unpaid assessment liens. In December, 2010, following its approval of NAC 116.470, the Commission adopted an "Advisory Opinion" concluding that the super priority lien could include collection costs.¹⁷ Prior to this, in November, 2010, the NRED's sister agency within the Department of Business and Industry, the Financial Institutions Division ("FID") issued its own advisory opinion that collection agencies may not include collection costs as part of the NRS 116 super priority lien if the sum exceeds nine months of common assessments. Unlike the Commission's advisory opinion, FID's advisory opinion basically prohibited collection agencies, under penalty of licensing violations, from violating the its conclusions. FID's action was challenged in court and

¹⁶ During the hearings before the Commission, the Commission learned that many collection agencies employed by associations in the foreclosure process were paid on a contingency basis. It is also worthwhile noting that the primary participants in the regulatory process leading to the adoption of NAC 116.470 were collection agencies, investors acquiring properties at bank foreclosures and real estate brokers, not mortgage lenders.

¹⁷ In December, 2012, NRED issued a new "Advisory Opinion" reaching the opposite conclusion, that collection costs are *not* a part of the super priority lien. As suggested by their names, neither opinion carried the weight of law.

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the collection agencies eventually prevailed in the Nevada Supreme Court, which agreed that FID could not determine super priority issues under NRS Chapter 116.¹⁸

Higher Ground Case. On January 22, 2010, a number of real estate investors (the "Higher Ground Investors") filed a class action complaint in Clark County District Court (Case No. A-10-608741-C) against approximately 125 CICs alleging, among other things, that the defendant CICs violated NRS 116.3116 by charging and collecting excessive amounts of delinquent assessments upon the bank/lender's foreclosure of the property. On May 5, 2010, the plaintiffs filed an Amended Complaint adding approximately 200 associations as defendants. On June 2, 2010, the law firms of Leach Johnson Song and Gruchow and Wolf Rifkin Shapiro Schulman & Rabkin filed their joint Motion to Dismiss Plaintiffs' Amended Complaint for Lack of Subject Matter Jurisdiction pursuant to required NRED alternative dispute resolution.¹⁹ On September 8, 2010, the Court entered its Order dismissing the Amended Complaint, stating, in part:

The present action was initiated by a group of real estate investors that purchased certain parcels of foreclosed units within common-interest communities in Clark County, Nevada. The basis of the causes of action Plaintiffs asserted in their Amended Complaint is that the Defendant common-interest communities violated N.R.S. 116.3116 by demanding and collecting more money from the Plaintiffs than they were statutorily entitled to. Defendant filed its Motion to Dismiss, arguing that the Amended Complaint should be dismissed on the ground that the Court lacked subject matter jurisdiction to entertain the matter. Pursuant to N.R.S. 38.310, no civil action based on a claim related to the interpretation, application or enforcement of a declaration of covenants, conditions or restrictions may be commenced in district court until and unless the

¹⁸ *Nev. Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 294 P.3d 1223, 128 Nev. Adv. Op. 34 (2012).

¹⁹ NRS 38.310 states:

1. No civil action based upon a claim relating to:
 - (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or
 - (b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property,may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS . . . , all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.
2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

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matter is submitted to arbitration or mediation with the Nevada Real Estate Division ("NRED").

Plaintiffs failed to submit this matter to the NRED for arbitration or mediation prior to commencing this action. Plaintiffs argued that they were not required to submit their claims to arbitration or mediation because they did not relate to the interpretation, application or enforcement of the declaration of covenants, conditions or restrictions for any of the Defendant common-interest communities. Plaintiffs further argued that this Court has sole and exclusive jurisdiction regarding the construction of N.R.S. 116.3116, that the complete disposition of this dispute does not require the Court or parties to consider a declaration of covenants, conditions and restrictions, and that this Court had authority to bifurcate or sever the declaratory relief claim for consideration by the Court.

This Court finds that this action relates to the interpretation, application or enforcement of the declaration of covenants, conditions or restrictions of the Defendant common-interest communities. Accordingly, this action falls squarely within the ambit of N.R.S. 38.310 and, as such, this Court lacks subject matter jurisdiction to entertain this matter. Because the Court lacks jurisdiction over the subject matter of this action, it is required to dismiss the action in its entirety.

On May 25, 2011, the Higher Ground Investors brought their claim to NRED with ADR Claim No. 11-90. On March 28, 2012, the arbitrator entered an Order in favor of the CICs. The Order resolved that: (1) the super priority lien pursuant to NRS 116.3116 includes interest, late fees and costs of collecting, including reasonable legal fees and costs, which are in addition to and not capped by the applicable period of common expense assessments; (2) the super priority lien includes 9 months of assessments in addition to all interest, late fees and the costs of collecting and enforcing the lien, which pursuant to NRS 116.310313 and NAC 116.470, may include any fee, including legal fees and costs; and (3) NRS 116.3116 does not require CICs to commence a "civil action" to enforce the super priority lien. On December 14, 2012, the Claimants filed a Motion for Reconsideration, based upon the NRED Advisory Opinion No. 13-01 issued December 12, 2012.²⁰ In his final Order, dated June 24, 2013, the Arbitrator reaffirmed his original conclusion, finding persuasive the decision of the Supreme Court of Connecticut in *Hudson House Condominium Association, Inc. v. Michael B. Brooks et al.* (233 Conn. 610, 611 A.2d 862.

²⁰ See footnote 17.

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BAC Servicing. On January 31, 2011 in *BAC Home Loans Servicing, L.P. v. Stonefield Homeowners Association, et al.* (Case 2:11-cv-00167-JCM-RJJ) a major home loan servicer, servicing "thousands of mortgage loans," filed suit in United States District Court for Nevada against 13 associations and their collection agencies and law firms. The Complaint (the "*BAC Complaint*"), sought two judicial declarations: first, that BAC had a "right to pay off or 'redeem' the associations' super priority liens"²¹ "even if payment is tendered before BAC forecloses on the deed of trust"²²; and second, that "an association's super-priority lien does not include attorneys fees or collection costs."²³ On February 22, 2011, a Motion to Dismiss based on NRS 38.310 was filed with the Court and granted on July 21, 2011.

BAC Home Loan's successor in interest, on the loans in question, Bank of America, NA ("*BANA*"), filed its claim with NRED, ADR Claim No. 12-58. On September 18, 2012, the Arbitrator issued his Non-Binding Arbitration Award in favor of the Respondents, holding that "assessments enforceable under NRS 116.3116 include all reasonable collection costs and fees relating to the nine month period." On October 16, 2012, BANA filed its Complaint in state district court, Case No. A-12-670230-B. An Amended Complaint was filed October 26, 2012.

Association Foreclosures and Priority. While the inclusion of collection costs in the super priority remained in contention in the context of bank foreclosures, the enactment of foreclosure prevention laws and a rising concern about the ownership of mortgage loans resulted in a significant slowdown in mortgage foreclosures.²⁴ In 2011, the Nevada Legislature enacted AB 284 in 2011, requiring a lender affidavit, under penalty of perjury, in order to initiate a non-judicial foreclosure.²⁵ This bill was one of the Nevada Attorney General's responses to the allegations at the time of bank "robo signing," the other being the court action leading to the Bank of America Settlement. As lenders adapted to the new rules, foreclosures declined. Associations, which previously could count on receiving at least some funds when a first mortgage loan foreclosed, began turning to their own foreclosures. These foreclosures have steadily increased, resulting in a new area of contention: the effect of an association lien foreclosure on a first mortgage loan, i.e., the *priority* rather than the amount of the association

²¹ BAC Complaint, Paragraph 74.

²² BAC Complaint, Paragraph 76.

²³ BAC Complaint, Paragraph 77.

²⁴ In 2011, Nevada law was also amended to require that all assignments of the deed of trust must be recorded before the lender may foreclose. See, NRS 106.210, 107.070. Prior to foreclosure, however, there is no legal requirement that an assignment of the deed of trust be recorded.

²⁵ NRS 107.080(2)(c). Most, if not all of these concerns were resolved by Assembly Bill 300, effective June 1, 2013.

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lien. Since approximately late 2012 quiet title actions have proliferated between buyers at association foreclosures and first mortgage lenders or purchasers at bank foreclosures. Interpleader actions have also greatly increased as associations seek judicial determinations of the rightful owners of surplus funds from association foreclosures, which are, based on anecdotal reports, resulting in increasingly higher auction prices.

Nevada Foreclosure Process. The primary real estate security instrument in Nevada is the deed of trust. While a deed of trust may be judicially foreclosed under NRS 40.430, until recently most deeds of trust were foreclosed pursuant to the trustee's power of sale under NRS 107.080.²⁶ The Nevada process requires the recording and giving of a notice of breach or default and election to sell ("*NOD*"), followed by a three month waiting period, at the end of which a notice of sale must be published and given, permitting a trustee's sale to occur after approximately 120 days. In 2009 the Nevada Legislature created the FMP, allowing homeowners to seek foreclosure mediation after the filing of the *NOD*.²⁷ Lenders must provide original or certified copies of loan documents and participate through a representative having authority to modify the terms of the loan. Both parties must participate in good faith. Foreclosure may only proceed following mediation in compliance with the FMP rules. Failure to comply with the FMP requirements can result in lender sanctions, including prohibiting the foreclosure (which may, however, be commenced again).²⁸ Until 2013, the FMP did not apply to judicial foreclosures.

SB 321, the Homeowner's Bill of Rights (which is not yet codified), basically requires loan workout efforts prior to the commencement of a judicial foreclosure or an *NOD* filing, and extends FMP protections to judicial foreclosures.²⁹ Unlike California's Homeowner Bill of Rights, which contains several sunsetted provisions, SB 321 contains no sunsetted sections. The combination of the Homeowner Bill of Rights and FMP mean that residential mortgage lenders

²⁶ NRS 40.430 is the Nevada "one action" rule, requiring that mortgage lenders foreclose before seeking a personal judgment against the debtor, which is limited to a judicial determined deficiency. The definition of the word "action" in NRS 40.430 (although the term is limited by the phrase "as used in this section") and, no doubt, the association of the word with a lawsuit have resulted in a variety of judicial interpretations of the phrase "an action to enforce the lien" found in NRS 116.3116 and 3-116.

²⁷ The statute, NRS 107.086, covers "owner-occupied housing" which is defined as "housing that is occupied by an owner as the owner's primary residence." NRS 107.086(15)(e).

²⁸ See NRS 107.086(5), (6) and (7).

²⁹ The law applies to a "borrower" who is "a natural person who is a mortgagor or grantor of a deed of trust under a residential mortgage loan," excluding a person who has "surrendered" the home to the lender or filed a bankruptcy case. A "residential mortgage loan" is a "a loan which is primarily for personal, family or household use and which is secured by a mortgage or deed of trust on owner-occupied housing as defined in NRS 107.086." SB 321, Secs.3, 7.

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must engage in loan workout efforts both before and after the commencement of a judicial or non-judicial foreclosure.

The average current time period between the filing of an NOD and a non-judicial foreclosure on a residential property has been estimated to be between 520 days and 57 months.³⁰ Fannie Mae guidelines anticipate at least a 360 day period.³¹ Whether one factor more than others caused this delay, there can be no doubt that bank default practices, the FMP, including its requirement for original loan documents and, now, the Homeowner Bill of Rights have all contributed to the length of time a Nevada non-judicial foreclosure takes. More importantly, from an association's point of view, the FMP is now embedded into the association lien foreclosure process by the 2013 Legislature's enactment of AB 273³², effective October 1, 2013, which prohibits an association from foreclosing on owner occupied housing, following the lender's recordation of an NOD, until the lender is permitted to foreclose following completion of the FMP process.³³

Over at least the past year, the number of judicial foreclosures has greatly increased, though the increase may be dated to around October 1, 2011, the effective date of AB 284, and

³⁰ According to RealtyTrac on October 9, 2012: "The average time to complete a foreclosure increased substantially from a year ago in several states where recent legislation and court rulings have extended the foreclosure process. These states included . . . Nevada (up 42 percent to 520 days)."

<http://www.realtytrac.com/content/foreclosure-market-report/september-and-q3-2012-us-foreclosure-market-report-7424>

According to Inman News on March 7, 2013: "But the difference between judicial and nonjudicial states is decreasing due to recently enacted 'judicial-like' legislation in some nonjudicial states, the report said. In Nevada, legislation has resulted in a jump from a 27-month timeline in June 2012 to 57 months at the end of January." <http://www.inman.com/2013/03/07/foreclosure-timelines-now-measured-in-years/#sthash.DVigkdz1.dpuf>

³¹ Fannie Mae's "Foreclosure Time Frames and Compensatory Fee Allowable Delays" (https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf) specifies the maximum number of allowable days between the due date of the last paid installment (LPI) and foreclosure sale date, as referenced in the Fannie Mae Servicing Guide, Part VIII, Section 106.08: Allowable Time Frames for Completing Foreclosure. The number specified for Nevada is 360 days.

³² The law requires that the homeowner continue to pay his or her obligations to the association "other than any past due obligation." NRS 107.086(10). The law does not, however, state what remedies are available to the association should the homeowner fail to make those payments.

³³ NRS 116.31162(5). The association must be in receipt of the statutory certificate that no mediation is required (i.e., waiver of mediation or failure of the homeowner to participate in the FMP) or that the FMP has been completed. AB 273 may represent the camel's nose in the tent. Not only does it amend Nevada UCIOA to prohibit the association from foreclosing on "owner-occupied housing" until completion of the FMP, it also amends the FMP statute itself, thus in effect "marrying" deed of trust foreclosure laws with association foreclosures. NRS 107.086(9), (10).

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lender concerns about their loan documents. Prior to approximately mid-2012 judicial foreclosures were rare, no doubt because of the expense and uncertainties of litigation as well as the one year right of redemption which follows a judicial foreclosure.³⁴ Whether the enactment of the Homeowner Bill of Rights, which requires FMP for judicial foreclosures, will reduce the number of judicial foreclosures remains to be seen.

Association Foreclosures. Nevada's version of 3-116 incorporates a non-judicial foreclosure process similar to the non-judicial foreclosure of a deed of trust. The process begins with a "notice of delinquent assessment" ("NDA").³⁵ While not required, most associations record the NDA. 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.³⁶ Ninety days following the giving of the NOD, the association must give notice of sale.³⁷ With certain exceptions, notice of sale must be "in the manner and for a time not less than that required by law for the sale of real property upon execution."³⁸ The foreclosure sale is a cash auction sale and "vests in the purchaser the title of the unit's owner without equity or right of redemption."³⁹

It is worth noting, as will be discussed below, "The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien."⁴⁰ The proceeds of the sale are applied 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

³⁴ NRS 21.200.

³⁵ NRS 116.31162(1)(a).

³⁶ NRS 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, 30 days before the recordation 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."

³⁷ NRS 116.31165.

³⁸ NRS 116.311635. 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." NRS 116.311635(1)(b)(2).

³⁹ NRS 116.31166(3). See also NRS 116.31164 and 116.31166 generally.

⁴⁰ NRS 116.31164(2).

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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."⁴¹

Over about the past year, greater numbers of associations have completed foreclosures of their assessment liens. As noted above, unlike first mortgage foreclosures, in which the main issue is how much the purchaser at a bank foreclosure must pay the association, the new issue has become the effect of an association foreclosure on the continued existence of the first mortgage. In a June 5, 2013 letter addressed to the Real Property Section of the State Bar of Nevada ("*Section*"), Clark County District Court Judge Jerry Tao invited the Section to file an amicus brief in a case pending before him involving the relative priority between the association's super priority lien and the first mortgage, noting that, "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."⁴² At a conference call of the Section's Executive Committee in September, a lawyer whose clients include purchasers at association lien foreclosures, advised the Committee that 51 cases are presently pending before the Nevada Supreme Court involving association lien/first mortgage priority issues.⁴³

Suggestions; Recommendations. Based on the foregoing, Nevada Responders have the following initial comments and suggestions in response to the Request:

1. Superpriority Lien Amount: the "Cap". The amount of the super priority lien (herein, the "*Cap*") may depend on whether the foreclosure is maintained by the association or the bank. For example, if the association is foreclosing, it may be appropriate to set a specific number of months of common assessments as the super priority amount. While a number of Nevada Responders support an overall Cap of 24 months, there is concern that an association with a low monthly assessment (the example given is \$5) should be able to include its collection costs in addition to the base monthly assessments.⁴⁴ Moreover, one of the challenges of setting a specific monthly cap in connection with an association foreclosure is the effect of bank

⁴¹ NRS 116.31164(3)(c).

⁴² Judge Tao had concluded that the association's foreclosure of its assessment lien without action by the first mortgage lender resulted in the elimination of the first mortgage, a position with which the Section, in its amicus brief, supported.

⁴³ Nevada does not have any intermediate appellate courts.

⁴⁴ The original version of AB 204 (2009), which extended the super lien period from six months to nine months, provided for a super lien period of two years; the bill had 24 co-sponsors out of the 42 members of the Assembly.

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foreclosure remediation programs on an association's ability to proceed. As noted above, AB 273 (2013) evidences 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.

Several Nevada Responders believe that a flexible Cap tied to the bank's foreclosure action makes sense. For example, a first mortgage lender that completes its foreclosure in less than one year might be required to pay nine months of assessments, a lender that completes a foreclosure between one and two years might be required to pay twelve months of assessments, a lender that completes its foreclosure between two and three years might be required to pay 18 months of assessments, and so on. A flexible period seems to offer both a carrot and a stick approach. Nevada Responders are concerned, however, that if the Cap depends on different time periods, those time periods must be easily ascertainable from the record (for example, the actual date the trustee's deed is recorded), so as not to result in questions of interpretation.

2. Composition of the Lien; Collection Costs. The composition of the association's super priority lien should include any amounts owed to the association that are a lien on the unit, including collection charges, up to the Cap. The amount of collection costs remains an issue in Nevada despite NAC 116.470. While many Nevada Responders report that associations and collection agencies cease collection activities if a mortgage foreclosure is proceeding, other report that associations and collection agents continue to provide collection activities under the same circumstances seeing a fee opportunity at the bank foreclosure. In Nevada's non-judicial system, concepts of reasonableness must be left to regulatory definitions and limits.

3. Title Issues. As indicated by the number of quiet title actions in Nevada and the variance in judicial decisions, UCIOA should be amended to include language which makes clear the effect of an association lien foreclosure. 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 in the same manner as the purchaser at a mortgage foreclosure sale (subject to the same or limited customary carve outs title insurers provide relating to defects in a mortgage foreclosure sale).

4. "Action". The term "an action to enforce the lien," in 3-116 needs to be clarified so that the meaning of the term "action" is absolutely clear. One solution may simply be to redefine the amount of the super priority lien in a different way. As noted above, not only does the word imply, in its traditional usage, the commencement of a lawsuit, the word is particularly troubling in Nevada which has a "one action" rule.

The term "action" also implies that the association must have taken some steps to foreclose. Many Nevada Responders believe that if a bank forecloses the purchaser should be required to pay delinquent assessments up to the super priority amount, even if the association

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has not instituted a foreclosure proceeding. 3-116 should be clarified to address whether, in the case of a bank foreclosure, the amount of the lien depends on whether the association has taken some "action" or the amount is simply measured as of the date of a bank foreclosure.

5. Master Associations. UCIOA 3-116 should be amended to address the effect of a foreclosure by a master association on a sub-association lien and vice versa, or otherwise provide for a determination of the relative priority of each lien upon a foreclosure by the other or perhaps a requirement by which both associations proceed to foreclosure or include the amounts owed to the other.

6. Bites at the Apple. 3-116 should be clarified to address the effect of a first mortgage lender satisfying an unpaid association lien. It is clear that the association may not foreclose a lien that has been satisfied. Does this mean that the association may not in the future seek to foreclose a lien based on new unpaid assessments and institution of a new foreclosure proceeding?

7. Notice. While ownership of the mortgage loan is not, strictly speaking, a UCIOA issue, basic due process requires that if a mortgage loan is subordinate to an assessment lien, the holder of the mortgage be notified of the association foreclosure. Ownership of the mortgage loan is not clear from the public records and this fact may need to be addressed in UCIOA.

8. Proceeds. Nevada UCIOA contains language found in 3-116(l) dealing with foreclosures in a cooperative. Among other things, 3-116(l)(3)(C) provides that proceeds of the sale are applied, after foreclosure expenses, to "satisfaction of the association's lien." Does this refer to the entire amount of the association's lien or just the amount of the super priority? If the former, doesn't this result in the association having a lien greater than the amount of the super priority? NRS 116.3116 also contains language somewhat similar to that found in the cooperative foreclosure provisions in 3-116(l)(1). UCIOA provides that "The association may buy at any public sale. . . ." In contrast, Nevada UCIOA permits the association to "purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien." While Nevada does not follow UCIOA in this regard, the nature of the limited priority lien created by UCIOA raises the questions of (i) whether and how an association may credit bid its bifurcated lien and (ii) the application of sales proceeds to the association, which has both a first and a third lien.

9. Impounds. In 2013, Nevada amended NRS 116.3116 to provide as follows:

The holder of the security interest described in paragraph (b) of subsection 2 or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the

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association pursuant to NRS 116.3115 if the unit's owner and the holder of that security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.⁴⁵

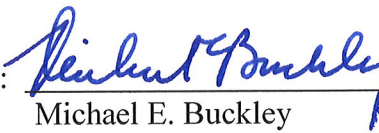
A greater effort to bring such concept into residential mortgage lending throughout the country is to be encouraged.

We are happy to answer any questions or provide clarification of any of the matters set forth in this letter and desire to be a part of the continuing discussions on the proposed amendment of 3-116 of UCIOA.

Very truly yours,

Submitted on behalf of, Common Interest Committee, Real Property Section, State Bar of Nevada and those named below:

Karen D. Dennison, Holland & Hart, LLP /Michael E. Buckley, Fennemore Craig Jones Vargas, Co-Chairs

By: 
Michael E. Buckley

MBUC/ab

cc: John Leach, Leach Johnson Song & Gruchow
William Wright, Wright Law Firm, Ltd.
Joan Wright, Allison, MacKenzie, Pavlakis, Wright & Fagan, Ltd.
Michael Brooks, Brooks Bauer, LLP

⁴⁵ SB 280, effective October 1, 2013.

EXHIBIT A

NEVADA ADMINISTRATIVE CODE SECTION DEFINING REASONABLE COSTS OF COLLECTION

[Note: Nevada assessment foreclosure process is non-judicial, modeled after the non-judicial trustee's sale process in NRS 107.080.]

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

1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 which exceed a total of \$1,950, plus the costs and fees described in subsections 3 and 4.

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

(a) Demand or intent to lien letter.....	\$150
(b) Notice of delinquent assessment lien.....	325
(c) Intent to notice of default letter.....	90
(d) Notice of default.....	400
(e) Intent to notice of sale letter.....	90
(f) Notice of sale.....	275
(g) Intent to conduct foreclosure sale.....	25
(h) Conduct foreclosure sale.....	125
(i) Prepare and record transfer deed.....	125
(j) Payment plan agreement - One-time set-up fee.....	30
(k) Payment plan breach letter.....	25
(l) Release of notice of delinquent assessment lien.....	30
(m) Notice of rescission fee.....	30
(n) Bankruptcy package preparation and monitoring.....	100
(o) Mailing fee per piece for demand or intent to lien letter, notice of delinquent assessment lien, notice of default and notice of sale.....	2
(p) Insufficient funds fee.....	20
(q) Escrow payoff demand fee.....	150
(r) Substitution of agent document fee.....	25
(s) Postponement fee.....	75
(t) Foreclosure fee.....	150

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

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

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

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

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

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

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

(b) A person “is controlled by” a community manager or agent if the community manager or agent:

(1) Is a general partner, officer, director or employer of the person;

(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the person;

(3) Controls in any manner the election of a majority of the directors of the person; or

(4) Has contributed more than 20 percent of the capital of the person.

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

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

Statutory Reference:

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

1. An association may charge a unit’s owner reasonable fees to cover the costs of collecting any past due obligation. **The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.**

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

3. As used in this section:

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

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

(Added to NRS by 2009, 2795)