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Rachel Furman

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COLLECTING UNPAID ASSESSMENTS: THE HOMEOWNER ASSOCIATION'S DILEMMA WHEN FORECLOSURE IS NO LONGER A VIABLE OPTION

*Rachel Furman**

I. INTRODUCTION

On the three-hour flight from Florida to New Jersey Mr. Albert Furman has plenty of time to contemplate his current challenges.¹ He is no longer concerned with snowy driveways in the winter or driving for miles to visit friends.² In fact, he abandoned these difficulties years ago when he moved to Florida and embraced the luxury of swimming pools and golf courses open year round.³ He also enjoys several other amenities in his housing development—a clubhouse, a gym, road maintenance, trash collection, and landscaping services.⁴ But now, on his flight to New Jersey, a less fortunate reality becomes clear to him.⁵ When he flies back home to Florida in less than one week, the assessments owed to his Homeowner Association (“HOA”) might increase.⁶ He may

* J.D. Candidate, Brooklyn Law School, 2012; B.A., Middlebury College, 2008. I would like to thank Jacki Belin, Mark Furman, Carly Furman, and Tomás Brennan for their continuous support and encouragement. I would also like to thank my Papa Al for inspiring me to pursue my Note topic. I also appreciate the assistance of the members of the Brooklyn Law School *Journal of Law & Policy*.

¹ Interview with Albert Furman, author’s grandfather, in Short Hills, N.J. (June 3, 2010).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

experience a decrease in services provided by his HOA; services previously guaranteed by the timely payment of his assessments.⁷ He will go to the next HOA meeting to hear that more and more homeowners are unable to pay their dues and that the HOA has no way to recover that lost money.⁸ As a member of the HOA for his community, this very real threat to his quality of life and investment in his home will preoccupy Mr. Furman during his week in New Jersey.⁹ And he is not alone.¹⁰

Currently, about one-fifth of the United States population lives in HOA communities.¹¹ As of 2010, there are 309,600 association-governed communities, 24.8 million housing units, and 62 million residents living in these communities.¹² HOA residents range in age and economic diversity, depending on the HOA community.¹³ Some communities offer less costly living alternatives for first-time buyers because the similarity in housing structures allows for

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See *Industry Data National Statistics*, COMMUNITY ASSOCIATIONS INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Mar. 27, 2011).

¹¹ Tammy Joyner, *Some HOAs Sue or Foreclose to Collect Dues*, ATLANTA JOURNAL-CONSTITUTION (Oct. 2, 2010, 8:12 AM), <http://www.ajc.com/business/some-hoas-sue-or-568408.html>.

¹² *Industry Data National Statistics*, *supra* note 10. “Association-governed communities include homeowners associations, condominiums, cooperatives and other planned communities. Homeowners associations and other planned communities account for 52–55 percent of the totals above, condominiums for 38–42 percent and cooperatives for 5–7 percent.” *Id.*

¹³ See, e.g., Marc Lacey, *Homeowner’s Fight Involves Flag Tied to Tea Party*, N.Y. TIMES, Aug. 30, 2010, <http://www.nytimes.com/2010/08/31/us/politics/31flag.html?scp=1&sq=homeowner%20associations&st=cse> (describing a HOA community comprised of tract homes); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994) (explaining the exclusive nature of HOA communities, which appeals to wealthy individuals); Edward J. Blakely, *Fortress America, Separate and Not Equal*, in *THE HUMANE METROPOLIS: PEOPLE AND NATURE IN THE 21ST-CENTURY CITY* 198, 202 (Rutherford H. Platt ed., 2006) (explaining that HOA communities include a range of retirement communities, resort developments, and high-security subdivisions).

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inexpensive production and cheaper sales.¹⁴ Other communities attract wealthier individuals by offering services and regulations above those offered by local governments, such as enhanced security systems and landscaping services.¹⁵ Further, some HOA communities cater to a specific age group, such as retired individuals.¹⁶

Unfortunately, the erosion of HOA communities has become a reality for many non-delinquent HOA residents, who watch helplessly as the association struggles to collect assessments from delinquent homeowners.¹⁷ Failure to collect assessments results in reduced amenities, increased fees for homeowners who diligently pay their assessments, and the possible demise of the community.¹⁸ Mr. Furman's dilemma is thus representative of a problem that plagues millions of Americans, and requires a timely and workable solution.

This Note argues that HOAs should require that all homeowners pay an initial security deposit in order to incentivize homeowners to pay assessments on time and to ensure that the burden of unpaid assessments falls to the defaulting homeowner. Part II provides background information on HOAs, and considers their organizational structure and financing techniques. Part III

¹⁴ See Lacy, *supra* note 13; Roger Showley, *Architect Who Brought Modernism to the Masses Shares Lessons of His Success*, SIGNON SAN DIEGO (Sept. 19, 2010, 7:24 PM), <http://www.signonsandiego.com/news/2010/sep/19/william-krisel-architect-stars-and-first-time-buyer/> (explaining why tract houses are less expensive to build and are therefore less expensive to purchase for first-time buyers).

¹⁵ Blakely, *supra* note 13, at 198.

¹⁶ *Id.* at 198, 202.

¹⁷ See J. Craig Anderson, *HOA Groups in Arizona Cutting Services, Raising Fees*, ARIZONA REPUBLIC (Aug. 29, 2010, 12:00 AM), <http://www.azcentral.com/business/realestate/articles/2010/08/29/20100829hoa-arizona-service-cuts-fee-hikes.html> [hereinafter Anderson, *HOA Groups in Arizona*].

¹⁸ See *id.*; Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2512 (2004) (noting the possibility that "nonpayment could cause the HOA's cash flow to become unstable and unpredictable, which would defeat the very reasons for the creation of a community having mutual covenants, restrictions, and obligations") (internal quotation marks and citation omitted).

explains the current problem HOAs face in relying on foreclosure as a means to compel payment from its members. Part IV considers the advantages and disadvantages of alternative means of enforcing payment, such as better drafting in the HOA's governing documents and rearranging lien priority, ultimately finding that the risks of these methods outweigh the benefits. Part V concludes that using security deposits as a means of enforcing assessment payments provides the greatest protection for HOAs and their members by incentivizing all members to pay their assessments on a timely basis.

II. BACKGROUND ON HOMEOWNER ASSOCIATIONS

HOAs are organizations created by developers where the members possess an interest in common area assets.¹⁹ The HOA is charged with ensuring common areas are properly developed and maintained for the use and enjoyment of its members.²⁰ HOAs aim to protect property values by maintaining the property itself and by preserving the character of any structures located on the property.²¹ They fund maintenance of the property by burdening the individual properties with a servitude demanding that the property owner pay assessments to the HOA.²² HOA communities require that homeowners pay assessments proportionally to cover the costs the association expends in maintaining the community.²³

Assessments are not optional charges or membership dues, but rather represent a proportion of the HOA's total expenses divided among its members to cover the costs of both running the association and providing services to the residents.²⁴ Assessments

¹⁹ See Motoko Rich, *Homeowner Boards Blur Line of Just Who Rules the Roost*, N.Y. TIMES, July 27, 2003, <http://www.nytimes.com/2003/07/27/us/homeowner-boards-blur-line-of-just-who-rules-the-roost.html?scp=1&sq=Homeowner%20Boards%20Blur%20Line%20of%20Just%20Who%20Rules%20the%20Roost&st=cse>; Giantomasi, *supra* note 18, at 2505.

²⁰ See Giantomasi, *supra* note 18, at 2505.

²¹ See *id.*

²² RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. a (2000).

²³ See *id.* § 6.5 (1)(a).

²⁴ Giantomasi, *supra* note 18, at 2509–10. Further, each HOA must collect

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provide the sole source of income for HOAs, and HOAs create their operating budgets based on the amount of assessments they collect from each homeowner.²⁵ Accordingly, if a homeowner fails to pay his assessments—or worse, if several homeowners fail to pay their assessments—the HOA loses money necessary to perform its central functions and the other homeowners are forced to bear the negative consequences.²⁶

Given their dependence on assessments for survival, HOAs treat collection of assessments as a critical matter.²⁷ The HOA secures its assessments by attaching a lien to each individually owned property.²⁸ The homeowners are aware of the lien because the HOA includes this information in its governing documents given to the homeowners prior to purchase.²⁹ Since courts recognize the importance of assessments for HOAs' survival, they usually read governing documents to contain an implied lien for unpaid assessments, even if the documents do not explicitly state that such a lien exists.³⁰

Through collection of assessments, HOAs provide their communities with all-inclusive amenities and aim to preserve and enhance property values.³¹ For example, HOAs offer benefits, such as capital improvements, landscaping, and pool care.³² Additionally, HOAs supply certain services usually provided by local government, such as road maintenance, utility services, street

assessments in accordance with state law and its own covenants. *See id.* at 2510.

²⁵ *See id.* at 2512.

²⁶ *See id.*

²⁷ *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. b (2000).

²⁸ *Id.* §§ 6.5 (1)(b), 6.5 cmt. d.

²⁹ *See id.* § 6.5 cmt. b (2000); Giantomasi, *supra* note 18, at 2509.

³⁰ *See* Perry v. Bridgetown Cmty. Ass'n, Inc., 486 So. 2d 1230, 1234 (Miss. 1986); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. d (2000); WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 107 (3d ed. 2000) [hereinafter HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE] (“[A] court may find an implied power to impose an assessment even when specific authorization is not set forth in the governing documents.”).

³¹ *See* Rich, *supra* note 19; Joyner, *supra* note 11.

³² Joyner, *supra* note 11.

and common area lighting, and garbage collection.³³ HOAs can even enact stricter regulations governing the community than can cities or counties, often ensuring greater protection against atypical housing designs or failure to maintain individual premises.³⁴ Many communities also provide recreational areas, including pools, tennis courts, gyms, clubhouses, and golf ranges, for homeowner use and enjoyment; this proves especially valuable since homeowners likely cannot afford to fund these luxuries independently.³⁵ Therefore, without the collection of assessments, the HOA cannot successfully maintain and repair the communities' amenities and homes, resulting in decreased housing prices for the community and an overall decline in appearance and communal facilities.³⁶

III. THE CURRENT PROBLEM FACING HOMEOWNER ASSOCIATIONS

The inability to maintain community aesthetics and amenities presents a common problem for HOAs that are unable to collect assessments from delinquent homeowners.³⁷ In the past, HOAs could often force delinquent homeowners to pay their unpaid assessments through the threat or use of foreclosure.³⁸ HOAs used

³³ See *id.*; Giantomasi, *supra* note 18, at 2521. Cities and counties often allow HOA to take over such roles since this provides an attractive alternative to raising taxes. See Rich, *supra* note 19.

³⁴ See Rich, *supra* note 19. Additional examples of the HOA's authority include its ability to "dictate house paint colors, lawn-mowing schedules and parking policies for recreational vehicles." *Id.*

³⁵ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. b (2000); Rich, *supra* note 19. Additionally, providing recreational benefits helps drive up property values in the community, thus enhancing the wealth of the unit owners. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. b (2000) (noting that "[d]eteriorating common property and facilities . . . are likely to depress property values, decreasing property-tax revenues as well as the wealth of the property owners").

³⁶ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. b (2000); Joyner, *supra* note 11.

³⁷ See Anderson, *HOA Groups in Arizona*, *supra* note 17.

³⁸ See *Condo Foreclosures Offer HOAs Critical Enforcement Power*, CONDOASSOCIATION.COM (Jan. 29, 2009, 7:59 PM), <http://www.condo>

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to rely on foreclosure as a final enforcement mechanism in order to force payment or to replace the delinquent homeowner with a homeowner able to pay his fees.³⁹ Members faced with the possibility of losing their house would often find means to pay their unpaid assessments.⁴⁰ HOAs who relied on the threat of foreclosure to collect unpaid assessments currently face a difficult situation. Taking ownership of a house in a poor economic environment often presents a greater financial burden to the purchaser than simply letting the homeowner remain in his home despite his inability to pay the bank or HOA.⁴¹ This problem arises in two similar situations.

A. Two Current Foreclosure Situations: (1) When the Homeowner Fails to Pay Both His Mortgage and His Assessments and (2) When the Homeowner Pays His Mortgage but Fails to Pay His Assessments

In the first situation, the homeowner defaults on his mortgage and cannot pay the bank.⁴² Often in this situation, the homeowner who has stopped making his mortgage payments has also stopped paying his HOA assessments.⁴³ Given that in poor economic conditions mortgage values often exceed housing values, coupled with the reality that there are rarely buyers, the bank is disinclined to foreclose even though the homeowner is not making his mortgage payments.⁴⁴ Buyers are scant due to problems such as

association.com/blog/tabid/19257/bid/8231/Condo-Foreclosures-Offer-HOAs-Critical-Enforcement-Power.aspx; *infra* Part III.A.

³⁹ *See id.*

⁴⁰ *See Rich, supra* note 19.

⁴¹ *See* Liz Pulliam Weston, *Your Lender Doesn't Want Your House*, MSN MONEY (Oct. 22, 2008), <http://articles.moneycentral.msn.com/Banking/HomeFinancing/YourLenderDoesntWantYourHouse.aspx>.

⁴² Keith Jurow, *Are HOA Foreclosures a Necessary Tool or an Extortion Racket?*, BUSINESS INSIDER (July 28, 2010, 8:27 AM), <http://www.businessinsider.com/are-hoa-foreclosures-a-necessary-tool-or-an-extortion-racket-2010-7>.

⁴³ *Id.*

⁴⁴ *See* Mhari Saito, *Banks Refusing to Take Back Foreclosed Properties*, NPR (Mar. 3, 2009), <http://www.npr.org/templates/story/story.php?storyId=>

“rapid price depreciation” and “extreme unemployment issues,”⁴⁵ which currently shape the economic environment. Foreclosure is thus an unattractive option because banks will have a difficult time finding a buyer and in the interim will be forced to pay the taxes on the house.⁴⁶

HOAs can try to force the bank to foreclose on the delinquent homeowner’s unit in the situation where the bank is reluctant to foreclose and the homeowner has stopped paying both his mortgage and his assessments.⁴⁷ The HOA can foreclose its own lien on the unit and have an auction sale subject to the first mortgage owned by the bank.⁴⁸ The unit buyer then purchases the unit with the original mortgage in place.⁴⁹ In the past, the HOA’s foreclosure process typically frustrated the bank, since the bank hesitated to allow someone else to live in the unit aside from the original borrower.⁵⁰ This would often force the bank to foreclose in

101386052; Weston, *supra* note 41.

⁴⁵ Saito, *supra* note 44. Unemployment is likely to continue to rise “from the current 9.6% to 9.9% by the first quarter of 2011” and this trend will continue until 2012. Dawn Wotapka, *Mortgage Bankers Push Housing Recovery to 2012*, WALL ST. J. (Oct. 26, 2010, 5:43 PM), <http://blogs.wsj.com/developments/2010/10/26/mortgage-bankers-push-housing-recovery-to-2012/>.

⁴⁶ See James L. Winokur, *Meaner Lienor Community Associations: The “Super Priority” Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 360–61 (1992); Weston, *supra* note 41.

⁴⁷ Telephone Interview with Ira Goldenberg, Adjunct Professor of Law, Brooklyn Law Sch., Partner, Goldenberg & Selker LLP (Oct. 7, 2010).

⁴⁸ See Nick Timiraos, *Condo Boards Take On Lenders: Chasing Unpaid Dues, Associations are Foreclosing on Units Seized by Banks*, WALL ST. J., Jun. 18, 2009, at A3.

⁴⁹ See *Bayou Land Co. v. Talley*, 924 P.2d 136, 152 (Colo. 1996); Richard A. Lord, *Agreement to Assume Mortgage—Distinction Between Assuming Mortgage and Taking Subject to Mortgage*, in 13 WILLISTON ON CONTRACTS § 37:41 (4th ed. 2010).

⁵⁰ The bank is not as comfortable with a purchaser who takes title to the property subject to an existing mortgage. If the new purchaser stops making his mortgage payments the bank can take the property, but there is no further personal liability for the purchaser, unless the contract between the purchaser and the grantee explicitly states such liability exists. See *Bayou Land Co.*, 924 P.2d at 152 (“If the buyer acquires the land subject to the encumbrance, the land

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order to replace the old borrower with a new borrower who has obligations directly to the bank.⁵¹ The bank consequently had an increased incentive to initiate its own foreclosure action or continue the pending foreclosure process with renewed vigor.⁵² The HOA could begin the process of foreclosing its own lien in hopes that by simply initiating the process, the bank would be forced to act in order to ensure that it finds a new buyer with a new mortgage.⁵³

However, in times of economic instability, banks are generally less responsive to HOAs' foreclosure proceedings.⁵⁴ First, even if the HOA forecloses its own lien, it likely takes time to find a new buyer for the reasons discussed above.⁵⁵ The problem of limited buyers is further compounded by the fact that the buyer must take the property subject to the pre-existing mortgage.⁵⁶ This discourages many buyers from purchasing since now they take ownership of an encumbered unit rather than taking ownership free and clear.⁵⁷ The bank is likely aware of the difficulty the HOA faces in finding a buyer and thus does not feel pressured to act

continues to secure the obligation but the buyer is not personally liable for the debt. However, the grantor or seller remains personally liable.”); Anne E. Melley, *Purchase of Property Subject to Lien or Mortgage*, 63 TEX. JUR. 3d REAL ESTATE SALES § 58 (2011) (“Where property is purchased subject to an outstanding lien or mortgage, but without an express or implied assumption thereof, the purchaser does not become personally liable for the debt so secured by the property.”). This provides less incentive for the new purchaser to make timely mortgage payments since no personal liability attaches if he fails to do so. *See id.* Banks are aware of this and thus prefer that the individual living in the house subject to the mortgage is the original mortgage holder. Telephone Interview with Ira Goldenberg, *supra* note 47.

⁵¹ Telephone Interview with Ira Goldenberg, *supra* note 47.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See Saito, supra* note 44 (explaining that in times of economic difficulty, lenders are unmotivated to foreclose).

⁵⁵ *See id.*; *supra* Part III.A.

⁵⁶ *See Bayou Land Co.*, 924 P.2d at 152.

⁵⁷ *See id.* (“When a seller transfers real property that is encumbered by a deed of trust, the buyer may either take the property subject to the encumbrance or assume the obligation secured by the encumbrance itself.”).

immediately to foreclose on its lien.⁵⁸

Additionally, even if the HOA does find a buyer, the bank might not feel the same pressure to foreclose on the unit as it does in a strong economic environment.⁵⁹ The bank is likely satisfied that the new buyer in the unit is paying the mortgage because now the bank can recover the mortgage on the unit.⁶⁰ Given that many banks experience great difficulty finding buyers⁶¹ and are often left to pay the taxes on the house in the interim between instituting foreclosure and an eventual sale,⁶² the bank is in no rush to continue a foreclosure action once the HOA has already foreclosed its own lien.⁶³ Even if the HOA exercises its power to foreclose on its own lien in hopes of causing the bank to continue or initiate its own foreclosure proceeding, the bank likely will not take any immediate action.⁶⁴ Further, it might take the HOA a long time to find a buyer for the encumbered unit for which it now assumes responsibility.⁶⁵

In the second situation the homeowner might still be paying his mortgage, but has failed to pay his assessments.⁶⁶ In this situation the bank has less involvement since the homeowner continues to

⁵⁸ This is problematic for the HOA, since the purpose of the HOA instituting its own foreclosure action was to force the bank to act quickly in its foreclosure action. Telephone Interview with Ira Goldenberg, *supra* note 47.

⁵⁹ *Id.*

⁶⁰ See *Bayou Land Co.*, 924 P.2d at 152; *supra* note 50 and accompanying text. While *supra* note 50 explains that banks prefer that the individual living in the house is the original mortgage holder, in times of economic instability the bank's preference will likely shift. The bank's priority in poor economic climates is ensuring that it receives the mortgage, regardless of whether the individual paying is the original mortgage holder. As *supra* note 50 explains, the new individual in the unit will still be responsible for paying the mortgage even though he does not assume personal liability for the mortgage.

⁶¹ Saito, *supra* note 44.

⁶² See Winokur, *supra* note 46.

⁶³ See Saito, *supra* note 44; Weston, *supra* note 41.

⁶⁴ See Saito, *supra* note 44.

⁶⁵ See *id.*; Weston, *supra* note 41.

⁶⁶ See Joyner, *supra* note 11 ("Some who have fallen behind on homeowners association fees—despite being current on their mortgages—have been sent into foreclosure by associations determined to collect.").

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pay his mortgage.⁶⁷ This presents serious problems for HOAs, since some HOAs face delinquency rates of fifteen percent or greater, which leads to serious revenue losses.⁶⁸ At this point, the HOA can decide to foreclose on its own lien in order to collect the unpaid assessments.⁶⁹ However, the same problems that the bank faces in initiating foreclosure—it must pay taxes while trying to find a new buyer—exist when HOAs initiate foreclosure to collect unpaid assessments.⁷⁰ Thus, it is an undesirable option for most HOAs.

B. The Problems Associated with Both Foreclosure Situations

Assuming either the bank or the HOA begins the foreclosure process, that respective party is responsible for paying taxes on the house until it finds a buyer.⁷¹ As Jim Svinth, the chief economist for LendingTree.com⁷² explains, foreclosure represents a bad option for lenders because they “lose money holding that house They have to maintain it, insure it, market it . . . until it sells.”⁷³ In a depressed economy this is financially more burdensome than simply letting a homeowner stay in his house, despite his inability to pay his mortgage or his assessments.⁷⁴

Further, even if the bank forecloses and finds a buyer, the HOA often still struggles to collect unpaid assessments.⁷⁵ In poor

⁶⁷ See generally Joyner, *supra* note 11 (explaining that HOAs, rather than banks, foreclosed on individuals who failed to pay assessments but still made timely mortgage payments to the bank).

⁶⁸ Jurow, *supra* note 42.

⁶⁹ See *id.*

⁷⁰ See Winokur, *supra* note 46; Weston, *supra* note 41.

⁷¹ See *id.*

⁷² LendingTree.com is an online mortgage broker. LENDINGTREE, <http://www.lendingtree.com> (last visited Mar. 27, 2011).

⁷³ Weston, *supra* note 41.

⁷⁴ See *id.*

⁷⁵ See Dawn Wotapka, *New Home Sales Stuck at Rock-Bottom*, WALL ST. J. (Oct. 27, 2010, 2:37 PM), <http://blogs.wsj.com/developments/2010/10/27/new-home-sales-stuck-at-rock-bottom/> [hereinafter Wotapka, *New Home Sales Stuck at Rock-Bottom*] (explaining that home sales are currently extremely low). Given that sale prices are so low, junior interests, such as the HOA’s lien for

economic conditions, the home will often be sold at a low price and the bank will be paid first, leaving little or no funds left over for the HOA.⁷⁶ While not completely uniform across the country, as “[s]ome jurisdictions give an association lien *some* priority over previously recorded liens in recognition of the importance of preserving the association’s income stream,”⁷⁷ most jurisdictions subordinate assessment liens to mortgage liens.⁷⁸ Once a house is sold through foreclosure, the bank gets its money first, and leftover funds are then distributed to other creditors, assuming leftover proceeds exist.⁷⁹ Given the present difficulty with securing a buyer, houses in foreclosure tend to sell at very depressed prices.⁸⁰ Accordingly, not enough money remains from the proceeds of the sale to pay the bank in full for its mortgage, let alone provide enough money to pay subordinate lien holders, such as the HOA.⁸¹

Unpaid assessments often do not become the obligation of the bank due to the language of the HOA’s governing documents.⁸² In

unpaid assessments, are unlikely to recover proceeds from the sale. *See, e.g., Bankers Trust Co. v. Bd. of Managers of Park 900 Condo.*, 81 N.Y.2d 1033, 1036 (1993) (a lien for unpaid assessments is subordinate to the bank’s mortgage); *Coral Lakes Cmty. Ass’n v. Busey Bank, N.A.*, 30 So. 3d 579, 585–86 (Fla. Dist. Ct. App. 2010).

⁷⁶ *See supra* note 75 and accompanying text.

⁷⁷ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 (2000) (emphasis added).

⁷⁸ *See, e.g., Bankers Trust Co.*, 81 N.Y.2d at 1036; *Coral Lakes Cmty. Ass’n*, 30 So. 3d at 585–86.

⁷⁹ *See Coral Lakes Cmty. Ass’n*, 30 So. 3d at 583–84.

⁸⁰ Wotapka, *New Home Sales Stuck at Rock-Bottom*, *supra* note 75.

⁸¹ *See supra* note 75 and accompanying text. Florida provides an extreme example of how a foreclosure sale fails to help the HOA collect its unpaid assessments; in Florida the foreclosure can extinguish subordinated liens and the buyer does not always assume responsibility for the unpaid fees. *See Crossland Sav. Bank, FSB v. Saffer*, 580 N.Y.S.2d 813, 815 (Sup. Ct. Orange County 1992) (holding that “on the foreclosure of a first mortgage of a residential unit the lien for unpaid common charges is extinguished”).

⁸² *See generally Coral Lakes Cmty. Ass’n*, 30 So. 3d 579. For example, the court in *Coral Lakes Cmty. Ass’n v. Busey Bank, N.A.* stated “that because of the Declaration’s plain and unambiguous language subordinating any claim for unpaid HOA assessments to a first mortgagee’s claim upon foreclosure or deed in lieu of foreclosure, it controls and absolves the Bank, as first mortgagee, from

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fact, many HOAs include a provision in their governing documents to “induce lenders to aid homeowners in purchasing property in the community by awarding them priority over the HOA’s claims for unpaid assessments.”⁸³ Banks are more comfortable giving mortgages to homeowners in HOA communities when the association assures the bank that, in the event of foreclosure, the bank will receive its money first.⁸⁴ Additionally, homeowners find it easier to secure mortgages with this language in the HOA’s governing documents, thus helping the community attract more buyers.⁸⁵ In the past, when foreclosure afforded HOAs a greater chance of recovering unpaid assessments, HOAs benefited from this relationship between the HOA, the homeowner, and the bank, since it brought more homeowners, and thus more income, into the community.⁸⁶ However, now that foreclosure fails to guarantee the HOA any proceeds, HOAs face the negative consequences of such drafting in their governing documents.⁸⁷

Another difficulty with foreclosure is that often a long delay exists between when the bank sends the homeowner a foreclosure notice and when the foreclosure process concludes.⁸⁸ In states such

liability for any assessments accruing before it acquires the parcel.” *Id.* at 583–84. Additionally, the court in *Shields v. Andros Isle Prop. Owners Ass’n* explained that “[r]estrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms[.]” *Shields v. Andros Isle Prop. Owners Ass’n*, 872 So. 2d 1003, 1005–06 (Fla. Dist. Ct. App. 2004). If a HOA has explicit language subordinating its lien to the bank’s lien, courts will give strong preference to upholding the language in the document. *See id.*

⁸³ *Coral Lakes Cmty. Ass’n*, 30 So. 3d at 581 n.1.

⁸⁴ *See id.* at 584.

⁸⁵ *See id.*

⁸⁶ *See id.* (noting that the HOA originally included language in its governing documents prioritizing the bank’s mortgage over its lien for unpaid assessments in order to “entice lenders to finance purchases in its community” and thus bringing more buyers into the community).

⁸⁷ *See* Wotapka, *New Home Sales Stuck at Rock-Bottom*, *supra* note 75 (noting the depressed prices of houses in foreclosure).

⁸⁸ *See* J. Craig Anderson, *Arizona HOAs Turn to Hardball Tactics; Critics Call System Inequitable, Some Owners Hounded to Pay Dues; Others Not*, ARIZONA REPUBLIC (Aug. 30, 2010, 12:00 AM), <http://www.azcentral.com>.

as Florida, where foreclosure cases currently overwhelm the courts' resources and time,⁸⁹ the courts move slowly processing all their foreclosure cases.⁹⁰ The Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases, charged with providing guidance and solutions for mortgage foreclosure cases, described the situation in Florida as follows:

Picture this: the biggest road out of town. Now imagine it is rush hour. In a thunderstorm. Add that it is also a hurricane evacuation. A lane is closed due to construction delayed by budget impacts. Imagine the traffic jam. The clearest description of the impact of the foreclosure crisis and the following recession on Florida's courts can be summarized by that picture. Imagine every car is a case The enormous increase in foreclosure filings has overwhelmed [the courts'] resources in many circuits and represents a caseload traffic jam that the infrastructure cannot meet in a timely and efficient manner⁹¹

Since courts severely lack resources, they simply cannot move efficiently through foreclosure cases.⁹² The community suffers as a

com/news/articles/2010/08/30/20100830hoa-arizona-service-critics.html [hereinafter Anderson, *Arizona HOAs Turn to Hardball Tactics*].

⁸⁹ Florida is an example of a judicial foreclosure state. *See generally* FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FINAL REPORT AND RECOMMENDATIONS ON RESIDENTIAL MORTGAGE FORECLOSURE CASES (Aug. 17, 2009), available at http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf [hereinafter TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES]. In judicial foreclosure states, foreclosures are processed through the courts, while in non-judicial foreclosure states, statutes establish foreclosure requirements rather than the courts. Catherine Rampell, *Answers to Your Questions on the Foreclosure Crisis, Part II*, N.Y. TIMES, Oct. 21, 2010, <http://economix.blogs.nytimes.com/2010/10/21/answers-to-your-questions-on-the-foreclosure-crisis-part-ii/>. Therefore, the problems associated with the courts' inefficient management of foreclosure cases relate only to those states requiring judicial foreclosure.

⁹⁰ *See generally* TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 89 (explaining that delays exist in the foreclosure process due to lack of resources in the courts).

⁹¹ *Id.* at 4.

⁹² *See id.*

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result of the slow pace of foreclosure cases because, during the proceedings, delinquent owners fail to pay assessments, and Florida does not require banks to pay the unpaid assessments until title has passed.⁹³

Similar to the courts, the banks also proceed very slowly in foreclosure cases, impeding the HOA's ability to collect unpaid assessments.⁹⁴ If the foreclosure process takes a long time to complete, which is likely given that the "[r]epeated postponement of foreclosure-sale dates has become commonplace,"⁹⁵ the homeowner is responsible for all the fees in the interim, which he likely will not pay.⁹⁶ Amanda Shaw, president of Phoenix-based community-management firm Associated Asset Management, described how Phoenix is currently grappling with this problem.⁹⁷ She explains that "[o]ver the past 18 months [as of August 2010], 120,000 Phoenix-area HOA members have received foreclosure notices, which often prompt the homeowners to move out in anticipation of a trustee sale and the loss of their home."⁹⁸ However, in most cases the lender still needs to complete the foreclosure process, and in the interim the original homeowner who moved out is responsible for paying the assessments.⁹⁹

Even when the bank takes a long time to complete the foreclosure process, the bank is often not responsible for the assessments on the unit.¹⁰⁰ For example, in *U.S. Bank Nat'l Ass'n v. Tadmire*, the Condominium Association¹⁰¹ filed a motion to

⁹³ *See id.* at 26.

⁹⁴ *See Timiraos, supra* note 48.

⁹⁵ Anderson, *Arizona HOAs Turn to Hardball Tactics, supra* note 88.

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *See, e.g., Deutsche Bank Nat'l Trust Co. v. Coral Key Condo. Ass'n* (at Carolina), 32 So. 3d 195, 196 (Fla. Dist. Ct. App. 2010); *U.S. Bank Nat'l Ass'n v. Tadmire*, 23 So. 3d 822, 823 (Fla. Dist. Ct. App. 2009). The bank might not be responsible for unpaid fees at all, or alternatively, the bank is not responsible for the fees during the pendency of the foreclosure action. *See U.S. Bank Nat'l Ass'n*, 23 So. 3d at 823.

¹⁰¹ While this case discusses a Condominium Association, the statute used to reach the decision applies to all mortgagees who "acquire title to a unit by

“compel the Bank to either proceed with its foreclosure action or to commence paying the \$939.56 monthly maintenance fee for the decedent’s condominium unit to the Association.”¹⁰² The Association made this motion after one year of waiting for the Bank to foreclose on the property, during which time the Association was unable to collect any assessments owed by the unit owner.¹⁰³ The Association claimed the court should use its equity power to order the bank to pay the assessments.¹⁰⁴ The court rejected the idea that equity demanded that the bank pay assessments while the foreclosure proceeding was pending.¹⁰⁵ Accordingly, the bank did not assume responsibility for paying assessments even in the face of a lengthy foreclosure proceeding.

However, the court did explain that the bank “may be required to pay condominium maintenance fees *after it acquires title* and then only in limited amount.”¹⁰⁶ Yet, this does not offer the HOA much relief.¹⁰⁷ In Florida, for example, the bank does not pay the association during the foreclosure proceedings, which can take approximately eighteen months or longer from the time the homeowner fails to make mortgage payments.¹⁰⁸ Then the amount owed to the HOA is statutorily reduced to a small percentage of the expense the HOA incurred to maintain the property.¹⁰⁹ This demonstrates that even those states providing some redress for HOAs who suffer during drawn-out foreclosure proceedings only allow HOAs to collect a minimal percentage of unpaid assessments

foreclosure” and thus applies to a situation where a bank forecloses on a unit owned by a HOA as well. *See* FLA. STAT. ANN. § 718.116 (West, Westlaw through ch. 274 (end) of the 2010 2d Regular Sess. of the 21st Legis. and ch. 283 of the 2010 Special “A” Sess. of the 22d Legis.).

¹⁰² *U.S. Bank Nat’l Ass’n*, 23 So. 3d at 823.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 823–24.

¹⁰⁶ *Id.* at 823.

¹⁰⁷ *See* Timiraos, *supra* note 48; TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 89, at 26.

¹⁰⁸ Timiraos, *supra* note 48.

¹⁰⁹ TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 89, at 26.

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after the bank completes the foreclosure sale.¹¹⁰

The long delay between initiating foreclosure and completing the foreclosure process only seems to be worsening.¹¹¹ In October 2010, banks began “suspending tens of thousands of foreclosures in the 23 U.S. states that handle foreclosure through the court system . . . pending a review of their paperwork practices.”¹¹² The banks’ foreclosure practices were called into question after it became apparent that banks employed “robo-signers,” who signed thousands of documents each month without appropriate review or notarization.¹¹³ This creates verification problems for the bank.¹¹⁴ First, the robo-signers likely did not check every affidavit to ensure that the bank employing them actually owned the mortgage.¹¹⁵ Second, although the notary step is supposed to occur when the robo-singer signs the affidavit, it often occurred at a much later date.¹¹⁶ While the banks suspended the foreclosures to improve the verification process, this does not indicate that the banks will forgive the unpaid mortgages.¹¹⁷ Instead, “the document issue will delay the foreclosure, but won’t change the outcome.”¹¹⁸ Accordingly, HOAs are harmed because homeowners, while still responsible for their assessments, often stop paying once they receive foreclosure notice.¹¹⁹ The longer the foreclosure process takes, the longer the HOA goes without collecting its

¹¹⁰ *See id.*

¹¹¹ *See* Robbie Whelan, *Foreclosure? Not so Fast*, WALL ST. J., Oct. 4, 2010, <http://online.wsj.com/article/SB10001424052748704029304575526182962738098.html>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Elizabeth Shell, *The Road to ‘Robo-Signing,’* PBS NEWSHOUR (Oct. 18, 2010, 4:00 PM), <http://www.pbs.org/newshour/rundown/2010/10/faulty-paper-work-lending-institutions-have.html>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Whelan, *supra* note 111; *see also* Shell, *supra* note 114 (“This is likely to mean delays to most people who are in foreclosure. This is not a silver bullet. The reality . . . is that most people signed a note, owe the money, and cannot pay.”) (internal quotation marks omitted).

¹¹⁸ Whelan, *supra* note 111.

¹¹⁹ *See* Anderson, *Arizona HOAs Turn to Hardball Tactics*, *supra* note 88.

assessments.¹²⁰

IV. ALTERNATIVE MEANS OF ENFORCING PAYMENT: BETTER DRAFTING IN THE HOAs' GOVERNING DOCUMENTS AND REARRANGING LIEN PRIORITY BASED ON COOPERATIVE LAW

Several hurdles exist that bar HOAs from collecting unpaid assessments through the foreclosure process in declining value markets.¹²¹ Yet, a range of solutions also exist for HOAs trying to collect unpaid assessments.¹²² The HOA can use better drafting techniques in creating its governing documents to explicitly state that it will be paid before the bank in a foreclosure proceeding or that the bank is responsible for paying a portion of the unpaid assessments after the sale.¹²³ Another option for the HOA is to

¹²⁰ This proposition assumes the homeowner stops paying his assessments once he receives notice of foreclosure.

¹²¹ See, e.g., Timiraos, *supra* note 48; TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 89, at 26.

¹²² There are several techniques HOAs can use to try to collect unpaid assessments, such as the imposition of late fees, sanctions, fines, and penalties. See HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE, *supra* note 30, at 120, 157–58. However, these methods offer little protection in a situation where the homeowner has stopped paying her mortgage, vacated the premises, and yet is still responsible for paying her assessments. Another option for the HOA is to withhold services. This too, however, leaves the HOA in a less-than-ideal situation. Now the homeowner who cannot pay her maintenance fees suffers the consequences, but so too does everyone else living in the community who must watch the subject property deteriorate. This has an adverse effect upon the neighborhood as a whole, both visually and economically. See *id.* at 159. HOAs can try other techniques as well, such as publishing a list of those homeowners who failed to pay their assessments in hopes that shame might convince the homeowners to pay; however, statutes now prohibit this tactic. See Lisa Magill, *Posting Debtor Lists to Collect Delinquent Condo & HOA Assessments*, FLORIDA CONDO AND HOA L. BLOG, (June 22, 2009), <http://www.floridacondohoalawblog.com/2009/06/articles/assessments-common-expenses/posting-debtor-lists-to-collect-delinquent-condo-hoa-assessments/>. Florida statutes also prohibit HOA from mailing anything to a debtor with words written on the envelope intended to embarrass the debtor or calling the debtor very early or very late at night. See *id.*

¹²³ See Coral Lakes Cmty. Ass'n v. Busey Bank, N.A., 30 So. 3d 579, 585 (Fla. Dist. Ct. App. 2010); Wayne S. Hyatt, *Condominium, and Home Owner*

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rearrange the lien priority structure between the HOA and the bank by borrowing aspects of cooperative law.¹²⁴ However, while both of these options provide some benefits for the HOA, overall they discourage banks from providing mortgages to purchasers in HOA communities, stifling the growth and economic advancement of the HOA and its community.¹²⁵ Lastly, the HOA can require that homeowners pay a security deposit upon purchase of a home in a HOA community. This provides the most viable solution for the HOA and its residents because it shifts the burden of unpaid assessments to the delinquent homeowners and incentivizes all homeowners to pay assessments in a timely fashion.¹²⁶

A. Better Drafting in the HOAs' Governing Documents

The HOA can use explicit language when drafting its governing documents, allowing the HOA to recover its unpaid assessments before the bank recovers its mortgage payments.¹²⁷ Alternatively, the HOA can include a provision in its documents stating that, even if the bank's lien takes priority over the HOA's lien, the purchaser, likely the bank, is still required to pay at least a portion of the unpaid assessments.¹²⁸ HOAs can look to new state statutes for guidance in establishing provisions that demand payments from the purchaser but are not too onerous as to create a disincentive for banks to loan any money to buyers. However, state statutes might not provide enough protection for HOAs.¹²⁹ Therefore, HOAs should borrow from the concept that the bank must pay a portion of the unpaid assessments, but should include in

Associations: Formation and Development, 24 EMORY L.J. 977, 990 (1975) [hereinafter Hyatt, *Condominium, and Home Owner Associations: Formation and Development*].

¹²⁴ See generally Dale A. Whitman, *Financing Condominiums and Cooperatives*, 13 TULSA L.J. 15 (1977).

¹²⁵ *Id.* at 15.

¹²⁶ See *infra* Part V.A–B.

¹²⁷ See *Coral Lakes Cmty. Ass'n*, 30 So. 3d at 585.

¹²⁸ See TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 89, at 26.

¹²⁹ See *id.*

its governing documents a requirement that the bank will pay a high enough percentage of the unpaid assessments to realistically help the HOA in its recovery.

For example, after a foreclosure sale in Florida “the delinquent amount [of assessments owed to a HOA] is statutory reduced to a mere fraction of an association’s expense to maintain the property.”¹³⁰ According to Florida’s Real and Personal Property laws governing HOAs, the purchaser is responsible to pay:

The parcel’s unpaid common expenses and regular periodic or special assessments that accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or . . . [o]ne percent of the original mortgage debt.¹³¹

Florida’s current statutory reduction to a mere fraction of what the HOA is owed presents an inadequate solution, since HOAs are unable to recover a fair portion of money owed from unpaid assessments.¹³² HOAs should therefore use state statutes as a guide, but not as an exact replica, of language to include in its governing documents ensuring an adequate payment from the bank of prior unpaid assessments. By including language ensuring that HOAs receive some payment for unpaid assessments, HOAs can put themselves in a more financially powerful situation with respect to banks, who otherwise are reluctant to give HOAs any money during or after the foreclosure process.¹³³

While this might help the HOA recover more during a foreclosure sale, this benefit is outweighed by the negative consequences resulting from its implementation.¹³⁴ First, if the

¹³⁰ *Id.*

¹³¹ FLA. STAT. ANN. § 720.3085 (West, Westlaw through ch. 274 (end) of the 2010 2d Regular Sess. of the 21st Legis. And ch. 283 of the 2010 Special “A” Sess. of the 22d Legis.). However, in *Coral Lakes Cmty. Ass’n v. Busey Bank, N.A.*, the Court notes that this statute did not apply retroactively and cannot be used to contradict the plain language of the governing documents. *See Coral Lakes Cmty. Ass’n*, 30 So. 3d at 583–84.

¹³² *See Coral Lakes Cmty. Ass’n*, 30 So. 3d at 583–84.

¹³³ *See generally Coral Lakes Cmty. Ass’n*, 30 So. 3d 579.

¹³⁴ *See id.* at 584.

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language in the governing document states that the HOA could collect unpaid assessments before the bank received its money, banks would be reluctant to give mortgages to homeowners looking to live in HOA communities.¹³⁵ This presents an unworkable solution since the bank was “the entity that previously made the . . . purchase of the home possible.”¹³⁶ Punishing the bank for delinquent homeowners’ failure to pay assessments causes banks to give fewer mortgages to individuals in HOA communities and therefore indirectly hurts the HOA.¹³⁷ Second, if the HOA includes language that a purchaser is responsible for paying a portion of the unpaid assessments, this might discourage potential buyers, including the bank, from purchasing or foreclosing the unit.¹³⁸ If banks are discouraged from foreclosing on a unit, then this presents the same problem addressed earlier where banks are reluctant to foreclose and the HOA must find another enforcement solution.¹³⁹

B. Rearranging Lien Priority Based on Cooperative Law

Another option for the HOA that shifts the burden of unpaid assessments to the bank is for the HOA to borrow aspects of the law governing cooperatives (“co-ops”).¹⁴⁰ Similar to HOA communities, co-ops are “legal formats for ‘unit ownership’—that is, the ownership of a physically defined portion of a larger parcel of . . . real property.”¹⁴¹ The owner of a co-op unit is a member of an organization made up of other owners, who all share

¹³⁵ See *id.* at 585. Banks would be reluctant to give mortgages because if the HOA subordinated the bank’s mortgage to its own lien for unpaid assessments this would “place the economic burden” on the bank, which would prefer not to have the added burden when giving a mortgage to a homeowner. See *id.*

¹³⁶ *Id.*

¹³⁷ See *id.* (explaining that language in the HOA’s governing documents giving the bank’s lien priority over the HOA’s lien benefits the community).

¹³⁸ See *id.*

¹³⁹ See *supra* Part III.A–B.

¹⁴⁰ See generally Whitman, *supra* note 124.

¹⁴¹ *Id.* at 15.

responsibility for maintaining and managing common areas.¹⁴²

One of the main differences between co-ops and HOA communities, however, is that in a co-op, a single corporation owns both the units and the common areas.¹⁴³ The corporation owning the co-op provides unit owners with two documents—a proprietary lease¹⁴⁴ and a stock certificate.¹⁴⁵ These documents establish the unit owner's ownership in a share of the corporation and his right of possession of a particular unit. Consequently, instead of owning their individual units, co-op owners own shares in a corporation that leases apartments to its shareholders.¹⁴⁶

Since co-op owners own shares in a corporation rather than owning actual real property, laws governing co-ops are vastly different from laws governing HOA communities.¹⁴⁷ For example, in New York, the state's Uniform Commercial Code, which relates to commercial transactions, governs co-ops.¹⁴⁸ The Code "unambiguously gives co-op corporations an automatic first lien on a shareholder's apartment . . . provided that the bylaws or proprietary lease give the co-op such a lien."¹⁴⁹ This differs from laws governing real property, such as ownership of a unit in a

¹⁴² *Id.* at 16.

¹⁴³ *See id.* at 17.

¹⁴⁴ A proprietary lease is a document authorizing a shareholder's right to use one of the apartments in a co-op building under the conditions specified in the lease. Jay Romano, *YOUR HOME; Proprietary Co-op Lease: New Model*, N.Y. TIMES, Dec. 17, 2000, <http://www.nytimes.com/2000/12/17/realestate/your-home-proprietary-co-op-lease-new-model.html>.

¹⁴⁵ *See* Whitman, *supra* note 124, at 18. A stock certificate designates the number of shares in the co-op that the co-op owner holds. Jay R. Fialkoff, *Real Estate and Title Insurance Trends: The Importance of Being 'Earnest', Does Defaulting Co-op Buyer Forfeit Deposit? Well, Maybe*, N.Y. L.J., Nov. 27, 2000, <http://mosessinger.com/articles/files/importance.pdf>.

¹⁴⁶ Jay Romano, *YOUR HOME; New Rules on Loans for Co-ops*, N.Y. TIMES, July 29, 2001, <http://www.nytimes.com/2001/07/29/realestate/your-home-new-rules-on-loans-for-co-ops.html?scp=1&sq=New%20Rules%20on%20Loans%20for%20Co-ops&st=cse>.

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

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HOA community.¹⁵⁰ In the real property context, the bank secures the loan it gives to a homeowner to purchase a unit by taking a mortgage on the property, which the bank can foreclose if the homeowner fails to repay his loan.¹⁵¹ By recording the mortgage, the lender establishes the legal priority of his lien over other liens, such as that held by the HOA for unpaid assessments.¹⁵² Therefore, one critical difference between the corporation's lien on a unit in a co-op as opposed to the HOA's lien on a unit in a HOA community is that the corporation's lien is given priority;¹⁵³ if the corporation must recover unpaid fees, it can do so before the bank recovers its mortgage.¹⁵⁴

Consequently, co-op ownership places a higher burden on the bank, since a co-op corporation's lien takes priority over the bank's lien.¹⁵⁵ Lenders, such as banks, are always concerned with the priority of their mortgage loans against the HOAs' liens for unpaid assessments.¹⁵⁶ Thus, banks loan money to buyers more readily if the bank's lien is prioritized because the bank is then first in line for repayment if the borrower defaults.¹⁵⁷ Arranging the priority of lien payments so that the bank's lien is subordinated to the co-op's lien discourages banks from loaning to individuals in co-ops, and accordingly might not provide an ideal structure for HOAs to emulate.¹⁵⁸

Without the assurance that banks are paid first, banks hesitate to loan money, and thus potential buyers would struggle to secure mortgages in order to purchase homes in a HOA communities.¹⁵⁹ This ultimately hurts the HOA and the homeowners because,

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Whitman, *supra* note 124, at 46.

¹⁵⁷ *See id.* at 47.

¹⁵⁸ *See id.* (“[s]ubordination of the association’s lien to the first mortgage . . . is generally thought advantageous to lenders,” and therefore without this advantage, banks are more hesitant to lend).

¹⁵⁹ *See id.*

without the bank willing to lend money, the community faces additional difficulties in selling houses in the community.¹⁶⁰ Property prices for the unsold houses would drop, decreasing the value of the other homes in the area.¹⁶¹ Further, with fewer homeowners in the association, the association would likely be unable to collect the assessments necessary to fully operate all of its services. While the bank's prioritization of its lien over the HOA's lien is "undesirable from the viewpoint of the association and its other members, since they will usually have to withstand an unusually heavy assessment to make up the delinquency of the foreclosed unit owners,"¹⁶² the HOA might actually fair better with a subordinated lien than if its lien took priority over the bank's lien. The co-op lien structure therefore might not provide a workable solution for HOAs, since allocating the burden of unpaid assessments to the bank would discourage banks from lending money to would-be-buyers.

Another difference between HOA communities and co-ops is the degree of reliance that exists between members of the community in terms of avoiding foreclosure.¹⁶³ In a co-op, the co-op corporation is typically the mortgager of the blanket mortgage¹⁶⁴ covering the building.¹⁶⁵ Thus, the members of a co-op are more dependent on the other members to successfully finance the building's mortgage, since all the co-op members together pay off the blanket mortgage.¹⁶⁶ If one co-op member defaults, the corporation suffers, as it will be short funds to pay off

¹⁶⁰ Difficulties in selling houses already exist in poor economic climates due to problems such as unemployment and a general lack of interest in buying homes. Saito, *supra* note 44.

¹⁶¹ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. b (2000); TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 89, at 16, 26 (explaining that the longer a house remains unoccupied and begins to decline in value, the worse the impact on the community).

¹⁶² Whitman, *supra* note 124, at 47.

¹⁶³ See *id.* at 20.

¹⁶⁴ A blanket mortgage is a mortgage covering the entire building.

¹⁶⁵ Whitman, *supra* note 124, at 18.

¹⁶⁶ Herbert J. Friedman & James K. Herbert, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 323-24 (1962); see also Whitman, *supra* note 124, at 20.

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the mortgage.¹⁶⁷ Additionally, the other members directly suffer since they have to make up the difference.¹⁶⁸ If the other members cannot cover the money owed by the defaulting member, this could trigger foreclosure of the entire co-op.¹⁶⁹

Contrastingly, in a HOA community, each individual unit owner is his own mortgager on his unit.¹⁷⁰ Therefore HOA communities provide better protection for homeowners against the harms resulting from defaulting homeowners since in HOA communities each individual homeowner is responsible for his own mortgage.¹⁷¹ Thus, if a homeowner in a HOA community defaults, his default “cannot directly trigger foreclosure . . . of the unit belonging to a non-delinquent owner.”¹⁷²

While HOA communities do provide a layer of protection to non-delinquent homeowners by protecting them from foreclosure against their own units when another member defaults, this benefit dissipates slightly in poor economic climates. First, HOA communities can no longer offer the same protections against foreclosure of non-defaulting individuals’ units since individuals are defaulting at such increasing rates.¹⁷³ As more homeowners in HOA communities fail to pay their assessments, the association becomes paralyzed by its lack of funding.¹⁷⁴ Since, for the reasons discussed above, foreclosure is not a viable or helpful option in poor economic climates,¹⁷⁵ HOAs struggle to find ways to replace delinquent homeowners with homeowners able to pay their

¹⁶⁷ Friedman & Herbert, *supra* note 166.

¹⁶⁸ *See id.*; Whitman, *supra* note 124, at 20.

¹⁶⁹ *See* Friedman & Herbert, *supra* note 166; Whitman, *supra* note 124, at 20.

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² Whitman, *supra* note 124, at 20; *see also* Friedman & Herbert, *supra* note 166.

¹⁷³ Jurov, *supra* note 42 (explaining that some HOAs face delinquency rates of fifteen percent or more, causing serious revenue shortfalls).

¹⁷⁴ *See* Anderson, *HOA Groups in Arizona*, *supra* note 17; Giantomasi, *supra* note 18, at 2512 (noting that HOA’s cash flow can become severely unstable if homeowners fail to pay assessments).

¹⁷⁵ *See supra* Part III.A–B.

assessments.¹⁷⁶ To compensate for the unpaid assessments owed by delinquent homeowners, one of the most feasible options for the HOA is to increase the assessments for homeowners who are able to pay.¹⁷⁷ This increase makes it harder for the remaining homeowners to pay the full amount they now owe on their assessments, causing even more homeowners to default.¹⁷⁸ In this scenario, defaulting homeowners in a HOA community can cause other homeowners to default on their own mortgages, possibly triggering foreclosure; albeit defaulting members cannot directly trigger foreclosure of non-defaulting members' houses. Such high default rates on behalf of individual homeowners seriously threaten an association's solvency.¹⁷⁹ Consequently, the advantage that HOA communities possessed over co-ops in terms of preventing foreclosure against non-defaulting individuals becomes more tenuous as the economy suffers and the HOA finds itself subject to the possibility of insolvency.¹⁸⁰

Second, HOAs cannot provide the same level of protection for non-defaulting homeowners against foreclosure in economically challenging times because the HOA has a difficult time evicting delinquent owners and replacing them with owners who can pay their full assessments.¹⁸¹ Without replacing delinquent homeowners, the HOA cannot collect unpaid assessments and the association and the other homeowners suffer and might eventually face insolvency.¹⁸² Despite a co-op's difficulty in protecting non-delinquent members from facing foreclosure if other co-op

¹⁷⁶ See Whitman, *supra* note 124, at 20.

¹⁷⁷ See Anderson, *HOA Groups in Arizona*, *supra* note 17 (stating that homeowners who diligently pay their fees are forced to face the consequence of increased assessments as a result of delinquent homeowners); Timiraos, *supra* note 48 (explaining that "with empty pockets, more . . . associations are forced to raise homeowner dues").

¹⁷⁸ See Timiraos, *supra* note 48 (questioning "[h]ow many of these owners are actually going to be able to pay an additional assessment").

¹⁷⁹ See Whitman, *supra* note 124, at 20; Anderson, *HOA Groups in Arizona*, *supra* note 17.

¹⁸⁰ See Friedman & Herbert, *supra* note 166, at 324; Whitman, *supra* note 124, at 20.

¹⁸¹ See Whitman, *supra* note 124, at 20.

¹⁸² See *id.*; Anderson, *HOA Groups in Arizona*, *supra* note 17.

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members fail to pay, a co-op has an easier time quickly evicting delinquent members and thus eliminating this problem.¹⁸³ The cooperative can

treat the delinquent member as a tenant¹⁸⁴ and use unlawful detainer or other summary process to evict him In a [HOA], by contrast, the usual remedy is foreclosure of the association's lien on the unit, an action which normally enjoys no calendar preference and may take many months to complete.¹⁸⁵

Therefore, in poor economies HOAs struggle to provide adequate protection against foreclosure for non-delinquent members since they cannot quickly replace defaulting owners with individuals who can readily pay their assessments.

Despite the difficulties HOAs face in shielding their members from foreclosure based on other member's inability to pay assessments, HOAs still provide non-defaulting members more protection against foreclosure than co-ops provide their members.¹⁸⁶ Unlike the co-op structure, which allows for one member's default to directly trigger foreclosure of the entire building,¹⁸⁷ the HOA structure prevents the default of one homeowner to cause any direct foreclosure proceedings against non-delinquent owners.¹⁸⁸ Adopting the co-op structure therefore might actually endanger non-delinquent HOA members more than it would offer protection.¹⁸⁹

¹⁸³ See Whitman, *supra* note 124, at 20.

¹⁸⁴ For an explanation of reasons why the cooperative can treat the delinquent member as a tenant, see *Sun Terrace Manor v. Mun. Court*, 108 Cal. Rptr. 307, 307 (Cal. Ct. App. 1973) (considering the approach of Maryland and New York and the opinion of a writer for the California Law Review, which all conclude that “[t]he relationship between the [shareholder-tenant] and the [corporate cooperative] is that of landlord and tenant”).

¹⁸⁵ Whitman, *supra* note 124, at 20–21 n.14.

¹⁸⁶ See *id.* at 20.

¹⁸⁷ See *id.*

¹⁸⁸ *Id.*

¹⁸⁹ See *id.*

V. THE USE OF SECURITY DEPOSITS PROVIDES THE GREATEST PROTECTION FOR HOAs AND THEIR MEMBERS BY INCENTIVIZING ALL MEMBERS TO PAY THEIR ASSESSMENTS ON A TIMELY BASIS

Another option for HOAs attempting to collect unpaid assessments is to use security deposits to re-allocate the burden of not paying assessments to the delinquent homeowners.¹⁹⁰ This method ensures that homeowners are incentivized to pay assessments in a timely manner in order to recover their security deposit.¹⁹¹ It also protects homeowners against paying increased assessments as a result of other members' defaults, since fewer members default after paying a deposit.¹⁹² The security deposit method allows a HOA to use a defaulting member's deposit to cure his default, as well as secure payments during the foreclosure process.¹⁹³ Finally, homeowners will not lose money by paying a security deposit, as they do by paying increased assessments, but rather will receive interest accruing on their deposit.¹⁹⁴ Therefore, requiring a security deposit from buyers provides a HOA with the greatest security against defaults and insolvency.

A. Background on Security Deposits

A security deposit in the real estate context is most common in a landlord-tenant relationship.¹⁹⁵ It is a deposit of cash or other assets from the tenant given to the landlord for the landlord to use in the event the tenant defaults.¹⁹⁶ Defaults result from failure to

¹⁹⁰ See generally Sidney G. Saltz, *Nonresidential Security Deposits*, 27 REAL ESTATE L.J. 225 (1999).

¹⁹¹ See *id.*

¹⁹² See John D. Benjamin, Cris de la Torre & Jim Musumeci, *Controlling the Incentive Problems in Real Estate Leasing*, 10 J. REAL ESTATE FIN. & ECON. 177, 186 (1995).

¹⁹³ See Saltz, *supra* note 190, at 230.

¹⁹⁴ See Mary N. Harrison, *Landlords and Tenants: Rules and Regulations*, UNIV. OF FLA., 1, 3 (Sept. 2005), <http://edis.ifas.ufl.edu/pdf/HE/HE73600.pdf>.

¹⁹⁵ See generally Saltz, *supra* note 190.

¹⁹⁶ *Id.* at 225.

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make timely rent payments, failure to perform necessary repairs as instructed under the lease, or failure to vacate the premises at the expiration of the lease.¹⁹⁷ The landlord may adjust the security deposit throughout the term of the lease, in the event the rent increases, in order to continually ensure the deposit covers any unpaid costs.¹⁹⁸ This incentivizes the tenant to pay rent on time and maintain the premises because he will lose his deposit if he fails to do so.¹⁹⁹

A landlord usually prefers to collect the security deposit from the tenant when the lease is executed and delivered.²⁰⁰ This ensures that the deposit is made and it provides the landlord with a fund in the event the tenant defaults on his rent at an early date.²⁰¹ Further, after the landlord collects the deposit he continuously checks that the deposit level does not drop.²⁰² For example, if the landlord must use the deposit, whether in part or in total, to cure a default, the landlord requires the tenant to refill the deposit to the original amount by making further payments.²⁰³ “While the requirement that the tenant replenish the security deposit may, in effect, result in trading one default for another, in the absence of such a requirement, the tenant may be deemed to have cured the default by virtue of the application of the security deposit.”²⁰⁴ Accordingly, maintaining a full deposit from each tenant at all times is important for the landlord in order to guarantee funds always exist to cure defaults, and to ensure that once the landlord

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* at 227. Another method of ensuring that the deposit is always capable of covering unpaid assessments is to “set the initial security deposit based on the final escalated rent.” *Id.*

¹⁹⁹ *See* Ralph J. Rohner, *Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act*, 35 CONN. L. REV. 647, 719 (2003) (“[T]he economic premise that any front-loaded payments, from a simple security deposit to full payment of the lease obligation . . . reduces the lessor’s risk and thus the consumer’s overall cost for the lease.” The lessor’s risk is reduced because the deposit ensures that the tenant pays.).

²⁰⁰ Saltz, *supra* note 190, at 228.

²⁰¹ *Id.*

²⁰² *See id.* at 230.

²⁰³ *See id.*

²⁰⁴ *Id.*

applies the deposit to the deficiency he still possesses a claim against the defaulting tenant.²⁰⁵

Once the landlord receives the security deposit, he becomes responsible for the money.²⁰⁶ Several options exist for how the landlord holds the money,²⁰⁷ but the tenant prefers that the deposit be held in some form of trust on his behalf and that his deposit not be comingled with the landlord's other funds.²⁰⁸ The landlord should provide information to the tenant regarding how he holds the money, including the rate of interest, if any, that the tenant will receive and the time the interest payments will be made.²⁰⁹ When the tenant decides to end the lease, the landlord is required to return the security deposit to the tenant less any money the tenant owes the landlord, unless the tenant vacates or abandons the premises before the lease expires.²¹⁰ In that case, the landlord is not required to return the deposit.²¹¹ This provides an incentive for the tenant to comply with the terms of the lease in order to recover his full deposit.²¹²

B. Benefit to the HOA and its Members of Requiring Security Deposits from Homeowners

The landlord-tenant relationship and the use of security deposits to establish trust and accountability between the two parties provide a good analogy for homeowners and the HOA. As

²⁰⁵ See *id.* at 229–30.

²⁰⁶ See generally *id.* (explaining the landlord's responsibilities when dealing with the tenant's deposit).

²⁰⁷ The landlord can comingle the security deposit with other funds, isolate the deposit, invest the funds on the tenant's behalf, or hold the deposit in trust for the benefit of the tenant. See *id.* at 237–38; R. Wilson Freyermuth, *Are Security Deposits "Security Interests"? The Proper Scope of Article 9 and Statutory Interpretation in Consumer Class Actions*, 68 MO. L. REV. 71, 81–82 (2003). Further, the tenant might require the landlord to "periodically prove that the funds are intact." Saltz, *supra* note 190, at 238.

²⁰⁸ See Saltz, *supra* note 190, at 237–38; Harrison, *supra* note 194, at 3.

²⁰⁹ See Harrison, *supra* note 194, at 3.

²¹⁰ *Id.* at 3–4.

²¹¹ See *id.*

²¹² See Benjamin, *supra* note 192, at 186.

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demonstrated in the landlord-tenant context, the use of a security deposit provides a strong incentive for tenants to comply with the rules set forth in their lease.²¹³ Similarly, HOAs looking to find new methods to force compliance in relation to paying assessments could use the security deposit method.²¹⁴ First, once the homeowner hands over a security deposit to the HOA he becomes more incentivized to make timely assessment payments.²¹⁵ If he fails to make timely payments, the HOA uses the defaulting homeowner's deposit to cure the deficiency and requires that the homeowner replenish the lost funds.²¹⁶ If the homeowner cannot replenish the funds, he recovers less of his security deposit if he decides to move.²¹⁷ If, however, the homeowner continues to timely pay his assessments, he receives his total deposit back from the HOA plus any interest that his deposit earned while held in trust on his behalf.²¹⁸

Second, by requiring a security deposit, the HOA receives a cushion in case the homeowner fails to pay.²¹⁹ The HOA can apply the security deposit to cure the homeowner's default, protecting the association and other homeowners.²²⁰ Third, if the HOA applies the deposit to cure the delinquent assessment payments and the homeowner subsequently fails to replenish his deposit, this provides notice to the HOA that it might have to consider foreclosure. However, unlike the foreclosure process explained above,²²¹ if the HOA has a security deposit it can continue to use the funds in the deposit to pay the delinquent assessments throughout the foreclosure proceedings.²²² Even if the funds

²¹³ See Saltz, *supra* note 190, at 225.

²¹⁴ See *generally id.* (noting the considerations of landlords and tenants in determining an appropriate security deposit amount).

²¹⁵ See *supra* note 199 and accompanying text.

²¹⁶ See Saltz, *supra* note 190, at 229–30.

²¹⁷ See Harrison, *supra* note 194, at 3.

²¹⁸ See Saltz, *supra* note 190, at 236–37; Harrison, *supra* note 194, at 3.

²¹⁹ See Saltz, *supra* note 190, at 230.

²²⁰ See *id.*

²²¹ See *supra* Part III.A–B.

²²² See Saltz, *supra* note 190, at 230 (explaining how the landlord can use the funds in the deposit to make up for unpaid rent payments).

eventually run out because of the slow pace of foreclosure, at least for a period during which the foreclosure case is pending the HOA can collect for unpaid assessments. Therefore, the HOA can once again rely on the foreclosure mechanism with the added cushion from the security deposit to protect it in the event of a delayed foreclosure sale.

While utilizing a security deposit provides several benefits for HOAs looking to incentivize homeowners to pay assessments on time, the increased cost the homeowner must incur upon the initial purchase presents an important complication to this landlord-tenant model. In the HOA context, the HOA would have to require a fairly large security deposit to provide enough protection against defaults.²²³ This is especially true if the HOA has to initiate foreclosure on a unit since the foreclosure process can take a protracted amount of time.²²⁴ The homeowner would therefore need to obtain a large amount of funding to put towards the security deposit. This requires taking out a larger mortgage, which banks might hesitate to provide, or taking out the same mortgage but scaling down on the purchase price of the house and applying some of the money towards the deposit.²²⁵ Prospective

²²³ See *id.* at 227 (explaining that landlords base security deposit payments on the price of the rent). HOAs looking to impose security deposits would similarly base the deposit on the price of the assessments.

²²⁴ See Anderson, *HOA Groups in Arizona*, *supra* note 17.

²²⁵ See generally Gregory C. Chow & Sharon Bernstein Megdal, *An Econometric Definition of the Inflation-Unemployment Tradeoff*, 68 AM. ECON. REV. 446 (1978) (explaining that tradeoffs require giving up some of one item in order to gain more of another item). While the article discusses tradeoffs in the inflation-unemployment context, the same general principle of tradeoff as an economic theory applies here. The tradeoff situation occurs when a homeowner must pay a large security deposit, assuming a fixed available income, because now the homeowner has less money to spend on purchasing the house. Alternatively, the homeowner can avoid the tradeoff problem by taking out a larger mortgage, since then the homeowner does not have to dedicate part of the original mortgage to the security deposit payment but rather gets a new mortgage that reflects the price of the security deposit. This is assuming the homeowner can obtain a larger mortgage from the bank, which the bank may be reluctant to grant. Louis Uchitelle, *Bankers Expected to Stay Hesitant to Lend for Years*, N.Y. TIMES, July 5, 1991, <http://query.nytimes.com/gst/fullpage.html?res=9D0CE2D91738F936A35754C0A967958260&scp=1&sq=banks%20>

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homeowners are likely to be dissatisfied with these options, since they require borrowing more money or living in a smaller home. However, these disadvantages are offset against the benefits to the homeowner of requiring a security deposit.

While funding the security deposit might present an initial hardship in terms of obtaining finances,²²⁶ homeowners are likely more willing to pay an increased cost up front and be assured that their assessments will not rise at a later date.²²⁷ This is especially true in light of the current predicament homeowners face, where they are required to pay increasing assessments to cover the costs of delinquent homeowners.²²⁸ Homeowners might actually prefer to pay a pre-determined rate up front, rather than an undetermined rate at an unknown later date.²²⁹ Thus, paying an initial deposit actually provides the homeowner with greater security and puts him in a better position to allocate his budget according to costs that he can predict.²³⁰ Further, even though the homeowner pays an upfront deposit, he will not lose this money, unless he fails to pay

hesitant%20to%20give%20bigger%20mortgages&st=cse (explaining that in recessionary periods lenders, such as banks, are hesitant to provide loans and require “higher incomes from home buyers seeking mortgages, and often larger down payments”).

²²⁶ See Saltz, *supra* note 190, at 225–26.

²²⁷ See E. THOMAS GARMAN & RAYMOND E. FORGUE, *PERSONAL FINANCE* 272 (9th ed. 2008) (“Insurance is a mechanism for transferring and reducing pure risk through which a large number of individuals share in the financial loss suffered by members of the group as a whole. Insurance protects each individual in the group by replacing an uncertain—and possibly large—financial loss with a certain but comparatively small fee.”); see generally Mila Kofman & Lee Thompson, *Consumer Protection and Long-Term Care Insurance: Predictability of Premiums*, GEO. U. LONG-TERM CARE FINANCING PROJECT (Mar. 2004), <http://ltc.georgetown.edu/pdfs/consumer.pdf> (explaining that individuals purchase insurance and pay premiums in order to protect themselves against paying greater, unexpected costs at a later date). Similarly, the security deposit method would ensure predictability by requiring an upfront payment, and then protecting homeowners against unknown, potentially larger costs at a later date resulting from other homeowners’ failure to pay assessments.

²²⁸ See, e.g., Anderson, *HOA Groups in Arizona*, *supra* note 17; TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 89, at 26.

²²⁹ See *supra* note 227 and accompanying text.

²³⁰ See *id.*

his assessments.²³¹ Assuming the homeowner pays his assessments, he is entitled to receive his entire deposit back when he moves plus any interest his deposit earned.²³² Contrastingly, if the homeowner does not pay the deposit upfront, but instead is subjected to increased assessments later as a result of other homeowners failing to pay their assessments, the homeowner simply loses the money spent on the increased assessments.

Additionally, since homeowners have less of an incentive to pay their assessments on time without a security deposit, a greater probability exists that homeowners will default if the HOA does not use the security deposit method.²³³ Even assuming the worst scenario—that the HOA has commenced foreclosure on a unit due to unpaid assessments but has not completed the process before it extinguishes the funds from the security deposit—the HOA and other homeowners should still suffer less of a financial burden than they would without the deposit, since presumably fewer homeowners will find themselves defaulting on assessments after paying a deposit. The HOA therefore should not find itself in the predicament outlined above, where several members of the community fail to pay assessments and threaten the solvency of the association, forcing it to raise assessment costs for other members.²³⁴ Consequently, the homeowner is better off paying the security deposit upfront, despite the initial difficulty obtaining the funding, because it will help decrease the chances of assuming the financial responsibility of the delinquent homeowners at a later date.²³⁵

VI. CONCLUSION

Considering the options available to a HOA to strengthen its ability to collect assessments, the security deposit method provides the greatest incentive for homeowners to pay assessments on time

²³¹ See Harrison, *supra* note 194, at 4.

²³² See Saltz, *supra* note 190, at 236–37.

²³³ See Benjamin, *supra* note 192, at 186.

²³⁴ See *supra* Part III.A–B.

²³⁵ See *supra* note 227 and accompanying text.

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and to ensure that the burden of unpaid assessments falls to the defaulting homeowner. The delinquent homeowners represent the ideal group to bear the burden of unpaid assessments, since they created the burden initially. Paying a security deposit also encourages homeowners to quickly cure any defaults. Thus, HOAs should consider requiring a security deposit from all homeowners upon purchase of a unit in HOA communities. With money available to cure defaults and protect the HOA and its members, Mr. Furman and other similarly situated homeowners can once again enjoy the benefits of living in a HOA community.