

STATEMENT OF PRINCIPLES

HOA SUPER PRIORITY LIENS

Within state legislatures and the courts, a debate has been taking place over whether priority lien status should be granted to one private party over another private lienholder that has followed proper procedures to record a first lien. In some jurisdictions, the debate over “super priority” liens has even extended to whether or not the subordinately filed lien should be granted the ability to extinguish liens recorded first in time.

The trade association signatories to this statement affirm the following as their joint public policy position on super priority liens for common interest communities, including condominiums, planned communities, and real estate cooperatives (referred to here, collectively, as HOAs):

- We support the bedrock principle in real estate finance of “first in time, first in right,” that any private lien secured after origination of a property’s first lien mortgage or deed of trust should not take priority over that mortgage or deed of trust in foreclosure (i.e. “payment priority”), or have the ability to extinguish the mortgagee’s interests (i.e. “true priority”).
- We are opposed to policy initiatives that seek to give priority lien status to one private party ahead of another private lienholder that has followed proper procedures to record their lien. These initiatives run contrary to the very heart and nature of secured lending, and can destabilize the entire real estate finance system by undermining the value of the collateral securing a loan — resulting in higher costs that will ultimately be borne by consumers.
- If state policymakers decide to proceed contrary to this core principle and allow for an HOA super priority lien within their jurisdiction, this lien should exist as a payment priority that is satisfied from the proceeds of a foreclosure sale conducted by a superior lienholder or encumbrancer. At no time should this lien hold true priority status with the capacity to extinguish a mortgagee’s superior interests in a property. Additionally, if a payment priority HOA super lien exists:
 - What is included within this lien must be expressly defined.
 - The associated costs must be reasonably limited. Included in the HOA super priority lien should only be the following:
 - Six months of delinquent regular assessments owed to the HOA by the homeowner, based on the HOA’s current periodic budget year, and excluding special assessments;
 - An interest rate based on the lien amount that is commercially reasonable and based on interest rates for other collection actions; and
 - Reasonable collection costs for the aforementioned six months of delinquent assessments, which should be defined by prescribed limits. The costs should be similar to amounts incurred in other collection actions, and must not be framed within generic statements of law — examples of generic statements of law include “attorney’s fees” or “necessary costs.”

- The maximum amount of an HOA super priority lien should be capped at one percent of the mortgage amount.
- An HOA's super lien should lose its payment priority status if the HOA sells its lien interest to a third party.

American Bankers Association
American Financial Services Association
Association of Mortgage Investors
Housing Policy Council of the Financial Services Roundtable
Mortgage Bankers Association
Securities Industry and Financial Markets Association
Structured Finance Industry Group

APPENDIX

HOA SUPER PRIORITY LIENS

July 23, 2015

Issue History:

In 1982, the Uniform Law Commission (ULC) developed the *Uniform Common Interest Ownership Act* (UCIOA)¹ as model law. UCIOA contained language for the formation, management, and termination of common interest communities, including condominiums, planned communities, and real estate cooperatives (referred to here, collectively, as HOAs). Prior to UCIOA, the ULC developed related models in the late 1970s: the *Uniform Condominium Act* (UCA)² and the *Uniform Planned Community Act* (UPCA).³ Since their creation, more than 20 jurisdictions have adopted variations of these acts or their amended versions — in whole or in part.⁴

Notably, the ULC suggested in each model that HOAs should hold a “super priority” lien on a property for several months of delinquent assessments. Typically, adopting jurisdictions have quantified the super priority lien as between six and nine months of unpaid amounts and related collection costs.

For decades, HOA super priority liens have been enforced as a “payment priority” from the proceeds of a foreclosure sale conducted by a superior lienholder or encumbrancer. However, in 2014 the Nevada Supreme Court⁵ and the District of Columbia Court of Appeals⁶ ruled that HOA super priority liens are “true priority” liens — meaning an HOA may conduct a foreclosure sale on this lien and if an otherwise superior lienholder or encumbrancer does not act to satisfy it, their otherwise advanced lien interest will be extinguished.

Existing Dangers:

These rulings⁷ — shifting HOA super liens from a payment priority to a true priority — have created profound, unintended consequences for mortgage lenders, the servicers of their loans, and the housing industry at large:

- In a true priority jurisdiction, a relatively diminutive HOA super priority lien amount — likely totaling in the thousands of dollars — now has the capacity to wipe out a mortgage or deed of trust worth hundreds of thousands of dollars. In the prior noted Nevada Supreme Court case, an HOA foreclosure sale was executed for \$6,000, in order to satisfy a delinquent \$4,500 HOA super priority

¹ [http://www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20\(1982\)](http://www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20(1982)).

² <http://www.uniformlaws.org/Act.aspx?title=Condominium%20Act>.

³ <http://www.uniformlaws.org/Act.aspx?title=Planned%20Community%20Act>.

⁴ According to the ULC’s [website](#), as of July 23, 2015 nine states have adopted UCIOA: AK, CO, CT, MN, NV and WV (1982 version); and CT, DE and VT (2008 version). Additionally, 14 states have adopted UCA: AL, AZ, KY, ME, MN, MO, NE, NM, PA, RI, TX, VA, WA and WV. Pennsylvania has also adopted UPCA. However, it is likely that the ULC’s aforementioned list is not definitive, given that Tennessee’s [existing condominium law](#) and the District of Columbia’s [existing condominium law](#) are both similarly structured to the UCA model and are not listed on the ULC’s website.

⁵ *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*

⁶ *Chase Plaza Condominium Assoc. Inc. v. JPMorgan Chase Bank, N.A.*

⁷ In 2012, a Washington State case — *Summerhill Village Homeowners Assoc. v. Roughley* — also established true priority for that State’s HOA super liens. Note that these are state interpretations of their laws, and these decisions are only controlling in states where and when they are made.

lien amount.⁸ This resulted in a loss of \$885,000 for the otherwise superior first lien mortgagee through lien extinguishment.

- HOAs do not always provide appropriate notice to a superior lienholder or encumbrancer that a super priority lien amount is delinquent — resulting in mortgage servicers being unaware of lien concerns until well after the HOA foreclosure sale has been conducted. Inadequate state notice requirements exacerbate this problem.
- Even if a servicer does determine that a property is subject to an HOA super priority lien, communication with HOAs is often difficult. Most HOAs do not have current registered agent information on file with their secretary of state and less than 20 percent are managed by a professional company.
- Numerous “payoff” issues have also arisen, including HOAs improperly rejecting servicers’ tender to satisfy the statutorily mandated super priority lien amount — in order to instead collect their full delinquent costs in foreclosure. In certain instances, some HOAs have even affirmatively refused to disclose to servicers the amount owed.
- Further, there is no mechanism to dispute the super priority lien amount purportedly owed by the homeowner, which essentially represents a private dispute with no judicial finding of the validity of the HOA’s claim.
- Moreover, speculative investors have begun capitalizing on HOA foreclosure sales in order to experience windfall profits upon resale.
- Over 1,000 Nevada cases are being litigated to determine whether clear title existed for purchasers at HOA foreclosure sales, and subsequently whether proper notice was given by HOAs to first lien mortgagees before these sales were executed. If the courts determine notice was proper under Nevada law and clear title exists, holders of first lien deeds of trust will lose hundreds of millions of dollars.

If other jurisdictions begin adopting a true priority standard, many of the aforementioned consequences will inevitably result there as well, leading to serious financial impacts that will directly harm consumers:

- Lenders in true priority jurisdictions will need to financially account for the risks related to possible extinguishment in order to continue originating mortgage loans. The impact this might have on a consumer’s loan will depend on an individual lender’s risk mitigation strategy. For example, a lender might price the related risk into higher interest rates, mitigate it through higher down payment requirements, or completely exit risky jurisdictions altogether. Inevitably, any option will have a negative impact on consumers seeking mortgage credit or refinance options in a time when the market is experiencing the lowest interest rates in decades. It may even impact homeowner property sales as consumers are offered less favorable loan terms for homes in HOA-managed areas.
- Aside from access to credit and property sale impacts, homeowners are also vulnerable to additional risks in a true priority jurisdiction. They could inadvertently lose their homes (and their hard-earned equity) in the course of an assessment dispute with their HOA. Added concerns arise when a

⁸ See *supra* note 5 (the specific lien amount owed ranged from \$1,149.24 when the notice of delinquency was recorded to \$4,542.06 when the notice of sale was sent).

homeowner is out of town, sick, etc. for an extended time period and inadvertently neglects to stay current on their HOA assessments. These concerns exist even if a homeowner is mortgage-free.

Notably, true priority HOA super liens significantly affect several public programs and federal government interests, including the Federal Housing Administration's (FHA) mortgage insurance program — which helps create sustainable homeownership opportunities for first-time and low- to moderate-income homebuyers, and the Federal Housing Finance Agency's (FHFA) conservatorship of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Given the magnitude of these concerns, numerous legal actions have been undertaken to challenge the appropriateness of true priority HOA super liens:

- In September 2014, the U.S. District Court for Nevada marginally limited the Nevada Supreme Court decision, barring HOA foreclosure sales on first lien deeds of trust in Nevada that are insured through FHA. The District Court held in *Washington and Sandhill Homeowners Association v. Bank of America N.A.* that the U.S. Constitution's Supremacy Clause bars foreclosure sales of this type and renders them invalid.
- Additionally, FHFA has directly intervened in several actions on this true priority issue. In June 2015, FHFA and Fannie Mae successfully challenged the ability of HOA super priority liens to extinguish federal government property interests in a case before the U.S. District Court for Nevada. In *Skylights LLC v. Byron et al*, FHFA and Fannie Mae did not dispute that recently upheld Nevada law allows an HOA's foreclosure of its super priority lien to extinguish an otherwise first position deed of trust if that lien is not properly satisfied by an otherwise superior lienholder or encumbrancer. However, FHFA and Fannie Mae counterclaimed that provisions of the federal *Housing and Economic Recovery Act of 2008* (HERA) prohibit an HOA from foreclosing on Fannie Mae's property interests without the consent of its conservator, FHFA. Given that FHFA did not consent to the extinguishment in question (and has publically stated it will not do so),⁹ the District Court determined that the HOA's foreclosure sale did not extinguish Fannie Mae's property interests, nor allow the property to be conveyed free of this encumbrance.
 - Importantly, the District Court's decision included language indicating that the ruling could be limited to a scenario where Fannie Mae was the deed of trust's record beneficiary at the time of the HOA's foreclosure. However, three cases decided in July 2015 expanded the ruling to the more common scenario for Fannie Mae or Freddie Mac — where either own the debt but are not the recorded beneficiary of the deed of trust. These cases are *Elmer v. JPMorgan Chase Bank, N.A.*; *Premiere One Holdings, Inc. v. Fed. Nat'l Mortg. Ass'n*; and *Williston Inv. Group, LLC v. JPMorgan Chase Bank, N.A.*
- While the aforementioned District Court decisions are not controlling in other jurisdictions, nor are other judges within the U.S. District Court for Nevada bound by these rulings, they do provide exceedingly favorable precedent for these arguments.
- Importantly, even if HOA super liens are eventually unable to extinguish FHFA and FHA property interests in any jurisdiction that adopts a true priority standard, loans made with private capital will remain vulnerable to extinguishment and investors will not have as much of an incentive to invest in homeownership, creating a major barrier to full housing market recovery and the ability of consumers to purchase homes in true priority states.

⁹ FHFA Statement on HOA Super-Priority Lien Foreclosures, *available at* <http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx> (April 21, 2015).