

LIEN ON ME: SHOULD SOUTH CAROLINA'S HOMESTEAD EXEMPTION PROTECT HOMEOWNERS FROM COMMUNITY ASSOCIATION FORECLOSURE?

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I. INTRODUCTION

A Colorado homeowner recently went to battle with his community association over \$96.30 in delinquent dues and fines for an unapproved fence color.¹ Homeowner Bob Robella, described as “frivolous and vexatious” by the presiding judge, relentlessly pursued his association in court until fees reached a staggering \$12,000.² Robella even attempted to give away his home to a friend to dodge his association dues.³ After finally reaching a binding arbitration settlement, whereby the association agreed to waive its fines and pay a portion of the legal fees incurred, Robella failed to appear to sign the settlement and brought suit again in small claims court.⁴

While this situation is not an everyday occurrence, it illustrates many of the conflicts that can arise between community associations and their members. Robella did not contend that he was unable to afford the \$96.30, nor did he try to reach a compromise with the association; he just refused to pay.⁵ His belligerence cost him and the association countless hours in wasted time and thousands of dollars in legal fees.⁶ Most likely the burden of paying the legal fees will fall on Robella’s neighbors by way of increased or special assessments.⁷

Associations are placed in quite a dilemma when their members fail to pay association dues. Though many association

1. Bill Vogrin, *Side Streets: Homeowner Facing \$12,000 Court Fees Over \$96.30 HOA Dues*, COLO. SPRINGS GAZETTE, Sept. 29, 2010, <http://www.gazette.com/news/vogrin-105473-side-streets.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* Robella has personally spent more than \$5,000 in legal fees. *Id.*

7. Press Release, Cmty. Ass’n Inst., CAI Survey: Associations Hit Hard by Housing, Economic Slump (Oct. 25, 2010), <http://www.caionline.org/about/press/Pages/HitHardbyHousing.aspx> [hereinafter *Associations Hit Hard*]. Community Associations Institute (CAI) is a national organization that provides education, resources, and support to homeowners governing community associations. *Who We Are*, CMTY. ASS’N INST., <http://www.caionline.org/about/who/Pages/default.aspx> (last visited Feb. 20, 2011). CAI also acts as an advocate for “legislative and regulatory policies that support responsible governance and effective management.” *Id.*

boards eventually resort to foreclosing on the association's lien on the property, they first should consider payment plans and deadline extensions as methods of collection. Nevertheless, foreclosure should be an available option because when an owner purchases property in a community association, she agrees to subject her property to foreclosure in the event that she defaults on her association dues.⁸ Furthermore, the association's lien on the property normally predates the owner's purchase, giving the association the right to foreclose on the property subject to the association's governing documents.⁹

Today, South Carolina is poised to face the issue of whether the homestead exemption should defeat foreclosure by community associations.¹⁰ This Note examines the unique problems community associations face in light of the current foreclosure crisis. What remedies should be available when homeowners cannot or will not, as in Robella's case, pay their assessments? If a community association files a lien for non-payment of fees, should foreclosure of this lien be a viable option? If foreclosure is an option, should homeowners be entitled to homestead protection?¹¹ This Note proposes that homestead exemption is not South Carolina's solution to the foreclosure dilemma because the owner subjects her property as security for association assessments and the association's lien on the property preexists the claim of homestead. Also addressed in this Note is the need for reasonable legislative solutions to protect the financial interests of both associations and

8. *Bessemer v. Gersten*, 381 So. 2d 1344, 1348 (Fla. 1980).

9. *Id.*

10. South Carolina courts have not addressed the issue of homestead exemption in the context of community association foreclosure as many other jurisdictions have. *E.g.*, *Boyle v. Lake Forest Prop. Owners Ass'n*, 538 F. Supp. 765, 769 (S.D. Ala. 1982); *Kell v. Bella Vista Vill. Prop. Owners Ass'n*, 528 S.W.2d 651, 653 (Ark. 1975); *MTDS, Inc. v. Cooney-Ames*, No. B181325, 2006 Cal. App. LEXIS 529, at *10 (Cal. Ct. App. Jan. 23, 2006); *Whispering Pines W. Condo. Ass'n v. Treantos*, 780 P.2d 26, 27 (Colo. App. 1989); *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 636 (Tex. 1987); *Bessemer*, 381 So.2d at 1348.

11. Statutes providing for homestead exemption allow a homeowner to keep her home out of reach of creditors. Ryan P. Rivera, *State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws*, 39 REAL PROP. PROB. & TR. J. 71, 73 (2004).

their members. Although foreclosure is an ugly solution to the problem of unpaid assessments, associations must work with the means available until legislators enact a better alternative.

II. ANATOMY OF A COMMUNITY ASSOCIATION

Community living has its appeal. Amenities, stability, and the convivial nature of planned developments have attracted 62 million people to approximately 309,600 community associations nationwide.¹² After all, what could be more American than a sidewalk-lined subdivision with a pool and tennis courts?¹³ While community association law is a relatively new subject area,¹⁴ community associations themselves have been gaining popularity in the United States since the 1970s.¹⁵

A. Defining the Association

Community associations consist of property owners in a planned development community who share common area property.¹⁶ For the purposes of this Note, the term “community association” is intended to include condominium associations, homeowners’ associations, property owners’ associations, common interest developments, and any other cooperative arrangement in a planned development.¹⁷ Community

12. *Industry Data*, CMTY. ASS’N INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited May 26, 2011).

13. Sharon L. Bush, *Beware the Associations: How Homeowners’ Associations Control You and Infringe Upon Your Inalienable Rights!!*, 30 W. ST. U. L. REV. 1, 3 (2002) (referring to the association as “a country club atmosphere with swimming pools, parks, tennis courts and lakes to persons who would not otherwise be able to afford those amenities”).

14. WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 1* (2d ed. 1988).

15. *Industry Data*, *supra* note 12.

16. Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 592 n.4 (1993).

17. HYATT, *supra* note 14, at 10. The main difference between a homeowner association and a condominium association is that a homeowner association itself has the legal title to common area property. *Id.* at 26. Conversely, in a condominium association, each condo owner holds title to an undivided portion of the common property. *Id.*

associations are unique because of their members' commonality of interest and "shared use and enjoyment of property."¹⁸

B. Association Governance

Typically, a community association is founded and managed by certain governing documents.¹⁹ These documents include the Declaration of Conditions, Covenants and Restrictions (CCRs), the association's articles of incorporation, bylaws, and applicable state statutes, such as the Nonprofit Corporation Act in South Carolina.²⁰ In his book, *Condominium and Homeowner Practice: Community Association Law*, Wayne Hyatt refers to the CCRs as the constitution of the association and the bylaws as the secondary law, or statutes, because of the ways these documents, taken together, create and govern the association.²¹

The CCRs dictate the "plan of development and ownership, the method of operation, and the rights and responsibilities of owners within the association."²² These instruments seek to protect the property values in the development and to establish structure and continuity for association members.²³ Stability can be a huge incentive to buy in a planned community.²⁴ Architectural restrictions, for example, can dictate the color of homes and the height of fences.²⁵ Restrictions function to promote harmony and seek to prevent one homeowner from

18. *Id.* at 25.

19. *Id.* at 10.

20. *Id.* Case law is an increasingly important source of direction and authority for community association governance. *Id.* Association developers also rely on state statutes to determine the requirements for forming an association. *Id.* at 18–19.

21. *Id.* at 357.

22. *Id.* at 356.

23. Bush, *supra* note 13, at 3–4.

24. See *What You Should Know Before You Buy*, CMTY. ASS'N INST., http://www.caionline.org/about/press/MediaStatements/statement_buyers2.doc (last visited May 26, 2011).

25. See Bush, *supra* note 13, at 1. Association regulations may also dictate when a homeowner should make repairs to her property and typically the association's architectural review board must be consulted prior to new construction or modifications to the property, such as the addition of a basketball goal, a screened porch or even certain landscaping. *Id.*

skewing the neighborhood design scheme.²⁶

The association's bylaws lay out the rules and procedures of operation that the association, like a mini-government, must follow.²⁷ In conjunction, the CCRs, bylaws, and articles of incorporation form the legal existence of the association and provide record notice to purchasers of the association's existence and rules.²⁸ Generally, these documents are recorded in the land records for the municipality in which the property lies.²⁹

Most community associations are incorporated under the law in their jurisdiction.³⁰ Incorporation provides "greater certainty to the association as the fee title holder [and] also brings to bear the entire body of statutory and case law developed in the jurisdiction's corporate law."³¹ Like a corporation, the association members elect the board of directors, which functions as the association's governing body.³² Board members are not required to undergo specialized training or certification, and they typically serve in a voluntary status.³³ The board is endowed with great responsibility and decision-making power on behalf of the association, including creating and upholding the general operating policies of the association.³⁴

Besides being just a place to live, a community association "engenders a real sense of community spirit, pride, and participation in the membership and provides an opportunity for meaningful individual involvement in the decision-making

26. *Id.* at 3–4.

27. HYATT, *supra* note 14, at 357.

28. *Id.* at 359.

29. *Id.* at 357.

30. *Id.* at 27.

31. *Id.*

32. *Id.* at 64–65; Bush, *supra* note 13, at 8.

33. HYATT, *supra* note 14, at 65 ("[Board members are] volunteers with a big job. Although they are volunteers serving on their own time without compensation, in most cases, they remain subject to the strictures of the law applicable to officers and directors."). CAI seeks to educate volunteer board members through its website, publications, and a new online training program. Press Release, Cmty. Ass'n Inst., CAI Launches Board Member Education Initiative (Sept. 9, 2009), <http://www.caionline.org/about/press/Pages/basicsnewsrelease.aspx>.

34. HYATT, *supra* note 14, at 65.

process.”³⁵ Nevertheless, critics of community associations complain that there is also a “dark side of paradise.”³⁶ Typically opponents raise two primary issues: mandatory membership in the association and required assessment payments.³⁷

C. Association Membership

Upon taking title to property within an association, the purchaser “automatically [and irrevocably] becomes a member of the association”³⁸ This membership subjects the owner to the obligations set forth in the governing documents.³⁹ Membership also entitles the owner to enjoy the amenities provided by the association.⁴⁰ Critics are especially vocal about this required membership in today’s unstable economy, where many homeowners are faced with a choice between paying their association dues and putting food on the table.⁴¹ When times are tough, association membership loses its appeal. Owners may stop caring about whether the landscaping in the neighborhood looks nice or if the pot holes in the private roads are repaired. The inability to avoid association obligations starts to seem a lot like a gym membership you signed up for at the start of the New Year. Now it is June and you would rather be anywhere than on that treadmill, but you are still obligated to pay \$40 a month for it.

35. *Id.* at 13.

36. Bush, *supra* note 13, at 4.

37. *Id.*

38. HYATT, *supra* note 14, at 47; Denise L. Palmieri & M. Edward Burns Jr., *Protecting Community Association Assessments in Bankruptcy*, 8 PROB. & PROP. 26, 26 (1994).

39. HYATT, *supra* note 14, at 47.

40. Bush, *supra* note 13, at 3.

41. See Paul J. Weber, *Homeowner Associations Start Foreclosures to Collect Dues*, USA TODAY, Jun. 12, 2009, http://www.usatoday.com/money/economy/housing/2009-06-11-homeowner-association-foreclosures_N.htm.

D. Assessments

Assessments are “a proportionate share of the expenses incurred to fund the association’s business and governmental services.”⁴² These funds are used for the maintenance and upkeep of common areas and facilities and for the payment of community services.⁴³ In addition to assessments, the CCRs also establish the association’s authority to enforce violations by way of fines or restrictions on common area and amenity use.⁴⁴ The power to levy dues and fines is an affirmative covenant and is enforceable in court.⁴⁵

The covenant to pay assessments is a covenant that runs with the land.⁴⁶ This “obligation arises out of the recorded instrument and ‘touches and concerns the land.’”⁴⁷ The covenant is attached to the property itself, and “is recorded in the land records.”⁴⁸ This means that all subsequent purchasers are also bound by the covenant.⁴⁹

At the time a purchaser buys property in an association, she may have ample funds to pay the required assessments, but other obligations may arise that prevent the owner from paying her association dues.⁵⁰ Homeowners may get sick, lose their jobs,

42. HYATT, *supra* note 14, at 48.

43. Palmieri & Burns, *supra* note 38, at 26; Inwood N. Homeowners’ Ass’n v. Harris, 736 S.W.2d 632, 636 (Tex. 1987). For example, association fees may also provide “utilities, trash pickup, snow removal, road and building maintenance and landscaping.” *Associations Hit Hard*, *supra* note 7.

44. James J. Scavo, *Dispute Resolution in a Community Association*, 17 URB. L. ANN. 295, 295 (1979).

45. HYATT, *supra* note 14, at 48.

46. *Id.* at 19; *see, e.g.*, *Whispering Pines W. Condo. Ass’n v. Treantos*, 780 P.2d 26, 27 (Colo. App. 1989); *William W. Bond, Jr. & Assocs. v. Lake O’The Hills Maint. Ass’n*, 381 So. 2d 1043, 1044 (Miss. 1980). The first Restatement of Property required that parties be in horizontal privity of estate for the burden of a covenant to run with the land. JESSE DUKEMINIER ET AL., PROPERTY 742-43 (6th ed. 2006). However, modern commentators agree that “[t]he requirement of horizontal and vertical privity . . . ordinarily creates no problem in enforcing restrictions on lots in a subdivision.” *Id.* at 743.

47. Palmieri & Burns, *supra* note 38, at 26.

48. HYATT, *supra* note 14, at 19.

49. *Id.*

50. *Foreclosure as a Last Resort*, CMTY. ASS’N INST., http://www.caionline.org/about/press/MediaStatements/statement_foreclosure2.doc (last

or face many other challenges that take priority to association dues.⁵¹ But like mandatory membership, there is no way to circumvent this financial obligation.⁵²

Delinquent assessments have three primary adverse effects on both the association as a business entity and the association members personally.⁵³ First, because most community associations are nonprofit corporations, an association has no income other than member assessments, and is not in the position to absorb debt on its own.⁵⁴ On October 25, 2010, Community Associations Institute (CAI) reported on the increasing association delinquency rates across the nation.⁵⁵ The CAI survey revealed that sixty-five percent of associations have delinquency rates of over five percent.⁵⁶ Even when some members fall behind on their assessments, the association is still responsible for paying association bills.⁵⁷

Second, the board of directors owes a fiduciary duty to the association and its beneficiaries.⁵⁸ In addition, board members

visited Feb. 20, 2011).

51. *Collecting Association Assessments*, CMTY. ASS'N INST., http://www.cai.org/online/about/press/MediaStatements/statement_assessments2.doc (last visited Feb. 20, 2011). Military families have also been hit particularly hard by community association foreclosures. See Wade Goodwyn, *Not So Neighborly Community Associations Foreclosing on Homes*, NPR (June 29, 2010), <http://www.npr.org/templates/story/story.php?storyId=128078864> (Captain Mike Claurer was serving in Iraq when his wife fell behind on assessment payments and the association foreclosed on their home. *Id.*

52. Bush, *supra* note 13, at 4.

53. See Palmieri & Burns, *supra* note 38, at 26.

54. *Id.*; William G. Gammon & Matthew Taylor Morones, *Feature: A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, 40 HOUS. LAW. 18, 20 (2002).

55. Associations Hit Hard, *supra* note 7 (finding that due to economic difficulties and high rates of assessment delinquency, associations are forced to curtail services or shift the burden to other members through "higher regular assessments or special assessments").

56. *Id.*

57. See Palmieri & Burns, *supra* note 38, at 26.

58. HYATT, *supra* note 14, at 69–70; see also *Frances T. v. Vill. Green Owners Ass'n*, 723 P.2d 573, 582 (Cal. 1986) (determining that the directors of an incorporated community association owe a fiduciary duty to the corporation and its members, which is independent from the ordinary duty of care owed to third parties).

must also be mindful of prospective individual liability.⁵⁹ As fiduciaries, the board members must fulfill two separate duties: “a duty of care” and “a duty of undivided loyalty and honesty.”⁶⁰ Courts apply the business judgment rule and the rule of reasonableness when considering these obligations.⁶¹ Under the business judgment rule, a board member will not be held personally liable for her actions that, although harmful to the association, were accomplished through the exercise of reasonable care.⁶²

Application of the business judgment rule can be seen in the South Carolina case *Dockside Association, Inc. v. Detyens*.⁶³ In that case, the board levied an emergency assessment to pay for common area repairs and to establish a reserve fund for future emergency repairs.⁶⁴ The association filed suit against Detyens and Burbic to foreclose on its lien when the owners refused to comply with an emergency assessment.⁶⁵ The trial court sided with Detyens and Burbic, holding that the association failed to show that the board members acted in good faith in levying the assessment.⁶⁶ However, the court of appeals reversed this decision based on the business judgment rule, holding that the trial court, absent a showing of bad faith, had no jurisdiction to question the board of directors’ judgment.⁶⁷ Thus, the burden falls on the party opposing the board’s decision to show bad faith, and failure to meet this burden results in affirmation of the board’s decision.⁶⁸ The fiduciary obligation of board members and the existence of the business judgment rule reiterate the fact that community associations are businesses and must be operated as such.

59. HYATT, *supra* note 14, at 70.

60. *Id.* at 70–71.

61. *Id.* at 69.

62. *Id.* at 71.

63. 352 S.E.2d 714, 716 (S.C. Ct. App. 1987).

64. *Id.* at 715.

65. *Id.*

66. *Id.* at 716.

67. *Id.*

68. *Id.*

Board members often find themselves in a peculiar position based on the potential for personal liability arising out of their business decisions.⁶⁹ Board members must strive to act with the utmost fidelity to the association, which may or may not go against the interests of their neighbors and friends, and sometimes their own self-interests.⁷⁰ For example, board members are responsible for maintaining adequate reserves and taking care of common areas pursuant to the CCRs. If association members fail to pay their assessments, the board of directors is not relieved of its fiduciary obligation to the rest of the neighborhood.⁷¹ While some of the association's members simply cannot afford to pay their assessments, other recalcitrant members, like Mr. Robella, contest the validity of assessments and simply refuse to pay.⁷² Boards cannot simply turn a blind eye to delinquent assessments because several courts have deemed the failure to collect assessments a breach of fiduciary duty.⁷³

69. HYATT, *supra* note 14, at 70 (explaining that “[t]hrough the very nature of the officer’s or director’s relations to the association, which are ‘created by law’ and provide not only an opportunity but, indeed, an obligation in most cases ‘to exercise a controlling influence’ over the rights, interests, and property of others, he or she is in a position of trust and confidence in respect to the other association members. As a consequence, the individuals who serve as volunteer officers and directors are held to a high standard of conduct, the breach of which may well subject each of them or all of them to individual liability, notwithstanding the fact that each acts on behalf of the association. This high standard of conduct is, of course, the duty of a fiduciary.”).

70. *See id.* at 72. In determining whether a board member failed to exercise this duty of care, courts look at both subjective and objective factors. *Id.* Subjective factors may include “[t]he nature of the community association, whether the director is full- or part-time, and whether or not he or she has a special background . . .” *Id.*

71. *Foreclosure as a Last Resort*, *supra* note 50.

72. *Id.*

73. *See, e.g.,* B & J Holding Corp. v. Weiss, 353 So. 2d 141, 143 (Fla. Dist. Ct. App. 1977) (holding that the board may be liable to association for failure to collect assessments); Maercker Point Villas Condo. Ass’n v. Szymiski, 655 N.E.2d 1192, 1194–95 (Ill. App. Ct. 1995) (finding that the developer breached his fiduciary obligation by failing to fund reserves); Cigal v. Leader Dev. Corp., 557 N.E.2d 1119, 1123 (Mass. 1990) (holding that an association may bring a claim of breach of fiduciary duty against a developer for failure to collect fees).

Third, delinquent assessments negatively affect other property owners in the association.⁷⁴ Essentially, someone must pick up the slack. Thus, members paying their dues may suffer increased assessments or loss in property value from deteriorated common areas.⁷⁵ “[A] fundamental unfairness arises when a debtor/owner receives the benefits of the services supplied by a community association while shifting the costs of the services to the neighbors.”⁷⁶

Owners may also be adversely affected by their neighbors’ delinquent assessments when it comes time to sell their homes.⁷⁷ For example, the Federal National Mortgage Association (Fannie Mae) will not purchase loans in an association where more than fifteen percent of the total owners are over thirty days delinquent on their assessments.⁷⁸ A prospective purchaser will be understandably dissuaded from buying property where she cannot secure federally backed mortgage funding.

Associations cannot exist without assessment payments; consequently, board members have a fiduciary duty to collect these funds and apply them for the community’s benefit. Furthermore, association members individually and collectively depend on their neighbors to pay assessments. Collective reliance on assessments is undeniable, but one question remains: how can associations enforce compliance with this contractual obligation?

III. LIEN POWER AND FORECLOSURE

A. Lien Power

Upon determining that the association must act in response to nonpayment of assessments, the next step is to address the association’s legal remedies. Depending on its governing documents, an association will generally be required to provide a

74. *Foreclosure as a Last Resort*, *supra* note 50.

75. *See id.*

76. Palmieri & Burns, *supra* note 38, at 26.

77. *Foreclosure as a Last Resort*, *supra* note 50.

78. *Selling Guide: Fannie Mae Single Family*, FANNIE MAE 583 (Jan. 27, 2011), <https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel012711.pdf>.

homeowner with notice of the delinquent assessment and a given period of time to pay the past-due amount, typically with an applicable penalty.⁷⁹ If a homeowner fails to comply after receiving reasonable notice and time to cure her delinquency, then an association will likely initiate foreclosure proceedings in an effort to spur the homeowner into compliance.⁸⁰

The power to foreclose is derived from an association's lien rights on the subject property.⁸¹ A lien is a "charge against or interest in property to secure payment of a debt or performance of an obligation."⁸² It provides a creditor with a security interest, but "[a] lien right alone does not give the lienholder right and title to property."⁸³ The title remains in the hands of the owner until the creditor forecloses on the lien.⁸⁴ A creditor's power to impose a lien on an owner's property is derived from state statutes and an agreement such as an association's governing documents.⁸⁵ A lien itself is usually enough to motivate the homeowner to pay delinquent assessments, so foreclosure rarely becomes necessary.⁸⁶ Unfortunately, that has not always been the case.⁸⁷ If America's financial climate remains turbulent, then foreclosure may become more commonplace.

As a secured creditor, the association may accelerate the debtor's future payments for the fiscal year.⁸⁸ This allows the association to take advantage of the full amount secured by the property.⁸⁹ There are two ways for a community association to become a secured creditor against the delinquent homeowner's

79. *Collecting Association Assessments*, *supra* note 51.

80. *Id.*

81. HYATT, *supra* note 14, at 48.

82. 11 U.S.C. § 101(37) (2006).

83. *Hamm v. Arrowcreek Homeowners' Ass'n*, 183 P.3d 895, 902 (Nev. 2008) (citing *In re Marino*, 205 B.R. 897, 899 (Bankr. N.D. Ill. 1997)).

84. *Id.*

85. HYATT, *supra* note 14, at 48.

86. *Foreclosure as a Last Resort*, *supra* note 50; *Collecting Association Assessments*, *supra* note 51.

87. *Foreclosure as a Last Resort*, *supra* note 50; *Collecting Association Assessments*, *supra* note 51.

88. Palmieri & Burns, *supra* note 38, at 28.

89. *Id.*

property.⁹⁰ The first method requires the association to possess an assessment lien on the debtor's property that is perfected either automatically under the terms of the governing documents, or through recordation of the assessment lien.⁹¹ An automatic or continuing lien may appear in the CCRs as follows: "The annual and special assessments, together with such interest thereon and costs of collection thereof as hereinafter provided, shall be a continuing lien upon the property against which each such assessment is made."⁹² The second method requires the association to file a judgment lien against the property.⁹³

B. The Power to Foreclose

If an association has provided notices, discussed repayment options, and imposed a lien on the property and the delinquent member has still avoided her obligations, the association will generally seek more drastic collection measures. "Foreclosure is the legal process through which a creditor acquires a real estate asset pledged as security by a borrower."⁹⁴ South Carolina employs judicial foreclosure,⁹⁵ which is available in all jurisdictions.⁹⁶ Judicial foreclosure is "a lengthy and expensive process by which the mortgaged property is sold through a court proceeding requiring standard legal steps," such as a "title examination, filing of a Summons, Complaint and *lis pendens*, a foreclosure hearing, and a foreclosure sale . . ."⁹⁷ In considering an association's right to foreclose on a homeowner's property, the Texas Supreme Court determined: "The remedy of foreclosure is an inherent characteristic of the property right. It is generally the only method by which other owners will not be forced to pay more than their fair share or be forced to accept reduced

90. *Id.*

91. *Id.*

92. Kell v. Bella Vista Village Prop. Owners Ass'n, 528 S.W.2d 651, 653 (Ark. 1975).

93. Palmieri & Burns, *supra* note 38, at 28.

94. SUSAN B. BERKOWITZ ET. AL., SOUTH CAROLINA FORECLOSURE LAW MANUAL 2 (South Carolina Bar 2d ed. 2009).

95. *Id.* at 3.

96. *Id.*

97. *Id.*

services.”⁹⁸

In South Carolina, the process of mortgage foreclosure is governed by statute.⁹⁹ Similarly, the South Carolina Horizontal Property Act¹⁰⁰ (HPA) dictates the foreclosure process used to collect unpaid assessments for apartments and condominiums.¹⁰¹ The HPA provides: “All sums assessed by the administrator . . . but unpaid, for the share of common expenses chargeable to any apartment shall constitute a lien on such apartment Such lien may be foreclosed by suit by the administration . . . in like manner as a mortgage of real property.”¹⁰²

An association’s board members should not take the decision to foreclose on a lien lightly.¹⁰³ The remedy of foreclosure should be the board’s last resort, after exhausting all other options and available remedies.¹⁰⁴ Foreclosure is costly and time-consuming. It does not guarantee satisfactory results for community associations, and it has a grave impact on the affected homeowner.¹⁰⁵ Alternative dispute resolution is a viable first step in association fee disputes.¹⁰⁶ Unlike the typical bank mortgage foreclosure or even landlord-tenant disputes, association issues are “more delicate” because they involve “neighbors who jointly own . . . property”¹⁰⁷ Therefore, avoiding costly and timely foreclosure litigation benefits both the

98. *Inwood N. Homeowners’ Ass’n v. Harris*, 736 S.W.2d 632, 636 (Tex. 1987).

99. S.C. CODE ANN. § 15-39-610 (2005 & Supp. 2010).

100. S.C. CODE ANN. § 27-31-10 (2007).

101. *Id.* § 27-31-210.

102. *Id.* § 27-31-210(a).

103. *Foreclosure as a Last Resort*, *supra* note 50 (endorsing the policy that “foreclosure should always be used as a last resort, applied only when a community association has exhausted all other collection options and only when a homeowner refuses to remedy a significant debt to the association”).

104. Alternative remedies might include suspending association privileges, denying access to common area amenities, and negotiating payment plans. *Collecting Association Assessments*, *supra* note 51; *see also* Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2518 (2004) (suggesting alternative dispute resolution for association disputes).

105. *See* Scavo, *supra* note 44, at 308.

106. *See* Giantomasi, *supra* note 104, at 2518.

107. Scavo, *supra* note 44, at 295–96.

association and its members.¹⁰⁸ CAI recommends that boards consider the following factors before deciding to foreclose on a member's property: "the amount of the debt, the financial health of the association, the reason for the debt and the homeowner's willingness and ability to bring the account up to date."¹⁰⁹ Another important consideration is uniformity in enforcement.¹¹⁰ If an association fails to consistently apply its rules, other homeowners will be more inclined to commit future violations.¹¹¹

IV. HOMESTEAD EXEMPTION

"[A] debtor's homestead exemption is his castle."¹¹² This clever adage seems to ring true in a day and age where so many Americans are facing bankruptcy and mortgage debt and are looking to the laws of their state for protection. Homestead exemption is a statutorily created protection that allows a debtor to shield her home from creditors.¹¹³ Almost every state has its own variety of homestead exemption and conditions precedent to its claim.¹¹⁴ Likewise, states attach different maximum value

108. *Id.* at 308.

109. *Foreclosure as a Last Resort*, *supra* note 50.

110. Giantomasi, *supra* note 104, at 2513.

111. *Id.*

112. Rivera, *supra* note 11, at 72 (citing *In re Englander*, 156 B.R. 862, 863 (Bankr. M.D. Fla. 1992)).

113. *See id.* at 73. Homestead rights did not exist at common law, and these rights are entirely statutorily created. *See Scholtec v. Estate of Reeves*, 490 S.E.2d 603, 604 (S.C. Ct. App. 1997). There are both federal and state homestead laws. William P. Mufich, *State Homestead Exemptions*, 9 MONT. L. REV. 71, 71 (1948). Federal homestead laws were enacted to encourage colonization. *Id.* The federal government gave the homesteader a parcel of land after he moved there and worked the land for a set period of time. *Id.* Any debts incurred before the homesteader took title to the land were then forgiven. *Id.* State homestead laws work inversely, by attaching only after a landowner acquires title and only forgiving certain debts subsequently incurred. *Id.*

114. Mufich, *supra* note 113, at 71. Common to most states are requirements of state residency, ownership and occupancy of the land in question, and that the claimant be the head of the household. *Id.* at 71-72. Arguably, there should be more consistency in state homestead exemption laws, especially in light of the interrelationships of the homestead exemption and federal bankruptcy laws. *See Rivera*, *supra* note 11, at 97 (proposing that "[t]he most noteworthy problem with the treatment of state homestead exemptions in federal bankruptcy proceedings is the current scheme is devoid of uniformity.").

requirements to the claim of homestead exemption.¹¹⁵ South Carolina's Homestead Exemption protects homeowners from "attachment, levy and sale . . . [t]he debtor's aggregate interest, not to exceed fifty thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence" ¹¹⁶

The rationale underlying this exemption is to preserve part of a debtor's property and keep it out of the reach of creditors. In theory, homestead exemption lessens the likelihood that the debtor will be forced to depend on the state for support.¹¹⁷ Like any statute, the issue of judicial interpretation has played a predominant role in its application.¹¹⁸ Courts are directed to liberally construe the homestead statute to avoid frustrating the legislative intent behind it: protection of debtors and the state.¹¹⁹

V. HOMESTEAD EXEMPTION AND ASSOCIATION FORECLOSURE

Every foreclosure arguably frustrates the purpose of the homestead exemption. The idea of neighbors evicting neighbors over what may total very insignificant amounts seems to undermine the very spirit of this statute.¹²⁰ However, every jurisdiction that has faced the question of whether homestead exemption defeats community association foreclosures has determined that the homestead exemption does not apply.¹²¹

115. Mufich, *supra* note 113, at 73. Some states also base this determination on the characteristics of the land itself. *Id.* Several states have no limit to the maximum value protected by the homestead exemption. Rivera, *supra* note 11, at 72. Texas, Florida, Iowa, Kansas, and South Dakota homestead statutes protect the full value of the debtor's home. *See id.*

116. S.C. CODE ANN. § 15-41-30(1) (2005 & Supp. 2010).

117. *In re Sims*, 421 B.R. 745, 751 (Bankr. D.S.C. 2010); *Am. Serv. Corp. v. Hickle*, 435 S.E.2d 870, 871 (S.C. 1993).

118. Rivera, *supra* note 11, at 82–83.

119. *Id.*; *In re Sims*, 421 B.R. at 751.

120. *See* Rivera, *supra* note 11, at 76 (identifying five social policies the exemption seeks to protect).

121. *E.g.*, *Boyle v. Lake Forest Prop. Owners Ass'n*, 538 F. Supp. 765, 769 (S.D. Ala. 1982); *Kell v. Bella Vista Vill. Prop. Owners Ass'n*, 528 S.W.2d 651, 653 (Ark. 1975); *MTDS, Inc. v. Cooney-Ames*, No. B181325, 2006 Cal. App. LEXIS 529, at *10 (Cal. Ct. App. Jan. 23, 2006); *Whispering Pines W. Condo. Ass'n v. Treantons*, 780 P.2d 26, 27 (Colo. App. 1989); *Inwood N. Homeowners'*

These decisions were grounded on two independent bases: (1) the manifestation of the homeowner's intent to subject the property as collateral for the obligation to pay assessments, and (2) the priority of the pre-existing association lien over the homeowner's claim of homestead.¹²²

A. Subjecting Property as Security for Association Assessments

Perhaps every home for sale within an association should come with a warning label.¹²³ The average homeowner likely does not realize or comprehend the potential for community association foreclosure when she purchases a home subject to association covenants.¹²⁴ However, record notice is legally sufficient to charge the homeowner with knowledge that her property is subject to restrictive covenants, including the covenant to pay assessments.¹²⁵

It is universally acknowledged that in the absence of constitutional or statutory provisions to the contrary, a homeowner can mortgage her property after declaring homestead,¹²⁶ thus subjecting it to the potential of foreclosure.¹²⁷ The South Carolina constitution and the homestead statute forbid the waiver of homestead, except by:

[D]eed of conveyance, or by mortgage, and only as against the mortgage debt; and no judgment creditor or other creditor whose lien does not bind the homestead shall have any right or equity to require that a lien which embraces the homestead

Ass'n v. Harris, 736 S.W.2d 632, 637 (Tex. 1987); Bessemer v. Gersten, 381 So. 2d 1344, 1348 (Fla. 1980).

122. Memorandum of Law from Stephanie C. Trotter, Esq. to Judge James O. Spence (March 2010) (on file with author).

123. See generally Bush, *supra* note 13, at 29 (arguing that homeowners' associations strip their members of basic rights).

124. See generally *Can My Homeowners Association Really Foreclose on My Home?*, FOX BUS. (Oct. 13, 2010), <http://www.foxbusiness.com/personal-finance/2010/10/13/homeowners-association-really-foreclose-home/>.

125. See HYATT, *supra* note 14, at 53–54.

126. Kelley v. Horner (*In re Kelley*), 7 B.R. 384, 387 (Bankr. D.S.D. 1980).

127. U.S. Bldg. & Loan Ass'n v. Stevens, 17 P.2d. 62, 64 (Mont. 1932); 40 AM. JUR. 2D *Homestead* § 105 (2010) (Some states prohibit "the mortgaging of homestead property.").

and other property shall first exhaust the homestead.¹²⁸

It is also well settled in South Carolina that a homeowner cannot mortgage his property and then claim homestead on the property to defeat the mortgagee's claim.¹²⁹ Thus, the homeowner is required to satisfy the mortgage on her property before claiming homestead on that property.¹³⁰

As other jurisdictions have determined, the homestead exemption likewise fails to protect against association liens.¹³¹ Although South Carolina has yet to confront this issue head on, the Florida Supreme Court in *Bessemer v. Gerstenheld* that "in accepting the deed with actual or constructive notice of the lien provision of the declaration of restrictions, [the homeowners] manifested the intent to let the real property stand as security for the obligation."¹³² The *Boyle* court in the Southern District of Alabama echoed this holding.¹³³ Similarly, a Colorado appellate court also found the *Bessemer* decision persuasive when it held: "Given this record notice, when defendant accepted the deed she manifested the intent to be thereby bound, and to let the property secure her obligation to pay."¹³⁴

128. *People's Bank of Campobello v. O'Shields*, 166 S.E. 351, 352 (S.C. 1932).

129. *Id.* at 353 (holding that "[i]f one mortgages his land, he may not claim homestead in it, as against the mortgage"); see *Rosenberg v. Lewi*, 7 S.C. 344, 350 (1876) (concluding that "there can be no right of homestead as against the claim of the mortgagee"); *Homestead Ass'n v. Enslow*, 7 S.C. 1, 21 (1875) (holding that the mortgagor had no claim of homestead entitling him to proceeds of a foreclosure sale of mortgaged property).

130. *Enslow*, 7 S.C. at 20.

131. See cases cited *supra* note 121.

132. 381 So. 2d 1344, 1348 (Fla. 1980).

133. *Boyle v. Lake Forest Prop. Owners Ass'n*, 538 F. Supp. 765, 769 (S.D. Ala. 1982).

134. *Whispering Pines W. Condo. Ass'n v. Treantos*, 780 P.2d 26, 27 (Colo. App. 1989).

B. First in Time, First in Right.

“Qui prior est tempore potior est jure
(Who is first in point of time is stronger in right).”¹³⁵

A fundamental tenet in property law is first in time is first in right.¹³⁶ This principle dates back to Roman law and establishes the idea that private ownership of land is determined by the notion of first possession and occupancy.¹³⁷ Naturally, this precept holds true in the arena of lien priority.¹³⁸ In order for the homestead exemption to defeat a lien on the property, thus preventing creditors from enforcing the lien by foreclosure, the homestead right must pre-exist the lien.¹³⁹ If not, the lien is enforceable through foreclosure.

Upon deciding to establish a community association, a developer deeds a parcel of land subject to applicable CCRs. At the time, this land is undeveloped and certainly would not be considered a homestead. After the developer constructs a house on the land, a purchaser takes title to the property. At this point the property may aptly be deemed a homestead.¹⁴⁰ As previously mentioned, covenants to pay assessments run with the land and are binding on all subsequent purchasers.¹⁴¹ It follows that when a homeowner has notice of a pre-existing lien on the property that predates the homestead itself, she may not subsequently

135. DUKEMINIER, *supra* note 46, at 3 (quoting Maxim of Roman Law).

136. *Id.* at 11.

137. *Id.*

138. Red Rock Props. 2005, Ltd., v. Chase Home Fin., L.L.C., No. 14-08-00352-CV, slip op. at 5 (Tex. App. Jun. 25, 2009) (finding that “different liens upon the same property have priority according to the time of their creation . . . This rule is known as ‘first in time is first in right’”) (citations omitted).

139. Mufich, *supra* note 113, at 73 (“A homestead exemption cannot be claimed against debts and liens in existence prior to or at the time the exemption law takes effect.”); *see also* Stewart v. Clark, 677 S.W.2d 246, 249 (Tex. App. 1984) (listing three situations when homestead property can be forcibly sold).

140. “Homestead signifies a dwelling house with customary appurtenances and includes outbuildings that are necessary for use where the family resides.” Rivera, *supra* note 11, at 72.

141. Cooksey v. Sinder, 682 S.W.2d 252, 253 (Tex. 1984); *see Ex parte* Morrow, 190 S.E. 506, 509 (S.C. 1937).

claim homestead exemption on the land to remove it from a creditor's reach. As early as 1882, the Texas Supreme Court in *Gage v. Neblett* determined that homestead claims are not unassailable and do not destroy pre-existing liens attached to the property.¹⁴² Essentially, the homestead exemption is not ten feet tall and bulletproof; it can be overcome by a lien that pre-existed the homeowner's claim of homestead.¹⁴³

The court in *Bessemer v. Gersten* also found the first in time principle relevant in its holding.¹⁴⁴ In that case, the developer of a subdivision recorded declarations in 1970, encumbering each lot purchaser with affirmative duties, including the obligation to pay monthly recreational charges enforceable by a lien provision.¹⁴⁵ Later that year, the Gerstens took title to a lot in the development.¹⁴⁶ In 1975, the Bessemer estate, as successor in interest to the developer, sought to foreclose the lien against the property for past due assessments.¹⁴⁷ The Gerstens did not deny the covenant to pay assessments; they simply contended that there was no enforceable lien on their property.¹⁴⁸ The court disagreed and held:

[T]he creation of the lien by acceptance of the deed relates back to the time of the filing of the declaration of restrictions. Thus, with regard to the time of attachment of the lien, this case is to be treated as if the respondents had taken title subject to a valid pre-existing lien. Since the acquisition of homestead status does not defeat prior liens, the lienor's right prevails over the respondents' homestead right.¹⁴⁹

The concept of lien priority was solidified in the landmark

142. 57 Tex. 374 (1882).

143. *Whispering Pines W. Condo. Ass'n v. Treantos*, 780 P.2d 26, 27 (Colo. App. 1989).

144. 381 So. 2d 1344 (Fla. 1980).

145. *Id.* at 1346.

146. *Id.*

147. *Id.*

148. *Id.* at 1348.

149. *Id.* (internal citations omitted).

1987 case, *Inwood North Homeowners' Ass'n v. Harris*.¹⁵⁰ In *Harris*, the developer of a subdivision properly filed a declaration of covenants and restrictions for the Inwood North Subdivision in 1980.¹⁵¹ Pursuant to the CCRs, each purchaser in the subdivision was “deemed to covenant and agree to pay the Association the following: (a) annual assessment or charges; and (b) special assessments for capital improvements.”¹⁵² The Inwood North subdivision covenants and restrictions also provided that they ran with the land and were binding on all purchasers.¹⁵³

Charlie Harris and Rolando Pamilar purchased lots in the subdivision between 1981 and 1983.¹⁵⁴ Consequently, the homeowners fell behind on assessment payments and the association instituted foreclosure proceedings to collect the past due amounts.¹⁵⁵ The Texas Supreme Court focused on when the association lien attached to the property in relation to the claim of homestead.¹⁵⁶ Because the covenants and restrictions containing the lien provisions were placed on the land before it became a homestead, the Texas Supreme Court held:

[U]nder the facts in the present case, the Homeowners' Association is entitled to the foreclosure of the contractual lien it has on the houses of delinquent owners. We recognize the harshness of the remedy of foreclosure, particularly when such a small sum is compared with the immeasurable value of a homestead. Under the laws of this state, however, we are bound to enforce the agreements into which the homeowners entered concerning the payment of assessments. Thus, the judgments of the trial court and court of appeals are reversed and we remand this cause to the trial court so that it may issue an order of foreclosure consistent with this opinion.¹⁵⁷

150. 736 S.W.2d 632 (Tex. 1987).

151. *Id.* at 633.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 634.

156. *Id.* at 635.

157. *Id.* at 637.

A California appellate court in *Amin v. Khazindar* agreed that priority in time is the determining factor and held that the homestead statutes do not protect against consensual liens or voluntary encumbrances the homeowner enters into, or secured liens that have priority over the declaration of homestead.¹⁵⁸ In a subsequent, unpublished opinion, a California appellate court determined that pursuant to the CCRs recorded prior to the declaration of homestead, nonpayment of assessments constituted a consensual lien on the homeowner's property.¹⁵⁹ Thus, the focus becomes notice: if the homeowner had actual or constructive notice of the covenant to pay assessments at the time she took title to the property, then the homestead exemption must fail.¹⁶⁰

VI. HOMESTEAD EXEMPTION IS INAPPROPRIATE IN COMMUNITY ASSOCIATION FORECLOSURES

When the homestead exemption was enacted in South Carolina, legislators likely did not anticipate community associations foreclosing on their members for failure to pay fines and fees. In light of this, it is imperative for our legislators to address the foreclosure epidemic head-on to provide community associations with a reasonable alternative for recouping assessments and fees in lieu of foreclosing on their members.

Until a better option exists, associations must work with the means available and avoid foreclosure until absolutely necessary. Most importantly, associations must function for the benefit of their members.¹⁶¹ This means they must have a consistent method of assessing dues and a reasonable protocol for collecting dues when owners slip into default.

Associations should strive to avoid controversy altogether by

158. 5 Cal. Rptr. 3d 224, 228 (Cal. Ct. App. 2003).

159. *MTDS, Inc. v. Cooney-Ames*, No. B181325, 2006 Cal. App. LEXIS 529, at *8 (Cal. Ct. App. Jan. 23, 2006).

160. *Zerquera v. Centennial Homeowners' Ass'n*, 752 So. 2d 694, 695 (Fla. Dist. Ct. App. 2000).

161. See *Associations Hit Hard*, *supra* note 7 (addressing the economic crisis for associations and finding that “[b]oard members in every community association manage the business of their communities, and businesses must pay their bills”).

setting forth comprehensive CCRs, articles of incorporation, and bylaws.¹⁶² In the same vein, associations should also be more upfront about the purpose of special assessments through newsletters and open board meetings.¹⁶³ When owners are better informed through efforts of a transparent board, conflicts will be less likely to arise and owners will have the opportunity to collaborate with the board in hopes of dispute resolution.¹⁶⁴ Furthermore, homeowners should receive written notice of the association's foreclosure policies and procedures at the time they purchase property in the association.¹⁶⁵

After a conflict over fees arises, owners should be granted due process notice of the delinquent fees and the opportunity to be heard by an association committee.¹⁶⁶ Associations should consider internal hearing processes before seeking judicial intervention.¹⁶⁷ This will give an owner the opportunity to realize the seriousness of the situation and to verbalize her protests.¹⁶⁸

Because South Carolina is on the cusp of determining how homestead exemptions apply to community association foreclosures, it can avoid the pitfalls other jurisdictions have encountered. Of the utmost importance in South Carolina is the necessity for legislative provisions to rein in on associations' power to foreclose for minor fee disputes, while at the same time protecting the associations from financial disaster.¹⁶⁹ This

162. Scavo, *supra* note 44, at 309.

163. *Id.* at 314.

164. See *Community Association Conflict*, CMTY. ASS'N INST., [http://www.caionline.org/about/press/Media Statements/statement_conflict2.doc](http://www.caionline.org/about/press/Media%20Statements/statement_conflict2.doc) (last visited Feb. 20, 2011); Joanne L. Willoughby, *Communication - The Key to a Successful Board and a Happy Community*, ASS'N TIMES, <http://www.assocliving.com/2010/06/communication-the-key-to-a-successful-board-and-a-happy-community/> (last visited Feb. 20, 2011).

165. See Giantomasi, *supra* note 104, at 2537 (suggesting that associations clearly outline the foreclosure proceedings and require the homeowner's signature).

166. Scavo, *supra* note 44, at 316, 319–20 (calling community associations a “mini government” and drawing comparisons between associations and administrative agencies); *Collecting Association Assessments*, *supra* note 51.

167. Scavo, *supra* note 44, at 330.

168. *Id.* at 316.

169. See *generally* Giantomasi, *supra* note 104, at 2542 (“Legislators must

delicate balance is imperative. Legislation that solely seeks to protect members while unduly burdening the association will be counterproductive and lead to a drop in voluntary member involvement in association governance and escalating delinquency rates.¹⁷⁰ Furthermore, legislators must keep in mind that these homeowners are association members by choice and have the opportunity to serve on the association's board; thus, the overprotection of members by binding the hands of associations is unnecessary.

Some jurisdictions, mainly California and Texas, have been proactive in this regard. California legislators began making strides in their statutory foreclosure provisions during the last decade.¹⁷¹ Among these advancements, legislators enacted a delinquency threshold requirement of \$1,800 for community association foreclosures.¹⁷² An association also cannot foreclose on a property when assessments are less than twelve months delinquent, and prior to foreclosing, the association must meet with the owner and offer to participate in dispute resolution.¹⁷³ The board of directors of the association must reach a majority vote in favor of initiating foreclosure thirty days prior to any public sale of the property.¹⁷⁴ The statute also provides for a ninety day right of redemption period after a non-judicial foreclosure, allowing the delinquent owner to regain her property.¹⁷⁵

The Texas Residential Property Owners Protections Act (TRPOPA) was enacted to protect association members from

enact laws that allow[] HOAs to retain their foreclosure power in order to keep a smoothly running community, while at the same time allow residents to live their lives free from the threat of an unwarranted foreclosure.”).

170. D. Ryan McCabe, Comment to *A Possible South Carolina Homeowner's Association Act*, S.C. CMTY. ASS'N L. BLOG (Jun. 26, 2009 10:23 PM), <http://sccommunityassociationlaw.com/2009/04/07/a-possible-south-carolina-homeowners-association-act.aspx#comment-2202366> (arguing against the overregulation of associations) [hereinafter McCabe, 10:23 PM].

171. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 200 (2006).

172. CAL. CIV. CODE § 1367.4(b) (West 2007).

173. *Id.* § 1367.4(c).

174. *Id.* § 1367.4(c)(2).

175. *Id.* § 1367.4(c)(4).

association overreaching.¹⁷⁶ First, TRPOPA institutes detailed notice provisions before an association can restrict access to common areas, file suit against the owner other than a suit to collect assessments or foreclose on the property, or levy a fine for violation of association restrictions or bylaws.¹⁷⁷ The Act also provides for a hearing before the board and alternative dispute resolution as methods of deciding matters short of trial.¹⁷⁸ However, the notice and hearing provisions do not apply to causes of action for foreclosure.¹⁷⁹ Provisions specifically relating to association foreclosure include requiring the association to notify the owner thirty days after the date of the foreclosure sale to inform the owner of the right to redeem the property.¹⁸⁰ Probably the most homeowner-friendly provision in the Act is the 180 day right of redemption, entitling the owner to redeem her former property subject to payment of amounts due the association at the time of the sale, interest, costs, and post-sale assessments.¹⁸¹ Texas and California legislators attempted to walk a fine line between protecting homeowners and protecting associations, which seems to be the best path to follow.¹⁸² This “balancing act” is undoubtedly the best approach to resolving

176. TEX. PROP. CODE ANN. §§ 209.001-209.013 (West 2007 & Supp. 2010). TROPOPA began as S.B. 507, unofficially dubbed the Wenonah Blevins Residential Property Owners Protection Act. S.B. 507, 77th Leg., Reg. Sess. (Tex. 2001). Wenonah Blevins, an eighty-two-year-old widow, lost her home in foreclosure by her community association when she could not afford \$814.50 in association dues. Giantomasi, *supra* note 104, at 2503. Her home, worth \$150,000, was sold at auction for \$5,000. *Id.* In response to the public outrage and substantial media coverage of Ms. Blevins’s plight, Texas legislators were spurred into action. *Id.*; see also Gammon & Morones, *supra* note 54, at 18. However, the story ended well for Ms. Blevins, who recovered her home and received a \$300,000 settlement from the association. Giantomasi, *supra* note 104, at 2503.

177. TEX. PROP. CODE ANN. § 209.006 (West 2007 & Supp. 2010).

178. *Id.* § 209.007(a).

179. *Id.* § 209.007(d).

180. *Id.* § 209.010(a).

181. *Id.* § 209.011(b), (d).

182. Gammon & Morones, *supra* note 54, at 25 (concluding that legislation seeking to protect delinquent homeowners ultimately harms owners that pay their dues on time, “as money diverted from the community to cover escalating costs of pursuing delinquencies leaves less funding for services that benefit the entire community”).

issues between community associations and their members.¹⁸³

South Carolina Senator Jackson recently introduced a bill entitled the South Carolina Homeowners' Association Act (S. 218) in the Senate.¹⁸⁴ S. 218 is the reintroduced and identical version of S. 30, and like its predecessor, is aimed at resolving a notable rise in litigation between associations and their members across the state.¹⁸⁵ The main goal of the act is to increase transparency of board members' decisions and general accountability in order to facilitate the strained relationship between the owners and the board.¹⁸⁶ S. 30 came under fire for its failure to address the real issues plaguing associations, while simultaneously stripping the associations of any shred of power they once held.¹⁸⁷ Remarkably, both versions of the act fail to confront foreclosure issues at all. The bill also raises constitutional issues of privacy amongst association members.¹⁸⁸ Most alarming, however, is the fact that it empowers the Department of Consumer Affairs to oversee all community association dealings.¹⁸⁹

183. See Giantomasi, *supra* note 104, at 2542.

184. S. 218, 119th Gen. Assemb., Reg. Sess. § 27-52-110 (S.C. 2011). S. 218 is identical to S. 30, a bill introduced into the Senate in 2009. S. 30, 118th Gen. Assemb., Reg. Sess. § 27-52-110 (S.C. 2009).

185. D. Ryan McCabe, *A Possible South Carolina Homeowner's Association Act*, S.C. CMTY. ASS'N L. BLOG (Apr. 7, 2009 12:29 PM), <http://scommunityassociationlaw.com/2009/04/07/a-possible-south-carolina-homeowners-association-act.aspx#comment-2202366> [hereinafter McCabe, 12:29 PM].

186. *Id.*

187. D. Ryan McCabe, Comment to *A Possible South Carolina Homeowner's Association Act*, S.C. CMTY. ASS'N L. BLOG (Jun. 26, 2009, 10:31 PM), <http://scommunityassociationlaw.com/2009/04/07/a-possible-south-carolina-homeowners-association-act.aspx#comment-2202366> [hereinafter McCabe, 10:31 PM]; *Senate Bill SB-30*, KIAWAH ISLAND CMTY. ASS'N INC., <http://www.kiawah-owners.org/sb30.htm> (last visited Feb. 20, 2011).

188. McCabe, 12:29 PM, *supra* note 188; KIAWAH ISLAND CMTY. ASS'N INC., *supra* note 190 (arguing S. 30 violates members' privacy "by making public your contact information, interference with association's ability to enforce covenant violations and double payments required for those who also own in sub-associations/regimes").

189. S. 218 § 27-52-110(7); McCabe, 10:31 PM, *supra* note 190 (arguing against S. 30 because "[t]he creation of a new agency or expansion of a new agency for the purpose of putting government in our neighborhoods is unprecedented in this country. NO OTHER STATE HAS AN AGENCY THAT DOES WHAT SB30 WOULD DO.").

Even the seemingly helpful provisions of S. 218 are poorly drafted and concocted.¹⁹⁰ For example, the bill requires an association member selling her home to disclose in writing that the property is part of a community association.¹⁹¹ By itself, this is arguably an important and necessary provision; however, the bill goes further to encumber the association and its members if the potential purchaser decides to proceed with the sale.¹⁹² In this event, the member must provide the potential purchaser with a burdensome packet of information including the following: the association's bylaws, CCRs, contact information, assessment information, association insurance information, association reserve funding, alterations or improvements to the lot that violate the association's CCRs, pending litigation by the association against the property, an acknowledgement that failure to pay assessments could result in foreclosure, and a copy of the association's budget and recent financial report.¹⁹³ In all candor, who in their right mind would purchase property in an association after being handed such an unwieldy amount of information? In addition, failure by the member to provide the above-mentioned disclosure packet allows the potential purchaser to void the contract of sale.¹⁹⁴

The foreclosure acknowledgement, however, is a step in the right direction. Not only would the purchaser have record notice of the association's right to foreclose, but she would also have actual notice of the potential for foreclosure in the event that her assessments become delinquent. Increased understanding on the front-end will remedy a lot of confusion and frustration with association procedures.

190. See McCabe, 10:23 PM, *supra* note 173.

191. S. 218 § 27-52-200(A).

192. *Id.* § 27-52-200(B).

193. *Id.*

194. *Id.* § 27-52-200(C).

VII. PROPOSED SOLUTION

Like TRPOPA, S. 218 prescribes notice and hearing provisions before an association can file suit against a member; however, neither provision applies to causes of action stemming from failure to pay assessments.¹⁹⁵ Unlike TRPOPA and the California act, S. 218 does not mandate a right of redemption or address a threshold delinquency before foreclosure can be initiated. While reasonable legislation is necessary, S. 218 as written is both extreme and unhelpful for the problems facing associations and members.¹⁹⁶

The ideal community association statute in South Carolina should be both moderate and flexible in its approach to associations. The statute should address issues like requiring written foreclosure acknowledgement to homeowners. It should also set reasonable guidelines for association foreclosure procedures. However, the statute must recognize that many associations in this state are small and are composed of very little property.¹⁹⁷ If the statute binds the hands of associations to the point that they have no method of recouping assessments, or the only available method is unduly burdensome and expensive, then associations will not be able to survive in this state.

The best approach for this legislation to take is a proactive one. If South Carolina had a reasonable statute that protected both associations and their members upfront with clear notice and procedure requirements, there inevitably would be less litigation and fewer compliance issues. The statute should not eliminate foreclosure as an assessment collection tool, but it should prescribe the steps associations must take before reaching foreclosure, including employing alternative remedies.

195. *Id.* § 27-52-180(A)–(D).

196. McCabe, 10:23 PM, *supra* note 173.

197. McCabe, 10:31 PM, *supra* note 190.

VIII. CONCLUSION

Community associations, above all else, should exist for the benefit of their members. Unfortunately, associations have faced many challenges including recent economic struggles. Associations have also had to contend with members like Robella who think their situation is paramount to that of their neighbors. There is nothing neighborly about a homeowner manipulating the legal system for personal gain or failing to meet her individual obligations to her neighbors' detriment. Associations should strive to get back to their roots as the most local and basic form of democracy and civic involvement. Although moderate legislative measures may be necessary to protect members and associations alike, drastic steps such as S. 218 would further alienate associations from their members.

The homestead exemption has its place in the protection of property owners from debtors; however, it is incompatible with the concept of community association foreclosure. In terms of both law and equity, the homestead exemption should not apply when a property owner knowingly and voluntarily subjects her property as collateral for association assessments. In addition, the association's lien on the property preexists the owner's claim of homestead, rendering it an untimely effort to overcome contractual obligations. Associations must have an avenue for recouping reasonable assessments and fines if they are expected to continue in existence. When utilized as a last resort, foreclosure is the best available resource associations have at their disposal.¹⁹⁸ Simply put, the homestead exemption is not the solution to the issue of community association foreclosure, and South Carolina should follow other jurisdictions that have determined the same.

198. *Foreclosure as a Last Resort*, *supra* note 50.