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## Raising the Bar: The Ninth Circuit's Troubling Interpretation of the Federal Foreclosure Bar

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## NOTE

# Raising the Bar: The Ninth Circuit's Troubling Interpretation of the Federal Foreclosure Bar

*Berezovsky v. Moniz*, 869 F.3d 923, 925 (9th Cir. 2017)

Sarah Rowan\*

### I. INTRODUCTION

With sixty-nine million residents in community associations<sup>1</sup> and eighty-nine million dollars in assessments, associations have a prominent role in today's society.<sup>2</sup> In 2017, the Ninth Circuit, in *Berezovsky v. Moniz*, restricted an association's ability to collect delinquent assessments when it held that the association cannot foreclose on its priority position lien without the Federal Housing Finance Agency's ("Agency") consent.<sup>3</sup> In so holding, the court sided with the big banks and lenders at the expense of local associations and state priority lien laws that have been in effect for twenty to thirty years. Not only does this decision burden associations, but it burdens the millions of homeowners living in those associations as well. This Note argues that the Ninth Circuit erred in holding that the Federal Foreclosure Bar requires the Agency's consent and that, even if it does require Agency consent, the Agency has not already impliedly consented. This Note also discusses the policy implications of the *Berezovsky* decision and of requiring the Agency's consent before associations can foreclose. The Federal Foreclosure Bar completely undercuts the balance that priority lien laws created between lenders and associations, and it effectively prevents associations from enforcing their rights.

Part II of this Note discusses the facts surrounding the Ninth Circuit's decision in *Berezovsky v. Moniz*.<sup>4</sup> Part III then describes the role of associa-

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1. "Community associations" refers to planned communities, such as homeowners' associations, condominium communities, and housing cooperatives.

2. CMTY. ASS'NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2016 at 1 (2016), <https://foundation.caionline.org/wp-content/uploads/2017/07/2016StatsReviewFBWeb.pdf>.

3. *Berezovsky v. Moniz*, 869 F.3d 923, 933 (9th Cir. 2017).

4. *Id.*

tions and analyzes cases interpreting superpriority liens, the Federal Foreclosure Bar, and the FDIC Exemption. Part IV explains the Ninth Circuit's rationale for holding that an association cannot foreclose on its priority position lien without the Agency's consent. Finally, Part V discusses why the Ninth Circuit should not have held that the Agency's consent in association priority lien foreclosures is required and the implications of requiring the Agency's consent before associations can foreclose.

## II. FACTS AND HOLDING

In 2007, Gregory and Idell Moniz took out a \$220,000 loan to purchase a home in Las Vegas, Nevada.<sup>5</sup> The loan was secured by a deed of trust with Bank of America, N.A. ("BANA") as its beneficiary.<sup>6</sup> A few years later, the Monizes missed payments owed to the homeowners' association ("HOA"), which governed their home's community.<sup>7</sup> Accordingly, an HOA lien arose against the Monizes' home.<sup>8</sup> For the first nine months of unpaid assessments, the HOA lien was further entitled under Nevada's superpriority lien statute to priority over BANA's lien.<sup>9</sup> After recording a lien against the home and providing a formal notice of default,<sup>10</sup> the HOA foreclosed on the Monizes' home.<sup>11</sup> Alex Berezovsky purchased the home at the HOA's foreclosure sale.<sup>12</sup> After purchasing the home, he sued the Monizes and BANA to quiet title in

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5. *Id.* at 926. The loan was sold to Freddie Mac in 2007, but Freddie Mac never recorded its interest. *Id.* at 932.

6. *Id.* at 926. BANA was the deed-of-trust beneficiary, and Freddie Mac was the note owner. *Id.* at 933.

7. *Id.* at 926. The missed payments to the homeowners' association totaled \$1767.38. *Id.*

8. *Id.* An HOA lien encumbers the title to a home, and if the debt is not paid off, the HOA may "call the lien due and seize your home." Ciele Edwards, *Tax Liens vs. HOA Liens*, ZACKS, <https://finance.zacks.com/tax-liens-vs-hoa-liens-9939.html> (last visited May 28, 2018).

9. *Berezovsky*, 869 F.3d at 925; see NEV. REV. STAT. ANN. § 116.3116(3) (West 2018) ("A lien under this section is prior to all security interests described in paragraph (b) of subsection 2 to the extent of: . . . (b) The unpaid amount of assessments . . . which would have become due in the absence of acceleration during the 9 months immediately preceding the date on which the notice of default and election to sell is recorded . . ."). Any unpaid assessments beyond the initial nine months were still subject to the HOA lien but were subordinate to liens or interests recorded after the Covenants, Conditions, and Restrictions ("CCRs"). *Berezovsky*, 869 F.3d at 925, 931 n.6.

10. BANA also received notice. Opposition to Plaintiff's Motion for Summary Judgment at 3, *Berezovsky*, 869 F.3d 923 (No. 2:15-cv-011860-GMN-GWF).

11. *Berezovsky*, 869 F.3d at 926. If an association forecloses on its lien, all other property liens or interests that were recorded after the CCRs attached to the title would be extinguished, including the subordinate portion of the HOA lien that went beyond nine months of unpaid assessments. *Id.* at 925.

12. *Id.*

Nevada state court.<sup>13</sup> Unknown to Berezovsky – and not shown on the record – Freddie Mac had purchased the Monizes' loan in 2007.<sup>14</sup> Freddie Mac then intervened and filed a counterclaim for title to the property.<sup>15</sup> Armed with 12 U.S.C. § 4617(j)(3) (“Federal Foreclosure Bar”), Freddie Mac removed the case to federal court and filed a motion for summary judgment.<sup>16</sup> Additionally, as Freddie Mac’s conservator, the Agency intervened and joined the motion for summary judgment.<sup>17</sup>

Freddie Mac and the Agency claimed that § 4617(j)(3) precluded the HOA from extinguishing Freddie Mac’s lien, unless the Agency consented to the HOA foreclosure of the priority portion of its lien.<sup>18</sup> They argued that the Agency did not consent to the HOA’s foreclosure of the priority portion of its lien; thus, the HOA foreclosure did not extinguish Freddie Mac’s lien.<sup>19</sup>

The district court granted Freddie Mac and the Agency’s motion for summary judgment, determining that the Agency did not consent to the HOA’s extinguishment of Freddie Mac’s lien on the property.<sup>20</sup> Berezovsky appealed, arguing that the Federal Foreclosure Bar does not apply to private association foreclosures and that because Freddie Mac and the Agency did not take any action to stop the sale, they implicitly consented to the foreclosure.<sup>21</sup> In the alternative, Berezovsky argued that Freddie Mac did not have a property interest that was enforceable.<sup>22</sup> The Ninth Circuit affirmed the district court and held that Freddie Mac possessed an enforceable property interest, Freddie Mac was under Agency conservatorship at the time of the foreclosure sale, and ultimately, the Federal Foreclosure Bar protected the deed of trust from being extinguished without the Agency’s consent.<sup>23</sup>

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13. *Id.* at 926.

14. *Id.*

15. *Id.*

16. *Id.* Freddie Mac produced evidence showing that it owned the Monizes’ loan and that BANA was Freddie Mac’s loan-servicing agent. *Id.*

17. *Id.* As conservator, the Agency owns and controls Freddie Mac’s assets. *Id.* at 926–27; see Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, §§ 1311, 1313, 122 Stat. 2654, 2261–62, 2664 (2008) (giving Agency the power to place entities, such as Freddie Mac and Fannie Mae, into conservatorship and to participate in litigation).

18. *Berezovsky*, 869 F.3d at 927; see also 12 U.S.C. § 4617(j)(3) (2012) (“No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency.”).

19. *Berezovsky*, 869 F.3d at 927, 933.

20. *Id.* at 927.

21. *Id.*

22. *Id.*

23. *Id.* at 933.

### III. LEGAL BACKGROUND

This Part discusses the role of associations, superpriority liens, and FDIC receiverships. It also analyzes court decisions that have interpreted superpriority liens and the FDIC exemption.

#### A. Community Associations

Associations oversee common areas and property interests, offer services for owners, and help cultivate a feeling of community through social activities and/or amenities.<sup>24</sup> In 2016, there were 342,000 associations in the United States, which housed sixty-nine million residents or 21.3% of the U.S. population.<sup>25</sup> The number of associations varies widely by state.<sup>26</sup> For example, Florida had 47,900 associations, while Alaska had fewer than 1000 associations in 2016.<sup>27</sup> Missouri had 5400 associations with an estimated 1,089,000 residents in 2016.<sup>28</sup> The number of associations in the United States is estimated to have increased to 345,000–347,000 in 2017.<sup>29</sup>

Moreover, with \$88 billion in assessments collected from homeowners across the country, associations have a role in both the national economy and in people's lives.<sup>30</sup> Assessments may go towards costs such as landscape, maintenance of common areas, snow removal, garbage collection, street lighting, amenities (pool, golf, exercise room, etc.), police patrol, and even insurance.<sup>31</sup> Condominium communities are slightly different because common areas are owned by all community members.<sup>32</sup> Accordingly, condo assessments typically go towards building exteriors, roofs, roads, common areas, sewage, and parking lots.<sup>33</sup> Moreover, associations will also maintain a reserve fund

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24. CMTY. ASS'NS INST., AN INTRODUCTION TO COMMUNITY ASSOCIATION LIVING 4 (2017), [https://www.caionline.org/HomeownerLeaders/ResourcesforHomeownerLeaders/community\\_association\\_living.pdf](https://www.caionline.org/HomeownerLeaders/ResourcesforHomeownerLeaders/community_association_living.pdf).

25. CMTY. ASS'NS INST., *supra* note 2. Community associations refer to planned communities, such as homeowners' associations, condominium communities, and housing cooperatives. *Id.* Of the totals, 51–55% are homeowners' associations, 42–45% are condominium communities, and 3–4% are cooperatives. *Id.*

26. *Id.* at 2.

27. *Id.*

28. *Id.*

29. *Id.* at 1.

30. *Id.* at 3.

31. CMTY. ASS'NS INST., *supra* note 24, at 18.

32. Tony Guerra, *What Is an Assessment in a Condo Association?*, SFGATE, <http://homeguides.sfgate.com/assessment-condo-association-57821.html> (last visited May 28, 2018).

33. *Id.*

for future and/or unanticipated expenses and to cover unpaid assessments potentially.<sup>34</sup>

Associations are also susceptible to economic downturn. During the mortgage crisis of 2007–2010, many homeowners defaulted on their mortgages, foreclosure rates went up, and home values crashed.<sup>35</sup> As a result, many borrowers went underwater on their mortgages.<sup>36</sup> Unsurprisingly, in tough economic times, association assessments were not being paid either.<sup>37</sup> Moreover, when lenders foreclosed on a property, there was not enough equity in the property to satisfy both the mortgage lien and the association lien.<sup>38</sup> Therefore, unpaid assessments were not being satisfied by the foreclosure, and the associations were left with a strained operating budget and potentially increased assessments for other homeowners in the association.<sup>39</sup> A limited priority position for an association's lien would provide some protection from adverse market forces and help soften the blow during economic downturns.<sup>40</sup>

### B. *The Superpriority Lien*

Generally, “first in time, first in right” governs the priority of liens.<sup>41</sup> In other words, the first lien to attach to a property has a priority position over liens that attach afterwards.<sup>42</sup> However, statutes that regulate lien priorities can change the general first in time, first in right rule.<sup>43</sup> For example, the Nevada statute at issue in *Berezovsky* created a superpriority lien for association assessments.<sup>44</sup>

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34. Casey Perkins, Note, *Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 NEV. L.J. 561, 565 (2010).

35. See John V. Duca, *Subprime Mortgage Crisis*, FED. RES. HIST. (Nov. 22, 2013), [https://www.federalreservehistory.org/essays/subprime\\_mortgage\\_crisis](https://www.federalreservehistory.org/essays/subprime_mortgage_crisis). Even as of April 2018, one in every 2058 housing units was in foreclosure. See *U.S. Real Estate Trends & Market Info*, REALTYTRAC (Apr. 2018), <http://www.realtytrac.com/statsandtrends/foreclosuretrends>.

36. Diana Olick, *Underwater Mortgage: CNBC Explains*, CNBC (Apr. 24, 2013, 10:52 AM), <https://www.cnbc.com/id/100543831>. A mortgage is underwater when “the amount of the mortgage is greater than the current value of the home.” *Id.*

37. Perkins, *supra* note 34, at 570.

38. *Id.* at 567.

39. *Id.* at 568.

40. *Id.* at 569.

41. 51 AM. JUR. 2D *Liens* § 70 (2018).

42. *Id.*

43. *Id.*

44. *Berezovsky v. Moniz*, 869 F.3d 923, 925 (9th Cir. 2017).

A superpriority lien elevates an association's lien for the first six months<sup>45</sup> of assessments to a position above other creditors, such as a mortgage lender.<sup>46</sup> In effect, a superpriority lien splits an association's entire lien into two portions, with six months of delinquent assessments getting priority over a first mortgage and the remaining unpaid assessments receiving a junior position to the mortgage.<sup>47</sup> The goal is to "strik[e] an equitable balance between the need to enforce collection of unpaid assessments and the need to protect the priority of the security interests of lenders."<sup>48</sup>

Superpriority liens for associations stem from section 3-116 of the Uniform Common Interest Ownership Act of 1982 ("UCIOA").<sup>49</sup> The UCIOA attempts to make uniform law among the states regarding common interest communities.<sup>50</sup> Comments to the UCIOA compare an association lien to other liens – such as liens for real estate taxes – because an association gets its revenue primarily, if not only, from common assessments.<sup>51</sup> Moreover, associations, rather than the public government, may be responsible for collecting trash and maintaining roads and parks.<sup>52</sup> Thus, association assessments are comparable to property taxes, and property tax liens typically have priority over all other liens.<sup>53</sup>

As of the time of this Note, eleven states have adopted a version of the UCIOA, which applies to condominiums, planned communities, and real estate cooperatives.<sup>54</sup> Fourteen states have enacted the Uniform Condominium Act ("UCA"), which only applies to condominium associations.<sup>55</sup> In some states, such as Nevada, the statute applies to an HOA's unpaid assessments for up to

45. The Nevada superpriority lien prioritizes the first *nine* months of association assessments. NEV. REV. STAT. ANN. § 116.3116(2)–(3) (West 2018).

46. Aušra Gaigalaitė, Note, *Priority of Condominium Associations' Assessment Liens Vis-à-Vis Mortgages: Navigating in the Super-Priority Lien Jurisdictions*, 40 SEATTLE U. L. REV. 841, 843–44 (2017).

47. R. Wilson Freyermuth & Dale A. Whitman, *Can Associations Have Priority over Fannie and Freddie?*, 29 PROB. & PROP. 27, 27 (2015). A foreclosure of a priority position lien results in the termination of all junior liens. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.1 (AM. LAW INST. 1997).

48. UNIF. COMMON INTEREST OWNERSHIP ACT § 3–116, cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

49. See UNIFORM COMMON INTEREST OWNERSHIP ACT § 3–116 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1982).

50. SFR Invs. Pool 1, LLC v. U.S. Bank, 334 P.3d 408, 410 (Nev. 2014) (en banc).

51. *Id.* at 413.

52. 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).

53. *Id.*

54. *Uniform Acts by State*, CMTY. ASS'NS INST., <https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx> (last visited May 28, 2018).

55. *Id.*

nine months.<sup>56</sup> In other states, like Missouri, the statute only applies to condominium associations for six months of unpaid assessments.<sup>57</sup> All other unpaid assessments, after the six or nine months, remain in a junior position to the lender's mortgage or to a first deed of trust.<sup>58</sup> Regardless of which statute a state enacts, the goal is still to “strick[e] an equitable balance between the need to enforce collection of unpaid assessments and the need to protect the priority of the security interests of lenders.”<sup>59</sup>

Nevada's superpriority lien law, NRS 116.3116, stems from the Uniform Common Interest Ownership Act of 1982 (“UCIOA”).<sup>60</sup> NRS 116.3116(2) states that an HOA “lien . . . is prior to all other liens and encumbrances on a unit except: . . . [a] first security interest.”<sup>61</sup> Then, it adds that the lien “is prior to all [first] security interests . . . to the extent of: . . . The unpaid amount of assessments . . . which would have become due in the absence of acceleration during the 9 months immediately preceding the date on which the notice of default and election to sell is recorded.”<sup>62</sup>

There is a division between Nevada district courts on whether a true priority lien is established by NRS 116.3116.<sup>63</sup> For example, multiple district courts have held that when an HOA forecloses on its superpriority lien, junior interests, including a first deed of trust, are extinguished.<sup>64</sup> Conversely, other courts have held that the foreclosure of the HOA superpriority liens does not extinguish an earlier-recorded first mortgage, nor does the foreclosure of an earlier-recorded first mortgage extinguish the HOA lien.<sup>65</sup>

In 2014, the Supreme Court of Nevada, in *SFR Investments Pool 1 v. US Bank*, determined whether NRS 116.3116 was a true priority lien or whether it only created a payment priority between the HOA and beneficiary of the first deed of trust.<sup>66</sup> The court determined that NRS 116.3116(2) splits an HOA lien

56. NEV. REV. STAT. ANN. § 116.3116(2)–(3) (West 2018).

57. MO. REV. STAT. § 448.3–116.2(3) (2016).

58. See Freyermuth & Whitman, *supra* note 47, at 27.

59. See UNIF. COMMON INTEREST OWNERSHIP ACT § 3–116, cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

60. *SFR Invs. Pool 1, LLC v. U.S. Bank*, 334 P.3d 408, 410 (Nev. 2014) (en banc).

61. § 116.3116(2).

62. *Id.* § 116.3116(3).

63. *SFR Invs. Pool 1, LLC*, 334 P.3d at 412.

64. See 7912 Limbwood Court Tr. v. Wells Fargo Bank, 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013); see also Cape Jasmine Court Tr. v. Cent. Mortg. Co., No. 2:13–CV–1125–APG–CWH, 2014 WL 1305015, at \*4 (D. Nev. 2014).

65. See Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d 1222, 1225 (D. Nev. 2013) (“The super-priority amount is senior to an earlier-recorded first mortgage in the sense that it must be satisfied before a first mortgage upon its own foreclosure, but it is *in parity with* an earlier-recorded first mortgage with respect to extinguishment, i.e., the foreclosure of neither extinguishes the other.”); see also Weeping Hollow Ave. Tr. v. Spencer, No. 2:13–CV–00544–JCM–VCF, 2013 WL 2296313, at \*5 (D. Nev. 2013), *rev'd and remanded on other grounds*, 831 F.3d 1110 (9th Cir. 2016).

66. *SFR Invs. Pool 1*, 334 P.3d at 412.



into a superpriority piece and a subpriority piece.<sup>67</sup> The last nine months of HOA dues, maintenance, and nuisance-abatement charges make up the superpriority piece and are “prior to” a first deed of trust. All other HOA fees or assessments are subordinate to a first deed of trust, making them the subpriority piece.<sup>68</sup>

If the superpriority lien is a true priority lien, an HOA could foreclose on it, which would result in an extinguishment of the first deed of trust.<sup>69</sup> The court examined official comments to the UCIOA, which note that the “split-lien” approach is designed to “enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders.”<sup>70</sup> Moreover, the Uniform Law Commission (“ULC”) established a Joint Editorial Board for Uniform Real Property Acts, which published a report in 2013 about the priority lien.<sup>71</sup> The report, like the comments to the UCIOA, further supports the proposition that the UCIOA established a true priority lien.<sup>72</sup> Ultimately, the Supreme Court of Nevada held that NRS 116.3116 established a true superpriority lien, and the HOA’s lien could be foreclosed non-judicially.<sup>73</sup>

After the court’s decision in *SFR Investments Pool 1*, Freddie Mac issued an announcement to its servicers.<sup>74</sup> The announcement reminded servicers to pay HOA and condominium assessments that take priority, or may take priority, over Freddie Mac’s lien – pursuant to Section 66.22 of its guidelines, *Expenses that May Become First Liens on the Property*.<sup>75</sup>

Similarly, the District of Columbia Court of Appeals held that a condominium association’s foreclosure on a condominium for unpaid dues extinguished the first mortgager’s deed of trust.<sup>76</sup> The District of Columbia has a

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67. *Id.* at 411.

68. *Id.*

69. *Id.*

70. *Id.* at 412.

71. *Id.* at 413.

72. *Id.*

73. *Id.* at 414. After the *Berezovsky v. Moniz* decision, the Nevada Supreme Court subsequently held that the Federal Foreclosure Bar preempts NRS 116.3113 and that the FHFA did not consent to the extinguishment of Fannie Mae’s property interest by failing to act. *Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat’l Mortg. Ass’n*, No. 69419, 2018 WL 1448731, at \*3 (Nev. 2018).

74. See FREDDIE MAC, BULLETIN NO. 2014-20 at 3 (Nov. 17, 2014), [www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1420.pdf](http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1420.pdf).

75. *Id.*

76. *Chase Plaza Condo. Ass’n, Inc. v. J.P. Morgan Chase Bank*, 98 A.3d 166, 178 (D.C. 2014); see also *Trademark Props. of Mich., LLC v. Fed. Nat’l Mortg. Ass’n*, 863 N.W.2d 344, 347–48 (Mich. Ct. App. 2014) (ruling in favor of a plaintiff who purchased a condominium unit at a sheriff’s sale after an association foreclosed the property).

condominium act that provides for a six-month priority lien for the association.<sup>77</sup> The District's Condominium Act is similar to Nevada's and is also rooted in the UCOIA and the Uniform Condominium Act ("UCA").<sup>78</sup> In so holding, the court looked to the language of the act and decided that it established a superpriority lien for the most recent six months of assessments.<sup>79</sup> Further, the court noted that "liens with lower priority are extinguished if a valid foreclosure sale yields proceeds insufficient to satisfy a higher-priority lien," which is a general principle of foreclosure law.<sup>80</sup> Therefore, looking at the act's language and basic principles of foreclosure law, the conclusion that the association's foreclosure extinguished the mortgager's first deed of trust follows.<sup>81</sup> If the District of Columbia Council intended to depart from basic foreclosure principles, as the mortgager argued, the Council would have explicitly done so.<sup>82</sup> Lastly, the court discussed how the act was based on the UCA and UCOIA, which recognize the understanding that a first deed of trust could be extinguished by a foreclosure on the superpriority lien.<sup>83</sup>

After decisions were issued determining that associations have a true priority lien that can be foreclosed, as in *SFR Investments Pool 1*, lenders developed new arguments to try and reclaim their lost assets.<sup>84</sup> One such argument, based on the Federal Foreclosure Bar, was that a first mortgage or first deed of trust could not be extinguished by an association's foreclosure without the Agency's consent.<sup>85</sup> The Federal Foreclosure Bar states that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency."<sup>86</sup>

In *Federal National Mortgage Association*, the United States District Court for the District of Nevada accepted the argument based on the Federal Foreclosure Bar and held that it prevents Nevada's superpriority lien statute

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77. *Chase Plaza Condo. Ass'n*, 98 A.3d at 178.

78. *See id.* at 174.

79. *Id.* at 173. The court looked at the Act's language, which stated that "[t]he lien shall also be prior to a [first] mortgage or [first] deed of trust . . . to the extent of the common expense assessments . . . which would have become due in the absence of acceleration during the [six] months immediately preceding institution of an action to enforce the lien." *Id.* (second and third alterations in original); *see also* D.C. CODE ANN. § 42-1903.13(a)(2) (West 2018).

80. *Chase Plaza Condo. Ass'n*, 98 A.3d at 173.

81. *Id.* at 174.

82. *Id.*

83. *Id.* at 174-75.

84. *See Fed. Nat'l Mortg. Ass'n v. SFR Invs. Pool 1, LLC*, No. 2:14-cv-02046-JAD-PAL, 2015 WL 5723647, at \*1 (D. Nev. Sept. 28, 2015); *see also SFR Invs. Pool 1, LLC v. U.S. Bank*, 334 P.3d 408 (Nev. 2014) (en banc).

85. *See Fed. Nat'l Mortg. Ass'n*, 2015 WL 5723647, at \*1.

86. 12 U.S.C. § 4617(j)(3) (2012).

from extinguishing Fannie Mae or Freddie Mac's interest without the Agency's consent.<sup>87</sup>

### C. The FDIC Exemption

The language of the Federal Foreclosure Bar is identical to the language of § 1825(b)(2) ("FDIC Exemption"), which governs the Federal Deposit Insurance Corporation ("FDIC").<sup>88</sup> The FDIC Exemption states that "[w]hen acting as a receiver . . . [n]o property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation."<sup>89</sup> The only difference between the two statutes is that in the Federal Foreclosure Bar the word "Corporation" is replaced with "Agency."<sup>90</sup> So while the Federal Foreclosure Bar may have first been interpreted by the Ninth Circuit in *Berezovsky*, the FDIC Exemption has been interpreted by courts for years.<sup>91</sup> Accordingly, the Agency's argument invoking the Federal Foreclosure Bar relates to cases regarding the FDIC Exemption because the statutes have identical language.<sup>92</sup>

The FDIC resolves failing banks and thrifts to try to recover the FDIC's investments in the institution and treat stakeholders fairly.<sup>93</sup> Furthermore, Congress has "conferred expansive powers to ensure the *efficiency* of the process."<sup>94</sup> In fact, in a matter of *weeks or months*, FDIC receivership takes a failed bank and either sells its assets or gets another bank to take them over.<sup>95</sup> The FDIC Exemption effectively functions as a "temporary stay," which halts creditor distractions and allows the FDIC to complete its job more efficiently.<sup>96</sup>

The FDIC's success in rehabilitating or resolving banks and thrifts led Congress to use the same basis in authorizing the Agency's conservatorship

87. See *Fed. Nat'l Mortg. Ass'n*, 2015 WL 5723647, at \*3.

88. *Berezovsky v. Moniz*, 869 F.3d 923, 928 (9th Cir. 2017).

89. 12 U.S.C. § 1825(b) (2012).

90. Compare § 4617(j)(3), with § 1825(b).

91. See, e.g., *Matagorda Cty. v. Russell Law*, 19 F.3d 215 (5th Cir. 1994).

92. Compare § 4617(j)(3), with § 1825(b)(2).

93. Michael Krimminger & Mark A. Calabria, *The Conservatorships of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles 2* (CATO, Working Paper No. 26/CMFA No. 2, 2015), [https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-26\\_1.pdf](https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-26_1.pdf).

94. FED. DEPOSIT INS. CORP., RESOLUTIONS HANDBOOK 26 (Dec. 23, 2014), [https://www.fdic.gov/bank/historical/reshandbook/resolutions\\_handbook.pdf](https://www.fdic.gov/bank/historical/reshandbook/resolutions_handbook.pdf) (emphasis added).

95. Freyermuth & Whitman, *supra* note 47, at 28.

96. *Id.*

powers over Fannie Mae and Freddie Mac in the Housing and Economic Recovery Act of 2008 (“HERA”).<sup>97</sup> However, in stark contrast to FDIC receiverships, the FDIC’s conservatorship is going on *nine years*.<sup>98</sup> Moreover, the Agency conservatorship shows no signs of ending soon.<sup>99</sup>

In *Matagorda County v. Russell Law*, the Fifth Circuit upheld the FDIC Exemption and determined that a local government’s property tax lien was barred from foreclosure without the FDIC’s consent.<sup>100</sup> However, the court noted that the postponement of the ability to collect on the tax lien was “a severe impairment of those assets.”<sup>101</sup> The “delay in the exercise of a valuable property right” was not enough to constitute a compensable taking *at this point*.<sup>102</sup> However, a compensable taking may occur *at some point* if there is “unmitigated delay” and reduced investment-backed expectations.<sup>103</sup>

In *FDIC v. McFarland*, the Fifth Circuit held that “private entities possessing normal judgment liens . . . are not barred by section 1825(b)(2), [the FDIC Exemption].”<sup>104</sup> In so holding, the court analyzed the FDIC Exemption by looking to the structure and purpose of the statute.<sup>105</sup> The court noted how, before the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”) 12 U.S.C. § 1825 only included § 1825(a), which exempted the FDIC from taxation when it was in its corporate capacity.<sup>106</sup> Then, the court held that § 1825(b) was added to extend the tax exemption to the FDIC when it is a receiver.<sup>107</sup>

#### IV. INSTANT DECISION

In *Berezovsky*, the Ninth Circuit held that the Federal Foreclosure Bar immunizes Agency property from being extinguished without the Agency’s consent.<sup>108</sup> According to the court, the HOA never obtained the Agency’s consent before foreclosing on the priority portion of the HOA’s lien, and therefore, the property’s deed of trust was protected from extinguishment.<sup>109</sup>

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97. Krimminger & Calabria, *supra* note 93, at 2.

98. *Conservatorship*, FED. HOUSING FIN. AGENCY, <https://www.fhfa.gov/Conservatorship> (last visited May 28, 2018). Fannie Mae and Freddie Mac were placed into conservatorships on September 6, 2008. *Id.*

99. Freyermuth & Whitman, *supra* note 47, at 28.

100. *Matagorda Cty. v. Russell Law*, 19 F.3d 215, 225 (5th Cir. 1994).

101. *Id.* at 224–25.

102. *Id.* at 225.

103. *Id.*

104. *FDIC v. McFarland*, 243 F.3d 876, 886 (5th Cir. 2001).

105. *Id.* at 885.

106. *Id.* at 886.

107. *Id.*

108. *Berezovsky v. Moniz*, 869 F.3d 923, 931 (9th Cir. 2017).

109. *Id.* at 933.

The court first determined that the Federal Foreclosure Bar applies to private foreclosures.<sup>110</sup> The court looked to the statute's structure and plain language.<sup>111</sup> According to the court, the first section of the Federal Foreclosure Bar makes it clear on its face that the subsections of § 4617(j) apply to "any case" in which the Agency serves as conservator, without limitation.<sup>112</sup> Moreover, the court noted that while the second subsection is limited to taxation, the third subsection, titled "Property protection,"<sup>113</sup> is not limited to taxation.<sup>114</sup> In fact, the court determined that foreclosure under the "Property protection" subsection is not limited to any "subset of foreclosure types."<sup>115</sup>

Further, the court distinguished its holding from that in *McFarland*, which did not apply the FDIC Exemption to private foreclosures.<sup>116</sup> In *Berezovsky*, the court stated that the statutory framework in the FDIC Exemption is distinguishable from the framework in the Federal Foreclosure Bar.<sup>117</sup> Specifically, the court noted that before FIRREA in 1989, the FDIC Exemption only included § 1825(a),<sup>118</sup> which exempts the FDIC from all taxation.<sup>119</sup> The court concluded that the addition of § 1825(b)<sup>120</sup> was designed to address tax exemptions that were not previously addressed in § 1825(a), specifically when the FDIC is acting as a receiver.<sup>121</sup> Further, the court pointed out the title of § 1825, which is "Exemption from taxation; limitations on borrowing."<sup>122</sup> Because the court in *Berezovsky* found that § 4617(j) does not include language that limits its applicability to taxation,<sup>123</sup> the court held that the Federal Foreclosure Bar is not limited to tax liens.<sup>124</sup>

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110. *Id.* at 929.

111. *Id.* at 927.

112. *Id.* at 928; *see also* 12 U.S.C. § 4617(j) (2012).

113. The subsection titled "Property protection" is the Federal Foreclosure Bar. *Berezovsky*, 869 F.3d at 928.

114. *Id.*

115. *Id.*

116. *Id.* at 928–29; *see also* FDIC v. *McFarland*, 243 F.3d 876, 886 (5th Cir. 2001). The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") governs FDIC receiverships. *Berezovsky*, 869 F.3d at 928. The language of the FDIC Exemption is identical to the Federal Foreclosure Bar, except that "Corporation" appears in the place of "Agency" in the FDIC Exemption. *Id.*

117. *Berezovsky*, 869 F.3d 928–29.

118. *Id.* at 929. Section 1825(a) is titled the "General rule." *See* 12 U.S.C. § 1825(a) (2012).

119. *Berezovsky*, 869 F.3d at 929; *see* § 1825(a).

120. Section 1825(b) is titled "Other exemptions." *See* § 1825(b).

121. *Berezovsky*, 869 F.3d at 929.

122. *Id.*

123. Section 4617 is titled "Authority over critically undercapitalized regulated entities." *See* 12 U.S.C. § 4617 (2012). Section 4617(j) is titled "Other Agency exemptions," which applies to the Agency as a conservator or a receiver. *See* § 4617(j). Section 4617(j)(2) is titled "Taxation," and § 4617(j)(3) is titled "Property protection." *See* § 4617(j)(2)–(3).

124. *Berezovsky*, 869 F.3d at 929.

Next, the court explicitly denied Berezovsky's argument that the Agency implicitly consented to the HOA foreclosure because neither Freddie Mac nor the Agency took any action to stop it.<sup>125</sup> In doing so, the court noted that Berezovsky produced no authority to support his position.<sup>126</sup> Moreover, the court held that the statutory language of the Federal Foreclosure Bar does not require active resistance to the foreclosure by the Agency;<sup>127</sup> rather, the Federal Foreclosure Bar flatly protects Agency property "unless or until the Agency affirmatively relinquishes" that protection.<sup>128</sup> Ultimately, the court found that the Agency did not relinquish its property interest.<sup>129</sup>

The court then determined whether the Federal Foreclosure Bar preempted Nevada state law.<sup>130</sup> First, the court concluded that the Federal Foreclosure Bar does not *expressly* preempt Nevada's superpriority lien because the language Congress used was not "sufficiently definite" to be considered expressly preemptive.<sup>131</sup> Next, the court found that the Federal Foreclosure Bar's language "unequivocally expresses" Congress's intent to supersede any state or contrary law that permits foreclosure of Agency property without its consent.<sup>132</sup> Moreover, the court noted that the Federal Foreclosure Bar prohibits Agency property from being foreclosed without Agency consent, but Nevada's superpriority lien law permits HOA foreclosures that would extinguish an Agency's lien without the Agency's consent.<sup>133</sup> Therefore, the court determined that the Federal Foreclosure Bar *impliedly* preempts and supersedes Nevada's superpriority lien statute because the Federal Foreclosure Bar is an "obstacle to Congress's clear and manifest goal of protecting the Agency's assets."<sup>134</sup>

Lastly, the court determined that Freddie Mac had a valid and enforceable property interest under Nevada law.<sup>135</sup> The court recognized that while BANA, the deed-of-trust beneficiary, was listed on the recording document, Freddie Mac, the note owner, was omitted from the recorded deed of trust.<sup>136</sup> However, the court determined that Nevada law recognizes a note owner as a secured

125. *Id.*

126. *Id.*

127. *See* § 4617(j)(3) ("No property of the Agency shall be subject to . . . foreclosure, or sale without the consent of the Agency . . .").

128. *Berezovsky*, 869 F.3d at 929.

129. *Id.*

130. *Id.*

131. *Id.* at 930; *see Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455, 458 (2012) (finding "in addition to, or different than those made under this [Act] may not be imposed by any state" to be expressly preemptive language (alteration in original)).

132. *Berezovsky*, 869 F.3d at 930–31. The court referred to the language of the Federal Foreclosure Bar, which stated "[n]o property of the Agency shall be subject to . . . foreclosure." *Id.* (alteration in original).

133. *Id.* at 931.

134. *Id.*

135. *Id.* at 932.

136. *Id.*

creditor with a property interest, even if the owner's agent is the only name on the recorded deed of trust.<sup>137</sup> As such, the court affirmed the district court's grant of summary judgment in favor of Freddie Mac.<sup>138</sup>

## V. COMMENT

As discussed above, the court in *Berezovsky* accepted the argument that the Agency's consent is required before an association can foreclose on its priority lien.<sup>139</sup> In requiring the Agency's consent, "the Federal government protects big banks at the expense of local community associations by compromising state priority lien laws that have been in place in many states for 20–30 years."<sup>140</sup> First, this Part discusses how the Ninth Circuit erred in holding that the Federal Foreclosure Bar requires the Agency's consent and that, even if it does require Agency consent, the Agency has not already impliedly consented. Next, this Part discusses the policy implications of the *Berezovsky* decision and of requiring the Agency's consent before associations can foreclose.

### A. *The Ninth Circuit Erred in Its Decision*

The Ninth Circuit erred in holding that the Federal Foreclosure Bar requires the Agency's consent in association priority lien foreclosures because it is a deprivation of due process, and the Federal Foreclosure Bar does not preclude foreclosures by private party liens. Moreover, even if the Federal Foreclosure Bar does apply, the Agency apparently consented to the association foreclosures.

One argument against using the Federal Foreclosure Bar as a defense is that it is a deprivation of due process.<sup>141</sup> The Fifth Amendment of the United States Constitution states that "[n]o person shall be . . . deprived of . . . property, without due process of law."<sup>142</sup> Deprivation occurs "when a governmental actor significantly alters or eliminates property rights recognized by state law."<sup>143</sup>

In *Matagorda*, the appellants argued that the FDIC had effectively "taken" their property without just compensation through the FDIC's use of

137. *Id.* In regard to the Monizes' loan, BANA is Freddie Mac's agent. *Id.* at 933.

138. *Id.*

139. *Id.* at 931.

140. Dawn Bauman, *Senator Warren (D-MA) Leads the Massachusetts Congressional Delegation to Question FHFA's Attack on Community Associations*, COMMUNITY ASS'NS INST. (June 2, 2016), <https://advocacy.caionline.org/senator-warren-d-ma-leads-the-massachusetts-congressional-delegation-to-question-fhfas-attack-on-community-associations/>.

141. Freyermuth & Whitman, *supra* note 47, at 29.

142. U.S. CONST. amend. V.

143. Freyermuth & Whitman, *supra* note 47, at 29.

the FDIC Exemption to prevent municipalities from foreclosing on real property tax liens during FDIC receiverships.<sup>144</sup> While the court rejected the appellants' argument *at this point*, it noted that because of the "indeterminate postponement" before the appellants could collect on its tax lien, the FDIC Exemption severely impaired the appellants' assets.<sup>145</sup> Moreover, "[u]nmitigated delay, coupled with diminishment of distinct investment-backed expectations, *may, at some point*, infringe on the entire 'bundle' of rights enjoyed by the Appellants to the point that a compensable taking occurs."<sup>146</sup>

Seeing that the Agency's conservatorship is now approaching nine years and there is no way to know when it will end, the conservatorship constitutes unmitigated delay.<sup>147</sup> Moreover, property interests are created by state law, and Nevada law gives the HOA a superpriority lien for unpaid assessments.<sup>148</sup> If the Federal Foreclosure Bar prevents associations from extinguishing Agency liens, then an association can only foreclose on the subpriority portion of its lien. However, foreclosing on a subpriority lien would be worthless because no, or very few, buyers would purchase a home still subject to a mortgage lien. Moreover, the Federal Foreclosure Bar contains no procedure for obtaining Agency consent.<sup>149</sup> In the FDIC context, the consent section acts as a temporary stay on foreclosures while the FDIC obtains consent through defined procedure.<sup>150</sup> The consent requirement for the Agency is more restrictive, however, due to the length of the Agency's conservatorship so far and the lack of procedure. Therefore, by interpreting the Federal Foreclosure Bar to require associations to obtain the Agency's consent before foreclosing on its priority portion of its lien, the Ninth Circuit has essentially taken away the HOA property right.

Second, the Federal Foreclosure Bar only precludes foreclosures by "any State, county, municipality, or local taxing authority,"<sup>151</sup> rather than private party liens. The Federal Foreclosure Bar exempts the Agency from "all taxation imposed by any State, county, municipality, or local taxing authority" in

144. *Matagorda Cty. v. Russell Law*, 19 F.3d 215, 223 (5th Cir. 1994).

145. *Id.* at 224–25.

146. *Id.* at 225; *see also* *Simon v. Cebrick*, 53 F.3d 17, 24 (3d Cir. 1995) (agreeing with the *Matagorda* court "that at some point a delay in the ability to exercise property rights may constitute a compensable taking").

147. *Freyermuth & Whitman*, *supra* note 47, at 30. The conservatorship remains in full force today and has been in effect since it was signed into law by President George W. Bush on July 30, 2008. *See Conservatorship*, *supra* note 98.

148. *Berezovsky v. Moniz*, 869 F.3d 923, 925 (9th Cir. 2017); *see also* *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .").

149. *Freyermuth & Whitman*, *supra* note 47, at 29. On the other hand, 28 U.S.C. § 2410(c) provides a procedure for obtaining consent, as required by the FDIC Exemption. *See* 28 U.S.C. § 2410(c) (2012).

150. *Freyermuth & Whitman*, *supra* note 47, at 28.

151. *See* 12 U.S.C. § 4617(j)(2) (2012).



section (j)(2).<sup>152</sup> In section (j)(4), the Federal Foreclosure Bar provides that “[t]he Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from . . . recording tax or any recording or filing fees when due.”<sup>153</sup> In between those two sections stands § 4617(j)(3).<sup>154</sup> Rather than taking § 4617(j)(3) out of context, it should be read with the statute as a whole and should apply to tax-related liens. Because, in interpreting a statute, “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>155</sup>

Notably, the Fifth Circuit in *McFarland* interpreted the FDIC Exemption – which has the exact same language as the Federal Foreclosure Bar – to “merely extend[] the general exemption of the FDIC from taxation to the receivership context.”<sup>156</sup> Accordingly, the court held that the FDIC Exemption does not bar claims by private entities’ judgment liens but only prohibits “state and local taxing authorities from foreclosing on property subject to an FDIC lien without its consent.”<sup>157</sup> The court came to this determination, in part, after reading the sections “in context, cognizant of the statute’s structure and purpose.”<sup>158</sup> When using the FDIC Exemption to interpret the Federal Foreclosure Bar, the *McFarland* decision indicates that the Federal Foreclosure Bar also applies only to state and local taxing authorities. Accordingly, a private party’s – such as a homeowners’ association – claim is not barred by the Federal Foreclosure Bar.<sup>159</sup>

Additionally, even if the Federal Foreclosure Bar does apply to the association foreclosure, as Berezovsky argued, the Agency already apparently consented to association foreclosures.<sup>160</sup> The court stated that Berezovsky cited no authority to support the notion that inaction conveys consent and further noted that the Federal Foreclosure Bar does “not require the Agency to actively resist foreclosure.”<sup>161</sup> In doing so, the court ignored the Agency’s past behavior. “Even when the person concerned does not in fact agree to the conduct of the other, his words or acts or even his *inaction* may manifest a consent that

152. *Id.*

153. *See id.* § 4617(j)(4).

154. *See id.* § 4617(j)(3).

155. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

156. *FDIC v. McFarland*, 243 F.3d 876, 886 (5th Cir. 2001).

157. *Id.*

158. *Id.* at 885–86 (stating that § 1825(b)(2) represents Congress’ will that the FDIC must consent before any property deprivation that is *initiated* by a state).

159. *Freyermuth & Whitman*, *supra* note 47, at 32.

160. *See Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017); *see also Freyermuth & Whitman*, *supra* note 47, at 30; RESTATEMENT (SECOND) OF TORTS § 892(2) (AM. LAW INST. 1979) (“If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.”).

161. *See Berezovsky*, 869 F.3d at 929.

will justify the other in acting in reliance upon them.”<sup>162</sup> For one, the Agency impliedly consents when it purchases loans subject to state law priority and lien enforcement rules.<sup>163</sup> Moreover, Freddie Mac and Fannie Mae have recognized the association’s priority liens in their servicing guidelines. For example, the 2015 Fannie Mae Servicing Guide states that Fannie’s servicers need to “take all reasonable actions to prevent new liens that would be superior to Fannie Mae’s mortgage lien from being attached against property.”<sup>164</sup> Notably, after the decision in *SFR Investments Pool 1*, Freddie Mac issued an announcement reminding servicers to make sure its mortgage was not adversely affected.<sup>165</sup> The announcement listed paying association assessments that are superior to Freddie Mac’s lien as a way to protect its mortgage.<sup>166</sup> The aforementioned guidelines and announcement would be pointless if Agency property required its consent before associations could foreclose on its priority lien.

Additionally, for the first six years of the Agency’s conservatorship, the Agency did not present the Federal Foreclosure Bar argument to prevent association lien foreclosure.<sup>167</sup> In fact, the Agency, Fannie Mae, and Freddie Mac have partaken in litigation regarding the validity of an association’s priority lien in the past – without bringing up the Federal Foreclosure Bar.<sup>168</sup> This is another example of the Agency consenting to state law lien priorities.

### B. Policy Implications

The following discusses (1) the implications of the *Berezovsky* decision, (2) why lenders are in a better position to safeguard their interests, and (3) how the Federal Foreclosure Bar creates an impossible trap for associations.

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162. RESTATEMENT (SECOND) OF TORTS § 892, cmt. c (AM. LAW INST. 1979) (emphasis added).

163. Freyermuth & Whitman, *supra* note 47, at 30.

164. *Id.* (quoting FANNIE MAE, SERVICING GUIDE: FANNIE MAE SINGLE FAMILY 391 (Jan. 14, 2015), <https://www.fanniemae.com/content/guide/svc011415.pdf>); *see also* FANNIE MAE, FANNIE MAE SINGLE FAMILY 2012 SERVICING GUIDE 302-2 (Mar. 14, 2012), <https://www.fanniemae.com/content/guide/svc031412.pdf>; FANNIE MAE, FANNIE MAE SINGLE FAMILY 2011 SERVICING GUIDE 302-2 (June 10, 2011), <https://www.fanniemae.com/content/guide/svc061011.pdf> (“When the HOA of a PUD or condo project notifies the servicer that a borrower is 60 days’ delinquent in the payment of assessments or charges levied by the association, the servicer should advance the funds to pay the charges if necessary to protect the priority of Fannie Mae’s mortgage lien. If the project is located in a state that has adopted the Uniform Condominium Act (UCA), the Uniform Common Interest Ownership Act (UCIOA), or a similar statute that provides for up to six months of delinquent regular condo assessments to have lien priority over the mortgage lien, Fannie Mae will reimburse the servicer for up to six months of such advances.”).

165. *See* FREDDIE MAC, *supra* note 74, at 3.

166. *Id.*

167. Freyermuth & Whitman, *supra* note 47, at 31.

168. *Id.*; *see, e.g.*, Trademark Props. of Mich., LLC v. Fed. Nat’l Mortg. Ass’n, 863 N.W.2d 344, 351 (Mich. Ct. App. 2014).

The *Berezovsky* decision greatly impacts homeowners' associations and their residents. Associations need to collect assessments to fund their functions, such as collecting trash and maintaining roads and parks.<sup>169</sup> Moreover, association assessments protect the collateral, which secures the mortgage loans.<sup>170</sup> Notably, the general counsel of Freddie Mac discussed the impact when associations do not receive their assessments.<sup>171</sup> He noted that non-payments threaten condominiums, which affects property values and in return, affects the interests of unit owners, mortgage lenders, and the surrounding community.<sup>172</sup> Community banks also recognize the benefits superpriority liens provide to common interest communities, homeowners, and lenders.<sup>173</sup>

If associations are required to wait until the Agency consents or forecloses, it is the paying homeowners in the associations that will bear the brunt of this decision. Without the ability to collect assessments through a foreclosure, associations can either neglect the upkeep to save money or raise the assessments for the paying homeowners. Neither option seems just as it was "Fannie's or Freddie's servicer being asleep at the switch."<sup>174</sup>

In fact, Senators and members of the House felt the issue was so important that some members sent a letter to the Agency in 2016.<sup>175</sup> The letter asked the Agency to solicit and consider public comments before starting its "no consent" policy because "its new position could potentially affect millions of homeowners and thousands of loan servicers and community associations."<sup>176</sup> Even further, the letter advocated that the Agency consider how its statutory purpose to ensure the "operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets" would be advanced by this "no consent" policy.<sup>177</sup> The recognition of the importance of this issue by Senators and members of the House furthers the position that the Federal Foreclosure Bar defense should not be accepted, and state law priority rules should be upheld.

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169. Winokur, *supra* note 52, at 361.

170. Wesley Blair, Opinion, *Some Banks Are Siding with Condos in the Battle Over Super Liens*, NAT'L MORTG. NEWS (June 14, 2016, 3:49 PM), <https://www.national-mortgagenews.com/opinion/some-banks-are-siding-with-condos-in-the-battle-over-super-liens>.

171. Henry L. Judy & Robert A. Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437, 475 (1978).

172. *Id.*

173. *See* Blair, *supra* note 170.

174. Freyermuth & Whitman, *supra* note 47, at 32.

175. Letter from Several U.S. Senators & Members of Congress to Mel Watt, Dir., Fed. Hous. Fin. Agency 3 (May 12, 2016), [http://www.warren.senate.gov/files/documents/2016-5-12\\_MA\\_delegation\\_ltr\\_to\\_FHFA.pdf](http://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_to_FHFA.pdf).

176. *Id.*

177. *Id.* (quoting 12 U.S.C. § 4513(a)(1)(B)(ii) (2012)).

Additionally, lenders are in a better position to safeguard their interests than are associations or third-party purchasers, such as Berezovsky.<sup>178</sup> In fact, associations have been termed a “unit owner’s involuntary creditor.”<sup>179</sup> Most associations cannot investigate and disapprove a potential homebuyer borrower’s credit, whereas a lender can.<sup>180</sup> To protect itself, a lender can investigate the borrower, require an escrow for priority claims, control the loan-to-value ratio, and demand notice of missed assessment payments so the lender can cover them.<sup>181</sup>

Moreover, a lender can more easily preserve its security interest in the event of a default.<sup>182</sup> A lender can easily secure its interest “by paying the delinquent amount and agreeing to pay common fees going forward, until the lender forecloses.”<sup>183</sup> Alternatively, to make the process quicker, the association could foreclose and the lender could attend the foreclosure, ensure high bids, and take the balance after the association’s assessments are paid.<sup>184</sup>

Finally, as a practical matter, an association or a third-party buyer does not know to obtain consent from Freddie Mac or Fannie Mae when its interest is not recorded on the deed of trust.<sup>185</sup> This creates an unavoidable trap for associations because Freddie Mac or Fannie Mae do not always record their interest on the deed of trust, and there is no process for obtaining Agency consent. Under the Federal Foreclosure Bar, the only way associations can preserve their state law priority interest is to assume every mortgage might be owned by Freddie Mac or Fannie Mae and to ask the Agency for consent.<sup>186</sup> Yet, as mentioned above, there is no process for obtaining consent.<sup>187</sup> As a result, an association’s ability to enforce its state priority lien has now become an impossible burden.

Therefore, in order to avoid the negative implications of the Federal Foreclosure Bar on associations and their residents, Congress should amend the Federal Foreclosure Bar, create an exception to the Federal Foreclosure Bar for associations, or pass a statute that allows states to regulate priority lien laws for associations. This would still allow lenders to safeguard their interests yet would also provide some protection for associations.

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178. See Kylee Gloeckner, Note, *Nevada’s Foreclosure Epidemic: Homeowner Associations’ Super-Priority Liens Not So “Super” For Some*, 15 NEV. L.J. 326, 345–46 (2014).

179. Winokur, *supra* note 52, at 361.

180. *Id.*

181. *Id.*; Judy & Wittie, *supra* note 171, at 481.

182. Winokur, *supra* note 52, at 361.

183. Blair, *supra* note 170.

184. *Id.*

185. In *Berezovsky*, the recorded deed of trust did not name Freddie Mac. *Berezovsky v. Moniz*, 869 F.3d 923, 932 (9th Cir. 2017).

186. See Freyermuth & Whitman, *supra* note 47, at 28.

187. *Id.* at 29.

## VI. CONCLUSION

In *Berezovsky v. Moniz*, the Ninth Circuit declared that an association cannot foreclose the priority portion of its lien without Agency consent. By interpreting the Federal Foreclosure Bar to require the Agency's consent – with no procedure for obtaining that consent – the Ninth Circuit has effectively taken away the association's ability to foreclose, a right that it is entitled to under state law.

To carry out the purpose of priority lien laws and place the burden where it belongs, the court should have denied the Federal Foreclosure Bar defense or held that the Agency and Freddie Mac have already impliedly consented to the foreclosures through their actions. Instead, the Ninth Circuit bailed out the lenders.<sup>188</sup> Now the burden lies on the associations and association members to upkeep the association community and the lenders' collateral. In dealing with the Federal Foreclosure Bar, Congress should act and create an exception to the Federal Foreclosure Bar or allow state law priority rules to be honored to prevent more associations and individuals from being negatively impacted.

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188. See generally *Berezovsky*, 869 F.3d 923.