

WHEN A COMMON INTEREST DEVELOPMENT FALLS APART, WHO IS REQUIRED TO PICK UP THE PIECES?

by

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Imagine the following scenario: A couple of years ago you purchased a new condominium unit in a new common interest development (CID). This CID originally was designed to have 200 condominium units. You were one of the first to purchase a unit and today only 30 units have been built and sold. You are still waiting for the developer to build the clubhouse with the pool and workout facility. The other day you received a notice that the developer has filed for bankruptcy and you also heard that the bank foreclosed upon the remaining property in the CID. Unfortunately, this scenario is not fiction. This situation is happening throughout the United States every day. With the downturn in the economy, developers of CIDs are defaulting on their loans and lenders are foreclosing.¹ Some questions arise out of this situation: Will the CID be completed as planned? Who will be responsible to complete the CID? Who will address unit owner warranty claims? The answers to these questions depend on where the CID is located. Approximately 25 states (including the District of Columbia) have adopted one of the uniform acts addressing CIDs, the Uniform Common Interest Ownership Act and the Uniform Condominium Act.² These uniform acts contain provisions that outline what should happen when a mortgagee forecloses upon a CID development. The remaining states have their own statutory schemes to address CID development, in particular condominiums. The majority of these states do not have any provisions in their CID statutes addressing when a mortgagee forecloses upon a CID.³ Three states, Florida, Massachusetts and Michigan, have unique statutory schemes which specifically address when a mortgagee forecloses on a CID. This paper will begin in Part I by discussing common interest developments in general and the roles of the various entities involved in their creation and in their operation. In Part II, I will examine the uniform acts and in particular the provisions that deal with foreclosure of the declarant's interest in the CID. I will also discuss various cases that have interpreted the uniform acts. In Part III, I will examine the statutory schemes of the remaining states and the judicial interpretations of those statutes. Finally, Part IV will conclude with my proposal for the creation of a fund that would protect not only the interests of the mortgagees, but the interests of the unit owners that have been left in the lurch.

I. Common Interest Development

Common Interest Development (CID) is a catch-all phrase that generally includes four basic types of ownership: condominiums, planned developments, stock cooperatives, and community apartments.⁴ All four forms of ownership generally involve the following: common ownership of private residential property coupled with individual use or ownership of a particular residential unit; mandatory membership of all unit owners in an association that governs use of the commonly owned property and regulates the use of individual units; and a set of governing documents providing for the financing of the association, its governance and rules that owners must follow with respect to common areas and to the units.⁵ CIDs are relatively new to the United States. Their growth in the last 50 years can be attributed, in part, to the enactment of Section 234 of the National Housing Act, which extended the Federal Housing Administration's mortgage benefits to condominiums in 1961.⁶ Mortgage lenders began issuing mortgages for this type of property because they were assured of the backing of the Federal Government in the event of a default. Since potential purchasers had access to funds to assist in their purchase of a condominium unit, more and more potential purchasers looked at condominiums for their housing needs.

Purchasers of units at these types of developments often cite that a main reason they bought this type of home was because condominium units usually require less maintenance for the individual homeowner.⁷ Another reason that people buy units in CIDs is that each development is governed by an association that oversees and ensures that all property restrictions are enforced.⁸ This property restriction enforcement ensures that property values will be maintained and that no unit becomes blight on the community.⁹ Many local governments encourage the development of CIDs because they see these developments as a way to bring new housing to their communities without increasing the maintenance burden on the local government.¹⁰ For example, roads in such developments are usually private roads and therefore the local government does not incur responsibility for snow removal or road repairs. These responsibilities fall instead onto the association that governs the community.¹¹

CIDs are statutory creatures. Each state has its own statutory scheme that governs the creation of these forms of ownership. A person that creates a CID is called a "declarant."¹² The Uniform Common Interest Ownership Act (UCIOA) defines the declarant as "any person or group of persons acting in concert that: (A) as part of a common promotional plan,

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offers to dispose of its interest of the person or group of persons in a unit not previously disposed of; or (B) reserves or succeeds to any special declarant right; or (C) applies for registration of a common interest community...¹³

Prior to creating a CID, the declarant typically acquires land upon which it wishes to establish the CID and obtains financing for the project. In order to create the CID, the declarant has to record the declaration in the local land records.¹⁴ Generally, the declaration has to contain the following information: the name of the community, a legal description of the land included in the development, the maximum number of units that the declarant reserves the right to create, a description of the boundaries of each unit, a description of the common areas, a description of development rights (i.e. to add land to the community, to create more units, to create additional common areas or to withdraw units), a description of the special declarant rights (the right to complete improvements, exercise development rights, maintain a sales office, use easements in the community, merge community associations, the right to appoint/remove members to the board of the association while under declarant control), an allocation of each unit's interest in the community, and easements that affect the property.¹⁵ Another requirement of the declaration is that the site plan or plat map must be included when it is recorded.¹⁶ The declarant is required to label improvements on the site plan as "MUST BE BUILT" or "NEED NOT BE BUILT."¹⁷ The declarant then is bound to build any improvement that is labeled "must be built" or that is not labeled "need not be built." A purchaser of a new unit in a CID can verify what amenities will be built in the CID by verifying if it is labeled "must be built." If it is not labeled in that fashion, then that amenity does not have to be built by the declarant.¹⁸

The declaration also sets forth any special declarant rights that the declarant wants to reserve for itself. If the declarant wants the right to withdraw some units from the CID, then it must specifically say so in the declaration when it is first recorded. If the declarant wants to be able to add units and/or land to the CID, then the original declaration must provide the declarant with that ability. Other special declarant rights that must be listed in the declaration include the right of the declarant to maintain models and sales offices at the CID, the ability of the declarant to appoint certain members to the association and the ability to exempt declarant owned units from association assessments.¹⁹

In addition to the rights and obligations of the declarant that are found in statutes or the declaration, there are also obligations and rights that arise via contract between the declarant and the purchasers of the units. These obligations usually take the form of warranties. A declarant may include express warranties regarding the construction of the unit and the common areas within the written purchase agreement or through other disclosures that may be required by statute.²⁰ In addition to express warranties, implied warranties also arise in the sale of units in CIDs.²¹

Thus, a declarant has many obligations when it creates a CID. It must comply with the relevant state statute; it must satisfy its lenders and investors; it must follow the site plans that are recorded with the declaration and build the items that are labeled "must be built;" and it must satisfy any warranty claim made by a unit owner. Most declarants meet these obligations; increasingly, however, many are not.²² This paper addresses the situation where the CID development has fallen apart; all of the units and amenities have not been built, the original declarant is under financial stress and its mortgage lender has foreclosed. Who then is responsible to honor the requirements of the various statutes, the declarations, and the individual purchase agreements entered into between the declarant and the unit owners? Who has to pick up the pieces? We will first look at how the uniform acts address this situation.

II. Uniform Acts

A. Uniform Common Interest Ownership Act (UCIOA) and Uniform Condominium Act (UCA)

Approximately twenty-five jurisdictions have enacted some form of the uniform acts, the UCIOA²³ or the UCA²⁴ (some with modifications), to address the development of CIDs within their states. States that have enacted the uniform acts are not immune to the problem of mortgagees foreclosing upon a CID development. In Norfolk, Virginia, an upscale condominium development opened in 2008. By February of 2011, the declarant had only sold two units and its lender was foreclosing.²⁵ Who will complete this development? Will the two purchasers who bought their units from the declarant get warranty issues addressed? Is the mortgagee now the declarant? Let us examine the uniform acts to see how those questions will be answered.

Each of the uniform acts contain a section that specifically deals with the scenario where a person has acquired the declarant's interest in the CID through a mortgage foreclosure process.²⁶ Section 3-104 of the UCIOA provides in part:

[...] (c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a common interest community subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that property held by that declarant, or only to any rights reserved in the declaration [...] and held by that declarant to maintain models, sales offices, and signs. The judgment or instrument conveying title must provide for transfer of only the special declarant rights requested. [...]²⁷

The comments to Section 3-104 of the UCIOA²⁸ state that this section is meant to address the problem that arises when a declarant transfers its interest in a CID. There are two parts to the problem – first, “what obligations and liabilities to unit owners (both existing and future) should a declarant retain;” and second, “what obligations and liabilities may fairly be imposed upon the declarant’s successor in interest.”²⁹ This section of the UCIOA is meant to offer some protections to both the unit owners and innocent successors in interest to the declarant, in particular those successors who obtained an interest in the CID merely through a debt security.³⁰

Under Section 3-104, the original declarant who loses its interest in the CID through foreclosure continues to be liable for any warranty obligations imposed by the act.³¹ Warranties imposed by the uniform acts include express warranties created by any affirmation of quality found in a purchase agreement, sales brochure or a sales model of a unit.³² An implied warranty of quality also arises under the uniform acts. This means that the declarant warrants that the unit and its common elements will be free from defective materials and that the CID was built according to local law and according to standards found in the construction and sound engineering industries.³³ A declarant’s ability to waive implied warranties is limited when the units are for residential use.³⁴ The original declarant is liable to any unit owner with a warranty claim whether the declarant sold that particular unit or not. The UCIOA does not require that there be privity of contract in order for a unit owner to pursue an action against the declarant for a breach of warranty claim.³⁵ Thus, if a unit owner sells their unit to another party, the original declarant is still responsible for any warranty items regarding that unit or common areas made by a successor purchaser. So even though a declarant may no longer own any units or land in the CID, it is still liable for defects in units and in common areas.³⁶

Although the uniform acts continue to hold the original declarant responsible after it has lost its interest in the CID, this does not mean that the party that obtained the declarant’s interest through a mortgage foreclosure proceeding owes no duties to the current unit owners. To the contrary, the UCIOA holds the successor in interest liable for certain aspects of the CID as well. If the successor wants to exercise any development rights or “special declarant rights,” then the successor must specifically request those rights in writing.³⁷ Unless the mortgage documents say otherwise, the person acquiring title to the foreclosed upon CID succeeds to all special declarant rights, but only upon his request.³⁸ Special declarant rights include those rights to expand the CID, to contract the CID, to appoint members to the board of directors of the association, and to have a sales office/model at the CID.³⁹ If a successor to the declarant decides that it wants to have those special declarant rights, then by requesting them the successor becomes liable for any obligations imposed by the act or the declaration except for misrepresentations made by the previous declarant, warranty obligations made by previous declarant, breaches of fiduciary duties owed by the previous declarant or any liability incurred by a previous declarant after the CID was transferred to the successor declarant.⁴⁰ Most importantly, when a successor declarant accepts the special declarant rights, then it becomes liable to build and complete any item or improvement that appears on a site plan that is labeled “must be built” or that is not labeled “need not be built.”⁴¹ This assures unit owners already in the CID, that even though the declarant is no longer in the picture, amenities and improvements that were promised will get built in spite of the fact that there is a successor declarant involved.⁴²

A mortgagee may not want to assume all of the special declarant rights and liability for those items imposed by the act; therefore, the act allows parties who acquire title to the declarant’s interest in a CID through foreclosure to specifically state that they do not want any or all of the special declarant rights. A successor to the declarant can state that it only wants the ability to maintain a sales office/model to sell existing units or that it only wishes to hold onto the special declarant rights in order to transfer those rights to someone else at a later date.⁴³ This election is done by filing a document in the land records in the county in which the CID is located.⁴⁴ The successor also has the option to not take any special declarant rights. If the successor elects to retain no special declarant rights then no one may exercise the special declarant rights.⁴⁵ In that situation the successor is not liable for any obligations under the act or the declaration.

When a successor declares that it only intends to keep the special declarant rights in order to maintain models, sales offices and signs, that successor will not be liable for any obligation as a declarant, except for filing of a public statement (if required) and for any liability arising out of the maintaining of the models and sales offices.⁴⁶ A mortgagee who succeeds to the declarant’s interest via foreclosure also has the option to retain all of the special declarant rights, but claim that they are doing so only because they intend to transfer all of those rights to another person or entity.⁴⁷ The mortgagee that is holding onto the special declarant rights for someone else may not exercise any of those rights, except to appoint members to the board of directors of the association.⁴⁸ So long as the successor declarant does not exercise any of those rights, then it does not face any liability as a declarant.⁴⁹ If the mortgagee cannot find another person or entity to transfer those rights to, then the mortgagee may record a document in the land records indicating that it now intends to assert those special declarant rights.⁵⁰ The uniform acts do not contain a time period or time limit during which the mortgagee must transfer those rights. A mortgagee in that situation could hold onto those rights for quite a long period time and possibly let the CID fall into a state of disrepair. In order to prevent that from happening, one state, Alaska, has directly addressed this issue.⁵¹ When Alaska adopted the

UCIOA, it added a provision wherein if the mortgagee did not transfer those special declarant rights within one year to another person or entity, then the mortgagee becomes the successor declarant with all of the special declarant rights and obligations.⁵²

When a mortgagee forecloses on a CID, it has four options. What will happen in the Norfolk, Virginia condominium development⁵³ will depend on what option the mortgagee selected. First, the mortgagee can decline to take any special declarant rights. By doing so, it incurs no liability to unit owners. Second, it could elect to only maintain a sales office to sell existing units. Again, by making this election, it faces no liability to the unit owners. Third, it can take special declarant rights, but only to hold them for someone else. This option imposes no liability on the mortgagee to unit owners as well. Fourth and finally, it can request all special declarant rights. This election exposes the mortgagee to liability to build items not labeled “need not be built” and for implied warranties that arise under the uniform acts.

B. Case Law Discussing Section 3-104 of the Uniform Acts

There is very little published case law interpreting Section 3-104 of either of the uniform acts. When issues regarding this section arise, the courts have been asked to determine if the mortgagee became the successor declarant under the act and what obligations if any, did that mortgagee owe to the unit owners. In *Southwick at Milford Condo. Ass’n. Inc. v. 523 Wheelers Farm Road, Milford, LLC*,⁵⁴ the Connecticut Supreme Court was called upon to determine the interest that the mortgagee obtained at foreclosure of the CID. The original declarant in *Southwick* proposed to build the CID in two phases. Phase 2 was part of the development; however, the declarant reserved the special declarant right to remove Phase 2 from the CID. On the site plan, the original declarant labeled everything in Phase 2 as “need not be built” except for a clubhouse and 2 gazebos. The declaration also contained a provision that stated that special declarant rights could only be exercised so long as the declarant was under any warranty obligations, owned any units in the CID or for 20 years from the date of recording the declaration, “whichever is sooner.”⁵⁵ The original declarant ran into financial difficulties and its lender/mortgagee foreclosed. During the foreclosure the mortgagee requested all of the special declarant rights. The mortgagee then transferred its interest in the CID and all of the special declarant rights to the defendant in the case, 523 Wheelers Farm Road, Milford, LLC (“523 Wheelers”).⁵⁶ Three years after it received its interest in the CID, 523 Wheelers decided that it wanted to develop Phase 2 of the CID. The association of unit owners brought suit to stop the development of Phase 2 arguing that the special declarant rights no longer existed because the declarant had reserved the right to remove that parcel from the CID, the declarant did not own any units and the warranty obligations were nonexistent at that time.⁵⁷ 523 Wheelers stipulated that it did not own any units and that it had no warranty obligations to the unit owners.⁵⁸ It maintained that it still owed an obligation to the unit owners though because the clubhouse and 2 gazebos were not labeled on the site plans as “need not be built” and therefore as successor declarant it was obligated to build those items and thus, its special declarant rights were not terminated.⁵⁹ The Connecticut Supreme Court found in favor of 523 Wheelers. The Court found that a declarant had a mandatory obligation to complete all improvements depicted on the site plan that are not labeled “need not be built.” The Court went on to say “if the legislature had intended to create any exception to this rule, including one for improvements that are located on land that the developer has reserved the right to remove from the development, we must assume that it would have said so expressly.”⁶⁰ The Court went on to hold that successor declarant, 523 Wheeler was required to build the clubhouse and 2 gazebos and as such, its special declarant rights had not expired and it was allowed to continue with development of Phase 2.

In *Mayflower Square Condo. Ass’n. v. KMalm, Inc.*⁶¹ the original declarant converted a 64 unit apartment complex into a condominium with an underground parking garage. The original declarant added a parcel of land to the rear of the apartment and the plans indicated that 12 townhouses would be built on that added parcel of land. The declaration for the condominium allocated parking spaces in the parking garage to the 12 – yet to be built – townhouses. The original declarant filed for bankruptcy. The bankruptcy trustee executed a deed conveying title to the condominium units (except for the ones already sold to third parties), the right to use the garage and all special declarant rights to defendant KMalm, Inc. ⁶² After four years had passed, KMalm had not begun to build any of the townhouses. It also had not paid any assessments on the parking garage for the townhouse units, so the condominium owners’ association initiated this action to collect those unpaid assessments for the parking spaces.⁶³ KMalm argued that because the townhouse units were not built, that it did not own the townhouse units.⁶⁴ The Commonwealth Court of Pennsylvania found in favor of the association relying on language found in the declaration and because KMalm requested the special declarant rights as found in the deed executed by the bankruptcy trustee. Therefore, the court held KMalm liable for the assessments on the parking spaces.⁶⁵

In *Greensleeves, Inc. v. Lee’s Wharf Marina Association*,⁶⁶ the Rhode Island Supreme Court was asked to determine if a successor declarant held special declarant rights in a condominium made up of dock slips and parking spaces. The original declarant was foreclosed upon by its mortgagee. That mortgagee did not request special declarant rights and nothing was recorded in the land records indicating that those special declarant rights were

transferred during the foreclosure.⁶⁷ The original declarant's interest in this CID changed hands a couple of times until it wound up being conveyed to Greensleeves, Inc. Greensleeves argued that the interest was "conveyed free of any special declarant rights or correlative obligations."⁶⁸ The Court found that under the UCA, a person only succeeds to special declarant rights and obligations upon their request and it must be evident in the land records.⁶⁹ Since there was no evidence in the land records of Greensleeves requesting or accepting a transfer of those rights, the court found that Greensleeves did not have special declarant rights.

There have been very few published cases from the states' highest courts interpreting Section 3-104 of the uniform acts. In the few cases that we have though, it is clear that if the document evidencing the transfer to the successor declarant refers to special declarant rights, then that successor declarant cannot avoid liability under the uniform acts. With the downturn in the economy and as more and more cases make their way through the nation's court systems we may see more lenders declining special declarant rights in order to avoid liability. When that happens we will see whether the courts will uphold the uniform acts' language requiring the successor declarant to request special declarant rights. In the absence of such a request, whether the courts will impose liability upon the successor declarant in order to protect innocent unit owners.

III. The Non-Uniform Act Jurisdictions

The remaining states have enacted their own common interest development legislation to govern the creation and regulation of CIDs. The majority of these states have statutes that do not address the issue of successor declarant liability, let alone, when that successor declarant is the mortgagee who obtained title through foreclosure.⁷⁰ Some states have statutes that define a declarant to include a person who succeeds to the declarant's interest; but beyond that they do not address the situation when a mortgagee takes that interest through a foreclosure process.⁷¹ Only three states have enacted specific legislation to address when a CID's declarant transfers its interest in the CID through a foreclosure process. Those states are: Florida, Massachusetts and Michigan.

A. Florida

Typically under Florida law, when a mortgagee foreclosed upon a condominium development, the mortgagee stepped into the shoes of the developer⁷² and was responsible to follow the Florida Condominium Act when it sold units or completed the development.⁷³ However, as the economy took a turn for the worse in the late 2000s, the Florida condominium market was at a standstill. Mortgagees were not foreclosing on developments and developers were left with a large number of unsold units in their inventories. The Distressed Condominium Relief Act⁷⁴ was enacted to address this situation. Florida's legislature described the problem as follows:

(1)The Legislature acknowledges the massive downturn in the condominium market which has occurred throughout the state and the impact of such downturn on developers, lenders, unit owners, and condominium associations. Numerous condominium projects have failed or are in the process of failing such that the condominium has a small percentage of third-party unit owners as compared to the unsold inventory of units. As a result of the inability to find purchasers for this inventory of units, which results in part from the devaluing of real estate in this state, developers are unable to satisfy the requirements of their lenders, leading to defaults on mortgages. Consequently, lenders are faced with the task of finding a solution to the problem in order to receive payment for their investments.⁷⁵

In an effort to encourage developers of distressed condominiums to transfer ownership of unsold units to other entities, the legislature created two types of transferees. The first is called the bulk assignee, which is a person who has acquired more than seven condominium units and receives an assignment of some or all of the rights of the developer.⁷⁶ These rights include the right to maintain models/sales offices. The second type of transferee is called the bulk buyer. The bulk buyer is a person who acquires more than seven condominium units, but does not receive an assignment of any developer rights.⁷⁷ A bulk assignee assumes liability for all duties and responsibilities of the developer under the condominium act or the declaration except for warranties, audits while under developer control and for actions taken by the board of administration while under the original developer's control. However, the bulk assignee is also responsible to fund certain reserve accounts if there is a shortfall.⁷⁸ A bulk buyer is only liable for the duties and responsibilities of the developer to the extent that the bulk buyer expressly assumes them in writing.⁷⁹ A person may only be characterized as a bulk assignee or a bulk buyer if they acquired the units while this act in effect and there can only be one bulk assignee per condominium development.⁸⁰ The developers' rights may be assigned by the developer, a previous bulk assignee or a court acting on behalf of a developer or previous bulk assignee.⁸¹ If a lender acquires title to more than seven units and receives an assignment of developer rights (either from the developer or from the court in a foreclosure proceeding), the lender is responsible to build/complete units and

amenities listed on the survey as not substantially completed.⁸² As this is a relatively new statute, we are still in the process of evaluating its impact. As of yet, there have been no published cases interpreting this new statute.

The legislation does not appear to solve the problem of distressed condominiums and appears to be more of a face-saving device for developers. Developers will be able to transfer 8 or more units to multiple bulk buyers (those that assume no liability for completing the project) at a single condominium. These developers will then be able to state they successfully completed and sold all of the units at the condominium; therefore, the condominium is no longer distressed. But what about the innocent unit owners? This act does not provide these innocent unit owners with any relief. Furthermore, although the act prohibits bulk assignees and bulk buyers from being an “insider,”⁸³ the Act does not appear to prohibit the shareholders of a corporate developer from forming another corporate entity and transferring units to that newly created entity.⁸⁴ These developers look successful on paper, but the unit owners are still left with little to no recourse for warranty claims and for having the condominium completed as planned with the amenities they desire.

B. Massachusetts

Massachusetts has addressed the situation when a lender forecloses upon a condominium development in a straightforward manner. “In the event of a foreclosure upon a condominium development, the lender taking over the project shall succeed to any obligations the developer has with the unit owners and to the tenants, except that the developers shall remain liable for any misrepresentation already made and for warranties on work done prior to the transfer.”⁸⁵ Under Massachusetts law the original developer continues to be liable for warranties and misrepresentations; however, a broad reading of this statute provides that the foreclosing lender may be liable as well. The lender succeeds to any obligations owed to the unit owners. That would include any and all warranty work. This statute provides the most protection to unit owners no matter how many units the lender forecloses upon. Arguably, a lender could acquire the last unit owned by the developer and that lender could be held liable for the developer’s obligations. In order to avoid that liability, lenders have tried to avoid foreclosing on CIDs.

In *Maloney v. Boston Five Cents Savings Bank, FSB*⁸⁶ a lender took title to a condominium development through a deed in lieu of foreclosure.⁸⁷ The trustees of the unit owners association sued the lender for defects in the common areas.⁸⁸ The lender defended the action based upon the argument that since they did not foreclose on the property, they were not liable under the act.⁸⁹ In determining that a deed in lieu of foreclosure triggered liability to the lender under this provision of the condominium act, the Supreme Judicial Court looked at the intent of the act.⁹⁰ The Court found that the intent of the act was to impose liability on lenders that take over a development.⁹¹ Allowing lenders to avoid liability under the act by taking deeds in lieu of foreclosure instead of going through the foreclosure process would make this provision of the act an empty shell.⁹² Therefore, the Court held that deeds in lieu of foreclosure, for purposes of the condominium act only, were equivalent to the foreclosure process and the lender can be held liable.⁹³ On remand, the trial court found that the lender, under the act, could be held liable for all claims against the developer including negligent construction, breach of warranty and breach of fiduciary duty.⁹⁴

C. Michigan

Michigan’s condominium act defines a “successor developer”⁹⁵ as “a person who acquires title to the lesser of 10 units or 75% of the units in a condominium project, other than a business condominium project, by foreclosure, deed in lieu of foreclosure, purchase, or similar transaction.”⁹⁶ This term, successor developer, brings with it exposure to liability for those that obtain it. A successor developer⁹⁷ has to comply with the act before selling any units.⁹⁸ For example, a successor developer must prepare and distribute a disclosure statement to all potential purchasers.⁹⁹ The successor developer also assumes all express written contractual warranty obligations for defects in workmanship and materials undertaken by the developer,¹⁰⁰ but it does not incur any other contractual obligations entered into by original developer.¹⁰¹ Michigan allows a successor developer to avoid liability for express contractual warranties of the developer if it obtains an insurance policy to cover all of the express warranty claims or if it establishes an escrow fund to cover warranty claims.¹⁰² If the condominium is not a residential condominium, but a business condominium, then the successor developer does not incur any liability for express warranties given by the developer.¹⁰³ In addition, the act does not hold residential home builders, who do not construct or refurbish any of the common areas, liable for express contractual obligations of the developer as well.¹⁰⁴

Michigan, like Massachusetts, provides a lot of protection to unit owners. Michigan obligates successor developers to follow the provisions of the condominium act and to assume responsibility for the express warranties entered into by the original developer. Unlike Massachusetts, successor developers are not liable for implied warranty claims. By requiring successor developers to follow the act, items labeled “must be built” on the site plan would need to be completed, just like under the uniform acts. Unlike the uniform acts, the Michigan statutory scheme does not offer much protection for an innocent mortgagee. When a mortgagee forecloses, it does so because it has not been receiving payments from the mortgagor. If the mortgagee acquires 10 units, not only does it assume obligations under the Act (of which it already had prior knowledge), but it now must assume responsibility for express warranties found in individual contracts between the developer and the unit owners. These express warranty obligations, most likely, would not be known by the mortgagee prior

to foreclosure. Unfortunately, because of this risk of liability for unknown express warranty obligations, a mortgagee in Michigan, like a mortgagee in Massachusetts, will look for alternatives to foreclosing on the CID. What is likely to happen is that mortgagees will let the property sit idle rather than incur the unknown liability.¹⁰⁵ This is the worst possible situation that could happen for all parties involved. The developer's goal of completing the condominium development will go unfulfilled; the unit owners are living in an unfinished development where monthly assessments will need to be increased to address the missing units not yet completed; and the mortgagee is losing value on its collateral as the property values decline. It is anticipated that mortgagees may litigate the issue of their liability; however, as of yet, Michigan's appellate courts have not addressed this section of the Michigan Condominium Act.

D. Cases in Non-Uniform Act States

Although many states have not addressed the problem of successor declarant liability in the case of foreclosure legislatively, many state courts have stepped in to address this issue. In *Westwood Investments, Inc. v Acord*¹⁰⁶ the Supreme Court of Idaho held that a mortgagee who obtained the declarant's interest in a Planned Unit Development (PUD) through foreclosure took that interest subject to the restrictions in the PUD and that the individual unit owners and association may assert their equitable rights against the mortgagee.¹⁰⁷

The Illinois Court of Appeal had an opportunity to address the issue of whether a purchaser of real property can develop the property as an assignee of a declarant of a PUD when it purchased the property through a foreclosure sale and did not receive a written assignment of rights. In *Board of Managers of the Medinah on the Lake Homeowners Association v Bank of Ravenswood*,¹⁰⁸ the court looked at the intent of the parties and the purpose of the mortgage documents and held that the purchaser could act as an assignee of the developer and develop the property.¹⁰⁹

In *The Terrace Condominium Association v. Midlantic National Bank*¹¹⁰, the defendant bank took title to a condominium development through a deed in lieu of foreclosure from the original developer.¹¹¹ When it took ownership of the twelve unit luxury condominium building, it represented to the public that it was now in charge of the construction and completion of the project.¹¹² At the time the bank took over there were at least \$1,000,000 worth of construction work yet to be completed.¹¹³ After the condominium project came to be occupied by unit owners, a myriad of construction defects were discovered.¹¹⁴ At first the bank made an effort to address all of the defects, but eventually the bank stopped addressing the concerns of the unit owners.¹¹⁵ The association of unit owners eventually made the repairs and sued the bank to recover their costs. The bank argued that it was just a mortgagee in possession and should not be held liable for construction defects that were likely the result of work performed by the original developer.¹¹⁶ The Court rejected that argument and held that once the bank took over construction, it assumed all of the obligations and responsibilities of the original developer.¹¹⁷

In *McNigh v. Board of Directors, Anchor Pointe Boat-a-Minium Association, Inc.*¹¹⁸ the Ohio Supreme Court had to decide, *inter alia*, whether a party that took a deed in lieu of foreclosure from the developer became the successor developer. The Court held that just because a party acquires an interest in a development through a deed in lieu of foreclosure, does not necessarily make that party a successor developer.¹¹⁹ However, when that party starts to assume the role of developer by performing acts to promote the development and further develop the property, then it has taken on the role of the developer and cannot insulate itself from the duties, constraints and obligations of a developer.¹²⁰

In the cases involving a mortgagee foreclosing on a declarant's interest in a CID, the majority of courts are going to find that the mortgagee succeeds to the declarant's interest and assumes the responsibilities and obligations associated with being a declarant. Although, this issue has not been litigated in all states, there does appear to be a trend in finding that the mortgagee will succeed to the rights of the declarant whether or not the declarant assigned those rights to the mortgagee.

IV. Conclusion

After reviewing all of the statutory schemes that regulate CIDs in the United States, it appears that there are no perfect solutions that protect both unit owners and lenders/mortgagees. For the most part, the legislation in place today protects the lenders/mortgagees from liability to unit owners. The uniform acts allow lenders/mortgagees to choose whether they want to take on any special declarant rights. If mortgagees choose not to take special declarant rights, then the unit owners can only pursue the original declarant for defects and warranty issues. The odds of successfully pursuing the original declarant for warranty repairs or for defective construction claims are slim in light of the original declarant's financial situation. Furthermore the CID may not be completed as originally envisioned.

Case law in those states that do not have the uniform acts and do not have any specific provisions regarding successor declarant liability in the event of a foreclosure, indicate that the foreclosing lender will be treated, at least in part, as a successor declarant. When foreclosing lender takes on the role as developer and promotes the development, the courts are more likely to hold that lender liable under the relevant act as a declarant. Thus, there is a trend of holding mortgagees liable for claims made by unit owners.

Although Florida's legislature expressed concern for the innocent unit owners in distressed condominium developments, it is unlikely that the Distressed Condominium Relief Act will provide unit owners much relief. That act

limits the liability that bulk assignees incur by limiting the warranties they are liable for and bulk buyers only become liable for developer obligations if they expressly assume them. The likely result of the act will be to allow developers of distressed condominiums to be able to sell off their existing units in bundles of 8 or more to real estate speculators and then leave it up to the speculators to sell those units to individuals that will likely reside in them. The state will then be able to say that they accomplished their goal of relieving developers of the burden of having unsold units. However, warranty claims and construction defect claims may go unresolved.

The Michigan Condominium Act protects some unit owners. When a lender forecloses on 10 or more units in a condominium it is exposed to liability imposed by the Condominium Act and it faces unknown liability for express warranties that were given by the original developer. Lenders can easily appreciate the risks involved in foreclosing based upon the requirements of the act; however, exposing them to the additional risks of express warranties given to each individual unit owner (which can be found in each individual purchase agreement) may be too much of a risk for a lender/mortgagee to take.

Massachusetts has a simple and straightforward provision. If a lender forecloses on a development, then the lender is liable for any obligations owed to unit owners. However, the original developer is still liable for misrepresentations and warranties it gave. Lenders/mortgagees assume a lot of liability to unit owners when a CID goes into foreclosure. The case law demonstrates that the courts in Massachusetts will hold a lender liable for breach of warranties made by the original developer. As a result, it is predicted that lenders/mortgagees will look for other ways to get the return on their loans while limiting their liability to unit owners.

Lenders and potential purchasers of units in unfinished CIDs have great risks. In this economy, it is a leap of faith to invest in such a development and know that it will be completed as planned. Legislation that limits the liability of innocent lenders while also protecting the rights of the innocent unit owners will be difficult to create, but that should be the goal. The uniform acts are great building blocks, although they tend to favor limiting liability to the lenders by giving the lenders the option to not succeed to special declarant rights. Legislation that creates a CID unit owners relief fund or that requires declarants to purchase insurance policies to cover warranty claims may be a solution.¹²¹ Many states have created homeowners construction funds to protect homeowners from the unscrupulous acts of unlicensed builders.¹²² These funds are created by collecting license fees. A similar fund could be created to protect unit owners in distressed CIDs by possibly charging registration fees and/or annual fees to declarants. Creating this fund would give unit owners a place to turn when the declarant has walked away from its warranty obligations and the successor declarant is not liable to honor those warranties. This fund or insurance requirement would also limit the liability mortgagees face when foreclosing on a CID. The mortgagees would then be able to focus on selling existing units and completing amenities without having to address individual owner warranty claims. This solution would most likely not help existing CIDs, but it could help future CIDs and help those who have to pick up the pieces if that future CID falls apart.

¹ See, i.e. Armen Hareyan, *Condo Construction Loan Delinquency Rates Not Pretty*, (May 7, 2009), <http://www.huliq.com/1/80626/condo-construction-loan-delinquency-rates-not-pretty>; Michael M. Phillips, *America's Newest Land Baron: FDIC*, (November 17, 2009), <http://online.wsj.com/article/SB125840904423151209.html>; Alby Gallun, *Foreclosure Suit Tarnishes Silver Tower Condo Project*, (March 10, 2010), <http://www.chicagorealestatedaily.com/article/20100310/CREDO3/200037381/foreclosure-suit-tarnishes-silver-tower-condo-project>.

² See *infra*, Part II. There are other uniform acts that touch on CID development as well. Those acts are the Uniform Planned Community Act, the Uniform Real Estate Cooperative Act and the Uniform Real Estate Time Share Act. This paper will only discuss the Uniform Common Interest Ownership Act and the Uniform Condominium Act.

³ See *infra*, Part III.

⁴ EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF THE RESIDENTIAL PRIVATE GOVERNMENT*, 126 (1994).

⁵ *Id.*

⁶ 12 U.S.C. 1715y(e)

⁷ Casey Perkins, *Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 NEV. LAW J. 561, 565 (2010).

⁸ *Id.*

⁹ *Id.* When first created, the association of unit owners is controlled and run by the declarant. Since the declarant owns all of the units from the start, it has all of the allocated votes within the association. Eventually, as non-declarant unit owners become the majority of unit owners, the declarant loses control of the association as it has less votes to cast.

¹⁰ Paula A. Franzese and Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1120 (2007).

¹¹ *Id.*

¹² I will use the term “declarant” throughout this paper (for the most part) because the majority of jurisdictions throughout the United States use this term to describe the person who creates a CID as the declarant. That term is used by both uniform acts. Other jurisdictions may refer to this person as “developer.” Compare, *i.e.* MICH. COMP. LAWS §559.106.

¹³ Unif. Common Interest Ownership Act (hereinafter “UCIOA”) §1-103(14) (1994) <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ucioa94.htm> (Amended 2008) http://www.law.upenn.edu/bll/archives/ulc/ucioa/2008am_approved.htm. The Uniform Condominium Act (hereinafter (“UCA”) has a similar definition except that the word “condominium” is inserted where “common interest community” would be. UCA §1-103(9) (1980) <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/uca80.pdf>.

¹⁴ See, *i.e.* UCIOA §2-101. Please note that some jurisdictions call this document the “master deed.” Compare, MICH. COMP. LAWS. §559.108.

¹⁵ UCIOA §2-105.

¹⁶ *Id.* §2-109. Does not apply to cooperatives.

¹⁷ *Id.* §2-109(c).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ UCIOA §4-113.

²¹ UCIOA §4-114.

²² See *supra*, note 2.

²³ The states that have enacted a version of the Uniform Common Interest Ownership Act (UCIOA) are: Alaska - ALASKA STAT. §34.08.010 (2011) *et seq.*; Colorado - COLO. REV. STAT. §38-33.3-101 (2010) *et seq.*; Connecticut - CONN. GEN. STAT. §47-200 (2011) *et seq.*; Delaware - DEL. CODE ANN. tit. 25, §81-101 (2011) *et seq.*; Nevada - Nev. Rev. Stat. §116.001 (2011) *et seq.*; Vermont - VT. STAT. ANN. tit. 27A §1-101 (2011) *et seq.*; and West Virginia - W.VA. CODE §36B-101 (2011) *et seq.*

²⁴ The states that have enacted a version of the Uniform Condominium Act (UCA) are: Alabama - ALA. CODE §35-8A-101 (2011) *et seq.*; Arizona - ARIZ. REV. STAT. ANN. §33-1201 (2011) *et seq.*; District of Columbia - D.C. CODE §42.1901.01 (2011) *et seq.*; Hawaii - HAW. REV. STAT. §514B-1 (2011) *et seq.*; Kentucky - KY. REV. STAT. ANN. §381.9101 (2011) *et seq.*; Maine - ME. REV. STAT. ANN. tit. 33§1601.101 (2011) *et seq.*; Minnesota - MINN. STAT. §515B.1101(2010) *et seq.*; Missouri - MO.REV.STAT. §448.1-101 (2011) *et seq.*; Nebraska - NEB. REV. STAT. §76-825(2010) *et seq.*; New Mexico - N.M. STAT. ANN. §47-7A-1(2011) *et seq.*; North Carolina - N.C. GEN. STAT. §47C-1-101 (2011) *et seq.*; Oregon - OR. REV. STAT. §100.005 (2009) *et seq.*; Pennsylvania - 68 PA. CONS. STAT. §3101(2010) *et seq.*; Rhode Island - R.I. GEN. LAWS §34-36.1-1.01 (2011) *et seq.*; Tennessee - TENN. CODE ANN. §66-27-201 (2011) *et seq.*; Texas - TEX. PROP. CODE ANN. §82.001 (2010) *et seq.*; Virginia - VA. CODE ANN. §55-79.39 (2011) *et seq.*; and Washington - WASH. REV. CODE §64.34.005 (2011) *et seq.*

²⁵ Josh Brown, *Norfolk Condo Development Faces Foreclosure, Auction*, (February 11, 2011), <http://hamptonroads.com/2011/02/norfolk-condo-development-faces-foreclosure-auction>.

²⁶ “Mortgage foreclosure process” as used in this paper means any of the following: judicial foreclosure, foreclosure by advertisement, or a deed in lieu of foreclosure.

²⁷ The Uniform Condominium Act (UCA) contains a similar section with the same section number 3-104. The language is identical except were the UCIOA refers to “common interest community” the UCA refers to “condominium.”

²⁸ The identical comments are found in the comments to §3-104 of the UCA as well.

²⁹ Comment 1 to the UCIOA and UCIOA 2008 Amendments

³⁰ *Id.* at comment 2.

³¹ UCIOA §3-104(b)(1) which states: A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this [Act]. Lack of privity does not deprive any unit owner from standing to maintain an action to enforce any obligation of the transferor.

³² UCIOA §4-113 – express warranty of quality.

³³ *Id.* §4-114 – implied warranty of quality.

³⁴ *Id.* §4-115.

³⁵ *Id.* §3-104(b)(1).

³⁶ It should be noted that most declarants take on the form of a corporation or a limited liability company. When a declarant has been in a financial situation wherein the mortgagee has decided to foreclose, typically the declarant will have little to no assets nor the ability to correct any defects found in a unit. Therefore, in most cases where a mortgagee has foreclosed upon a declarant’s interest in a CID, the unit owners will have very little luck in successfully pursuing the declarant to correct and/or pay for defects.

³⁷ UCIOA §3-104(c).

³⁸ *Id.* Some jurisdictions that have adopted the uniform acts have deleted the provision which allows the mortgagee to request the special declarant rights. Thus, these jurisdictions make the transfer of the special declarant rights automatic, but they allow the mortgagee the opportunity to reject them as well. *See, i.e.* ALA. CODE §35-8A-304; ARIZ. REV. STAT. ANN. §33-1244; CONN. GEN. STAT. §47-246; and MINN. STAT. §515B.3.104.

³⁹ *See supra.* Part I.

⁴⁰ UCIOA §3-104(e)(2). Section 3-104(e) states in part:

(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

[...]

(2) A successor to any special declarant right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations

and liabilities imposed by this [act] or the declaration:

(i) on a declarant which relate to the successor’s exercise or nonexercise of special declarant rights; or

(ii) on his transferor, other than:

(A) misrepresentations by any previous declarant;

(B) warranty obligations on improvements made by any previous declarant, or made before the common interest community was created;
(C) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or
(D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs ..., may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement, and any liability arising as a result thereof, and obligations under Article 5.

(4) A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the executive board in [...] for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, the successor declarant is not subject to any liability or obligation as a declarant other than liability for his acts and omissions [...].

⁴¹ *Id.* §4-119.

⁴² It has been my experience as an attorney practitioner in the area of CID development, that most declarants, in order to limit their liability, are careful in the way items are designated on the site plans and in brochures. The vast majority of items on any given site plan will be labeled "need not be built" thus a successor declarant will not be held liable under the act to build that many items if the original declarant has been careful in its labeling.

⁴³ *Id.* §3-104(e)(3) and (4).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* §3-104(e)(3).

⁴⁷ *Id.* §3-104(e)(4).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Alaska specifically addresses this issue in its version of UCIOA §3-104 – ALASKA STAT. §34.08.350(h). Minnesota addresses the longevity of special declarant rights by making all special declarant rights expire 10 years after the conveyance of the first unit to a person or entity other than the declarant. MINN. STAT. §515B.3-104(i).

⁵² ALASKA STAT. §34.08.350(h).

⁵³ *See, supra* Part II, A, paragraph 1.

⁵⁴ 984 A.2d 676(Conn. 2009).

⁵⁵ *Id.* at 678.

⁵⁶ *Id.*

⁵⁷ *Id.* at 679.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 682.

⁶¹ 724 A.2d 389 (Pa. Commw. Ct., 1999)

⁶² *Id.* at 391.

⁶³ *Id.*

⁶⁴ *Id.* at 392.

⁶⁵ *Id.* at 394.

⁶⁶ 711 A.2d 1140 (R.I., 1998).

⁶⁷ *Id.* at 1141.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1142.

⁷⁰ See i.e. – Arkansas – ARK. CODE ANN. §18-13-101 (2011) *et seq.*; Idaho – IDAHO CODE ANN. §1501(2011) *et seq.*; Indiana – IND. CODE §32-25-1-1 (2011) *et seq.*; Iowa – IOWA CODE §499B.1 (2011) *et seq.*; Kansas – KAN. STAT. ANN. §58-4601 (2011) *et seq.*; Louisiana – LA. REV. STAT. ANN. §9:1121.101 (2011) *et seq.* (Louisiana could have been discussed in the discussion *supra* about the uniform act states because it has a form of the UCA; however, where section 3-104 should be found, it was left blank); Maryland – MD. CODE ANN. REAL PROP. §11-101 (2011) *et seq.*; Mississippi – MISS. CODE ANN. §89-9-1 (2011) *et seq.*; Montana – MONT. CODE ANN. §70-23-101 (2011) *et seq.*; New Hampshire – N.H. REV. STAT. ANN. §479-A:1 (2011) *et seq.*; New Jersey – N.J. STAT. ANN. §46:8B-1 (2011) *et seq.*; New York – N.Y. REAL PROP. §339-d (2011) *et seq.*; North Dakota – N.D. CENT. CODE §47-04.1-01 (2011) *et seq.*; South Carolina – S.C. CODE ANN. §27-31-10 (2011) *et seq.*; South Dakota – S.D. CODIFIED LAWS §43-15A-1 (2011) *et seq.*; and Wyoming – WYO. STAT. ANN. §34-20-101 (2011) *et seq.*

⁷¹ See, i.e. - California – CAL. CIV. CODE §1350 (2011) *et seq.* (California when it defines “declarant” it includes a persons who “succeed to special rights” CAL. CIV. CODE §1351(g); Georgia – GA. CODE ANN. §44-3-70 (2011) *et seq.* (Georgia code in defining “declarant” includes any successor in title. GA. CODE ANN. §44-3-71(13)); Illinois – 765 Ill. Comp. Stat. 605/2 (2011) and §765 ILL. COMP. STAT. §160/1-5 (2011) (Illinois also has a Distressed Condominium Statute, 765 ILL. COMP. STAT. §605/14.5 (2011) wherein it gives the court the ability to appoint a receiver when 60% of the units are in foreclosure or 50% of the units are in arrears of their assessments); Ohio – OHIO REV. CODE ANN. §5311.01 (2011) *et seq.* (Ohio Condominium Property Act defines developer to include a successor that stands in the developers shoes, OHIO REV. CODE ANN. §5311.25); Oklahoma – OKLA. STAT. tit. 60 §501 (2011) *et seq.* (defines declarant to include successors who have been granted and assumed responsibilities reserved to the declarant in the declaration, OKLA. STAT. tit. 60 §503); Utah – UTAH CODE ANN. §57-8-1 (2011) *et seq.* (defines declarant to include “any successors of the persons referred to in this subsection who come to stand in the same relation to the condominium project as their predecessors.” UTAH CODE ANN. §57-8-3); and Wisconsin – WIS. STAT. §703.01 (2011) *et seq.* (“A declarant may assign his or her rights and obligations as a declarant under this chapter by recording an amendment to the declaration that includes the assignment and an acceptance of the

assignment that is signed by the assignee and acknowledged. A declarant may not assign under this subsection less than all of his or her rights and obligations as a declarant under this chapter.” WIS. STAT. §703.09(4)).

⁷² Florida uses the term “developer” as opposed to “declarant” in its Condominium Act. FLA. STAT. §718.101 *et seq.* For this discussion of Florida law, I will use the term “developer.”

⁷³ OFFICE OF THE ATTY. GEN. OF FLORIDA, 1977, NO. AGO 77-13 (February 8, 1977).

⁷⁴ FLA. STAT. §718.701 (2011) *et seq.*

⁷⁵ *Id.* §718.702.

⁷⁶ FLA. STAT. §718.703(1).

⁷⁷ *Id.* §718.703(2).

⁷⁸ *Id.* §718.704.

⁷⁹ *Id.*

⁸⁰ *Id.* and FLA. STAT. § 718.707. The Distressed Condominium Relief Act will sunset on July 1, 2012. It should be noted that there can be more than one bulk buyer in a single condominium development.

⁸¹ FLA. STAT. §718.704(5).

⁸² *Id.* §718.104.

⁸³ *Id.* §718.704(4).

⁸⁴ *Id.* §726.102(7).

⁸⁵ MASS. GEN. LAWS ch. 183A§22. I will use the term “developer” in this discussion of Massachusetts law since that is the word used in the statute.

⁸⁶ 663 N.E. 2d 811 (Mass., 1996).

⁸⁷ *Id.* at 812.

⁸⁸ *Id.*

⁸⁹ *Id.* at 813.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 814.

⁹³ *Id.*

⁹⁴ *Maloney v. Boston Five Cents Savings Bank, FSB*, 1997 Mass. Super. LEXIS 592.

⁹⁵ A person that creates a condominium in Michigan is referred to as the “developer” as opposed to other jurisdictions which refer to that person as the declarant. MICH. COMP. LAWS §559.106(2).

⁹⁶ MICH. COMP. LAWS §559.235(1).

⁹⁷ It should be noted that a person can become a successor developer when they acquire title to any 10 units within a CID. They do not have to receive title from the original developer. In a large CID, it is possible to have one mortgage lender hold mortgages on over 10 units in a single CID. In the event that the individual unit owner defaults and the mortgage lender forecloses on 10 units within a single CID, that mortgagee becomes a successor developer as defined by the act even though those units were not developer owned units. Given the rate of foreclosures in the State of Michigan, this scenario is not very farfetched.

⁹⁸ MICH. COMP. LAWS §559.235(2)(a).

⁹⁹ MICH. COMP. LAWS §559.184a. This disclosure statement must contain the following information: the names and addresses of the developer, its prior experience with the development of condominiums, the names and addresses of the builder and real estate broker, an estimated budget for the association of co-owners, disclosure of any express warranties, an explanation as to whether the condominium may be expanded or contracted, identification of all structures that are labeled “must be built” or “need not built,” and an explanation of the escrow arrangement.

¹⁰⁰ MICH. COMP. LAWS §559.235(2)(b).

¹⁰¹ *Id.*

¹⁰² MICH. COMP. LAWS §559.235(3).

¹⁰³ MICH. COMP. LAWS §559.235(4).

¹⁰⁴ MICH. COMP. LAWS §559.235(5).

¹⁰⁵ In my practice as a community association lawyer in Michigan, I have seen this happen. Lenders with mortgages on 10 or more units within a single condominium development are just letting those units sit without foreclosing.

¹⁰⁶ 106 P.3d 401 (Idaho, 2005).

¹⁰⁷ *Id.*

¹⁰⁸ 692 N.E.2d 402 (Ill. Ct. App., 1998).

¹⁰⁹ *Id.*

¹¹⁰ 633 A.2d 1060 (N.J. Super. Ct. Law Div., 1993).

¹¹¹ *Id.* at 1062.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1063.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1064.

¹¹⁷ *Id.* at 1065.

¹¹⁸ 512 N.E.2d 316 (Ohio, 1987).

¹¹⁹ *Id.* at 319.

¹²⁰ *Id.*

¹²¹ Martin A. Schwartz, *The Successor Developer Conundrum in Distressed Condominium Projects*, 83 FLA. BAR J. 64 (2009).

¹²² *See, i.e.* MICH. COMP. LAWS §338.2239.