TIME TO REHAB THE AGING CONDOMINIUM CONCEPT: FIXING PROBLEMS UNCOVERED BY THE GREAT RECESSION

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The condominium concept arrived in the United States with the passage of section 234(c) of the National Housing Act, 12 U.S.C. § 1715y, in 1961. The intent of section 234(c) was to encourage the use of condominiums to promote affordable individual ownership of units in multifamily buildings through mortgages insured by the Federal Housing Administration ("FHA"). Since condominiums did not exist at common law, in order for a condominium to be created and qualify for FHA-insured unit loans, the state in which the property was located needed to adopt a statute authorizing and enabling the condominium form of ownership. Within several years after the passage of section 234(c), every state had enacted a statute enabling individual ownership of units in multifamily buildings. The concept proliferated and over time the condominium form of ownership became a major vehicle for home ownership, particularly in urban areas.

The condominium concept in the United States is now over 55 years of age. Many of the early condominium projects are old and in need of rehabilitation or cannot economically be rehabilitated and are candidates for demolition and redevelopment. As time passed and the experience with condominiums grew, weaknesses in the condominium concept began to emerge, some of which could or should have been addressed by legislative reforms. Many states still have a version or modified version of the state's enabling statute which was originally passed in the early 1960s and has not been amended to address problems that emerged and evolved over the years. In short, the condominium concept is old and in need of rehabilitation, both in its statutory underpinnings and in documentation.

This article identifies issues that have been exposed and presents a modest proposal that future condominium

statutes and documents include provisions that would help in any future downturns. The authors do not agree even among themselves as to all specific possibilities, but they are unanimous in the observation that this topic has been exposed and is worthy of the consideration of legislatures and practitioners.

TROUBLESOME ISSUES

The housing market crash that led to the Great Recession is sometimes referred to as the "Crash." The Crash put enormous stress on the housing market in general and the condominium form of ownership in particular. Many problem situations that arose in the aftermath of the Crash might benefit from changes that could be made in the statutory structure, practices, and policies that underlie the condominium concept, particularly as applied to condominiums whose units are, or should be, affordable by moderate income households.

The consequences of the Crash and some of the issues that flowed from it include the following:

- Where there were severe declines in unit values, a large number of home owners found themselves underwater on their mortgage loans.
- Lenders tightened underwriting standards and procedures to the point where it became very difficult to obtain a home mortgage.
- The lack of availability of financing made it extremely difficult for homes to be sold and/or refinanced, especially if the home was underwater. Those sellers who were able to find a buyer able to obtain financing or pay cash had to either come to closing with their own cash to pay off the balance of their mortgage in excess of the sales price or convince the holder of their mortgage to agree to a short sale, or both.
- Many owners, faced with the above problems and located in a jurisdiction with an archaic or cumbersome judicial foreclosure system, opted to abandon their units or, even worse, remain in their units for months or even years without paying mortgage debt service, real estate taxes, or condominium assessments. Such owners would then sometimes strip or trash the unit when they finally were required to move out.

While the above issues were not unique to condominiums and also affected single family homes, the negative effects of the Crash were magnified when combined with the structure of co-dependency created by a condominium regime. Issues unique to condominium regimes often included the following:

- Presale requirements, restrictions on the percentage of units in a project that could be owned by investors, and limits on the number of delinquencies and other restrictions that lenders applied to condominium projects made it much more difficult to obtain mortgage financing for a condominium unit than for a single family home or a non-condominium townhome unit.
- The rise in assessment delinquencies created serious financial issues for some condominiums and their non-delinquent unit owners. In many instances, lenders or the provisions of the state's condominium statute required that condominium declarations make the lien for unpaid assessments subordinate to the lien of the first mortgage on the unit. When the first mortgage was foreclosed, the foreclosure sale would result in the extinguishment of the lien for unpaid assessments, depriving the association of much needed income. Non-delinquent owners were faced with rising assessments and special assessments to cover the shortfalls created by delinquencies and extinguished assessment liens.
- Many condominiums were unwilling or unable to assess in advance for sufficient reserves for necessary major repairs or replacements when needed, resulting in associations borrowing and/or levying a special assessment to pay for needed work. Sometimes the associations were incapable of borrowing, because of credit issues, deficiencies in the condominium documents that did not permit financing, or statutes that did not provide a framework to make lenders comfortable that they could be given sufficient collateral or safeguards to make a loan prudently. In the absence of a source of funds for repairs, many condominium associations chose to defer needed repair work, resulting in the deterioration of the property, a decline in unit values and an increase in the difficulty of the owners to sell or refinance their units.

The legal capacity of condominium associations is a separate and interesting topic. The first area of examination is a particular condominium's documentation to see if the association's board is authorized (or

actively prohibited) from borrowing and the second is the state's law as to any statutory authority of the board to borrow and as to any rights that can be, or are, extended to lenders. New York provides an example of a statutory response to issues of deficient condominium documents. N.Y. Real Prop. Law § 339-jj (borrowing by board of managers). See also Matthew J. Leeds & Joel E. Miller, Condominium Act Addition Gives New York Boards of Managers Effective Borrowing Ability, 73 St. John's L. Rev. 135 (1999).

- After the turnover of control of the association from the developer, condominium associations often sued developers and/or builders on real, and perhaps sometimes exaggerated, claims such as construction defects and mismanagement, making it difficult, if not impossible, for a unit owner whose condominium was in the midst of such litigation to sell or refinance the owner's unit.
- Restrictions or prohibitions on leasing of condominium units made it difficult for an owner no longer in occupancy of their unit to rent the unit to generate income to help pay the unit's ownership costs until the unit could be sold.
- When developers or investors sought to stabilize troubled condominiums, they often had difficulty obtaining the "developer" or "declarant" rights and powers to permit them to do what was necessary to effectively complete the development of the condominium or restore the financial footing of the association.
- Some condominiums became candidates for "termination" or "de-conversion" to enable them to become single owner apartment developments or to be rehabilitated or demolished and replaced. However, many, if not most, state condominium statutes make it extremely difficult to accomplish such a transition, especially when there are multiple unit owners and underwater mortgages.

The main source of financing in the years leading up to the Crash, and one of the principal causes of the Crash, was from the originators of residential mortgage backed securities ("RMBS"). The originators of RMBS disappeared as players in the secondary mortgage market after the Crash. To a limited extent, they were replaced by lenders making loans qualifying for sale to, or insurance or guaranty by, Fannie Mae, Freddie Mac, FHA or VA (all government related entities or "GREs"). But, many owners experienced greater difficulty in obtaining a mortgage on a condominium unit than on a single family home or a non-condominium townhome due to the fact that the GREs require that the condominium project, and not merely the unit, meet certain underwriting requirements. Many of the GREs' project requirements date back to the mid-1970s. The structure of the secondary mortgage market, especially the role played by the GREs, needs to be changed. A discussion of what can or should be done to fix the secondary mortgage market is beyond the scope of this article.

POSSIBLE SOLUTIONS

Reserves

One of the most significant functions of the board of directors or managers of a condominium association is to adopt budgets and levy assessments to provide funds to pay the expenses of operating the condominium. Such budgets should provide for funds to be added on a monthly basis to reserves for significant repairs or replacements. Buildings deteriorate and depreciate over time. Many observers feel that it is fundamentally fair that owners of units in a condominium pay on a current basis their appropriate share of such depreciation and the funds to maintain and restore the property. If sufficient reserves are not accumulated over time, then, at some point, when repairs or replacements become necessary, the board will be faced with the option of levying a special assessment or borrowing the necessary funds and repaying the loan out of future assessments. Both of these options put the burden on the current owners, not necessarily those who owned units when the depreciation occurred. (It is recognized that the alternative argument is that the unit owners who will actually benefit from the repairs and improvements will be those in ownership in the future after such work is performed, and that the value added by such work will be realized by the owners paying such amounts from the proceeds on the resale of the units). Alternatively, the board may do nothing and allow the improvements to deteriorate. The Crash added to the stress on condominium associations, including those which had built up adequate reserves, because the reserves were often used to make up shortfalls in current operating expenses resulting from under budgeting and/or delinquencies.

The GREs require that in order to be approved for purchase, insurance or guarantees of unit loans, a condominium must fund and maintain appropriate reserves. See https://www.fanniemae.com/content/guide/selling/b4/2.2/02.html. Some state condominium statutes require that reasonable reserves be accumulated and maintained, such as the Illinois statute, 765 Ill. Comp. Stat. § 605/9. However, it is very difficult to monitor or measure the level of reserves that are necessary or appropriate for a given condominium. One possible approach, which could focus attention on the issue of the adequacy of reserves, would be to require, either by statute or in the declaration, that condominium associations provide a report to the owners each year detailing (a) the current plan for the major repair or replacement of major systems, (b) the estimated cost of such work, (c) the number of years remaining until necessary work will need to be done, (d) the current balance of the reserve account for the work and (e) how much will be added to the reserve account in the coming year. In this way the owners will better be able to evaluate the likelihood that the required work will be done when needed and that the funds will be available to pay for it, without a special assessment or the need to take out a loan.

Certain accounting rules, policies and conventions suggest that associations periodically have physical surveys made of their properties and anticipate future capital improvements. However, it has become standard that associations refrain from making such a survey and that accountants for associations merely state this as an exception to the complete certification of annual financial statements.

Pursuing Litigation

In many jurisdictions, it is common that after control of a condominium association has been turned over to the owners, the condominium association hires an attorney, commissions a "reserve study" that identifies "construction defects" or underfunding of reserves, and pursues (often by litigation) the developer and/or its representatives who served on the board prior to turnover for construction defects and for breach of fiduciary duty. Although there are certainly instances where such actions may be justified, such pursuit often leads to consequences about which the owners have no warning or appreciation. Often the lawsuits take many years to resolve at great cost to the owners, resulting in increases in assessments, a special assessment, or depletion of reserves; often with little, if anything, in return. While such a lawsuit is pending, the ability to obtain financing or refinancing on units in the condominium is severely hampered. And, certainly the existence of such a dispute can denigrate the value and salability of units.

One possible way to avoid this issue would be to afford the owners an opportunity to better understand what they may experience by requiring disclosures of the consequences of a lawsuit and giving the owners the right to vote on whether proposed litigation will be initiated and prosecuted. Such disclosure may be required by statute or by a provision in the declaration. It would require that before an association files any significant lawsuit (other than for the collection of assessments), the board provide to the owners information on the grounds for the lawsuit and the estimated cost, duration and likelihood of recovery, and hold a special meeting of the owners to discuss and vote on the proposed litigation. In order to commence such litigation, a super majority of all owners (not just those who vote on the issue) would be required before the lawsuit can be filed and prosecuted. It should be noted that Illinois restricts the validity of such provisions in a condominium declaration unless approved by owners holding at least 75 percent of the percentage interests in the condominium. 765 Ill. Comp. Stat. § 605/18.9.

Attorneys familiar with board governance may chafe at the notion of needing to present such a complex and important matter to the debate of a great number of unit owners. In addition, the nature of litigation often argues for a more controlled, flexible and discrete, let alone secret, approach to a dispute. It can also be argued that the point of a board is to be the representative body that makes decisions on matters such as litigation. Nevertheless, the foregoing proposal is sensitive to the potential concerns of owners and purchasers who might suffer from situations where there is a lack of disclosure and where they are lulled into false or unfounded assumptions as to what the future holds for their condominium, because the information is not more public.

Unit Leasing

In the 1960s and early 1970s, when the condominium concept was still relatively new and had not yet been as widely accepted, many of the early condominiums were conversions from rental apartments. In those

days, it was not unusual for the monthly carrying cost to own a unit in a converted building to be less than the monthly rent on the same or a comparable unit before the conversion. As the condominium concept gained wider acceptance, and as interest rates rose, the cost to own a unit similarly increased and, more often than not, exceeded the monthly rent on a comparable unit. Converters claimed that the cost to own, after taking into account tax benefits from the deductions for real estate taxes and mortgage interest, remained less than rent. Eventually, the cost to own, even after available tax deductions, far exceeded the cost to rent. In many jurisdictions, it was not until after the Crash that, for the first time in over 40 years, the monthly cost to own a unit fell below the cost to rent the same or a comparable unit in certain areas.

When Fannie Mae and Freddie Mac entered the business of buying loans on condominium units, they established requirements for the purchase of such loans. Among the requirements was that a minimum percentage of units in the condominium needed to be sold to, or under contract for sale to, owner/occupants, commonly referred to as a "pre-sale requirement." Initially, the pre-sale requirement was 70 percent, but currently it is 51 percent or less. See https://www.fanniemae.com/content/guide/selling/b4/2.2/02.html In addition, the GREs will not buy, insure or guaranty unit loans in a condominium in which a large percentage of the units are owned by investors who rent them. Generally, if more than 50 percent of the units are investor owned, or one investor owns more than 10 percent of the units, the units in the condominium will not qualify for the purchase, insurance or guaranty of mortgages by the GREs. See, https://www.fanniemae.com/content/fact_sheet/ineligible-condo-project-characterisitics.pdf.

Some perceive that the foregoing restrictions are based, in part, upon a general imbedded bias against renters, who were deemed inferior to owner/occupants. This mindset might have originated from a presumption that renters will not treat their units as well as owner/occupants and not participate in the community to the same extent as owner/occupants. Additionally, it was thought that renters have less financial stability and less of a stake in the stability or success of the condominium. Such assumptions caused many condominiums to prohibit or severely limit the leasing of units. After the Crash, the world changed for many. As mentioned above, some owners of units who were underwater on their mortgage opted to remain in their units for many months, even years, without paying mortgage debt service, real estate taxes or assessments. Disgruntled owners sometimes stripped or trashed their units when they finally were required to move out. As this phenomena unfolded, investors who took care of their units and carefully screened and monitored their tenants looked better than defaulting owner/occupants. Large numbers of potential home buyers were shut out of the housing market because of damaged credit or big student loans. Many people who could afford to buy and who could qualify for a mortgage chose to rent rather than buy in order to keep their options open and to avoid risking a potential diminution or loss of their equity in the event of a decline in housing values. Alternatively, such potential buyers were concerned that they might be stuck in a unit they no longer were able or desired to live in. It has been observed that many millennials delayed marriage and family formation, and thus the need or desire to purchase a home. As a result of many factors, the percentage of home ownership in the United States significantly declined.

Today, in many areas where home prices have failed to significantly rebound from the post-crash lows, those who want to buy and are able to qualify for a loan are able to own a home or condominium unit for less per month (even before tax deductions) than it would cost to rent a comparable home or unit.

With the foregoing background, some observers believe that an outright prohibition on leasing is neither necessary nor a good idea. The more serious problem is the disruptive rise of what are referred to as "short term rental" companies or "STRs" like AIRBNB or VRBO. Instead of an outright prohibition of leasing, a condominium could prohibit leasing of less than all of a unit (i.e., a bedroom), prohibit short term rentals or renting for transient purposes, and require a minimum lease term of at least six months or a year, requirements that GREs have been applying for many years. If there is concern that too many units will be leased and that mortgages may become unavailable, a condominium could limit the number of units that could be leased at any one time to, say, 25 percent to 30 percent of the total number of units.

Even at that, the authors recognize that many communities still perceive that encouragement of renters, let alone super-short term occupants in the ersatz hotels

of an AIRBNB, can affect the nature of life in a condominium. Renting can burden management when it is perceived that the occupants require greater supervision, and can affect unit value negatively (although, as suggested above, allowing such expanded rights to rent may actually increase and stabilize values).

DEVELOPER/DECLARANT RIGHTS ISSUES

The Uniform Common Ownership Act ("UCIOA") currently adopted in some but not many states, provides an interesting starting framework for condominium statutes. UCOIA, as promulgated by the National Commission of Uniform State Laws at its annual conference in July 2008 and amended in 2014, effectively addresses issues involving the transfer and preservation of developer/declarant rights. In particular, UCOIA section 1103 (33) contains a definition of "Special Declarant Rights" and section 3104 provides for how Special Declarant Rights may be transferred (by recording an assignment). In a foreclosure sale, tax sale, judicial sale or bankruptcy sale of real estate involving a party holding Special Declarant Rights, section 3-104(c) provides that, only upon the request of the person acquiring title to the real estate and by specific reference in the instrument conveying title, such person shall succeed to some or all of the Special Declarant Rights. Section 3-104(e) gives a party acquiring Special Declarant Rights the option to declare in a recorded instrument that it is holding the rights solely for transfer to another person. In such a case, the holder of the Special Declarant Rights will only have the right to control the board of the association and all other rights cannot be exercised and will be held in abeyance (with the holder subject to no liability in connection with such rights) until the rights are formally transferred in a recorded instrument to a person that acquires title to the real estate in question.

It is suggested by many that states should incorporate the relevant provisions of UCIOA by amendment to their condominium statutes to clarify and facilitate the transfer of declarant rights. As an example, it is noted that Florida, in 2010, adopted Part VII of the Florida Condominium Act called the Distressed Condominium Relief Act. This Act created two classes: "Bulk Assignees," buyers which acquire declarant's rights; and "Bulk Buyers," buyers which do not. A bulk buyer may acquire certain limited declarant's rights but, if it acquires a majority of the units, it can control the association without regard to any statutory requirement to cede control. This statute was considered essential to promote absorption of unsold units by providing bulk purchasers with a shield from potential developer liability. Such potential liability was discouraging attempts to salvage unsuccessful projects. And, in fact, it worked. A projected 10 to 15 year absorption period was reduced to 4 or 5 years.

Absent legislative mandates, issues relating to the transfer or assignment of declarant rights may be effectively dealt with in the declaration or an amendment to the declaration. Of course, if the condominium documents do not provide the flexibility that is desired for a particular purpose, they would have to be amended. Amendment normally requires a supermajority of unit owners, commonly a two-thirds vote, which is often difficult to obtain. Moreover, it is not unusual that the original developer would have created documents that cannot be amended in any way or to delimit developer's rights without the consent of the developer or the then holder of the developer's rights. Needless to say, the extent to which this can be done will be determined by particular documents and/or the requirements of the particular state's condominium statute.

Deconversions/Terminations

For various reasons, including aging buildings and condominium projects that failed or stalled after the Crash, in many jurisdictions there has been an increased effort in recent years to "de-convert" or terminate existing condominiums. In certain areas that have done very well in terms of increases in real estate values, "deconversion" has been a topic where speculators might want to buy a property from the unit owners and use it for re-development purposes.

As with the issue of declarant rights mentioned above, the issue of termination is not effectively dealt with in most first generation condominium acts. Section 2118 of UCIOA contains provisions that could be a model for amendments to existing acts, providing a workable approach to termination. In particular, section 2-118 provides a process for terminating a condominium and selling the entire property. In such a case, title to the condominium property would vest in the "condominium association as trustee for the holders of all interests in the units," and the property can be sold and conveyed free of liens, with the proceeds being distributed to the owners and lien holders as their

interests may appear. UCIOA § 2-118 (e), (g). See also Fla. Stat. § 718.117 (provides for the sale of the property after termination with the liens on units transferring to the proceeds of sale).

In the absence of enabling legislation, it may be possible to provide a workable termination provision in the declaration of condominium or by an amendment to an existing declaration, although there may be issues of preemption by the existing statute or challenges to vested rights in the case of an amendment. (To clarify the scope of this article, there are circumstances, such as substantial casualty or condemnation, when a condominium regime may be subject to termination, but this article is focused on the issues relating to voluntary terminations.)

The challenges in trying to terminate an existing condominium are many. Some older condominiums sit on land that is more valuable as vacant land than it is with its existing improvements. Other condominiums are worth more as a rental project than the sum of the total sale value of their units. Either situation provides an incentive to re-developers or apartment investors to try to acquire a sufficient number of units to control the condominium and terminate its existence. Set forth below are some of the issues that need to be considered.

a. Required Approval

Some first-generation condominium statutes require the approval of a large super majority, up to 100 percent of unit owners and 100 percent of the lenders, to terminate a condominium. Such an approval requirement is, in most cases, extremely difficult to attain. Unless the statute or the declaration specifically prohibits modification of the termination provisions, it may be possible to amend the declaration to provide for a lower threshold. Lender consent might be avoided or ameliorated if they are paid off in full from the sale of the condominium property following termination. In Illinois, 100 percent of the units can be required to be conveyed if at least owners of 75 percent of the percentage interests vote to approve the sale, with certain rights for dissenters. 765 ILCS 605/15

As another example, in New York's Condominium Act, N.Y. Real Prop. Law art. 9-B, §§ 339-d et seq.), which is purportedly the first state condominium law, withdrawal from the provisions of the condominium law requires by statute the vote of no less than 80 percent in number, as well as in common interest, of all unit owners.

b. Effect on Non-Consenting Owners

If a sufficient number of unit owners successfully vote to terminate, dissenting owners may still be a problem. Under some statutes, dissenting owners may be able to challenge the portion of the proceeds that will be allocated to their unit by obtaining an independent appraisal of their unit's value. In addition, the inequity of a dissenting owner being required to vacate their home may not play well in court. This may be an effective equitable defense to the termination, especially if the dissenter is old or infirm.

c. Effect on Leases

If the condominium association has commercial leases or certain residential owners have leased their units, and the leases are subject to the declaration and the condominium act, there is some thought that the leases will be terminated when the condominium is terminated, although the tenant may be entitled to a portion of the proceeds attributable to the leased premises. However, if a lease is not subject to the declaration or the act, it may cause a problem for the terminator or the lessor. For example, if the association has entered into a retail lease of a portion of the common elements and the owners then seek to terminate the condominium it is not clear that the lease would be terminated as a result of the termination. This issue may need to be factored into the economics of the termination.

On the other hand, depending on the jurisdiction and the local law, tenants might argue that their lease remains in force, and whoever is deemed the owner of the property after termination is the landlord. As discussed below under "Operation of the Property," one extreme situation would result if the ownership is deemed to be in the previous unit owners as tenants-in-common upon withdrawal of the property from the condominium. This would carry with it the concern that the new tenants-in-common would normally have to act with unanimity, unless the statute names one party as essentially the owners' representative or a trustee. The tenant might not know who to talk to when it needs to contact the landlord, the tenants-in-common themselves might fear that they have joint and several liability for the obligations of

landlord, and—to get right down to it—who deposits the checks?

d. Effect of Termination

Unless otherwise provided in the condominium statute, the termination of a condominium will typically result in a tenancy in common among the former unit owners. In addition, there may be mortgagees holding mortgages on former units. A judicial proceeding may need to be brought to force a sale of the property to dispose of the joint ownership and deal with the liens. A judicially-ordered sale would likely resemble a foreclosure sale in which third parties are allowed to bid for the property. In such a case, the party seeking to terminate the condominium may find itself in a position of being outbid by a third party and losing some of its incurred costs. For many, a better approach would be to tie the termination to the sale of the entire property.

Another way to express this result is presented by the New York statute and the typical New York condominium documents that speak to withdrawal of the property from the condominium form of ownership in the context of the property being subject to an action for partition. N.Y. Real Prop. Law § 339-t. Normally, partition would lead to a sale of the property pursuant to an equitable proceeding, and the statute requires that the proceeds of the partition sale would be used to pay off lenders on units before a unit owner received the unit owner's share of proceeds.

e. Operation of Property Post-Termination

If the termination does not lead to an immediate transfer of title, the former condominium will need to operate for some period of time without the formal structure of a condominium regime. This situation would create several tricky issues, including the following: How are funds for this operation generated? Who runs the property without the condominium structure in place—is it the condominium association or some receiver who will be appointed by a court? The answer to these questions may be resolved by the condominium statute or the severance proceedings or may not be resolved by either. In such case, the termination may create a morass, without the ability to levy and collect assessments or operate the property.

Referring again to a statute, such as New York's, that calls for the availability of an action for partition, presumably the action for partition would normally result in a sale, as described above. In terms of control and operation of the property, in the partition action the court could dictate the forms of controls and operations that would allow for continued operation of the property and would thus account for issues cited above, such as how to run the property and how to deal with tenants.

f. Title Issues

Another issue to consider is whether or not following termination and sale or a severance lawsuit the buyer will wind up with marketable and insurable title to the property. There are typically notice, service and other issues generated in a termination. A successful termination must involve the participation of a title insurance company to document all of the necessary steps so that, upon conclusion of the proceedings, the owner of the property will have marketable and insurable title.

It would be anticipated that with sufficient evidence of the votes needed to terminate the condominium, a title insurance company could accept that the condominium regime no longer exists, but they would have to satisfy themselves as to who is responsible for the property, who can convey it, and so on. Again, in some states, an order in an action for partition would be expected to provide a legal framework to suggest responsibility in the conduct of a sale.

Another issue that will arise is the mechanical housekeeping issue of cleaning up the land records and, separately, the tax records that carry each condominium unit as a separate tax lot. The condominium declaration recorded to submit the property to the condominium form of ownership in the first instance remains on record. Perhaps a court in a partition action could craft an order that would clarify the records and itself be recorded. It would be cleanest of all if some party were invested with the authority to record a document withdrawing property from the provisions of the condominium statute.

Some drafters of condominium documents have anticipated these situations and have incorporated provisions in the condominium documents calling for each unit owner to be deemed to give an irrevocable power of attorney coupled with an interest to a particular party, such as the people who acted as members of the board of managers prior to the termination. The attorney in fact is authorized to execute and record a

document terminating the condominium documents in the event of withdrawal of the property from the ambit of the condominium act. It might also make sense to have the power of attorney authorize those individuals to perform such other acts as are necessary in the "winding up" of the affairs of the condominium, such as dealing with bank accounts.

As to the tax records, there would likely need to be a filing with the local tax authorities to meld all of the tax lots representing the condominium units back into one tax unit. It is submitted that a court in a partition action might grant authority to a participant to do so, or might even order the tax authority to do so. And, again, the power of attorney concept might be built into the original documents to authorize some identifiable person, such as any member of the board of managers immediately prior to the dissolution of the condominium, to act as agent to do so.

g. Payment to Former Unit Owners

When the termination is completed and the property is sold, the next issue of significance is how the proceeds will be allocated. The default approach would normally be to allocate proceeds based on the percentage ownership in the common elements. However, this approach may produce inequitable results if the current relative values of the units do not correspond with the percentage interests. In most cases a unit in a line on the second floor of a condominium without any view would have the same percentage ownership as the same size unit in such line on the top floor with spectacular views. These are some of the issues that need to be considered and dealt with. As an example, Illinois's condominium act provides a mechanism for a dissenting owner to challenge the portion of the sales price of the property allocable to the owner's unit by obtaining an appraisal of the unit. 765 Ill. Comp. Stat. § 605/15.

As an example of another approach, the New York statute calls for the availability of an action for partition, but explicitly calls for the division of net proceeds based on the respective percentages of common interest. Not surprisingly, the statute calls for the payment of liens on a unit before payment of any portion of net proceeds to the owner of the unit. N.Y. Real Prop. Law § 339.

IMPLEMENTING SOLUTIONS

Statutory Changes

Many states still have versions of first or second generation condominium acts. Some states, but far from a majority of states, have adopted a version of UCIOA. It might well behoove many states to take a closer look at the UCIOA. Even if a state is not willing to adopt the entire proposed statute, it should at least consider amending its current statute to include certain concepts and provisions that are in UCIOA, in order to respond and deal with the issues discussed in this paper.

However, a change in the statute does not necessarily effectively fix a perceived problem, as Florida found when it amended its termination statute in 2007 to eliminate 100 percent ownership approval as the default requirement for terminations. The revised statute allowed terminations by approval of owners holding 80 percent of the voting interests as long as not more than 10 percent opposed the termination. Fla. Stat. § 718.117. The statute was recently amended to permit five percent of voting interests to block terminations. Although the statute on its face applies equally to condominiums in existence and to newly formed ones, Florida courts have held the statute cannot be applied retroactively on the theory of impairment of existing contracts, Tropicana Condo. Ass'n v. Tropical Condo., LLC, 2016 WL 6778379 (Fla. Dist. Ct. App. 2016), thereby eliminating most of the salutary efforts of the statute.

Document Changes

It is often very difficult and time consuming to attempt to navigate the legislative process to effectuate desired statutory changes. In the condominium field, it is often possible to effectively "legislate" for a specific condominium by dealing with a particular issue in the condominium declaration. However, even then the requirement of a super-majority, or the requirement of the participation of a particular constituency, such as those with "declarant rights" or lenders, might make it difficult to amend the documents. Of course, the condominium act may override the provisions in a declaration, though if the statute is silent or inadequate it may be possible to effectively deal with an issue in the declaration without interference from the existing statute.

CONCLUSION

The shocks and aftershocks of the Crash occurred along seismic faults in the housing and housing finance industry in the United States, causing extensive and serious financial damage to vulnerable condominiums and their unit owners—particularly moderately valued, affordable condominiums which were ill prepared to withstand the quakes. Now, with the benefit of hindsight, there is an opportunity to strengthen the foundation and structure of the condominium concept so that condominiums can better withstand future shocks.

Since real estate law is primarily local, it falls to the state and local governments to adopt laws or amend existing laws to respond to the issues exposed and amplified by the Crash, particularly as they affect affordable condominiums. Some think that UCIOA provides states with a well thought-out model statute that effectively deals with many of the issues. Only a few states have adopted a version of UCIOA. Other states, particularly Florida, have used different legislative approaches to the issues.

Many observers feel that state and local governments have been remiss in updating and adjusting their laws to accommodate the evolution and growth of the condominium industry. Perhaps the relatively recent experiences in distressed areas and distressed situations will impel legislators to take action and to come up with unique and creative approaches to stabilize moderately priced condominiums so that middle income households can become successful owners of affordable condominium units without fear that they will be disproportionately damaged when the next housing shock occurs.

The strength and resilience of a particular condominium depends to a great degree on the quality of its governing documents. Many of the issues that threaten condominiums can be effectively dealt with in the governing documents, with or without statutory support. Too many practitioners use off the shelf documents without giving much thought to how their documents can be modified to make the condominium more resistant to economic shocks. It is hoped that the suggestions in this article will stimulate practitioners to take a closer look at their documents and make changes in them so that the owners of units and condominium associations can better deal with problems and challenges, which will inevitably arise and confront them in the future.