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Condo-ning Eviction: Questioning the Illinois Approach to Forcible Entry and Detainer Actions With Regard to Condominium Unit Owners

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Condo-ning Eviction: Questioning the Illinois Approach to Forcible Entry and Detainer Actions With Regard to Condominium Unit Owners

JEFFREY M. REED*

Illinois is currently the only state that allows the forcible eviction of a condominium unit owner for failing to pay his monthly association dues. In Spanish Court Two Condominium Association v. Carlson, the Illinois Supreme Court was asked to determine whether the Illinois Condominium Property Act and the Forcible Entry and Detainer Act allow a unit owner to affirmatively defend against a forcible eviction by asserting that the condominium association was negligent in maintaining the condominium common areas. In a 4-3 decision, the Illinois Supreme Court held that such an affirmative defense is not “germane to the distinct purpose of the proceeding” as is required by the Forcible Entry and Detainer Act.

This Comment explores and questions the legal and policy justifications for allowing the forcible eviction of a condominium unit owner but not providing him with the same affirmative defenses available to others. Within the context of the Forcible Entry and Detainer Act, the Illinois Condominium Property Act, and the holding in Spanish Court, this Comment analyzes the complex nature of the condominium association-unit owner relationship and the inconsistent application of forcible eviction. The Comment concludes with suggestions on how forcible eviction in Illinois can be applied with more consistency and clarity, thus ensuring the rights of Illinois condominium property owners are not overlooked.

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I. INTRODUCTION

Consider the following hypothetical situation. Adalynn James owns a top-floor unit in a Chicago condominium. She routinely pays both her mortgage and her monthly association dues. The roof above her unit is in disrepair, and as a result, every time it rains the interior sustains water damage. She notifies the condominium association board of managers several times that water from the leaky roof continues to damage her unit. The board of managers ignores her pleas and fails to remedy the situation. Adalynn knows the law requires that she continue paying her monthly dues, but her unit continues to sustain damage and the resale value plummets. She tries, unsuccessfully, to use the condominium political system to remove the board members. She finally decides to employ the self-help option of ceasing payment of her monthly dues.

A few months later, Adalynn receives notice that the association board of managers now seeks a court-ordered eviction pursuant to a forcible entry and detainer action.¹ Once eviction occurs, the board will attempt to rent Adalynn’s unit in order to recoup past due assessments. She learns that she is a candidate for eviction despite holding her unit in fee simple absolute. During the forcible entry and detainer proceeding, Adalynn affirmatively defends her actions by arguing that her obligation to continue paying monthly dues terminated when the board willfully mismanaged the maintenance of the common areas. She argues that the board’s actions resulted in a breach of the condominium’s declaration and bylaws. The court grants the

1. See 765 ILL. COMP. STAT. 605/9.2 (2014); 735 ILL. COMP. STAT. 5/9-102(a)(7) (2014); 735 ILL. COMP. STAT. 5/9-111 (2014).

board's motion to strike her affirmative defense because the defense is not germane to the distinct purpose of the forcible entry and detainer proceeding.² Without any defense, the court finds for the association. The association is now entitled to possession and moves forward with eviction.

Adalynn now has a stark choice: either (1) pay the past due association fees, in addition to any late fees or attorney's fees, and remain in her damaged unit;³ or (2) find a new place to live, move out of her condominium unit, and wait while the association rents her unit and recoups the past due assessments.⁴ Further, if she wishes to take action against the association, her only option is to pay significant upfront costs to sue the association in a separate action for failure to maintain the common areas.⁵

While this hypothetical may seem extreme, the Forcible Entry and Detainer Act and the Condominium Property Act, as interpreted by the Illinois Supreme Court in *Spanish Court Two Condominium Association v. Carlson* ("Spanish Court"), allow for such an outcome.⁶ Illinois is currently the only state that permits the summary eviction of a condominium unit owner who fails to pay his monthly association dues.⁷ Furthermore, the Illinois Supreme Court characterized the relationship between condominium associations and unit owners as primarily statutory, not contractual.⁸ This interpretation reinforces a unit owner's absolute obligation to pay monthly association dues regardless of the condominium association board's negligence or willful mismanagement.⁹ A unit owner may not engage in the self-help option of ceasing payment of dues, and the owner may not use as an affirmative defense to a forcible entry and detainer action the association board's negligence in maintaining the common areas.¹⁰

This Comment explores the complex nature of the relationship between the condominium association and the unit owner within the context of the Illinois Condominium Property Act and the Forcible Entry and Detainer Act. While not undermining the importance of timely payment of association dues to the overall health of the condominium system, this Comment does question whether a summary proceeding initially tailored to the landlord-tenant relationship is suitable to the more complex hybrid relationship that exists between a condominium association and a unit owner. It

2. See 735 ILL. COMP. STAT. 5/9-106 (2014); see also *Spanish Court Two Condo. Ass'n v. Carlson*, 12 N.E.3d 1, 8 (Ill. 2014).

3. See 735 ILL. COMP. STAT. 5/9-111 (2014).

4. See *id.* at 5/9-111.1.

5. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 13 (Freeman, J., dissenting).

6. See *id.* at 1, 9 (majority opinion).

7. See *id.* at 11 (Freeman, J., dissenting).

8. See *id.* at 6 (majority opinion).

9. See *id.* at 6-7.

10. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d. at 7-8.

calls for the Illinois General Assembly to reconsider eviction as a remedy in condominium association-unit owner monthly fee disputes. At the very least, the Illinois General Assembly could provide guidance by clarifying whether a unit owner's obligation to pay monthly association fees is absolute.

Part II of this Comment explores the obligations that arise from the condominium form of property ownership and examines the common remedies available to associations when a unit owner defaults. Part III details the applicable Illinois statutes and the forcible entry and detainer process. In Part IV, the holding in *Spanish Court* is reviewed. The relationship between the contractually related remedy of eviction and the semi-contractual nature of condominium unit ownership is analyzed in Part V. Part VI examines the Illinois General Assembly's refusal to provide condominium unit owners with the same affirmative defenses available to tenants, despite expanding the application of eviction to condominium unit owners. Part VII acknowledges that a forcible entry and detainer action provides a quicker method for an association to dispossess a condominium unit owner, but questions the method's effectiveness in recouping past due assessments. In Part VIII, public policies are weighed, and in Part IX possible statutory changes are explored.

II. THE CONDO ASSOCIATION AND UNIT OWNER RELATIONSHIP

While the exact definition varies, generally speaking, “[a] condominium . . . consists of an undivided interest in common in a portion of real property, together with a separate interest in another portion of the same parcel.”¹¹ The commonly owned portion differentiates condominium property ownership from other types.¹² Condominium ownership tends to have a dual nature, as the unit owner holds his individual unit in fee simple, but also shares interest with the other unit owners in the commonly owned portions.¹³ A unit owner becomes subject to the condominium declarations and bylaws upon purchase of the unit.¹⁴ Unit owners elect representatives to the board of directors, which in turn manages the condominium's operations.¹⁵

11. 31 C.J.S. *Estates* § 234 (2014).

12. 1 GARY A. POLIAKOFF, *THE LAW OF CONDOMINIUM OPERATIONS* § 1.1 (2015).

13. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 9.

14. POLIAKOFF, *supra* note 12, at § 1.13.

15. POLIAKOFF, *supra* note 12, at § 1.1.

A. ASSOCIATION DUES AND CONDOMINIUM MANAGEMENT

The elected board of directors imposes assessments in order to pay for the condominium association's common expenses.¹⁶ Unit owners have a duty to pay for the common expenses, usually in proportion to their respective interests.¹⁷ Assessments constitute the condominium association's only revenue source for improving and maintaining common areas, as well as for delivering community services.¹⁸ Unit owners do not have the ability to opt out of the obligation to pay the association dues.¹⁹ Because the management of the entire condominium is funded through association dues, condominium associations place particular importance on dues collection.²⁰

B. TYPICAL COLLECTION OPTIONS IN ILLINOIS AND ELSEWHERE

Condo associations confronted with unit owners who have been delinquent in paying their common expense dues typically have several options.

1. *Amenity Prohibitions*

An association can ban the delinquent unit owner from using any of the common amenities.²¹ While an association has the power to prohibit a unit owner from using the community pool or gym, most states do not allow an association to cut off any necessary utilities.²² This approach may prove effective if one of the unit owner's main reasons for purchasing the condominium was to take advantage of the cost effective nature of community

16. POLIAKOFF, *supra* note 12, at § 1.2; *see also* 765 ILL. COMP. STAT. 605/18.4 (Board of managers duties include: “[P]rovid[ing] for the operation, care, upkeep, maintenance, replacement and improvement of the common elements.”).

17. 18 PAUL COLTOFF, ILL. LAW AND PRAC. ESTATES § 58 (2015); *but see* 16 SOLOMON GUTSTEIN, EILEEN MURPHY, AND JOSHUA GUTSTEIN, ILL. PRAC., REAL ESTATE § 15:88 (3d ed. 2015) (Unit owners pay monthly assessments “generally but not always in proportion to their percentage interest in the common elements.”).

18. Rachel Furman, Note, *Collecting Unpaid Assessments: The Homeowner Association's Dilemma When Foreclosure Is No Longer A Viable Option*, 19 J.L. & POL'Y 751, 754-55 (2011). While Ms. Furman's note analyzes homeowner associations rather than condominium associations, the characteristics described here apply generally to both types of organizations.

19. Furman, *supra* note 18, at 755.

20. Furman, *supra* note 18, at 755.

21. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53, 87-88 (2011).

22. Boyack, *supra* note 21, at 87-88.

amenities.²³ To effectuate this method, the condominium declaration or bylaws must provide for specific amenity prohibitions.²⁴

2. *Revocation of Voting Rights*

Another option available to condo associations is suspension of the unit owner's voting rights.²⁵ It is not unusual for a condominium association to mandate that unit owners be up to date on monthly assessments in order to vote.²⁶ As with amenity prohibitions, in order to employ this method, the condo association bylaws must permit the action.²⁷ In Illinois, the board of managers may suspend a unit owner's voting rights, but a unit owner is still allowed to participate in votes on amendments to the condominium declarations and bylaws.²⁸

3. *Debt Collection*

If the self-help options fail to force the defaulting owner into payment, depending on the jurisdiction, an association may proceed with debt collection.²⁹ As long as the association follows the applicable statutes, it can file a lawsuit against the defaulting owner.³⁰ Some jurisdictions require an association to send a demand for past due assessments before filing a lawsuit.³¹ In Illinois, the demand must not violate the Fair Debt Collection Practices Act.³² Although additional costs in time and money are incurred, debt collection remains the primary method by which associations recover past due assessments from defaulting owners.³³

23. Michael R. Fierro, Note, *Condominium Association Remedies Against A Recalcitrant Unit Owner*, 73 ST. JOHN'S L. REV. 247, 262 (1999).

24. Fierro, *supra* note 23, at 262.

25. See Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2514-15 (2003).

26. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.8 (Tentative Draft No. 7, 1998).

27. Fierro, *supra* note 23, at 261.

28. 16 SOLOMON GUTSTEIN, EILEEN MURPHY, AND JOSHUA GUTSTEIN, ILL. PRAC., REAL ESTATE § 15:264 (3d ed. 2015).

29. Boyack, *supra* note 21, at 88.

30. Boyack, *supra* note 21, at 88.

31. See 16 SOLOMON GUTSTEIN, EILEEN MURPHY, AND JOSHUA GUTSTEIN, ILL. PRAC., REAL ESTATE § 15:98.20 (3d ed. 2015) ("Illinois law requires that a demand for past-due assessments be made prior to the filing of any action and requires that attorneys' fees be included in the demand letter.").

32. *Id.*

33. Boyack, *supra* note 21, at 88-89.

4. *Liens*

While debt collection serves as the primary means of recouping past due assessments, lien actions provide associations with another option.³⁴ Because of the encumbrance on title, liens constitute a significant hurdle for a unit owner seeking to sell the unit in order to pay his outstanding debt.³⁵ Nearly all condominium statutes contain language providing for creation of a lien on past due assessments.³⁶ When the unit owner fails to pay the monthly community fees, a lien is established with the condo association board of managers as the lienholder.³⁷ If the unit owner does not pay his association dues and his mortgage payment, the lender also has the option to foreclose on the lien established when the mortgage was executed.³⁸ Any lienholder, upon continued failure by the unit owner to pay, may choose to enter foreclosure proceedings to force the sale of the condo in order to use the sale proceeds to pay off the outstanding debt.³⁹

The proceeds from the sale of the unit may fail to cover the unit owner's outstanding debt to both the lender and the condo association.⁴⁰ In this situation, the lender's lien takes priority over the association's lien, and the ability of the condo association to recoup any of the past due assessments depends on the jurisdictional lien priority statutes.⁴¹ Under the common law, the association's lien would retain junior lien status, since most likely the lender would have first established its lien.⁴² Most states have passed statutes giving the condo association lien priority over all other liens aside from first mortgages and some governmental liens.⁴³ Some other states permit the condo association lien to have limited priority status over the first mortgage for up to six months of community assessment fees.⁴⁴ Once the unit has been sold in a foreclosure proceeding, the condo association is paid, based on its position, for up to six months of past due assessments.⁴⁵

34. Boyack, *supra* note 21, at 89.

35. Boyack, *supra* note 21, at 89.

36. POLIAKOFF, *supra* note 12, at § 5:23.

37. See Furman, *supra* note 18, at 755.

38. Daniel Goldmintz, Note, *Lien Priorities: The Defects of Limiting the "Super Priority" for Common Interest Communities*, 33 CARDOZO L. REV. 267, 270 (2011).

39. Goldmintz, *supra* note 38, at 270.

40. See Goldmintz, *supra* note 38, at 270.

41. See Boyack, *supra* note 21, at 89-90.

42. See Goldmintz, *supra* note 38, at 271.

43. See Goldmintz, *supra* note 38, at 271.

44. Boyack, *supra* note 21, at 99-101.

45. Boyack, *supra* note 21, at 101.

III. THE ILLINOIS APPROACH

Illinois is currently the only state that allows a condo association the option of maintaining temporary possession of a unit through eviction so that an association can recoup past due fees through rental.⁴⁶ The portion of the forcible entry and detainer statute that applies to condo associations and unit owners “makes Illinois unique in allowing a condominium association to evict a unit owner for failure to pay assessments . . . [and] was adopted to provide a constitutionally permissible, quick method for collection of assessment arrearages in condominium associations.”⁴⁷

A. RELEVANT ILLINOIS STATUTES AND PROCEDURES

In Illinois, when a unit owner fails to pay his dues, the Condominium Property Act and the Forcible Entry and Detainer Act govern the remedial process afforded condo associations.⁴⁸ Immediately upon default, a lien on the unit owner’s interest in the property is created.⁴⁹ The lien has priority status over all other liens except over taxes and any other liens established prior to the default.⁵⁰ The condo association board of managers retains lienholder status in the newly created common expense lien, and the board holds the lien in the interest of the other condo unit owners.⁵¹ Section 9.2 of the Condominium Property Act gives the association additional recourse in the following form:

In the event of any default by any unit owner, his tenant, invitee or guest in the performance of his obligations under this Act or under the declaration, bylaws, or the rules and regulations of the board of managers, the board of managers or its agents shall have such rights and remedies as provided in the Act or condominium instruments *including the right to maintain an action for possession against such defaulting unit owner* or his tenant for the benefit of all the

46. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 11 (Freeman, J., dissenting).

47. *Knolls Condo. Ass’n v. Harms*, 781 N.E.2d 261, 265 (Ill. 2002) (quoting 765 ILL. COMP. STAT. ANN. 605/9.2 (West 2006) (formerly ILL. ANN. STAT., ch. 30, ¶ 309.2, Historical and Practice Notes, at 179-80 (Smith-Hurd Supp. 1991))).

48. *See generally* 765 ILL. COMP. STAT. 605/1 (2015) (Condominium Property Act) and 735 ILL. COMP. STAT. 5/9 (2015) (Forcible Entry and Detainer Act); *see also Knolls Condominium Ass’n*, 781 N.E.2d at 265.

49. 765 ILL. COMP. STAT. 605/9(g)(1) (2014).

50. *Id.*

51. 765 ILL. COMP. STAT. 605/9(h) (2014).

other unit owners in the manner prescribed by Article IX of the Code of Civil Procedure.⁵²

The forcible entry and detainer statute reinforces the right of the condo association to maintain action against the defaulting unit owner when:

any property is subject to the provisions of the Condominium Property Act, [and] the owner of a unit fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or of any other expenses lawfully agreed upon or any unpaid fine, the Board of Managers or its agents have served the demand set forth in Section 9-104.1 of this Article in the manner provided for in that Section and the unit owner has failed to pay the amount claimed within the time prescribed in the demand.⁵³

After the condo association has filed a forcible entry and detainer action against a delinquent unit owner, the court clerk issues a summons.⁵⁴ The defendant has the opportunity pretrial to deny the charges, and may assert affirmative defenses.⁵⁵ However, “no matters not germane to the distinctive purpose of the proceeding shall be introduced”⁵⁶ Either party then has the option to request a jury trial.⁵⁷ Once the trial concludes, the court must decide whether the plaintiff has proved all of the charges in the complaint by a preponderance of evidence.⁵⁸ If the court determines that the unit owner owes the association past due assessments:

the plaintiff shall be entitled to the possession of the whole of the premises claimed, and judgment in favor of the plaintiff shall be entered for the possession thereof and for the amount found due by the court including interest and late charges, if any, together with reasonable attorney's fees, if any, and for the plaintiff's costs.⁵⁹

Although the right of possession has been granted to the condo association board of managers, the unit owner still retains title to the unit, and right of possession will be returned to the unit owner once the association

52. 765 ILL. COMP. STAT. 605/9.2 (2014) (emphasis added).

53. 735 ILL. COMP. STAT. 5/9-102(a)(7) (2014).

54. 735 ILL. COMP. STAT. 5/9-106 (2014).

55. *Id.*

56. *Id.*

57. 735 ILL. COMP. STAT. 5/9-108 (2014).

58. 735 ILL. COMP. STAT. 5/9-109.5 (2014).

59. 735 ILL. COMP. STAT. 5/9-111 (2014).

has recouped all past due community association fees.⁶⁰ The association is then allowed to rent the unit and use the funds to offset the past due common expenses.⁶¹ The new lease created with a bona fide tenant cannot exceed thirteen months after stay of the judgment.⁶² Once the condo association has recouped all past due assessments, any extra funds belong to the unit owner.⁶³ Upon payment of the judgment amount by the unit owner to the condo association, whether through the association's lease of the unit or by the unit owner's direct payment to the association, the unit owner may file a motion to vacate the judgment.⁶⁴ If the judgment is vacated while the new tenant remains in the unit, judgment enforcement is deferred until the lease expires.⁶⁵

IV. SPANISH COURT TWO CONDOMINIUM ASS'N V. CARLSON

The Illinois Supreme Court recently heard and decided *Spanish Court Two Condominium Ass'n v. Carlson*, a case that highlighted all of the difficulties and practical implications of allowing forcible entry and detainer in condominium situations.⁶⁶ Although the case dealt primarily with whether or not a unit owner could assert the condominium association's failure to maintain the common areas as an affirmative defense to a forcible entry and detainer action, both the majority and dissenting opinions articulate the critical legal and policy questions that need answering in order to determine whether application of the forcible entry and detainer statute to unit owners makes sense.⁶⁷ Therefore, in the following sections, the majority and dissenting opinions are examined, and the legal and policy questions underpinning the opinions are extracted.

A. RELEVANT BACKGROUND

Lisa Carlson owned a unit in the Spanish Court Two Condominium.⁶⁸ In response to her failure to pay the monthly condominium association dues, the Spanish Court Two Condominium Association filed a forcible entry and detainer action.⁶⁹ The condominium association alleged that Ms.

60. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 11 (Freeman, J., dissenting).

61. *Id.*; 735 ILL. COMP. STAT. 5/9-111.1 (2014).

62. 735 ILL. COMP. STAT. 5/9-111.1 (2014).

63. *Id.*

64. 735 ILL. COMP. STAT. 5/9-111(a) (2014).

65. *Id.*

66. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d 1 (2014).

67. *See id.*

68. *Id.* at 2.

69. *Id.*

Carlson had failed to pay six months' worth of association dues.⁷⁰ Accordingly, the association sought both a money judgment and possession of Ms. Carlson's unit until all past due assessments were recouped.⁷¹ Ms. Carlson conceded that she had not paid her assessments in six months, but she contended that she was not required to pay the assessments.⁷² Rather, she alleged that the condominium association had failed to maintain the common roof above her unit, and consequently, her unit sustained significant water damage.⁷³ The conduct of the condominium association, according to Ms. Carlson, constituted a breach of association duties as outlined in the condominium declaration and bylaws.⁷⁴ The association argued that Ms. Carlson was not allowed to present that as an affirmative defense because it was not germane to a forcible entry and detainer proceeding.⁷⁵ The trial court struck Ms. Carlson's affirmative defense as not germane to a forcible entry and detainer proceeding.⁷⁶ At a bench trial, the court ruled against Ms. Carlson, and the condominium association was granted a money judgment and possession of the unit.⁷⁷

Ms. Carlson appealed the judgment and order of possession, and asserted that the trial court erred in refusing to allow the assertion of the condominium association's failure to maintain the common areas as an affirmative defense.⁷⁸ The Second District Appellate Court reversed the trial court's decision to strike the affirmative defense.⁷⁹ The appellate court held that one could present an affirmative defense of failure to maintain common areas as justification for refusing to pay the monthly association dues.⁸⁰ The court held that, by analogy to a tenant being able to offer a landlord's failure to maintain the rented unit as an affirmative defense to a forcible eviction proceeding, a unit owner should be able to offer the association's failure to maintain the common areas.⁸¹ Critical to the appellate court's decision was classifying the unit owner's duty to continuously pay the monthly assessments and the condominium association's duty to maintain the common area as mutually exchanged promises.⁸² By doing so, under the tenets of contract law, failure of either party to keep its obligation would dis-

70. *Id.*

71. *Spanish Court Two Condominium Ass'n*, 12 N.E.3d at 2.

72. *Id.* at 2-3.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 2-3.

77. *Id.* at 2.

78. *Id.* at 3.

79. *Id.*

80. *Id.*

81. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 3.

82. *Id.* at 3.

charge the other party's duty to perform.⁸³ Finally, the appellate court held that under Illinois's specific forcible entry and detainer statute, failure to maintain the common areas was germane to the specific proceeding.⁸⁴

B. ILLINOIS SUPREME COURT MAJORITY OPINION

Before deciding whether failure of the condominium association to service common areas is germane and therefore an allowable affirmative defense, the majority first had to make critical determinations as to: (1) whether the same justifications for allowing a similar affirmative defense in landlord-tenant law apply to condominium association-unit owner relationships, (2) whether contract law or statutory law governs the condominium association-unit owner relationship, and (3) whether the unit owner's obligation to pay monthly assessments is dependent or independent of the condominium association's duty to maintain and repair the common elements.⁸⁵

1. *Landlord-Tenant Law is Contractual in Nature*

The majority noted that the relationship between a landlord and tenant is contractual.⁸⁶

While there may be many statutes that guide the dealings between a landlord and a tenant, there is no landlord-tenant relationship without an agreement between the parties to enter that relationship.⁸⁷ As a result of this contractual relationship, when a landlord breaches any of the agreement terms, the tenant has been allowed to seek historically contractual remedies.⁸⁸ These remedies include "damages, rescission, reformation, or abatement of rent."⁸⁹

2. *Condominium Association-Unit Owner Relationships Are Statutory*

The relationship between a unit owner and a condominium association, the majority states, is predominately statutory in nature as defined by the Illinois Condominium Property Act.⁹⁰ Although the majority asserts that statutory law mainly governs the condominium association-unit owner rela-

83. *Id.*

84. *Id.*

85. *Id.* at 4-10.

86. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 4-10.

87. *Id.* at 6.

88. *Id.*

89. *Id.*

90. *Id.*

tionship, certain contract law principles apply and are reflected in the “condominium’s declaration, bylaws, and rules and regulations”⁹¹ The Illinois Condominium Property Act stipulates that a condominium association must maintain and repair the common elements, and the unit owner is required to pay his pro rata share of any common expenses.⁹² Although both the Illinois Condominium Property Act and the condominium declaration and bylaws may reflect the aforementioned duties, the majority held that these statutory impositions “exist independent of the association’s governing documents.”⁹³

3. *Comparing the Condominium Association-Unit Owner Relationship to the Landlord-Tenant Relationship*

Flowing from the principle that the unit owner’s duty to regularly pay monthly assessments exists independent of any duplicate duties listed in the condominium bylaws is the notion that the unit owner’s obligation does not equal a tenant’s duty to pay rent.⁹⁴ The majority focuses on the language within the Forcible Entry and Detainer Act, noting that the section dealing with landlord-tenant relationships provides that when a lessee fails to pay the monthly rent, the landlord may provide notice to the tenant, and unless a payment is made by the specified time in the notice, the lease is terminated and the landlord may proceed in a lawsuit for possession and back due rent.⁹⁵ As a result of the lease termination, it necessarily follows that the landlord-tenant relationship is also terminated.⁹⁶ Conversely, no language in the Forcible Entry and Detainer Act provides that the condominium association-unit owner relationship is terminated.⁹⁷ Despite the dispossession provided for by the Forcible Entry and Detainer Act, the unit owner continues to own title to the unit and is required to keep up with his monthly assessments.⁹⁸ The majority further distinguishes the landlord-tenant relationship from the condominium association-unit owner relationship by noting the temporary nature of an association’s forcible possession of a unit versus the permanent nature of a landlord’s forcible possession of an apartment.⁹⁹ Consequently, the majority cites these differences when stating that a land-

91. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 6. (citing 1 GARY A. POLIAKOFF, THE LAW OF CONDOMINIUM OPERATIONS § 1:23 (1988 and Supp. 2012-2013)).

92. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 6.

93. *Id.* at 7.

94. *See id.* at 7.

95. *Id.*

96. *Id.*

97. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 7.

98. *See id.* at 7.

99. *Id.*

lord-tenant relationship is not analogous to a condominium association-unit owner's relationship.

4. *Effect of the Majority's Characterization of the Condominium Association-Unit-Owner Relationship*

Because of the majority's characterization of the condominium association-unit owner's relationship as not analogous to a landlord-tenant relationship, the same defenses that a tenant can employ in a forcible entry action may not be available to a unit owner.¹⁰⁰ In order to determine whether a unit owner could offer failure to maintain common areas as an affirmative defense, the majority further examined the Illinois Condominium Property Act and the circumstances surrounding the unit owner's monthly assessment requirement.¹⁰¹ The majority read the Illinois Condominium Property Act as "not provid[ing], expressly or impliedly, that such duty is contingent upon the repair and maintenance of the common elements."¹⁰² Furthermore, the majority, while citing the Illinois Condominium Property Act, states that a unit owner is not allowed to "avoid the duties, responsibilities, and liabilities of a unit owner . . ."¹⁰³ The majority reasoned that these excerpts indicate that a unit owner's duty to pay monthly assessments is not contingent on whether or not the association maintains the common area.¹⁰⁴ Finally, since the court held that a unit owner could not avoid his monthly assessment obligation, it reasonably followed that the unit owner could not assert as an affirmative defense that his duty to pay was extinguished as a result of the association's failure to maintain the condominium common areas.¹⁰⁵

5. *Additional Policy Justifications Cited by the Majority*

While the majority rooted its decision that the association's failure to maintain the common areas did not nullify Ms. Carlson's obligation to pay her monthly dues, important policy considerations were also weighed.¹⁰⁶ The majority focused its considerations on the policy of facilitating the seamless administration of collecting association dues.¹⁰⁷ The condominium

100. *Id.*

101. *Id.*

102. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 7-8.

103. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 7-8. (citing 765 ILL. COMP. STAT. 605/18(q) (2008)).

104. *Id.* at 8.

105. *Id.* at 8.

106. *See id.* at 8-10.

107. *See id.* at 9-10.

association is responsible for the complete administration of the property.¹⁰⁸ The monthly association dues paid by all condominium members facilitate the maintenance of the common elements.¹⁰⁹ Furthermore, “[t]he association’s ability to administer the property is dependent upon the timely payment of assessments, and any delinquency in unit owners’ payments of their proportionate share of common expenses may result in the default of the association on its obligations”¹¹⁰ Since the unit owners depend on each other, the condominium ownership model breaks down if unit owners fail to pay their pro rata share.¹¹¹ The condominium ownership model, the majority argues, would be severely threatened financially if a unit owner were allowed to avoid his obligation.¹¹²

C. ILLINOIS SUPREME COURT DISSENTING OPINION

Although the dissent would ultimately conclude that a condominium association’s failure to maintain the common areas should be allowed as an affirmative defense to a unit owner seeking to defend against a forcible entry action, the critical language of the dissent for the sake of this Comment’s analysis relates to the following: (1) whether the landlord-tenant relationship is analogous to the condominium association-unit owner relationship, (2) whether the association’s right to collect assessments is dependent upon maintenance of the common areas, (3) whether the nullification defense opposes the objective of the forcible entry and detainer statute, and (4) policy considerations.¹¹³

1. *Landlord-Tenant Relationship is Analogous Enough to the Condominium Association-Unit Owner Relationship to Apply Preexisting Landlord-Tenant Law*

The Illinois Supreme Court previously held that since a landlord is allowed in a forcible entry and detainer action to add an unpaid rent action against the tenant, the tenant is also allowed to present as a defense to the added action that he owed no rent to the landlord.¹¹⁴ The dissent states that the Illinois Supreme Court previously noted that to permit a landlord to append a claim of past due rent to a forcible entry and detainer action

108. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 9.

109. *See id.*

110. *Id.* at 9 (citing 1 GARY A. POLIAKOFF, *THE LAW OF CONDOMINIUM OPERATIONS* § 5:03 (1988 and Supp. 2012-13) (internal quotations omitted)).

111. *See id.*

112. *See id.*

113. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 10-13 (Freeman, J., dissenting).

114. *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 359 (Ill. 1972).

against a tenant but prohibit the same tenant from presenting an affirmative defense for the specific violation of a lease provision would “violate[] common sense and accepted rules of statutory interpretation.”¹¹⁵ Accordingly, the dissent asserts that the Illinois Supreme Court should analogously apply that same analysis to a forcible entry and detainer proceeding in an association-unit owner case.¹¹⁶ The dissent disagrees with the majority classifying the association-unit owner relationship as being predominantly controlled by statute rather than contract law.¹¹⁷ Instead, the dissent sees the relationship as controlled by the Illinois Condominium Property Act and “the condominium’s declaration, bylaws and rules and regulations.”¹¹⁸ Because the dissent believes contract law governs the relationship more than the majority asserted, a similar nullification defense available to a tenant should also be at the disposal of the unit owner.¹¹⁹

2. *Illinois Condominium Property Act Does Not Address Whether A Unit Owner Must Continue to Pay Dues*

The dissent insists that a nullification defense is consistent with the Illinois Condominium Property Act because the Act does not outline what happens when failure of the association to maintain the common areas causes a unit owner to cease paying his assessments.¹²⁰ Furthermore, the Illinois Condominium Property Act dictates that a unit owner pay his monthly assessments and that the association maintain the common areas.¹²¹ While the dissent acknowledges the majority’s statement that most other jurisdictions have refused to accept the proposition that a unit owner’s obligation to pay his monthly dues is dependent upon the association’s maintenance of the common areas, the dissent asserts that the majority is not adequately considering that Illinois is the only state allowing forcible entry and detainer causes of action against delinquent unit owners.¹²² Consequently, the dissent finds other states’ decisions on the matter unpersuasive.¹²³

115. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 11 (citing *Jack Spring*, 280 N.E.2d at 208) (internal quotations omitted).

116. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 11.

117. *Id.*

118. *Id.*

119. *See id.*

120. *See id.* at 12.

121. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 12.

122. *Id.*

123. *Id.*

3. *The Nullification Defense Does Not Oppose the Express Objective of the Forcible Entry and Detainer Statute*

The goal of permitting forcible entry and detainer causes of actions against unit owners was “to provide a constitutionally permissible, quick method for collection of assessment arrearages in condominium associations”¹²⁴ The dissent notes that the majority does not expressly prohibit a unit owner from presenting all defenses to an allegation that he owes monthly assessments, but the unit owner is not allowed to present a nullification defense.¹²⁵ But the dissent points out that the majority failed to show how a nullification defense would prolong the forcible entry litigation process more than another permissible defense.¹²⁶

4. *Policy Considerations*

The dissent notes several policy considerations in arguing that the majority incorrectly decided the case. First, the majority fails to promote the policy of judicial economy in its decision.¹²⁷ “The salutary trend . . . [is] determining the rights and liabilities of litigants in one, rather than multiple, proceedings.”¹²⁸ The dissent then addresses the majority’s concern that allowing a nullification defense would undermine the foundation of the condominium financial model.¹²⁹ The unit owner would not be able to assert simply any breach by the association.¹³⁰ Rather, the breach “must be material and cannot be based on a general disagreement with the association.”¹³¹ Furthermore, the dissent acknowledges that a unit owner who chooses the self-help remedy of ceasing monthly dues payments will still face eviction if the court finds that the association breach was not material.¹³² While it is important that all unit owners consistently pay their monthly dues, the dissent also recognizes that the condominium model functions properly only when the association keeps up its end of the bargain.¹³³ The dissent concludes that prohibiting a unit owner from raising as an affirmative defense the failure of the association to fulfill its obligation places additional con-

124. *Knolls Condo. Ass’n v. Harms*, 781 N.E.2d 261, 267 (Ill. 2002).

125. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 13.

126. *Id.*

127. *See id.* at 13.

128. *Id.* at 13 (citing *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972)).

129. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 13.

130. *See id.*

131. *Id.*

132. *See id.*

133. *See id.*

straints on the unit owner in the form of time and money (by requiring him to undergo a separate court proceeding).¹³⁴

D. WAS THE MAJORITY CORRECT? DOES IT MATTER?

The key question is not whether the majority correctly held that a condominium association's failure to maintain common areas is not germane to a forcible entry and detainer proceeding. Rather, the main question emanating from the *Spanish Court* decision is whether eviction should be a remedy for a condominium association against a unit owner for failure to pay assessments. The remainder of this Comment argues that the Illinois Supreme Court's holding that the unit owner's obligation to pay monthly dues is independent of the condo association's obligation to maintain the common areas is inconsistent with the concept of condominium unit owner eviction. Furthermore, the policy considerations in favor of eliminating eviction as a remedy tend to outweigh the policy reasons in favor of keeping it. Finally, this Comment calls for the Illinois General Assembly, by clarifying the language in the applicable statutes, to ultimately decide whether failure to maintain the common areas is germane to a forcible entry and detainer action.

V. EVICTION AND THE DUAL NATURE OF THE CONDO ASSOCIATION-UNIT OWNER RELATIONSHIP: A CONFUSING AND INCONSISTENT APPLICATION

The dissent in *Spanish Court* recognized that the condo association-unit owner relationship is of a dual nature, governed by both statute and contract.¹³⁵ Even the majority, despite ultimately stating that the condo association-unit owner relationship is predominantly statutory in nature, acknowledged that there are aspects of contract law at play.¹³⁶ The majority focused on that concept in order to hold the obligations of each party independent of one another.¹³⁷ Despite this holding, the Illinois General Assembly provides eviction as a remedy when eviction is only otherwise applied to primarily contractual disputes (landlord-tenant) in which breach of a covenant is an affirmative defense for failure to pay rent, or in situations where the person in possession no longer has title to the property through a breach of contract (mortgage foreclosure).¹³⁸ In other words, eviction is typically available as a remedy when one party holds superior title over the person in current possession, and not in cases where the unit owner main-

134. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 13.

135. *Id.* at 11.

136. See *id.* at 6 (majority opinion).

137. See *id.* at 7-8.

138. See 765 ILL. COMP. STAT. 5/9-102 (2014).

tains superior title.¹³⁹ By applying this view, the Illinois General Assembly has expanded the application of eviction to an ill-fitting area where the unit owner does not have the same recourse as the other parties in which eviction is applied.

This idea is reflected in other provisions of the Illinois forcible entry and detainer law. While the first three provisions of the law are general catchall provisions allowing action when entry is made unlawfully without right or title,¹⁴⁰ the subsequent provisions specifically address primarily contractual situations such as landlord-tenant disputes¹⁴¹ and other contractual disputes such as when a vendee possesses a recently purchased property despite failing to comply with the terms of the contract.¹⁴² The only other permitted action can occur when lands have been sold by a grantor or sold pursuant to a state judgment (such as a foreclosure sale), and the grantor remains in possession.¹⁴³ In each of these cases, the party filing the action has either *superior title* or has the right to possession through a *contractual violation*.¹⁴⁴

In landlord-tenant relationships, barring any contractual stipulations or breaches, the lessor transfers a lower interest, usually only a possessory interest in the property, to the lessee through a lease.¹⁴⁵ The lease creating the relationship is “a type of contract . . . and . . . is governed by the rules which govern contracts generally”¹⁴⁶ When a lease expires or the tenant has violated a term in the lease, the landlord-tenant relationship is terminated,¹⁴⁷ and the landlord has the right to evict the tenant based on the return of the landlord’s possessory right.¹⁴⁸ The right of possession was conveyed to the tenant through the contract, and the landlord’s right to possession is returned upon breach.¹⁴⁹ Yet with condominium-unit owner relationships, based on the Illinois Supreme Court’s interpretation that these types of relationships are primarily statutory and not contractual, the Illinois General Assembly has provided condominium associations with the right to possession despite that right possibly never being conveyed contractually to

139. *See id.*

140. *See id.* at §§ (a)(1) – (3).

141. *Id.* at § (a)(4).

142. *Id.* at § (a)(5).

143. 735 ILL. COMP. STAT. § 5/9-102(a)(6) (2014 State Bar Edition).

144. *See id.* §§ (a)(1) – (3) (emphasis added).

145. *See* 8930 South Harlem, Ltd. v. Moore, 396 N.E.2d 1, 4-5 (Ill. 1979).

146. Midland Mgmt. Co. v. Helgason, 630 N.E.2d 836, 839 (Ill. 1994) (internal citations omitted).

147. *See* 735 ILL. COMP. STAT. 5/9-209 (2014).

148. *See id.*

149. *See id.*

the association.¹⁵⁰ This involuntary, statutorily imposed “conveyance” despite a lack of contractually agreed upon terms is expansive and groundbreaking.¹⁵¹

With mortgagors and mortgagees, the other predominant relationship in which forcible detainer and entry actions are permitted, the mortgagor and mortgagee consent to the creation of a lien that grants a *property interest* as a debt security.¹⁵² The lien and associated debt security is created through a written instrument.¹⁵³ Furthermore, this written instrument is defined as a contract between the parties.¹⁵⁴ When a mortgagor violates the terms of the contract creating the mortgage, a foreclosure action may be pursued in order to terminate the mortgagor’s “legal and equitable interests in real estate”¹⁵⁵ Similar to landlord-tenant relationships where eviction is available only when the lease has expired or the tenant has violated the contract, eviction as a remedy is available to mortgagees only when the mortgagor violates the contract and has his property rights terminated.¹⁵⁶ Allowing evictions as a remedy for failure to pay monthly assessments, despite the assertion that contract law does not govern¹⁵⁷ and the fact that the condominium owner maintains certain property rights,¹⁵⁸ proves inconsistent.

In short, despite the condominium association-unit owner relationship’s inclusion in the forcible entry statute¹⁵⁹ and despite the landlord-tenant and mortgagee-mortgagor relationships being governed by contracts in which the grantor transfers a property right,¹⁶⁰ the Illinois Supreme Court’s classification of the condo association-unit owner relationship as predominantly statutory is inconsistent with this approach due to the involuntary property right conveyance and allowance of a contractually based

150. See *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 6; 735 ILL. COMP. STAT. 5/9-102(a)(7) (2014).

151. See *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 11 (dissenting opinion) (“We are unaware of any other state that permits an association such a remedy in a forcible entry and detainer.”).

152. 735 ILL. COMP. STAT. 5/15-1207 (2014).

153. *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 734 N.E.2d 493, 496 (Ill. App. Ct. 2000).

154. *Resolution Trust Corp. v. Holtzman*, 618 N.E.2d 418, 423 (Ill. App. Ct. 1993).

155. 735 ILL. COMP. STAT. 5/15-1203 (2015).

156. See *id.*

157. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 6.

158. *Id.* at 7 (“A unit owner does not cease to be a unit owner even if dispossessed of his or her unit”).

159. See 735 ILL. COMP. STAT. 5/9-102 (2014).

160. See *Resolution Trust Corp.*, 618 N.E.2d at 423; *Midland Mgmt. Co.*, 630 N.E.2d at 839.

eviction remedy.¹⁶¹ This inconsistency in application is confusing and seemingly justified only by a public policy argument that condominium associations need a quick method of collecting assessments, without which the condo model of ownership would break down.¹⁶²

VI. THE ILLINOIS GENERAL ASSEMBLY HAS NOT COUPLED THE
EXPANSIVE USE OF EVICTION WITH A CORRESPONDING PROVISION
ALLOWING THE SAME AFFIRMATIVE DEFENSES

While the Illinois General Assembly is within its power to alter property rights and allow eviction as a remedy for condominium associations, in doing so and in light of the Illinois Supreme Court classifying condominium association-unit owner relationships as predominantly statutory, condominium unit owners are subject to eviction without the same array of defenses available to tenants and mortgagors.¹⁶³ Furthermore, condo owners are forced to jump through additional hoops to pursue remedies against a breaching condominium association.¹⁶⁴

With landlords and tenants, in a forcible entry and detainer action, the tenant is allowed to assert as an affirmative defense a breach of covenant.¹⁶⁵ Under the Forcible Entry and Detainer Act, a breach of covenant to repair is germane to the forcible entry and detainer proceeding.¹⁶⁶ The tenant is not forced to file a separate action against the landlord and is not under a continuing obligation to pay rent.¹⁶⁷ Condominium unit owners, on the other hand, are now not allowed to present breach of covenant as an affirmative defense because the obligations are independent.¹⁶⁸ Despite this restriction, condominium unit owners are subject to the same summary proceeding, again under the auspice of ensuring smooth functionality of the condominium property ownership model.¹⁶⁹ An apt analogy would be trying to fit a square peg in a round hole.

With mortgagors and mortgagees, the forcible entry and detainer action is simply *fait accompli*. The foreclosure process is already complete,

161. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 8; 735 ILL. COMP. STAT. 5/9-102 (2014).

162. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 8.

163. *Id.* at 7.

164. See *id.* at 10 (“[A] unit owner who believes he or she has been aggrieved . . . may . . . remove the offending board members; become involved in management of the association by seeking election to the board; or seek recourse through the courts.”).

165. *Jack Spring*, 280 N.E.2d 208 at 359.

166. See *id.*

167. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 6.

168. See *id.* at 7.

169. See *id.* at 8-9.

and the question of who maintains title has already been resolved.¹⁷⁰ The mortgagee's right of possession has already been adjudicated, and without any remaining property rights, the mortgagor has no defense to the forcible entry and detainer action.¹⁷¹ Unlike condominium unit owners and tenants, where the assertions and defenses to right of possession are determined during the forcible entry and detainer proceeding,¹⁷² the mortgagor does not have that same ability.

VII. EFFECTIVENESS OF EVICTIONS IN ALLOWING A QUICK METHOD OF RECOUPING PAST DUE ASSESSMENTS

An important public policy rationale is seemingly required to validate the Illinois approach, given the fact that condominium unit owners are subject to the same eviction process as tenants and mortgagors despite not being afforded the same defenses in the forcible entry and detainer proceeding. Again, the justification proffered for grouping condominium unit owners with tenants and mortgagors with respect to the eviction process is that condominium associations need a quick method of recouping assessments.¹⁷³ Because of the confusing and inconsistent application of forcible entry and detainer actions on all three aforementioned groups, it becomes critical to evaluate the public policy rationale for the Illinois approach and whether or not the approach is effective.

Due to Illinois being the only state to allow a forcible entry and detainer action for eviction of condominium association owners, there is a lack of readily available statistics indicating the number of condo owners evicted in Illinois each year, and of those evictions, how much money associations were able to recoup.¹⁷⁴ However, there is information demonstrating that the time it takes to complete a forcible entry and detainer action is faster than a foreclosure proceeding. In a forcible entry and detainer action, a unit owner must first be given thirty days to satisfy the past due assessments.¹⁷⁵ Nothing prohibits this demand letter from being served on a unit owner the day after a missed monthly payment.¹⁷⁶ If the unit owner leases the unit, the tenant need not be served with notice.¹⁷⁷ Once thirty days has passed and there has been no payment, a cause of action may be main-

170. See 735 ILL. COMP. STAT. 5/15-1203 (2015).

171. See *id.*

172. See 735 ILL. COMP. STAT. 5/9-102 (2015).

173. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 8.

174. A diligent search of lobbying groups such as the Illinois Chapter of the Community Associations Institute, www.cai-illinois.org, reveals no relevant data.

175. 735 ILL. COMP. STAT. 5/9-104.1 (2014).

176. See *id.*

177. 735 ILL. COMP. STAT. 5/9-104.2 (2014).

tained.¹⁷⁸ In Cook County, the county with the highest concentration of condominiums, the total time for an eviction may take four to seven months.¹⁷⁹

Foreclosures, on the other hand, tend to require more time. In order to sever the mortgagor's rights in a foreclosure action, the defendant must be served.¹⁸⁰ A complaint must then be filed and must be properly formulated according to Illinois statute.¹⁸¹ If unresolved, there may even be a trial or a hearing.¹⁸² Although the total time to complete a foreclosure proceeding varies case by case, estimates suggest that the total duration may be from ten to twelve months¹⁸³ to as high as sixteen to twenty months.¹⁸⁴ While it is clear that a forcible entry and detainer action is much shorter in duration than a foreclosure proceeding, the lack of statistics regarding effectiveness in recouping past due assessments demonstrates that other available remedies may be just as, if not more, effective. In addition, simply allowing eviction as a remedy in order to provide a quick method of recouping past due assessments, without examining the other public policy ramifications and practical impacts of such an approach, is narrow sighted.

VIII. PUBLIC POLICY ANALYSIS: DOES THE HARM OUTWEIGH THE BENEFIT?

At what public cost does the Illinois General Assembly allow for an expedited eviction process in which condo unit owners are not afforded the same defenses as others? The following section examines the various public policies at play and attempts to weigh them against one another. The public policies involved include preserving the condominium form of property ownership, preventing undue hardship on Illinois Citizens, judicial economy, and separation of judicial decision-making from the "political" remedies available to a condominium unit owner.

178. 735 ILL. COMP. STAT. 5/9-102 (2015).

179. See Mark Pearlstein, *Law Boosts Associations' Authority in Eviction Cases*, CHI. TRIB. (Apr. 29, 2012), http://articles.chicagotribune.com/2012-04-29/classified/ct-mre-0429-condo-adviser-20120427_1_assessments-detainer-act-eviction.

180. 27A Chris Gimeno et al., ILL. LAW AND PRAC. MORTGAGES § 248 (2015).

181. 735 ILL. COMP. STAT. 5/15-1504 (2014).

182. Gimeno et al., *supra* note 180, at § 269.

183. *Mortgage Foreclosure Timeline*, ILL. LEGAL AID, http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=66 (last updated Dec. 2014).

184. See Mark Pearlstein, *Law Boosts Associations' Authority in Eviction Cases*, CHI. TRIB. (Apr. 29, 2012), http://articles.chicagotribune.com/2012-04-29/classified/ct-mre-0429-condo-adviser-20120427_1_assessments-detainer-act-eviction.

A. PRESERVING THE CONDOMINIUM FORM OF PROPERTY OWNERSHIP

It has been widely recognized that condominium ownership is unique, with unit owners having both a fee simple ownership interest in the unit itself and a property interest in the common areas.¹⁸⁵ This common ownership and collective administration of the common areas “only works if each unit owner faithfully pays his or her share of the common expenses.”¹⁸⁶ The Illinois Supreme Court even went so far as to claim that the financial stability of condominium associations would be severely undermined if a unit owner could claim as an affirmative defense the association’s failure to maintain the common areas.¹⁸⁷

However, as the dissent noted, there is no basis for such an apocalyptic view.¹⁸⁸ A condominium unit owner would still face the threat of eviction, and that threat would serve as a deterrent to a condominium unit owner thinking about stopping payment for an unmeritorious reason.¹⁸⁹ A unit owner would only succeed with his affirmative defense if the association materially breached the contract.¹⁹⁰ An additional deterrent preventing the unit owner from stopping payments based on an unmeritorious claim is the expense involved in defending a foreclosure proceeding. Because the current approach in Illinois is touted as an effective way to collect past due assessments,¹⁹¹ and the fact that unit owners have little defense to eviction,¹⁹² it appears that the Illinois approach helps promote effective administration of condominiums. However, the differing views between the majority and dissent highlight the fact that the question is still open as to whether allowing a nullification defense would be contrary to the public policy of promoting effective administration of condominiums.

Even if the Illinois approach promotes the aforementioned public policy, the remaining forty-nine states utilize other methods of collecting past due assessments without taking possession away from an owner who retains title.¹⁹³ As mentioned previously in this Comment, other states allow for the creation of a lien when a unit owner fails to pay, and the condo association

185. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 9 (dissenting opinion); 765 ILL. COMP. STAT. 605/2(g) & 605(4)(e) (2014).

186. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 9 (dissenting opinion).

187. *See id.*

188. *See id.* at 13.

189. *See id.*

190. *See id.*

191. *Spanish Court Two Condo. Ass’n*, 12 N.E.3d at 9 (dissenting opinion).

192. *Id.* at 10 (“A unit owner could, for example, challenge whether assessments are due by challenging the association’s recordkeeping, or the manner in which the assessment was adopted.”).

193. *See id.* at 11.

can foreclose the lien in order to collect.¹⁹⁴ An association may be reluctant to enter a prolonged foreclosure process with a subordinate lien, but the threat of foreclosure may be incentive enough for a unit owner to pay his past due assessments. Therefore, while forcible entry actions in Illinois against condominium unit owners may promote the public policy of preserving the condominium ownership model, other methods are available that serve the same purpose without inhibiting other public policies.¹⁹⁵

B. UNDUE HARDSHIP ON ILLINOIS CITIZENS

With all the rhetoric regarding the rights of condominium associations, little mention has been made regarding the effect of an eviction on a condominium unit owner.¹⁹⁶ In the context of *Spanish Court*, it was not the job of the Illinois Supreme Court to decide whether evictions in general should be allowed for condominium unit owners.¹⁹⁷ But again, given the discussion regarding the rights of associations and their respective financial health, a brief analysis is required regarding the effect of an eviction on a unit owner.

While little information exists regarding tenant evictions, even less information exists regarding condominium unit owner evictions.¹⁹⁸ Accordingly, it becomes necessary to examine information on landlord-tenant evictions and analogize. Even though a condominium unit owner eviction is meant to be temporary,¹⁹⁹ a record of eviction makes it more difficult for a unit owner to find subsequent housing.²⁰⁰ Some landlords refuse to rent to those with an eviction on record.²⁰¹ Furthermore, because most landlords will not rent to them, former tenants end up in housing with less than optimal conditions.²⁰²

An additional hurdle facing condominium unit owners is their continuing obligation to pay past due assessments, current due assessments, and the monthly mortgage payment.²⁰³ It seems highly unlikely that an evicted condominium owner would continue to pay his mortgage, assessments, rent at

194. See *supra* Section II.

195. See *id.*

196. *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 8-10.

197. See *id.*

198. See Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88 (2012).

199. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 7.

200. Desmond, *supra* note 198, at 118 (Although the primary purpose of the study was to examine effects on urban poverty, important eviction information is applicable in this case.).

201. *Id.*

202. Les Christie, *Rents are Soaring: And so are Evictions*, CNN MONEY (Oct. 29, 2014, 7:12 PM), http://money.cnn.com/2014/10/29/real_estate/evicted/.

203. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 7-8.

a new apartment or condominium, and still be able to afford attorney fees to sue an association for failure to preserve the common areas. If the methods employed by other states are as effective or even close to as effective as eviction, an approach that avoids evictions is a more appropriate compromise because it simultaneously serves both the public policy in favor of not making condo unit owners susceptible to additional hardships and the policy in favor of promoting smooth operation of condominium associations.

C. PROVIDING CITIZENS WITH SPEEDY AND LOW COST JUDICIAL RECOURSE

The majority in *Spanish Court* suggests that an aggrieved unit owner still has recourse against a breaching association by initiating a separate action.²⁰⁴ However, this would be an entirely different action, adding costs in both time and money.²⁰⁵ Judicial economy would be served by allowing the condo association and unit owner to resolve the dispute in the forcible entry and detainer action.²⁰⁶ By forcing a unit owner to seek remedy through a separate judicial action, the additional court costs are added to the already burdensome obligation to continue paying the mortgage and monthly assessments. Some unit owners may be unable to shoulder that burden.

D. "POLITICAL RECOURSE"

The majority also suggests a unit owner has the ability to try and remove deficient board members through impeachment, or to try for election to the board.²⁰⁷ This option is impractical due to the length of time required to undergo such a change.²⁰⁸ While condominium associations have the freedom to set the term length of a board member, the Illinois Condominium Property Act states that one-third of the board members must be open annually.²⁰⁹ Asking a unit owner to wait possibly an entire year for the potential to change the composition of the board via election while the condo association breach continues is impractical and not likely to occur.

IX. CONCLUSION

The public policy analysis indicates that although the Illinois approach *may* be more effective in promoting the condominium form of property ownership, the negative impact on other public policies caused by the com-

204. *See id.* at 10.

205. *See id.* at 13 (dissenting opinion).

206. *See id.*

207. *See id.* at 10 (majority opinion).

208. *See* 765 ILL. COMP. STAT. 605/18 (2014).

209. *Id.*

combination of allowing unit owner evictions and refusing to allow certain affirmative defenses is significant. The impact of evictions causes reverberations in other areas, judicial economy is not promoted, and unit owners are left with little other recourse.²¹⁰ Not only is there an imbalance in public policy considerations, but the mishmash application of forcible entry and detainer actions on tenants, unit owners, and mortgagors is confusing and inconsistent.²¹¹ To rectify this problem, the Illinois General Assembly has several options.

First, the Illinois General Assembly could remove condominium associations and unit owners from the forcible entry and detainer statute. Other states have shown that there are other remedies available to condominium associations to collect past due assessments that are much less invasive and harmful to the condominium unit owners.²¹² By eliminating evictions, the additional harmful effects on a unit owner related to the subsequent securing of affordable and safe housing would be eliminated. Condominium associations would still have recourse against a non-paying unit owner through debt collection or through the traditional lien and foreclosure process. The processing time may be longer, but this would ensure consistent application of evictions to those who have only lost the right to possession primarily through contract termination rather than through statute.

Second, if the Illinois General Assembly insists upon allowing eviction as a remedy, the forcible entry and detainer statute could allow a unit owner the ability to assert an affirmative defense in the event of a breach by the association. As the dissent in *Spanish Court* points out, there are safeguards in place that would prevent the overblown, total collapse of the condominium association property model.²¹³ This approach would streamline the process and allow the dispute to be litigated in one step.²¹⁴ If it turns out that a disproportionate amount of unit owners frivolously stop paying assessments, the Illinois General Assembly could then amend the law to prohibit the defense.

Condominium association-unit owner disputes present difficult questions without easy answers. The Illinois Government has explicitly recognized these difficulties by recently creating a new position designed to resolve condominium disputes.²¹⁵ The Illinois General Assembly should recognize that although these difficult questions need to be addressed, the rights of condominium owners should not be ignored in the process.

210. See *supra* Section VIII.

211. See *supra* Section V.

212. See *supra* Section II.

213. See *Spanish Court Two Condo. Ass'n*, 12 N.E.3d at 13 (dissenting opinion).

214. See *id.*

215. *New State Office to Help Resolve Condo Disputes*, THE ST. J. REGISTER (Dec. 28, 2014, 11:17 AM), <http://www.sj-r.com/article/20141228/News/141229622#ixzz3NILjclQM>.

