



Delinquent Payment Collection Examined

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Today's column is the eleventh installment of a comparative study of Florida's laws applicable to community associations, with an emphasis on the difference between the laws for condominiums and homeowners' associations. As previously reported, Governor Bush has recommended that the powers-that-be study whether there should be a unified law for all of Florida's community associations.

So far, we have looked at the historical and legal development of both condominiums and non-condo deed restricted communities (generically referred to as homeowners' associations), the differences between the two laws in the areas of government regulation and consumer protection, and the procedural differences in the two laws, focusing so far on the election process, "sunshine" regulations, access to books and records, and sanctions available against errant members.

Today, we will continue our comparison of procedural similarities and dissimilarities between the laws in the area of collection of delinquent assessments:

"Joint and Several" Assessment Liability: Pursuant to Section 718.116(1)(a) of the Florida Condominium Act, a unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure, is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. There is no similar provision in the law for homeowners' association, rather the Governing Documents will control.

Mortgagee Holder Liability for Unpaid Assessments: The Condominium Act extends a special protection to the holder of a first mortgage on a condominium unit. The liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due prior to the mortgagee's acquisition of title is limited to the lesser of: (a) the unit's unpaid common expenses and regular periodic assessments which accrued during the 6 months immediately preceding the acquisition of title, or (b) one percent the original mortgage debt. For homeowners' associations, there is no mention in the law of mortgagee liability. Again, the Governing Documents control, and most completely excuse the lender from past due assessment liability.

Interests, Late Charges, and Costs: For condominiums, the law provides that assessments that are not paid when due bear interest at the rate provided in the documents, or if no rate is provided, then at 18% per year. Moreover, a condominium association may levy an administrative late fee if permitted by the declaration of condominium or the bylaws of the association. The amount of the charge may not exceed the greater of \$25 or 5 percent of each assessment or assessment installment that is delinquent. Once again, Chapter 720, the law for homeowners' association, is silent on the point.

Claim of Lien: By law, a condominium association has a right to lien for all unpaid assessments and must file a claim of lien with the Clerk of Courts in

the County where the condominium is located. The claim of lien is effective from the time of its recording for a period of one (1) year. The law secures all unpaid assessments, interest, costs and attorney's fees that are due, and those that come due during enforcement proceedings, until the entry of a final judgment in foreclosure. If an enforcement action is not started by the Association within one (1) year period of the filing of the lien, the lien will become void. The law for homeowners' associations contains no information about homeowner association liens.

Notice to Delinquent Owner: Prior to proceeding with a foreclosure action a condominium association must give the delinquent owner written notice of its intention to foreclose thirty (30) days before the action is commenced by certified or registered mail. If the notice is not given, the fees and costs cannot be recovered. As you may have guessed, Chapter 720 is mute on this issue.

As you can see Chapter 718 of the Florida Statutes, clearly lays out the framework in which assessments can be collected for condominiums. The law attempts to establish meaningful collection rights for an association, while providing procedural safeguards for the owners alleged to be in arrears. Meanwhile, Chapter 720 of the Florida Statutes, governing homeowner's associations, contains no guidance for association nor basic due process rights for homeowners.

In my opinion, this is another area where there no compelling reason for these differences in the two laws.

Next week, we will continue exploring comparisons between the two laws, looking at the area of enforcement of rules and regulations, with an emphasis on the difference between arbitration and mediation. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.

Majority of Voting Interests Can Recall Board Member

Question: I am the secretary of a condominium association. I have a question regarding the use of e-mails as a way for board members to communicate with each other between board meetings. We created a closed system which accepts only board e-mails, which ensures that all e-mails will be properly recorded and stored, and ensures that all board members will always get the e-mails from each other. I have received complaints that this is not a legal way for the board to communicate, and that it violates the sunshine laws. This is a very effective way to talk with other board members in between our meetings, and we always bring matters up at the next board meeting for final votes or discussion. Is it a problem to communicate with other board members this way? D.S. (via e-mail)

Answer: Although perhaps a close call, and certainly an area where some specific legislation would be helpful, I believe members of a board can freely e-mail each other without violating the so-called “sunshine laws”. The Florida Administrative Code defines a meeting of the board of administration as any gathering of the members of the board of directors, at which a quorum of the members is present, for the purpose of conducting association business. The Condominium Act further requires that meetings of the board at which a quorum of the members is present must be open to all unit owners (except meetings between the board and the association’s attorney with respect to proposed or pending litigation when the meeting is held for the purpose of seeking or rendering legal advice). The same general principles apply to homeowners’ associations.

Sending e-mails is basically like writing letters, and I do not think that doing so amounts to a meeting of the board where a quorum of the members is present. A different answer might apply if the emails occur in a “real time” setting, such as a “chat room”.

I think boards of directors should be careful, however, because they do not want e-mail communications to evolve to the point where they are discussing all of the association’s business through e-mail and never holding board meetings. I am aware of at least one case where a condominium association received a stiff fine for doing so.

In your case, it sounds like board meetings are being held to vote on matters and attend to other association business, so the use of e-mail communications does not appear to run afoul of the law. I do believe that copies of all emails should be retained as part of the official records of the association, and therefore open to inspection by any member.

Question: My condominium board of directors has contracted for towing services to remove unauthorized vehicles from our parking lot. I do not believe that the board has the authority to sign such a contract. Can they? S.D.

Answer: Florida law provides that condominium associations may contract for the maintenance, management and operation of the condominium property. Under most circumstances, the condominium documents will grant most associations powers to the board of directors. In my view, a contract for towing services would be included within these general powers of the board. Assuming that the condominium documents in your association do not specifically prohibit contracts of this nature, your board of directors is probably justified in taking such action.

You should also be aware that Section 715.07 of the Florida Statutes, which is commonly referred to as the Florida Towing Statute, must also be followed. Towing is a “self-help” remedy, and the provisions of the statute must be strictly complied with, which include requirements for erecting signage to provide

notice of towing, requirements for towing companies, penalties for violating the statute, etc.

Further, most attorneys I have polled on the subject believe that if an association is going to tow vehicles, that authority must be granted to the board in the association's governing documents.

Question: I live in a neighborhood with a homeowners' association and a recorded set of deed restrictions. The board of directors recently voted to file a lawsuit against two homeowners for violation of the setback provisions in the deed restrictions. This decision was made by the board at a closed board meeting, with no posted notice. Most of the members do not want this lawsuit. Our association funds are very limited. Our bylaws do not mention recalling the board. Can the owners recall the board for violating the sunshine laws? F.C. (via e-mail)

Answer: Chapter 720 of the Florida Statutes, informally called the Florida Homeowners' Association Act, provides that all meetings of the board must be open to all members, except for meetings between the board and its attorney with respect to proposed or pending litigation, where the contents of the discussion would otherwise be governed by the attorney-client privilege. Therefore, if the decision to proceed with a lawsuit was made at a meeting with the association's attorney, the board meeting would not be open to owners.

The question that remains, however, is whether notice of such a meeting has to be posted, even if owners are not permitted to attend. The Division of Florida Land Sales, Condominiums, and Mobile Homes has recently ruled that, as to condominiums, such meetings must still be noticed. The Florida courts have not yet addressed this issue, and it is an open issue in the homeowners' association context. However, I feel that such meetings should still be noticed even though owners are not entitled to attend. As a practical matter, the Board could remedy this defect by posting notice and ratifying its decisions.

The Homeowners' Association Act provides that regardless of any provision to the contrary contained in the governing documents, any member of the board may be recalled and removed, with or without cause, by a majority of the voting interests. The board may be recalled by an agreement in writing or by written ballot without a membership meeting. If the governing documents provide, the board can also be recalled by a vote taken at a meeting. Therefore, if your governing documents are silent regarding recall, the only recall procedure that can be used is a recall by written agreement. In either case, the board must meet and decide whether or not to certify the recall. If the board decides not to certify the recall, the board must file for binding arbitration. ■

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