



## How Should Association Pursue Delinquent Fees?

### No easy answer to tough situation

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**Q:** Our condo association has several units in arrears on association fees as well as special assessments. If we file a lien we only get a maximum of six months of assessments. We currently have several units over one year delinquent. My questions are whether we can file for payment in small claims court, and whether we can we take further action of garnishment of wages after judgment in favor of the association. Also how would this apply to foreclosures? **R.M. (via e-mail)**

**A:** It should come as no surprise, given the economic realities of the current real estate market, especially here in Southwest Florida, that I get questions like this frequently.

As an initial matter, you state that you are concerned about filing liens because “we only get a maximum of six months of assessments.” Section 718.116(5)(b) of the Florida Condominium Act provides that the association’s claim of lien secures all unpaid assessments (both regular and special) which are due and which may accrue subsequent to its recording of the claim of lien and prior to the entry of a certificate of title, as well as interest and all reasonable costs and attorney’s fees incurred by the association incident to the collection process. Accordingly, the association’s claim of lien secures not only six months of unpaid regular (monthly or

quarterly) assessments, but all unpaid assessments due at the time the claim of lien is recorded, and all unpaid assessments which accrue subsequent to the recording of the claim of lien.

Historically, the right of the association to record a lien and to foreclose that lien, and to collect costs and attorneys’ fees incurred in the process has been a very effective tool for the benefit of community associations. Of course, when there is a first mortgage on the property, and the fair market value of the property is less than the amount owing on the first mortgage, most all of the benefits of the statutory lien and foreclosure provisions are lost, or at least blunted. This is because a first mortgage that has been recorded before the association’s lien is recorded has legal priority over the association’s lien. If the first mortgagee does foreclose or take a deed in lieu of foreclosure from the owner, there is limited joint and several liability of the first mortgagee (6 months past assessments or 1% of the original mortgage amount, whichever is less, in the case of a condominium unit, and 12 months past assessments or 1 % of the original mortgage amount, whichever is less, in the case of a homeowners’ association).

To secure the right to pursue other assets of a delinquent owner, a well-drafted association foreclosure complaint will include a separate count

which seeks a money judgment against the unit owner. However, when a money judgment is issued, all the association receives is a piece of paper which the association must then go out and collect. A money judgment creditor, which is what the association would be in that case, is an unsecured creditor that finds himself in line behind all secured creditors, such as mortgagees, taxing authorities, and other types of lien holders, and in a “pool” with all other unsecured creditors racing to find assets.

In our historical experience, almost every unit owner who is on the verge of losing his unit in a mortgage foreclosure does not have other assets readily available to satisfy unsecured debts. Admittedly, these strange economic times give rise to situations where investor owners are walking away from properties based upon their economic evaluation of those specific properties, and those investors may have substantial assets elsewhere. For this reason, the association needs to evaluate whether to pursue individual owners personally on a case-by-case basis. In addition, many such investor owners are out of state, and any attempt to collect from them would require retaining legal counsel or a collection agency in another jurisdiction.

If the amount in dispute is less than five thousand dollars, small claims court is an option. However, I have not seen much success with this alternative. For one thing, if the owner’s only asset is the unit, and it is their primary residence, a small claims judgment would not overcome homestead protections. Further, if there is no mortgage foreclosure in the mix, the association is clearly in a better legal position through a lien foreclosure. Where a mortgage foreclosure is involved, the lender has to name the association as a party to the suit (or it loses its statutory assessment liability cap), so the association will find itself in court anyway.

With regard to your question about garnishment, while garnishment may be a tool that an

association can use to recover the amounts owed in a judgment, there are specific rules which must be complied with in seeking to enforce a writ of garnishment. Garnishment is controlled by Chapter 77, Florida Statutes, and there are specific protections for wage earnings contained in that law. For example, with respect to garnishing wages, there are certain exemptions in the law which protect the wages of particular individuals.

For example, if the individual is the head of a family, their wages may be protected from garnishment. If the wages sought to be garnished are derived from social security, welfare, workers compensation, unemployment compensation, veteran’s benefits, retirement benefits, pension benefits, life insurance, disability or certain educational or medical savings accounts, that income is likewise protected in whole or in part from garnishment. Accordingly, while garnishment can be a useful tool to collect on a judgment in some instances, it has its limitations.

In summary, there is no magic or easy answer in dealing with these difficult situations. Some associations feel that the best bet is to simply do nothing, and wait for the mortgagee holder to foreclose. While this strategy may produce the best net financial benefit in some situations, disaster can follow this strategy. If owners know that the association will take no action to enforce the collection of assessments, others may stop paying. Further, and perhaps more problematic, the association’s failure to treat all unit owners equally in the collection of delinquent assessments can raise “selective enforcement” problems if the association does choose to pursue collection of a particular delinquent account.

The association should carefully review each individual delinquency with legal counsel prior to making a decision as how to best proceed. Reportedly, the end of this historic property value “adjustment” is in sight. Let’s hope so.

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