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NAVIGATING The Collection Process

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Anyone who has served on a Board or as a manager understands the importance of the prompt collection of assessments for a Condominium, Cooperative or Homeowners Association. If assessments are not collected, the Association cannot meet budgetary requirements and cannot provide the services necessary to maintain and operate the community. In fact, the most frequent dispute between Associations and individual unit owners involve the collection of assessments. The purpose of this article will be to outline the collection and foreclosure process, as well as to discuss some of the issues that can arise within that process that can delay or hinder an Association's ability to collect its assessments.

A Community Association's right to assess for common expenses and enforce the assessment obligation by lien or foreclosing on the owner's unit is based upon covenant and statutory authority. It is very important in determining the scope of an Association's authority to review the Declaration of Condominium for Condominium Associations, the Declaration of Covenants, Conditions, and Restrictions for non-condominium Homeowners' Associations, or the Articles of Incorporation and Bylaws of Cooperative Associations. However, significant differences exist in the authority of Associations to collect, lien, and foreclose, between Condominiums and Cooperatives on the one hand, and Homeowners' Associations on the other. Section 718.116, Fla. Stat., which governs Condominium

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TIDBITS Did You Know

Allocation of RECONSTRUCTION EXPENSES

One of the most critical questions you face in reconstruction after casualty is how to allocate the cost of repairing damage for which you have no insurance proceeds. This is particularly pertinent with hurricane damage because of the substantial deductibles.

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Associations, contains a detailed outline of a Condominium Association's rights to assess, lien, and foreclose, the procedures that must be followed in this process, and the relative priorities in the collection process between the Association and other lien or judgment holders. Likewise, although there are some differences with the Condominium Statute, Section 719.108, Fla. Stat., which governs Cooperatives, contains an almost equally detailed and specific description of a Cooperative's rights, procedures, and relative priorities. By contrast, Section 720.308, Fla. Stat., which governs Homeowners' Associations, leaves it up to the Homeowners' Association's Governing Documents to outline the Association's powers to lien and foreclose, the procedures to be followed, and the Association's relative priorities with other lien owners and judgment holders.

The Governing Documents and, for Condominiums and Cooperatives, the applicable statutes, are also the

source of the Association's authority to recover interest, late charges, costs and attorneys' fees in the collection/foreclosure process. Equally important, the Governing Documents and applicable statutes also define the Board's authority to prepare a budget for the Association, allocate common expenses among the units, and levy regular and special assessments. The Association must follow the procedures set forth in its Governing Documents and its applicable statutes or there may be problems in the collection/foreclosure process as unit owners may have defenses or counterclaims which may defeat the ability of the Association to collect on its assessment. As long as the Association has complied with the requirements in its Governing Documents and applicable statutes, once a unit owner becomes delinquent in the payment of the assessments, the Association can commence the collection process.

It is highly recommended that every community Association establish a uniform collection procedure

TIDBITS *cont.*

Some condominium documents provide for the deductible to be levied as a common expense against all owners. However, most older condominium documents provide that the deductible is allocated to the entire community as a

common expense for the cost of repairing damage to the common elements and is allocated to the owners of the damaged units to the extent of the cost of repairing those damaged units.

The Division of Land Sales has taken the position that the deductible is a common expense, regardless of what your Declaration says. The Division reasons that the deductible is a risk which should be shared by the entire community.

Even if you find the Division's position appealing or logical, the Division's position is not currently supported by any language in the Statute. The specific language found in Chapter 718.111(11) addresses what items must be covered by the Association's hazard insurance policy but does not discuss maintenance, repair or replacement issues nor does it address responsibility for uninsured losses such as deductibles.

If your Declaration already provides for the deductible to be allocated to all owners as a common expense, the Division's position does not create a problem for you. However, if your documents provide for the deductible to be allocated to all of the owners to the extent the damage affects the common elements and to the owners of the individual damaged units to the extent of damage to the units, the Division's position creates a problem. You will be forced to choose between ignoring the Division's position or ignoring the provisions of your governing documents.

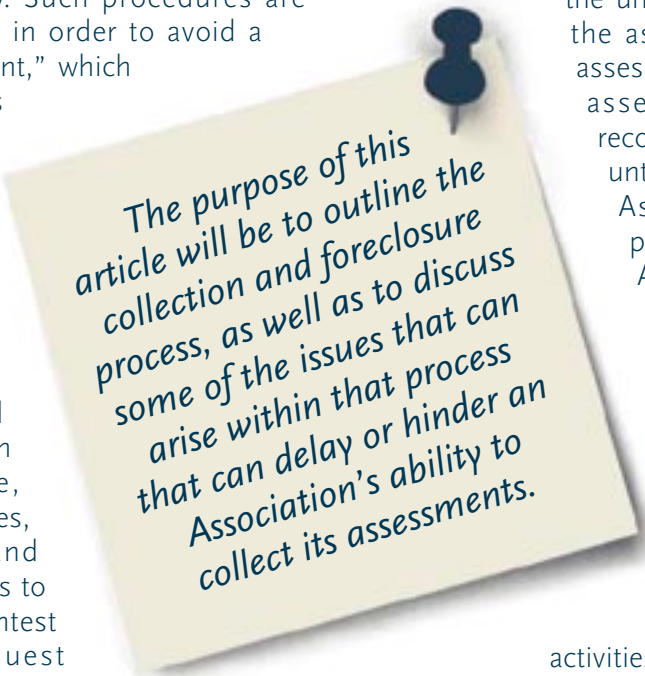
For many of you, the conflict cannot be reconciled by amending your documents because you either cannot get the votes necessary to amend your documents or, in many cases, the reconstruction provisions cannot be amended without the consent of the mortgage holders. In these instances, you should rely upon Association counsel to assist you with this decision-making process.

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that should be followed, without exception, in the case of a unit owner delinquency. Such procedures are important for an Association in order to avoid a claim of “selective enforcement,” which could defeat an Association’s ability to collect a delinquent assessment. Once counsel is advised that a particular unit owner is delinquent in the payment of assessments, counsel will send a thirty day Initial Demand Letter (“IDL”). The letter introduces counsel for the Association, sets forth the exact amount due, including interest, late charges, costs and attorneys fees, and gives the unit owner thirty days to pay the account in full or contest the amounts due and request documentation. The purpose of the IDL is to comply with the Federal Fair Debt Collection Practices Act, (FDCPA) 15 U.S.C. Section 1692 et. seq. The IDL must contain five specific items and information:

1. The amount of the debt;
2. The name of the creditor;
3. A statement that unless the debtor within thirty days after receiving the notice disputes the validity of the debt or any portion thereof, the debt will be assumed to be valid;
4. A statement that if the debtor disputes the debt that the debt collector will obtain verification of the debt; and
5. A statement that the communication is from a debt collector, that the debt collector is attempting to collect a debt, and that all information obtained will be used for that purpose.

It is important to note that, under the FDCPA, your counsel must cease all collection activities if the unit owner provides notification within the thirty day period



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disputing the assessment. Therefore, if the unit owner disputes the validity of the assessment, the amount of the assessment, or any item related to the assessment, the attorney cannot recommence collection proceedings until information substantiating the Association’s claims have been provided to the unit owner. Associations often blame their attorneys for “delays” in the collection process caused by “exchanging letters” with the unit owner, but the Association must understand that the attorney is bound by the FDCPA to respond to a unit owner who disputes the amounts due, and cannot proceed with further collection

activities until those disputes have been sufficiently countered by providing evidence to justify the Association’s claims. Only then can the attorney move forward with the second step in the process, the recording of the Claim of Lien and the Thirty Day Letter.

If the unit owner does not respond to the IDL, counsel will advise the Association and request authorization to file a Claim of Lien. The Claim of Lien is the document that perfects the Association’s rights by notifying anyone reviewing the public records that the Association has a claim against a particular unit owner for an unpaid assessments. The Claim of Lien is recorded in the Public Records in the County in which the community is located, in the same place and the same manner as a deed or mortgage. Recording a Claim of Lien is a prerequisite to the filing of a foreclosure lawsuit.

The Florida Statutes govern the existence, filing, and priority of liens for Condominiums and Cooperatives, while a Homeowners’ Association’s Declaration governs the existence and filing of liens for a Homeowners’ Association. Additionally, the Florida Legislature amended §720.305(2), Fla. Stat., in 2004 to prohibit a Homeowner’s Association from liening for collection of a fine. One noticeable difference between the

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Condominium and Cooperative Statutes is that, under the Condominium Statute, an Association's lien for unpaid assessments exists even prior to the filing of the Claim of Lien, while, under the Cooperative Statute, the lien does not arise until a Claim of Lien has actually been filed. However, the filing of a Claim of Lien under a Condominium, Cooperative or Homeowners' Association is always a prerequisite to the filing of a foreclosure action.

Simultaneous with recording the Claim of Lien, another prerequisite to filing a foreclosure action, is sent; this is known as the Thirty Day Letter. A Thirty Day Letter is a certified letter sent to the unit owner advising that the Claim of Lien has been recorded, setting forth the amount due, including interest, late charges, costs, attorneys' fees, and demanding the mailing of payment within thirty days. The letter informs the unit owner that the Association will commence a foreclosure action if the account is not paid in full within the thirty day deadline.

For Condominiums and Cooperatives, a Thirty Day Letter is a statutory prerequisite that the Association is required to send to obtain a full foreclosure judgment. If the Association files a foreclosure lawsuit without sending this letter, the Association will lose its ability to obtain a judgment for its costs and attorneys' fees under the statute. The letter must be sent to the unit owner's "last known address" and, if sent, is effective upon mailing, even if it is not ultimately received by the unit owner. Under the Condominium and Cooperative

Statutes, a Claim of Lien is good for one year from the date of the filing of the Claim of Lien, during which time a foreclosure action must be brought, or the Claim of Lien expires. This is true even if, which will be discussed later, the first mortgagee files a bank foreclosure action.

A foreclosure lawsuit is the process by which the Claim of Lien is enforced. The outcome of a successful foreclosure lawsuit is a judgment ordering the clerk to sell the unit at a public auction. Ordinarily, this occurs through a truncated procedure called a "Summary Judgment." Summary Judgments are awarded when there are no factual issues that the Court would need to consider evidence to determine. If a response is filed to the lawsuit by the unit owner which raises legal defenses and questions of fact which require testimony, the case may have to go to trial. Obtaining a trial date usually involves a much longer delay, which varies from judge to judge.

The most important part of the foreclosure lawsuit is extinguishing as many competing encumbrances on the unit as the law allows. Some encumbrances may be superior and others may be subordinate to the Association's lien. Encumbrances on the unit may include, for example, mortgages, federal tax liens, state tax certificates, construction liens, judgment liens, and leases. The fewer encumbrances on a unit at the time it is sold, the easier it is to sell, and the more it is worth to the person buying it at the foreclosure auction. The process of extinguishing encumbrances on

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the unit is accomplished by naming the holders of these encumbrances as defendants in the foreclosure lawsuit and proving that the association's claim of lien is superior to these interests. Ordinarily, the holders of encumbrances that are clearly superior to the Association's lien would not be named in the lawsuit.

The only interests that are always superior to a Condominium Association's claim of lien are real estate taxes, most federal tax liens, and a first mortgage recorded prior to the association's claim of lien. This means the buyer at the foreclosure auction will normally take title subject to the rights of the tax collector, the IRS, and the first mortgage holder. All encumbrances recorded after the Association's claim of lien are subordinate and will be extinguished by the Association's foreclosure lawsuit. Relative priorities between a Homeowners' Association's lien and other encumbrances are determined by Declaration.

Filing a foreclosure complaint initiates the lawsuit. All holders of encumbrances which are subordinate to the association's claim of lien must be named as defendants in the foreclosure complaint in order for their interests in the unit to be extinguished. Usually unknown tenants and spouses are named, too, in order to cut off any interest these parties may have. The foreclosure complaint must be properly delivered to (or served on) the unit owner and other defendants before the case can proceed. Delivery of the complaint is called "Service of Process". Proper delivery requires the sheriff or a licensed process server to locate and personally give each defendant a copy of the foreclosure complaint. The sheriff or process server then files an affidavit verifying he or she properly delivered the complaint. Each defendant has twenty (20) days from the day after service to file a response to the foreclosure complaint. If an individual defendant cannot be found after diligent search, the complaint can be "delivered" by publishing notice of the foreclosure lawsuit in a local newspaper. The notice must be published for four (4) consecutive weeks. The deadline for the defendant to respond is thirty (30) days from the first publication of the notice.

An additional complicating factor could be if any of the defendants are dead or die during the course of the

lawsuit. The Association must then move to substitute the estate of the deceased person, or, if there is no estate, appoint a guardian for the benefit of the estate and all heirs. This process can add two to three months to the length of a lawsuit.

In most foreclosure lawsuits, there are four likely outcomes:

1. The unit owner will re-finance, sell, or otherwise satisfy the lien.
2. The Association will be paid out of the proceeds from the sale.
3. The Association will take title to the unit at the public auction. As the foreclosing plaintiff, the Association has the right to bid up to the amount of its foreclosure judgment at the auction without actually paying any money (except for the clerk's fee and documentary stamps). All other bidders must pay cash or pay in a form acceptable to the clerk. The rising housing market has created a demand for foreclosure sale units, so for the last few years most units have sold for more than the Association's judgment. This trend may begin to reverse itself in the near future if the predicted burst of the "housing bubble" in Florida occurs.
4. If the unit owner has a mortgage, the bank which holds the mortgage on the unit may ultimately foreclose as well. Failure to pay assessments is often a default under many mortgage documents. This usually prompts the Association to stop its own foreclosure action in midstream.

The filing of a foreclosure lawsuit by the holder of the first mortgage will have a significant impact on the Association's ability to collect delinquent assessments. This is because the Association's lien is almost always inferior to the first mortgage. Therefore, the first mortgage foreclosure lawsuit will ordinarily extinguish the Association's lien.

If the bank forecloses its first mortgage before the Association does, there are also two possible outcomes. First, if the bank takes title, the bank will

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have to pay Assessments beginning from the date the bank acquires title. In addition, with Condominiums, the bank may be obligated to pay some assessments which came due before the date the bank took title. In some cases, if someone other than the bank takes title to a Condominium unit as a result of the bank foreclosure, that person may be liable for past due assessments. As always, a Homeowners Association's individual Declaration must be reviewed as to the Association's relative priorities and the liability of a subsequent purchaser. However, if after the bank's judgment is satisfied, there remain proceeds from the sale, the Association may file a claim post-sale with the Court for disbursement of funds from what is called the "surplus". Surplus funds are disbursed in accordance with the relative lien priorities of the named defendants in the bank foreclosure action. The Condominium Statute makes a Condominium Association almost always first in line for surplus proceeds, but a Homeowners Association must review its Declaration to determine its priorities.

The Association's foreclosure lawsuit may be interrupted if the unit owner files for bankruptcy. If the first mortgage holder is also foreclosing, that lawsuit will also be interrupted by the bankruptcy. This interruption is based upon federal bankruptcy law which imposes an automatic stay (or stop) on any pending lawsuits or other actions against the unit owner for claims arising prior to the filing of the bankruptcy petition.

A unit owner bankruptcy filing should not always be viewed as the time to give up. In 2005, Congress substantially re-wrote the consumer bankruptcy code that would involve most bank or association foreclosure actions. These changes are complicated and beyond the scope of this Article; associations wishing to maximize their recovery in the event a unit owner files bankruptcy should contact their association counsel.

Although every lawsuit is different, if no unusual defenses are raised by the unit owner, the process normally takes about five to seven months. Some lawsuits may take less time and others may take longer. Of course, if the unit owner pays at any stage in the proceedings, the process is terminated early.

An important matter that could affect the timing of a foreclosure lawsuit is a special assessment. In the case of George v. Beach Club Villas Condominium Association, 833 So.2d 816 (Fla. 3rd DCA 2002), a Condominium Association had imposed two separate special assessments, one for mansard repairs and a second later special assessment for roof repairs. The Association had filed an initial Claim of Lien for the mansard repairs, for which it proceeded to foreclosure litigation, and in the foreclosure litigation sought both the initial claim of lien for mansard work and the second special assessment for roof repairs, which was passed after the lawsuit was filed. In denying the Condominium's recovery for the second special assessment for roof repairs, the Appellate Court ruled that while a condominium Claim of Lien would secure subsequently accruing general assessments and subsequently accruing installments of a special assessment referred to in the Claim of Lien, it would not cover a subsequently passed new special assessment, for which a new or an amended Claim of Lien would need to be filed. Additionally, the Court ruled that the Florida Rules of Civil Procedure would not allow the Condominium to recover the subsequently passed special assessment without amending the Complaint to refer to that special assessment or a new or an amended Claim of Lien which referred to that special assessment. The import of this ruling is that any special assessments that are passed after the Claim of Lien is filed require the recording of a new or an amended lien and a new Thirty Day Letter, as well as an amendment to the foreclosure complaint if the lawsuit has been initiated, a process that usually takes at least 90 days to accomplish for **each** newly passed special assessment. As you can see, 2-3 special assessments could cause substantial delays in completing a foreclosure action.

Once the foreclosure judgment is entered by the judge, a foreclosure sale is set. The sale cannot be sooner than thirty (30) days from the date of the judgment and is usually longer, up to forty five (45) days, depending upon the clerk's calendar. Assuming the sale generates sufficient funds to satisfy the Association's judgment, there is usually an initial 10-20 day delay after the sale before the Clerk actually disburses the proceeds to the Association.

CA DAY

SHARED VISION, SHARED VALUES

Wednesday, March 15, 2006 - State Capitol, Tallahassee, Florida

CA DAY Agenda - March 15, 2006

Arrive in Tallahassee (morning)
Welcome Orientation & Light Breakfast
Walk the Halls & Meet Your Legislators
Press Conference
Luncheon with VIP Speakers & Legislators
Walk the Halls & Meet Your Legislators
Visit to House Chamber
Adjourn (early evening)

CA DAY Travel Information

A nonrefundable (except as otherwise noted below) **\$300.00*** fee is required for those taking the chartered plane. The chartered plane will leave from Fort Lauderdale International Airport on Wednesday, March 15th at 8:00 a.m. and will depart Tallahassee at approximately 6:00 p.m. the same day. The plane holds 172 passengers. **If we do not have at least 150 participants interested in taking the chartered plane, we will cancel these arrangements and all deposits will be returned.** Ground transportation will be provided to and from Tallahassee airport for those taking the chartered plane. Unfortunately, it is not economically feasible to charter multiple planes in various locations around the State. Other groups located around the state of Florida will be driving or taking buses to the event. We are more than happy to assist you with transportation and lodging arrangements if necessary. For more details call Cherell Murphy at (800) 432-7712 x 5237.

CA DAY Registration

HOW TO REGISTER: MAIL or FAX the completed Registration Form to Cherell Murphy at FAX: (954) 985-4176 / MAIL: Becker & Poliakoff, 3111 Stirling Road, Ft. Lauderdale, FL, 33312. Register ONLINE at www.beckerpoliakoff.com/seminars.

REGISTRATION CUT-OFF DATE FOR CHARTERED PLANE: Wednesday, March 1, 2006. For registrants wanting to take the chartered plane it is first-come first-serve as space is limited.

CA-DAY REGISTRATION FORM

Check the following as they apply: **breakfast, lunch & incidentals provided for all registrants*

- Yes, I will be taking the charter plane. **AMOUNT: \$300.00**
- Yes, I will be attending CA Day but I will make my own travel and lodging arrangements. **AMOUNT: \$50.00**

Name _____

Association _____

Address _____

Phone: _____ Email _____

Please select your shirt size: M Lg XL

*** GROUP DISCOUNT:** *If more than 1 (one) member of your Association registers for CA Day, and will be taking the chartered plane, please make your check payable for the amount of \$250.00 per person.*

PAY BY CHECK: (make check payable to Becker & Poliakoff)

CREDIT CARD PAYMENTS: Check appropriate box, fill in credit card information and sign.

- MASTERCARD
- VISA
- AMERICAN EXPRESS

CARD HOLDER NAME _____
(PRINT as it appears on credit card)

CREDIT CARD NUMBER _____ Exp. Date _____

SIGNATURE _____ AMOUNT _____



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