



**A Guide To
Understanding
The Community
Association
Collection And
Foreclosure Process**

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What is the initial demand letter?

What is a Claim of Lien?

What is a thirty (30) day letter?

How do you foreclose a Claim of Lien?

What if the unit has a mortgage on it?

What does it cost?

How long does it take?

What if the bank forecloses its mortgage?

What if the unit owner files for bankruptcy?



The answers to these and other frequently asked questions are contained in this handbook.

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FORECLOSURE

INTRODUCTION

It has often been said that the lifeblood of a Community Association is its ability to assess its members for the costs of maintaining the shared or owned amenities. If assessments are not collected, the Association cannot meet its budgetary requirements and cannot provide the services necessary to maintain and operate the community. The most frequently occurring dispute between associations and individual unit owners involves the collection of assessments. Due to the frequency with which assessment disputes arise and the importance of effective collection of assessments to Community Associations, the Firm of Becker & Poliakoff has prepared this booklet to assist the Board in its understanding of the collection and foreclosure process.



ESTABLISHING THE ASSESSMENT AUTHORITY

A Community Association's right to assess for common expenses and enforce the assessment obligation by lien and foreclosure is based upon contract and statutory law.

The starting point in determining the scope of an Association's authority is the declaration of condominium for Condominium Associations; the declaration of covenants, conditions and restrictions for non-condominium Homeowners' Associations; or the articles of incorporation or by-laws of cooperative Associations. In addition, Condominium Associations, Cooperative Associations and Homeowners' Associations are governed by and derive authority from the Condominium Act (Chapter 718) and the Cooperative Act (Chapter 719), and the Homeowners' Associations Act (Chapter 720), respectively.

The governing documents and applicable statutes discussed above 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 the applicable statutes or there may be problems in the collection and foreclosure process as the unit owner may have defenses or counterclaims.

The governing documents and applicable statutes are also the source of the Association's authority to recover interest, late charges, costs and attorney's fees in the collection and foreclosure process.

As long as the Association has complied with the requirements in its governing documents and the applicable statutes, once the unit owner becomes delinquent in the payment of assessments, the Association can commence the collection process.

THE COLLECTION PROCESS

Initiating the Collection Process

Every Community Association should establish a uniform collection procedure which should be followed, without exception, in the case of unit owner delinquency. For example, the Association might prepare a “reminder” letter to be sent to the unit owner when the assessment is ten (10) days past due. Once the Association is entitled to add interest and late charges, these amounts must be included in the letter to the owner.

The account should be turned over to counsel for collection no later than thirty (30) days after the account becomes delinquent. Bear in mind that a delinquent unit owner may also be falling behind on the first mortgage. The longer the Association waits before commencing its collection procedure, the greater the likelihood that the first mortgage foreclosure will impact upon the Association’s ability to foreclose and collect the outstanding assessments.

The Legal Process

The Initial Demand Letter

Once counsel is advised that a particular owner is delinquent in the payment of assessments, counsel should send a demand letter. For Condominium Associations, the law requires sending a letter to the owner demanding payment within thirty (30) days. This letter introduces counsel for the Association, sets forth the exact amount due, including interest, late charges, costs and attorney’s fees, and gives the unit owner thirty (30) days to pay the account in full. This letter must also notify the owner that the Association intends to record a lien against the property if payment is not received in thirty (30) days. No lien may be recorded without first giving notice. A significant percentage of collection disputes are resolved without the need to record a claim of lien.

For Homeowners' Associations, the Association is required by law to notify the parcel owner of all amounts due forty-five (45) days before a claim of lien is recorded.

The Claim Of Lien

The claim of lien is the document that perfects the Association's rights by notifying anyone perusing the Public Records that the Association has a claim against a particular unit for unpaid assessments. The claim of lien is recorded in the Public Records in the County in which the community is situated in the same place and in the same manner as a deed or mortgage.

Recording a claim of lien does not mean a lawsuit has been filed against the property owner. However, Community Associations must record a claim of lien before filing a foreclosure lawsuit.

The Intent to Foreclose Letter

Simultaneous with recording the claim of lien, a letter is mailed to the owner advising him that the claim of lien has been recorded, setting forth the amount due, including interest, late charges, costs and attorney's fees, and demanding payment within a specified time. For Condominium Associations, 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 (30) day deadline. For Homeowners' Associations the law requires a forty-five (45) day notice.

This pre-suit letter is a statutory prerequisite to the Association's ability to obtain a foreclosure judgment. If an Association files a foreclosure lawsuit without sending this letter first, the Association may lose its ability to obtain a judgment for its costs and attorney's fees.

FORECLOSING THE CLAIM OF LIEN

The Foreclosure Lawsuit

A foreclosure lawsuit is the process through 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. However, there are many steps required to get to the auction.

The most important part of the foreclosure lawsuit is extinguishing as many competing interests in the unit as the law allows. Some competing interests may be superior and others may be subordinate to the Association's lien. Competing interests in the unit may include, for example, mortgages, federal tax liens, construction liens, judgment liens, and leases. The fewer encumbrances (competing interests) 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 competing interests in the unit is accomplished by naming the holders of these competing interests as defendants in the foreclosure lawsuit and proving the Association's claim of lien is superior to these interests.

The only interests that are always superior to the Association's claim of lien are real estate taxes 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 and the first mortgage holder. All encumbrances (competing interests) recorded after the Association's claim of lien are subordinate and will be extinguished by the Association's foreclosure lawsuit.

Filing a Foreclosure Complaint

Filing a foreclosure complaint initiates the lawsuit. Before filing a foreclosure complaint, title to the unit or parcel is reviewed to determine

whether or not the competing interests are superior or subordinate to the Association's claim of lien. Remember, all holders of competing interests 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.

Delivery of the Foreclosure Complaint

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 date of delivery to file a response to the foreclosure complaint.

For proper delivery of the complaint to individuals, the law requires delivery to the individual or delivery at the individual's place of abode to a person who is at least 15 years old who resides there. 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 two (2) consecutive weeks. The deadline for the defendant to respond is thirty (30) days from the first publication of the notice.

Likely Outcomes

In most foreclosure lawsuits, there are three likely outcomes:

1. The Association will be paid.
2. The Association will take title to the property 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 nominal fee and documentary stamps). All other bidders must pay cash or pay in a form acceptable to the clerk.

3. If the owner is truly in dire financial straits, the bank that holds the mortgage on the unit may ultimately foreclose as well. This may prompt the Association to stop its own foreclosure action in midstream.

The Impact of the Bank's Foreclosure Lawsuit

The filing of a foreclosure lawsuit by the holder of the first mortgage may have a significant impact on the Association's ability to collect delinquent assessments, depending upon the point in time at which the bank files its lawsuit and whether the unit is worth more than is owed on the mortgage. This is because the Association's lien is usually inferior to the first mortgage. Therefore, the first mortgage foreclosure lawsuit will 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 have to pay assessments beginning from the date the bank acquires title. In addition, the bank may be obligated to pay some or all assessments which came due before the day the bank took title. If someone other than the bank takes title to a unit or parcel as a result of the bank foreclosure, that person may be liable for past due assessments.

In some cases, when the bank files its foreclosure lawsuit, the Association may make the business decision not to pursue its own foreclosure lawsuit. However, this is an issue that is decided on a case-by-case basis.

If the value of the unit or parcel exceeds the mortgage balance, the Association may be more inclined to pursue its foreclosure. In this situation, there is the possibility of selling the unit or parcel for enough to pay off the first mortgage, with money left over to pay off the Association's claim. This also increases the chances of the owner selling the property before the foreclosure process is complete so that the unit owner, rather than the creditors, can benefit from the value of the unit.

OWNER BANKRUPTCY

The Association's foreclosure lawsuit may be interrupted if the 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 owner for claims arising prior to the filing of the bankruptcy petition.

An owner bankruptcy filing should not always be viewed as the time to give up. The Association should protect its rights in the owner's bankruptcy by asserting all appropriate claims and seeking all appropriate relief from the bankruptcy court. If the owner uses the property as a primary residence, the owner is usually allowed to keep it as a residence. In this case, if the Association recorded a claim of lien before the bankruptcy was filed, the Association will likely be paid because bankruptcy does **not** extinguish liens.

If the property is not the owner's residence, the owner may be more inclined to give up the property. This may result in the bank obtaining permission from the bankruptcy court to go back to state court and

continue the foreclosure process. The property may also be sold in the bankruptcy, with creditors having liens against it, such as the Association, being paid out of the sale proceeds.

In appropriate circumstances, the Association may also ask the bankruptcy court for permission to go back to state court to continue its foreclosure process. This is particularly appropriate where the property is homestead and the owner does not pay off the claim of lien and/or where the lender is not moving forward with its foreclosure lawsuit in a timely manner.

PRACTICAL CONSIDERATIONS

The most frequently occurring question is how the Association can recover any money if the owner does not voluntarily pay the arrearages. If the Association pursues its foreclosure lawsuit to its conclusion, the most likely outcomes are that the Association will be paid or the Association may be the successful bidder at the foreclosure sale and may take title to the property. If the Association acquires title to the property and the value of the property exceeds the amount of the liens remaining against the property after the foreclosure, the Association can try to sell it. Regardless of the equity in the property, the Association can try to rent the unit and apply rent towards delinquent assessments. Any such lease should be set up on a month-to-month basis because a subsequent bank foreclosure can result in the Association's interest, including that of its tenant, being extinguished. **However, under no circumstances will the Association become personally obligated to pay the mortgage. The worst that can happen is the bank becomes the owner of the property after its foreclosure sale.**

If the bank forecloses before the Association does, there are also two possible outcomes. First, if the bank takes title, the bank will have to pay assessments beginning from the date the bank acquires title. Additionally, the bank may be obligated to pay some portion of the assessments which came due before the day the bank took title.

The second possible outcome of a mortgage foreclosure is collecting the delinquent assessments from the owner who has been foreclosed. The former owner remains liable for all past due assessments and the Association still can pursue a money judgment against the former owner for those assessments even after the bank forecloses.

In an owner bankruptcy, the foregoing are still the most likely outcomes. The only difference is the owner will not be liable for a money judgment for assessments. Failure to assert your rights in a bank foreclosure or owner bankruptcy may result in the loss or waiver of certain rights. That is not advisable, especially where there is a chance of even a partial recovery.

WHAT DOES IT COST?

There are certain costs and attorneys fees which are part of the collection and foreclosure process. For example, the county charges a fee for recording a claim of lien and the clerk of the court charges a fee for filing a lawsuit (which varies from county to county), plus a fee for each additional defendant after the first five. There is a cost incurred in doing the title search on the unit. Delivering the complaint to the defendants also involves a cost. In cases which go all the way to a foreclosure auction, there is a cost associated with publishing a notice of sale in a local newspaper, the clerk's fee for the sale and the documentary stamps for the title.

The Association is legally entitled to collect these and most other costs from the delinquent unit owner.

Attorney's fees are generally billed on an hourly basis, although some aspects of the collection process may be suitable to a flat fee arrangement. The attorney's fees vary depending upon the extent to which the case is defended, any difficulties encountered delivering the complaint, the extent of any settlement negotiations and the complexity of the legal issues which may arise. **The Association is also legally entitled to recover its attorney's fees from the delinquent owner.**

HOW LONG DOES IT TAKE?

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

The process before the foreclosure complaint is filed is defined by Florida Statute and certain deadlines are set forth in the demand letters. Once the foreclosure complaint is filed, the Association must allow a few days to a few weeks for the complaint to be delivered. If a defendant cannot be found, the delivery process can take much longer, as long as a few months.

Once the complaint is delivered, the defendant has twenty (20) days to file a response. If no response is filed or if a response is filed which raises no legal defenses, the Association can usually proceed to judgment. This process should take an additional thirty (30) to sixty (60) days, depending upon availability of hearing time on the judge's calendar. If a response is filed 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.

Once the foreclosure judgment is entered by the judge, a foreclosure sale is set. The sale cannot be sooner than twenty (20) days from the date of the judgment and is usually longer, up to thirty-five (35) days, depending upon the clerk's calendar.

CONCLUSION

There will often be business decisions to be made in the context of a foreclosure. While your lawyers do not make business decisions for you, they will assist you in making informed decisions.

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