

**A BOARD MEMBER'S GUIDE
TO
COLLECTION OF ASSESSMENTS**

PRESENTED BY

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FOREWORD

This book is intended to be a guide to assist Board members in understanding the process of collecting past-due Association assessments. The efforts of Mr. Donnie Rudd and Ms. Laurel Hart for drafting the First Edition of this work are acknowledged.

A BOARD MEMBER'S GUIDE TO COLLECTION OF ASSESSMENTS

At one time or another, any common interest community Association will be required to consider collection procedures to obtain delinquent assessments. Because an Association has a duty in which to maintain, replace and repair certain elements within the Association, the Association must have monies to accomplish these duties. Even if one owner does not pay, the Association can suffer in obtaining the goals they have listed

It is essential that an Association establish collection procedures prior to this becoming a problem. If the owners within an Association understand what is to occur to them if they do not pay their assessments, the compliance rate of payment of assessments will be greater. If you wait until it becomes a problem, it may be too late for the Association to obtain a proportionate remedy.

THEORIES OF RECOVERY

Before the collection procedures are detailed it will be helpful to explain the theories on which recovery can be made. There are two basic theories for recovery of delinquent assessments in an Association. The first is by virtue of the owner's personal obligation to pay all assessments which come due while he or she owns the property. The second is by virtue of the assessment lien which runs against the property itself regardless of who owns it. Both are imposed by the provisions of Section 9 of the Illinois Condominium Property Act as well as the Declarations of most, if not all, Associations.

The personal obligation entitles the Association to file suit for breach of contract against an owner who fails to pay his or her assessments. The lien theory allows the Association to file its lien against the property and to wait until it is sold to collect, or to foreclose its lien and take the property to satisfy the amount owed. In addition to these two theories, there is a statutory remedy in Illinois which allows the Association to evict an owner from the unit for failure to pay assessments. The eviction remedy is quite effective and is permitted by virtue of provisions found both in the Illinois Condominium Property Act and in the Illinois Forcible Entry and Detainer Act. In this case, the Association does not get title to the unit, but merely possession until the debt is paid.

COLLECTION PROCEDURES

At this point, let's talk about the actual collection procedures themselves. First, the Association can use a suit for straight breach of contract in order to collect the delinquent assessments. In this circumstance, the Association files a complaint requesting monetary damages. This complaint then must be filed and forwarded to the Sheriff of the county in which the delinquent owner is located for service. The Sheriff then attempts to serve the owner with the Association's complaint. If unsuccessful the Association has to attempt again to obtain the service. This can either be accomplished at another address known as an "Alias Summons" or the Association can hire a special process server to accomplish the service. Please note that most Sheriffs only work between the hours of 8:30 a.m., and 5:30 p.m. If an Association only knows an owner's residential address and not a business address, service by the Sheriff cannot be accomplished. Therefore, the need of a special process server, who is any person over the age of 18 and is not involved in the lawsuit, can be obtained to serve at other hours.

Assuming that the Association obtained service upon the individual, the Association then proceeds with its lawsuit. However, please note that an individual owner would be entitled to file a counter-claim against the Association in this type of lawsuit. Therefore, if the owner feels that the Association is not properly maintaining the premises, which is the reason why they have not paid their assessments, this issue may appear in the lawsuit. In that case, the Association would not only be prosecuting its claim for failure to pay assessments, but would also be defending the Association in the counter-claim filed by the owner.

In any lawsuit, the Association must obtain a judgment. After service of papers upon the delinquent owner, a Court date is set up. At this trial, all issues before the Court, including any counter-claim, will be addressed. The person most familiar with the Association's books must appear at trial to testify as to the amounts outstanding. If a counter-claim is present, additional witnesses may be necessary. Unless contradicted to the Judge's satisfaction, a judgment should be entered

This is not the end of the Association's litigation process. Unfortunately, monetary judgments are not self-enforcing. Thus, they require post-judgment litigation procedures unless the owner pays the judgment voluntarily. These post-judgment proceedings include garnishments and citation to discover assets. Once the Association has determined what assets are available, the Association can proceed to collect its delinquency.

Generally, the straight breach of contract lawsuit is not advantageous to an Association. First, the Association must serve its complaint upon the individual owner before it can go to trial. This can be quite difficult if an individual owner is delinquent in many areas. He or she will know that they are to avoid service when they see a Sheriff

walk up their steps. In some cases, individual owners have been able to avoid service for several months or even years. Secondly, post-judgment procedures are quite time consuming and require additional court appearances for the attorney and court costs to the Association. Any time a post-judgment procedure is required to go in front of the Court, it usually requires service of the papers upon the individual owner. That means that the Sheriff or special process server must go out to serve the owner with the papers. Thirdly, because the post-petition procedures take time to accomplish, it gives the owner time to disappear, file bankruptcy, slip into a worse financial condition or possibly allow a mortgage foreclosure action to occur. Each of these would have a detrimental effect upon the Association. Lastly, despite receipt of a judgment, the owner may not have any assets in which to clear off the Association's delinquency. One cannot obtain monies from an individual who does not have any. This is especially true if a person is not working, has no car or other valuable assets.

A second collection procedure available is the process of lien foreclosure. The first step requires the Association to file an actual lien in the Recorder's Office of the County in which the property is located. After the lien is recorded and the owner fails to pay the delinquency, the Association can file a lawsuit to foreclose the lien. This type of action is very similar to a mortgage foreclosure lawsuit. In regards to this type action, the Association will obtain ownership of the owner's unit if the Association is successful.

The next step in this action is the filing of a complaint and service of the complaint upon the individual owner. Assuming that the Association obtained service upon the individual owner, a trial is held. If successful, a judgment will be entered and will conclude with a direction that execution issue. An execution is an Order signed by the Clerk of the Court that renders the judgment directing the Sheriff or some other public official to sell the property of the delinquent owner in order to pay off or satisfy the judgment.

Assuming that the execution is issued and delivered to the Sheriff, in some states the Sheriff then delivers a copy of this execution to the individual owner and demands payment of the judgment. The next step is a purely formal and technical one. It is known as a levy and consists of those acts by which a Sheriff sets apart and appropriates a particular part of the individual owner's property for the purpose of satisfying the command of the execution. A levy on real estate often consists of nothing more than the Sheriff's statement on the execution that he is levying on certain real estate, followed by a description of the real estate. Next, the Sheriff must publish notice of the coming sale and post copies thereof in certain public places. At the date fixed for the sale the Sheriff auctions off the individual owner's unit to the highest bidder, who is usually the Association since an Association can bid up to the amount of its judgment without producing any cash other than the Sheriff's cost. Also, in many states, there is a redemption period, just as in the case of a mortgage foreclosure sale, which allows the

individual owner time in which to redeem the property. Ultimately, if no redemption is made, a Sheriff's deed issues to the purchaser.

As in the breach of contract lawsuit, there are many disadvantages to this type of action. First, as in the above-mentioned collection procedure, the Association must obtain service of its complaint upon the individual owner. If this cannot be accomplished, the lawsuit cannot proceed. Secondly, the costs are expensive in this type of lawsuit, such as filing fees, publication costs and ordering Minutes of Foreclosure. Secondly, the lien foreclosure procedure is quite lengthy. In the State of Illinois, the process requires waiting for approximately seven months after trial before the Association is entitled to obtain a deed to the property. This is because the Association must sell the unit at a Sheriff's Sale, which takes a minimum of three weeks after the judgment is entered, plus there is a redemption period of six months after the Sheriff's Sale during which the owner can pay back the Association all monies owed to redeem the unit. Thirdly, the Association will have to expend money to purchase the unit. This requires some up-front cost even though the Association could later sell the unit to a third party. Lastly, even though the Association would end up with the unit, it probably would be subject to any mortgage liens the owner might have on it. In this case, the mortgage company might elect to foreclose on the Association because title was transferred without its consent

Thirdly, and the last collection procedure, an Association has the right to file a Forcible Entry and Detainer Action. This is typically the least expensive, most expeditious and effective collection procedure available to the Association. It is a civil remedy to recover the possession of a unit and, if possible, a monetary judgment as well. The first step in this type of action is directing the Association's attorney to send a notice letter to the owner and tenant regarding the delinquency. This letter states that the full amount of the delinquent assessment must be paid within thirty days or the owner's right to possession of the unit will be terminated. The letter is sent by certified as well as by regular mail, so that a copy will be delivered even if the owner fails to receive the certified mail copy. Fortunately, the law does not require that the certified letter be received, simply that it is sent with proper postage and a correct address. In the event payment is not received from the owner within the thirty-day period, a Forcible Entry and Detainer Action can be filed. The only issue in this type lawsuit is whether the owner has or has not paid his or her assessments. The defendant, in most circumstances, is prohibited from filing a counter-claim in the Forcible Entry and Detainer Action. If they wish to raise or allege any misconduct by the Association, it would have to be raised in a separate lawsuit. Cook County has initiated an additional step which must be accomplished as a condition precedent to a forcible action. It should be noted that a Federal Statute, The Fair Debt Collection Act requires that certain disclosures be included in any communication to a Debtor. These disclosures generally pertain to the right of the Debtor to dispute the debt and the procedures which be followed if the Debtor

exercises this right. If these disclosures are not made, severe financial penalties may be awarded against the creditor.

The first step in a Forcible Entry and Detainer Lawsuit requires that a complaint be filed and served upon the individual owner. A trial date is usually set approximately three to four weeks from the date the complaint is filed with the clerk. If service cannot be obtained through this procedure, a second attempt to serve the Defendant through the use of an alias summons and special process server is usually attempted. If the special process server is unable to obtain service upon the individual owner, the Association then has the right to use a "Notice of Posting" as its means for obtaining service. Under this procedure, the Sheriff of the County in which the property is located posts certain forms indicating that the Association is taking action against a particular unit. It is presumed that every homeowner within each state walks through its Court building everyday to determine whether any action is being taken against his or her property. If a Notice of Posting is necessary, it usually requires an additional two to three week wait.

If a judgment is rendered in favor of the Association and against the delinquent unit owner, an order will be entered allowing the Association to take possession (but not ownership) of the unit. However, state law requires enforcement of that judgment to be delayed to allow the individual owner time to pay the delinquency. Enforcement of the judgment for possession must be delayed for a minimum of sixty (60) days, although a Judge may delay the enforcement of the judgment for up to one hundred and eighty (180) days. The unit owner then has until the expiration of the stay period in which to pay all past-due assessments, attorneys' fees and court costs incurred in the action.

In the event payment is not made, a writ (usually a certified copy of the Order for Possession) is placed with the Sheriff for the County in which the property is located to remove the owner from his or her unit. Typically, notice is sent to the owner prior to the Sheriff actually appearing. If the owner fails to make payment of the amounts due to the Association, the Sheriff will act and actually enforce the Association's Order. This will result in whoever is residing in the unit to be evicted and the Association placed in possession of the unit. Typically, the Sheriff has movers who place all of the delinquent owner's personal possessions located within the unit outside; thereby allowing anyone to scavenge through it. Then the Association usually changes the locks to the premises in order to prevent the resident from returning to the unit in question.

However, under a Forcible Entry and Detainer Action, the Association need not always evict the residents of a unit to collect the owner's delinquency. If a unit is occupied by a non-owner, the Association can require that the lessee turn over rent payments to the Association. This is called an "assignment of rents." Obviously, this is in the best interest of the Association. If it is necessary to evict the resident, the Association will have to spend time and money to locate a new renter.

The Association has the option to use any and all of the above-mentioned collection procedures. It is recommended that each Association confer with its own attorney to determine which procedure is the best for the individual Association.

RECOVERY OF LEGAL/COLLECTION FEES

For condominiums, reasonable attorneys fees incurred in the collection process are deemed part of the owner's share of the common expenses and constitute a lien on the unit. However, this is not applicable to expenses or fees charged by non-attorneys. For instance, if the management company charges a fee for performing collection related services, this fee may not be "back charged" to the unit owner's account. It will be the sole responsibility of the condominium association. Accordingly, caution must be undertaken when engaging in the collection process to ensure that the Association is not becoming responsible for collection charges simply because it permitted non-attorneys to perform the work. The only exception to this rule, is if the Association files an amendment to its declaration permitting "back charging" collection related work by non-attorneys. As this typically requires a two thirds vote of the unit owners, this solution may not be available in every instance.

For townhomes and homeowner associations, the ability to recover attorneys' fees and costs of collection must be set forth in the declaration or other governing documents. As these fees may be quite substantial, it is certainly worth having these documents reviewed by the Association's attorney, and amended if necessary to provide for this recovery.

BANKRUPTCY

Previously we discussed an action that an individual owner can take to avoid payment of Association assessments. This is the filing of a bankruptcy petition. Since most owners are private individuals, the bankruptcies an Association is likely to encounter will be of two types. The first is a Chapter 7 Bankruptcy, which is commonly known as a "straight" or "liquidation" bankruptcy. The second is a Chapter 13 Bankruptcy, which is also known as an individual "reorganization or wage earner plan."

In a straight bankruptcy, the individual is seeking to obtain a fresh start by wiping out all of his or her personal debts (not secured) obligations. A straight bankruptcy will allow an individual debtor to be relieved from personal debts that he or she has incurred to the extent that the debts are not secured with some type of collateral. Typically, the bankruptcy does not eliminate the debt, but it prevents the creditor from using the legal power of the Courts to enforce or collect the debt.

Under a Chapter 13 wage earner plan, the debtor is not seeking to eliminate all of his or her debts, but is seeking the protection of the Bankruptcy Court in order to obtain some breathing room so that he or she can devise a plan to pay secured creditors who have collateral and unsecured creditors who do not have collateral. With the wage earner plan, the individual must propose a plan to the Bankruptcy Court outlining how he or she will repay the creditors. Typically, most wage earner plans provide for paying secured creditors (having collateral) all or substantially all the money which is owed to them. On the other hand, unsecured creditors (without collateral) are typically paid only a small percentage of the amount that is owed to them. Generally this amounts to approximately ten (10%) to twenty (20%) percent of the unsecured debt. A wage earner plan requires the wage earner to pay a fixed amount each month through the Court and on to the creditors. The money is then allocated to the various creditors in accordance with the provision of the plan.

Typically, a wage earner plan should last no longer than three (3) years; however, such plans can last for a period of up to five (5) years if the Court approves it. If the debtor complies with the terms of the plan for the entire period, the debtor is discharged from any further obligation to any of the creditors at the end of the time period. Since the secured creditors are typically paid in full, there is no debt still remaining to them that must be discharged. However, an unsecured creditor may have received only a small percentage of the amount actually owed, and the remainder is discharged at the end of the plan

After a bankruptcy has been filed, notices must be sent to each of the creditors listed in the schedule to inform them that the bankruptcy has been filed. Under federal law, when a creditor, such as the Association is notified that a bankruptcy has been filed, the creditor is informed of an "automatic stay." The automatic stay means that all

creditors are under an order from the Federal Bankruptcy Court not to take certain actions against the debtor to do any of the following:

- a) begin or proceed with any lawsuit against the debtor;
- b) enforce any prior judgment against the debtor;
- c) take any action to obtain possession of any property owned by the debtor which is part of any property involved in the bankruptcy proceeding;
- d) take any action to create, perfect or enforce any liens against any property involved in the bankruptcy;
- e) take any act to create, perfect or enforce any lien against property of the debtor if that would convert any unsecured claim into a secured claim; or
- f) attempt to reduce or offset any amount owed by the debtor with any amount owed to the debtor.

In other words, all lawsuits must stop, all formal and informal attempts to collect the debt must stop, all garnishments and wage deductions must stop and so on. Any creditor who proceeds to take any steps to collect the debt after notice from the Bankruptcy Court is in violation of a Federal Court Injunction and is potentially liable for contempt of Court, which could result in fines or even imprisonment. The violator could include the Association, the Association's Officers and Directors, the Association's property manager, and the Association's attorneys, depending on whom the Court finds violated the stay.

Although there are some exceptions, which depend on the technicalities of bankruptcy law, in general the "automatic stay", or injunction from the Bankruptcy Court remains in effect until the case is closed, the case is dismissing or a discharge of the debts is granted or denied, whichever occurs first. This means that any action a creditor wishes to take concerning the debt must be done as part of the Federal Bankruptcy proceeding. From the Association's standpoint, this means that the Association cannot proceed to collect any judgments, cannot proceed with an existing lawsuit to obtain a judgment, cannot file a new lawsuit, cannot file a lien and cannot do anything else to collect the debt. Any attempts to collect the debt outside of the Bankruptcy Court can result in the violator being found guilty of contempt of court.

Although the procedures are somewhat different from other types of lawsuits, the creditors in a bankruptcy are not automatically stuck with the debtor's bankruptcy. The creditors still have the right to contest the bankruptcy, to show that the debtor really does not owe more than he can pay and so on. Further, each creditor is given an opportunity to file a proof that the claim is valid and that the claim is secured or unsecured. From the Association's standpoint, the Association always wants to argue that it is a secured creditor

rather than an unsecured creditor. The reason for this is that secured creditors obtain better treatment than creditors who are not secured

In many cases, the Association will not have filed a lien prior to the time the bankruptcy is filed. If the Association has not filed the lien, it has to present evidence in its proof of claim that it has a right to be considered a secured creditor. Typically, this is done by preparing a proof of claim and attaching appropriate sections of the Association's Declaration which provide that the amount of any unpaid assessments shall constitute a lien against the property. The Proof of Claim is then filed with the Bankruptcy Court.

Once the Association has filed a proof of claim with the Bankruptcy court, the claim will be evaluated by the bankruptcy trustee for a determination as to whether the Association's claim is secured. If the trustee rules against the Association, the Association has a right to challenge the ruling, but again the expense of such a contest must be weighed seriously against the potential for recovery.

In a wage earner plan, the Association will be paid in accordance with the plan approved by the Court, and the amount it receives will depend upon whether or not the Association is listed as a secured creditor. Thus, under the wage earner plan, the Bankruptcy trustee pays the Association's pre-petition assessments, those assessments and debts incurred prior to the filing of the owner's bankruptcy petition.

The real problem occurs when the debtor fails to pay the Association post-petition assessments, those assessments that become due after the bankruptcy is filed. Because of the automatic stay, the Association cannot take action against any property of the debtor that is part of the bankruptcy proceeding. In these cases, the Association essentially has two options. First, it can do nothing and wait to see if the money does begin to come in voluntarily from the debtor. The second choice is to go back to Court seeking either to have the case dismissed or to have the automatic stay lifted so that the Association would be allowed to pursue a separate collection against the debtor outside the Bankruptcy Court. Whether or not the Court will grant the Association the second remedy depends on numerous factors and ultimately is up to the Court's discretion.

If the Court does dismiss the proceeding or allows the automatic stay to be lifted, the Association would be entitled to pursue the debtor in the same manner as if the bankruptcy had never been filed. One risk involved in this alternative is that the debtor might convert the Chapter 13 plan into a straight bankruptcy. With a straight bankruptcy, the Association must write off as bad debt whatever personal obligation is owed by the debtor as of the date that the bankruptcy is filed. The Association should recognize that a straight bankruptcy consumes an average of three to six months before it is completed and the debtor is discharged. During that entire time period, the Association can take no action to enforce its debt against the debtor.

It is possible in a wage earner plan that the debtor might elect to reaffirm or reassume that personal obligation for the debt owed to the Association. Since the Association's lien is

secured by the property, the Association could foreclose its lien and take the property, although there is certain risk involved in this, particularly where there are mortgages which have priority over the Association's lien. If the debtor elects to reaffirm or reassume the debt, this would have to be approved by the Court which will all take into consideration whether or not the debtor has the financial resources to repay the debt with anything other than the property itself. If the Court finds that the debtor does not have the financial resources to reaffirm the debt, or finds that a reaffirmation is not in the best interest of the debtor, the Court will disallow the reaffirmation. This will leave the Association only as a secured creditor, behind any other creditors, such as first mortgagees who have priority.

MORTGAGE FORECLOSURE

The other problem that has serious implications for an Association is the foreclosure of an owner's mortgage. A mortgage is a lien like the Association's lien for unpaid assessments. However, a mortgage is a lien against real property that is given by the borrower to the lender as collateral to secure repayment of the debt. The borrower is referred to as the "mortgagor" because the borrower gives the security to the lender. The lender is referred to as the "mortgagee" because the lender is accepting the mortgage as security to repay the debt. Mortgage foreclosures are governed by the provisions of state law and thus will differ from state to state. The provisions discussed below concern how mortgage foreclosures take place in Illinois.

In Illinois, a mortgage foreclosure is the means by which a lender seeks to obtain repayment of its debt by selling the property against which the mortgage has been recorded. Mortgage foreclosures can occur for a number of reasons; however, undoubtedly, the most common cause of a mortgage foreclosure is the failure of the borrower to repay his or her debt in a timely manner. The next most common cause of a mortgage foreclosure is that the borrower has attempted to sell some interest in the mortgaged property to another person without the consent of the lender. An example of this would be the typical contract sale where the contract buyer agrees to purchase the property over a period of time. Under most mortgages, this activates a "due-on-sale" clause that allows the lender to demand full payment on its mortgage. If the lender is not paid in full, the lender has the right to foreclose.

In Illinois, a mortgage foreclosure requires a Court proceeding where a Judge must find that the debtor is in default of the terms of the mortgage. The Judge must also establish the amount that is due under the mortgage, after which a Judgment of Foreclosure and Sale is entered, thereby "foreclosing" the mortgage lien. The judgment entitles the lender to sell the property at public auction in order to recover the amounts set forth in the judgment. At the public sale, the Sheriff asks for bids on the property to be sold. Generally, the amount owed under the judgment is less than the market value of the property. However, it is usually still high enough in comparison with the value of the property that the general public will not be interested in bidding on the property. As such, in approximately 99% of the cases, the lender will bid the exact amount of its judgment, no one will bid a higher amount, and the property will be sold to the lender for the amount of its judgment.

Even though the property is sold to the lender, or to anyone else for that matter at the Sheriff's Sale, this does not mean that the purchaser at the Sheriff's Sale becomes the automatic owner of the property. Illinois still requires that there be a "redemption" period after the Sheriff's Sale during which the original owner of the property can redeem the property by paying off the amount bid at the Sheriff's Sale plus any statutory interest or costs incurred since that date. In Illinois, the usual redemption period is six (6) months

from the date of the Sheriff's Sale. This time period might be longer if an appeal is taken, if a bankruptcy is filed in the interim or for other reasons. At the end of the redemption period the purchaser at the Sheriff's Sale is entitled to a deed for the property. Until now, we have not really addressed the Association's role in a mortgage foreclosure. As mentioned above, common interest communities, in virtually every case, are entitled to a lien against the unit for unpaid assessments due to the Association. Any such lien is an encumbrance on the title to the unit as long as it exists, and any title company would object to closing on a unit until it has proof that the Association's lien was satisfied or that all assessments have been paid in full. The unfortunate fact about an Association's lien is that, under the language of virtually every Declaration, the Association's lien is secondary to at least the first mortgage lien, sometimes to all mortgage liens and occasionally to all liens against the property. The reason that this is unfortunate is that the Association's rank as a creditor is the determining factor as to whether or not its lien rights will be eliminated in a foreclosure action.

Once the priority of lien holders have been ranked from highest to lowest, it can be determined whose rights will be eliminated. The person with the highest priority can "foreclose" or eliminate the interest of every subordinate lien holder. The person second in priority can foreclose the interest of everyone who is third or lower, but can do nothing about the priority of the first lien holder. Since the Association is almost always at least second in position, the foreclosure of a first mortgage will foreclose or eliminate the Association's right to recover any delinquent assessments from the new owner after the foreclosure.

To protect the Association, it is possible for the Association to bid on the unit at the Sheriff's Sale. However, to accomplish this, the Association would have to pay off any unpaid amounts then due and owing under the Judgment of Foreclosure, plus any excess amounts that might be necessary to cover any bids presented at the Sheriff's Sale. In addition, after the purchase of the property at the Sheriff's Sale, the Association would have to sell the property on the open market after the expiration of redemption period in order to recover its monies.

One other option available to the Association would be to redeem the property during the redemption period. Since the Association has lien rights in the property, it could pay off any unpaid amounts due to the bank during the redemption period and add that amount to its own assessment lien against the property. However, the Association would still have to foreclose its lien and sell the property if the owner was unable to pay or failed to pay the amounts due. Undoubtedly, if the owner were unable to redeem the property, this would require a foreclosure of the Association's lien. Thus, if any Association wished to consider paying off the bank, it should either be at the Sheriff's Sale or it should attempt to purchase the certificate of sale from the lender during the redemption period. Unless the Association obtained a certificate of sale, a second foreclosure would be needed in order to recover the amount due to the Association.

Associations often ask when they may begin to charge the bank for the Association's monthly assessments. The law provides that the bank has the duty to pay assessments starting the first day of the month after the date of the judicial foreclosure sale, delivery of the deed in lieu of foreclosure, or taking possession pursuant to a court order.

Accordingly, there may be a substantial period of time between the date that the unit owner initially fails to make assessment payments and the date that the bank is required to do so as set forth above. Fortunately, the Association is not without a remedy. The purchaser of a condominium, townhouse or single family home in an association unit at a judicial foreclosure sale or the purchaser of a unit from a bank which obtained it in a judicial foreclosure sale is required to pay assessments which are due during the six months immediately preceding institution of collection proceedings. As a result of this requirement, it is very important that the Association forward the delinquent unit owner's account to the Association's attorney for collection, as if this is not done, the subsequent purchaser's six-month payment obligation is not applicable.

LIABILITY ISSUES

As a result of certain abuses involving the collection process, generally, Congress enacted the Fair Debt Collection Act. This Act is applicable to “debt collectors”. Debt collectors” include attorneys and managers involved in collecting association assessments, fines etc. The Fair Debt Collection act provides for substantial penalties for “debt collectors” who violate its provisions to include fines and an award of attorney fees. The Fair Debt Collection Act sets forth specific limitations on tactics which may be used by creditors, as well as requiring “debt collectors” to utilize various procedures enacted to protect the debtor from abuse. Even though board members and employees of associations do not fall within the definition of “debt collector”, as Associations frequently are contractually obligated to indemnify and defend management companies for this type of liability, it is essential that this coverage be included in the association’s insurance package.

CONCLUSION

In summary, an Association has three types of collection procedures that can be initiated to collect a delinquency from an owner. These are a Forcible Entry and Detainer Action, a Breach of Contract Action, and a Lien Foreclosure Action. Each one of these procedures has advantages and disadvantages. Depending upon the cost and time involved, the Association should evaluate which one is the best for its needs. Although an Association may have the right to collect past-due assessments, there are two types of actions begun by the owner or a third party that can affect the Association's rights. In a bankruptcy, the Association is stayed from taking any action against an individual owner to collect its delinquency. However, an Association can file a Proof of Claim to obtain payment of pre-petition assessments from the Bankruptcy Trustee and, if necessary, file a motion to lift the automatic stay to collect post-petition assessments. Thus, all is not necessarily lost if an owner files a bankruptcy action.

On the other hand, a foreclosure by a mortgage lender who has superior rights to those of the Association can wipe out the Association's claim unless a bid is made at the foreclosure sale or the Association redeems the property during the redemption period following the sale. Please note that the foreclosure by a mortgage lender does not alleviate the individual owner of his or her financial responsibility to the Association. In those circumstances, the Association can still proceed with a breach of contract action against the owner. A concern the Association should have is whether they will be able to obtain service upon the owner since the mortgagee will take over ownership of the unit and the owner will have to vacate the premises. Further, there is a chance that a foreclosure that the debtor does not have any assets and may file a bankruptcy against the Association.

The effect of bankruptcies and foreclosures should be obvious. The former prevents or eliminates the Association from taking any action against an individual to collect the debt and the latter eliminates the Association's ability to collect the assessment amount from the sale of the property itself by either a lien foreclosure or Forcible Entry and Detainer Action. Where both a foreclosure and bankruptcy occur, the Association's lien will be completely wiped out. If the Association quickly advises their legal counsel regarding what has occurred, there is a chance that the Association can recoup some of the costs owned by an individual owner. Thus if the Board Members follow the suggestions set forth in this book, there is a possibility that not all is lost if an owner is delinquent in his/her assessments.