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Understanding the collection process

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Condominium associations obtain the funds necessary for their operation primarily from an annual common expense assessment imposed on their unit owners. The assessment normally is payable in equal monthly installments. While our law firm, which represents more than 100 community associations in New Jersey, has not yet noticed an increase in the number of unit owners defaulting on their payments, associations can expect that this will occur if the current economic difficulties continue. Since any resulting deficit necessarily will burden an association's remaining unit owners, associations should be particularly diligent in their efforts to collect arrears from delinquent owners. Owners, in turn, should be aware of the remedies that their association should pursue against delinquent owners, and of the adverse consequences that can occur due to nonpayment.

One effective way for an association to improve collections is for its board to adopt and enforce uniform collection procedures for the association's property manager and attorney to follow for all past-due accounts, which also will eliminate the need for the board to separately review each account to decide on appropriate action. Items that a board should consider incorporating into these procedures include the following.

Late fees, interest, and attorney's fees. Under the New Jersey Condominium Act, an association may impose late fees, interest, and reasonable attorneys' fees against a delinquent unit owner's account, but only if expressly authorized by the master deed or by-laws. Most associations charge a monthly late fee of \$25; a court may refuse to enforce a late fee that it deems to be too high. If an association's master deed or by-laws specify the amount of the late fee, the amount can be changed only by a formal amendment to those governing documents, not simply by a board resolution. The Act allows an association to charge interest not exceeding the "legal rate." The New Jersey Department of Community Affairs, a state agency with jurisdiction over community associations, has interpreted this to mean that the interest cannot exceed the rate that New Jersey courts impose on judgments. This amount, which is established annually, is 5.5 % for 2008.

Suspension of rights and privileges. An association's governing documents may permit the association to suspend a delinquent owner's rights and privileges, such as use of common recreational facilities and the right to vote. During the summer, suspending the right to use an association's swimming pool often results in prompt payment. But a board must be careful to not exceed its powers to suspend an owner's rights. Otherwise, under a 2001 New Jersey appellate court decision, the association could be liable for damages.

Acceleration. An association's master deed or by-laws may authorize the association to demand that a delinquent owner immediately pay all remaining installments of the annual assessment. This process, known as "acceleration," is quite beneficial because it allows an association, upon filing a lien or collection lawsuit against the owner, to seek payment of the entire annual assessment, not simply the amount then due.

Rent assignment. Some owners rent their units as investment properties but fail to pay their common expenses even though they are collecting rent from their tenant. An excellent tool in this situation, if authorized by an association's master deed or by-laws, is a "rent assignment" that allows the association to compel the tenant to pay all rent directly to the association instead of to the owner – without the need to first obtain a judgment in court – until all arrears are paid.

An association's two strongest remedies against a delinquent owner are imposing a lien against the owner's unit and suing the owner for a personal monetary judgment for all amounts owed.

Filing a Lien. A lien is a claim against the condominium unit itself, similar to a mortgage, for past due common expenses and other charges (but associations are prohibited by statute from recording a lien solely for unpaid late fees). A lien must be recorded in the appropriate county office, i.e., the County Clerk or the Register, depending on the county. The association must notify the unit owner that the lien is being recorded. A lien will not automatically result in payment of the arrears; however, if the owner sells or refinances the unit, the buyer or lender normally will require payment of the lien.

Under the Condominium Act, an association can establish a priority for its lien (known as a "super lien") for six months "customary" common expenses (not including late charges, penalties, interest, reserves for contingencies, or collection costs) over a prior recorded first mortgage recorded after April 1, 1996.

Although an association can file a foreclosure lawsuit based on its lien, and ultimately seek a sheriff's auction of the unit, an association's board should consult with legal counsel regarding whether foreclosure is appropriate for a particular unit, due to various concerns. For example, an association's foreclosure action will not eliminate mortgages, judgments, or other liens that were recorded against the property prior to the association's lien, and therefore, unless a unit has substantial equity, it may not make sense for the association to foreclose.

Suing for a personal judgment. Rather than foreclose, most associations sue delinquent owners for a personal monetary judgment. Unlike in some landlord-tenant situations, condominium owners have no right to withhold payment of common expenses based on alleged claims against the association – they must pay their expenses and then pursue their claim independently.

A collection lawsuit has numerous steps and can take six months or longer. Major steps include filing and serving the complaint; requesting the court to enter default judgment (if the unit owner fails to answer the complaint) or summary judgment (if the owner contests the lawsuit); trial (in rare circumstances); docketing the association's judgment; obtaining a court order to depose the unit owner about his assets; obtaining a wage garnishment, or writ of execution authorizing the Sheriff to attach bank accounts, a tenant's rent payments, vehicles, or other identified assets; and ultimately collecting payment of the association's judgment.