



Special Report:

Bank Foreclosures, Bankruptcy and Community Association Collections.

*A guide to navigating your community
association's collections in a troubled economy.*

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1. Being the “Bad Guy” In a Difficult Economy.

Understanding a Board of Directors’ obligations to the community at large.

- a) Most community associations do not have multiple revenue streams.
- b) The ability of a community association to pay its expenses is typically based solely on its ability to collect assessments.
- c) If a member does not promptly pay his/her assessments, the expenses of a community association do not go down. Instead, the other members must pay the difference.
- d) Collecting assessments is mandated by each community association’s *Governing Documents*. Members relied upon, and voted for their Board members to enforce, the *Governing Documents*.

2. Common Sense Practices.

Sometimes it is easier than it looks.

- a) Both bank foreclosures and bankruptcies have important deadlines community associations must follow.
- b) If a deadline in a bank foreclosure or bankruptcy is missed, the association will waive certain rights relating to collecting past due assessments.
- c) Avoid missing important deadlines by ensuring your Registered Agent is the association’s attorney.




Do not appoint a property manager or a Board member as a registered agent. Changing a Registered Agent is an easy process. Go to www.sunbiz.org for information.

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- d) If the association is not served with a foreclosure or a bankruptcy, but learns such a lawsuit has been initiated against an owner, contact the association's attorney and request the filing be located and the association included as a party.

3. Bank Foreclosures.

What to do when a bank forecloses on a member's home

- a) When a bank forecloses on a member's home, all hope is not lost.
- i) Homeowner Associations can collect up to **twelve months** of delinquent assessments from the first mortgage holder ("bank"). [F.S. § 720.3085](#).
- a. Last year the law had no limitation on the time period in which the association could seek delinquent assessments from the first mortgage holder.
 - b. The legislative change limiting a bank's delinquency liability was a gift to the banking industry. If your community association is not prepared, this gift can become a "free ride" for a foreclosing bank.
- ii) Condominium Association can collect up to **six months** of delinquent assessments from the foreclosing bank. [F.S. § 718.116](#).
- iii) For both condominium and homeowner associations:
-  a. Be careful **not** to apply the above referenced delinquency limitations to new owners of a foreclosed property that are **not** the first mortgage holders.
 - b. New property owners, regardless of the method in which they obtained title to the property, are jointly liable with the prior owner **for all outstanding assessments**.
 - c. The legislature limited the banks delinquency responsibility but did not express any intent to erase the remaining deficiency.

d. Deficiencies should be sought from the new owner that purchased the home from the bank and should be **on all estoppel requests from potential purchasers.**

- iv) Once a bank owns a home through a foreclosure of its mortgage, the bank becomes a member of the association and is responsible for all future assessments.

b) “Best Practices”

- i) When the association is served with a foreclosure lawsuit, the association’s attorney should file an Answer and Affirmative Defense. Without these filings:
1. the Court will issue a Default Judgment against the association causing the waiver of any possible claims or defenses as to all the parties in the foreclosure lawsuit;
 2. surplus funds cannot be obtained from the foreclosure sale;
 3. the association will not be able to monitor the foreclosure and will be unable to timely act when a new owner has taken title and should begin paying assessments;
 4. if the association does not have a lien on the property (*ex. the member’s delinquency has not met the time periods to file a lien*), the new titleholder will claim insufficient notice of the delinquent assessments;
 5. some banks will delay prosecuting their foreclosure action because they do not want to own the home/unit if the resale market is poor;
 6. banks hope that if they delay the foreclosure lawsuit long enough, when they eventually complete the foreclosure and own the property, the resale market turned around. In the meantime, the association has a limited time period in which a bank is responsible for delinquent assessments and having a new owner take title, even the bank, allows the resumption of assessment collections;
 7. By answering the foreclosure complaint, the association is able to file a motion seeking to have the Court move the bank’s foreclosure along.



4. Bankruptcies.

If handled properly the association is a secured creditor that will eventually be paid when a member files for bankruptcy.

- a) The association is a secured creditor that is not “wiped out” with either a chapter 7 or chapter 13 bankruptcy.
- b) Although the filing of a bankruptcy requires the association to stop collecting its delinquent assessments until the bankruptcy case has been resolved, the assessments accrue. There is no time limit on recouping delinquent assessments from the Bankruptcy Court.
- c) **“Best Practices”**
 - i) As with mortgage foreclosures, receiving notice of and participating in the bankruptcy will preserve the association’s rights to collect past due assessments.
 - ii) When a bankruptcy is filed and the association’s Registered Agent is served, a Proof of Claim should be filed by the association’s lawyer.
 - iii) The Proof of Claim establishes the association as a secured creditor in the bankruptcy proceeding. Failure to file a Proof of Claim will result in a waiver of the association’s rights to collect past due assessments.
 - iv) Typically, a community association is paid by the member in increments over a time period set by the Trustee. **These time periods are usually drawn out and require detailed accounting to ensure all payments are received.**
 - v) Once a case is no longer in bankruptcy, the member will be required to pay the incremental sum set by the Trustee for the delinquent . Assessments that come due after the bankruptcy case are collectable in the usual manner.

5. Practices to Avoid.

Certain federal and state laws regarding debt collection must be followed, or the consequences for a community association can be severe.

- a) Regardless of the amount owed, a community association is forbidden to:
 - i) Publish or threaten to publish individual names or a list of names of debtors (a/k/a “dead beat list”).
 - ii) Mailing any communication to a debtor in an envelope or postcards with words written or typed on the outside of the envelope or postcard calculated to embarrass the debtor such as “Deadbeat Owner”.
 - iii) Announcing, or providing a list of, delinquent owners at Board or member meetings.
 - iv) Despite these restrictions members are entitled to access Official Records of the association ([click here for hyperlink to the statutory definition of Official Records](#)).
 - v) Discretion, discretion, discretion.



6. Is It All Worth It?

Our association does not want to be a landlord nor “throw good money after bad” chasing delinquent owners.

- a) Our present economy is creating new challenges for community associations. Is racing to the courthouse with a foreclosure lawsuit still benefit to the association?
- b) All things considered, prompt, uniform and diligent action is in the association’s best interest because:
 - i) Many owners are attempting to refinance or otherwise take steps to stay in their homes. Prompt, diligent action ensures the association is paid in full when a refinancing or rehabilitation of the owner’s finances happens.

- ii) In its role as a creditor most, if not all, of the work necessary to be performed by the association's attorney is "routine". Building on continued practice in this area, an average foreclosure lawsuit entails 3-5 hours of attorney's time and rarely ever significant costs other than the court's filing fee.
- iii) If an association holds title to a home that is subject to a mortgage in excess of the home's value and the mortgage lender refuses to take action, there is very little the association can do other than possibly renting the home. However, prior to this point of ownership, the association may be able to delay the foreclosure lawsuit hoping the bank steps in.
- iv) Some banks, but not all, are refusing to take the title from an association owned home. The fact some banks refused shocked many people and led them to believe a majority of, or all, banks are refusing to take back title. This is simply not true.
- v) If a bank does take the title of a unit back, the bank is responsible for the assessments and a delinquent owner is no longer consuming services that he/she is not paying for.
- vi) If the association does nothing, the bank has no incentive to proceed until the housing market improves and it may be a few years before assessments related to the particular home are collected.



7. The Best Defense is a Good Offense

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Position: _____

Community association name: _____

Mailing Address: _____

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Thank you!

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