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# The Alliance of Delray Residential Associations

proudly present:

***Is your community association unnecessarily losing money when a bank forecloses on a delinquent owner?***

-Joshua Gersttin, Esq. & Kelly Blum, Esq.

By now its “common knowledge”, residential bank foreclosures are on the rise and Florida in particular is leading the nation. If “the past is a predictor of the future”, Florida’s residential market will continue in this miserable condition for another two or three more years. During this period of economic tightening, an uninformed community association Director can be very costly.

If your community association does not follow, or is uninformed about, the proper collection procedure to implement when a bank forecloses on a member’s home, your association is throwing away money. Continued over time, your community association will have to levy special assessments or increase assessments to cover shortfalls.

Both condominium and homeowner associations can collect most, if not all, of the delinquent assessments owed from a member whose bank is foreclosing on his/her home. Payment of these delinquent assessments can come from the new owner who purchased the home (at a foreclosure auction or otherwise) or the bank itself if the bank owns the home (happens if the bank is unable to sell the home at auction).

Following are some tips to guide your community association through the laws and procedures that are used to collect delinquent assessments when a member’s home has been foreclosed upon by a bank. Please note these are general guidelines. Please consult with your attorney prior to undertaking any action.

## **General Guidelines for both Homeowner & Condominium Associations.**

**“First Things First”.**

1. Collection procedures at your community association must be uniformly applied to all members. This uniformity applies to all members, even those members whose homes are being foreclosed upon by their bank. Unless your *Governing Documents* allow your association to take extra measures because a member’s home is being foreclosed upon by a bank, do not use any extraordinary collection tactics (acceleration, asking for a deposit, etc.). Extraordinary collection tactics violates the various collection laws governing this subject, each of which allows for costly penalties for violators.
2. Is your association collecting late fees? If your association’s *Governing Documents* allow for the imposition of late fees (typically located in the *Bylaws*) the association should be charging late fees to delinquent owners. If your association’s *Governing Documents* do not allow the imposition of late fees, your association should consider amending its *Governing Documents*. In most instances an association’s *Bylaws*, with its lower threshold of required affirmative voters, is the proper (and easier) *Governing Document* to amend.

3. The association should designate their attorney as the association's Registered Agent. The Registered Agent is an individual that is required by law to be appointed by every Florida corporation (profit or non-profit). One of the statutory requirements of a Registered Agent is to accept service of process (lawsuits). When a bank forecloses on an owner, the association's Registered Agent is usually served by the bank with the foreclosure lawsuit. If the Registered Agent is irresponsible, no longer involved with the association, moved but never updated his/her address, a former property manager that no longer cares, etc. the Association risks missing important deadlines or suffering costly delays that can result in a waiver of rights to claim surplus funds, if any, after a member's home is sold at auction.
4. Community associations should have their attorney's answer each foreclosure Complaint filed by a bank against an owner and served upon the association. The legal fees for such tasks should be minimal because the association does not "actively litigate" these cases. Instead, the association is an interested party that by filing its Answer is staking its claim to surplus funds that remain after a foreclosure sale. Without an Answer, the association cannot seek these surplus funds and misses a good opportunity to collect past due assessments.
5. If a community association learns of a foreclosure, but has not been served with a Complaint by the bank, the association's attorney should review the public records, locate the lawsuit and then file a Motion to Intervene into the bank's foreclosure lawsuit. As above, this filing is ministerial, but required, to allow a community association to make a claim on surplus funds from an auction.

With a few simple steps and procedures, a community association can better position itself to collect delinquent assessments when a bank forecloses on a member's home. Additionally, certain recently enacted and already existing Florida laws offer significant assistance to community associations that know how to use them. Divided by the applicable form of community association (H.O.A. or Condo.), following is an overview:

*Updated for 2008*

#### **H.O.A. Only**

Until recently, homeowner associations did not have the ability to collect delinquent assessments from subsequent parcel owners, including a bank in possession, after a bank foreclosed on a member's home. However, in its latest legislative session The Florida Legislature change course and passed laws granting the following powers to homeowner associations:

(1). A parcel owner, regardless of how his or her title to property has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments that come due while he or she is the parcel owner. [Click here to view the full text of Senate Bill that passed \(SB 1986\)\(internet access is required\).](#)

(2). The present parcel owner (including a bank) is jointly and severally liable with the previous parcel owner for unpaid assessments (banks are limited to six months) that

came due up to the time of transfer of title. [Click here to view the full text of Senate Bill that passed \(SB 1986\)\(internet access is required\).](#)

There is an ongoing debate regarding whether The Florida Legislature forgot to place a cap on the amount of delinquent assessments that can be collected from the new owner, including the bank, after a foreclosure action. Until June of 2008 there was no cap on the amount of delinquent assessments that a homeowners' association can collect from a new owner, including a bank, after a bank foreclosure action has completed and the new owner obtains title. Following is the recent legislative change limiting the association's recovery against a bank to twelve (12) months of delinquent assessments or 1% (One Percent) of the mortgage amount that was foreclosed upon by the bank:

*Updated for 2008*

- *Liens.* A homeowners association, when authorized by the governing documents, has a lien on each parcel to secure the payment of assessments and other specified amounts. Such lien is effective from and relates back to the date the original declaration of the community was recorded. As to first mortgages of record, however, the lien is effective from and after a claim of lien is recorded in the public records. The legislation establishes requirements for the validity of a claim of lien and identifies the assessments and other amounts secured by the claim of lien.
- *Notice of Contest of Lien.* A parcel owner may record a notice of contest of lien, in substantially the form set forth in the statute, to require an association to enforce a recorded claim of lien against the parcel within ninety (90) days after service of the notice upon the association. The lien becomes void if the association fails to file an action to enforce the lien within such period, subject to extension for delays arising from the filing of a bankruptcy petition.
- *Foreclosure of Lien.* An association may foreclose a lien for assessments in the same manner in which a mortgage of real property is foreclosed. Further, an association may recover a money judgment for unpaid assessments, as well as reasonable attorney's fees incurred in the action.
- *Rent.* The court may require a parcel owner who remains in possession of a parcel after entry of a foreclosure judgment to pay reasonable rent. If a parcel is leased during the pendency of a foreclosure action, a receiver may be appointed to collect rent, with the expenses of such receiver to be paid by the party who does not prevail in the action.
- *First Mortgagees.* The legislation limits the liability of a first mortgagee, or its successors or assigns, that acquires title to a parcel by foreclosure or deed in lieu of foreclosure for the unpaid assessments that became due prior to such acquisition to the lesser of the unpaid common expenses and assessments that accrued during the 12 months immediately preceding the acquisition of title or 1% of the original

mortgage debt. This limitation applies only if the first mortgagee initially joined the association as a defendant in the foreclosure action filed against the parcel owner, subject to certain exceptions.

- *Notice.* The association is required to make written demand upon the parcel owner for payment of unpaid assessments before it may file a lien. The demand for payment must give the parcel owner 45 days following the date the demand is deposited in the mail to make payments for amounts due. Further, an association may not file an action to foreclose a lien until 45 days after the association has given the parcel owner written notice of its intent to foreclose the lien. Such notice may not be provided to the parcel owner until the passage of the 45-day period after mailing of written demand for payment. These time limitations do not apply if the parcel is subject to a foreclosure action or forced sale by another party or if the owner of the parcel is a debtor in a bankruptcy proceeding.
- *Qualifying Offers.* The legislation provides an additional limitation on when a parcel owner may make a qualifying offer to an association and specifies circumstances in which a qualifying offer may become void. In addition, a qualifying offer must be in substantially the written form set forth in the legislation.

### **Condominiums Only**

Although the following statutes have been in effect for years, many condominium associations did not need to utilize them until now. Even worse, some condominium associations do not know they exist. Following are the Florida condominium laws related to collecting delinquent assessments when a bank forecloses on a member's unit;

- (1). Unit owners are jointly and severally liable with the prior owner for all unpaid assessments up to the time title is transferred to the new owner. This means you can choose to collect against the new owner only or, against both the prior and new owner.
- (2). First Mortgagees (usually a bank) that obtains title to a Unit by foreclosure or deed in lieu of a foreclosure, are ONLY LIABLE for unpaid assessments up to the lesser of:
  - (a). The Unit's unpaid assessments that came due in the Six (6) months before the mortgagee took title by foreclosure or deed in lieu of foreclosure or, One Percent (1%) of the original mortgage (debt) or;
  - (b). One Percent (1%) of the original mortgage amount.

[Click here to view the above referenced statutes \(internet access is required\).](#)

### **Exceptions:**

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- (a). A first Mortgagee is exempt from liability for unpaid assessments if the previous owner's mortgage was recorded before April 1, 1992.
- (b). None of the above applies if a lien to collect unpaid assessments was recorded BEFORE the mortgage was recorded. In such an event, the full amount owed can be collected by the association.

Hopefully this article made you aware of the various tools available to your community association to assist in maximizing the collection of delinquent assessments when a bank forecloses upon a member's home. The above information is only a summary. Each community association should consult their attorney for legal advice before proceeding. Due to the time sensitive nature inherent in the above information, association's that need assistance in implementing these collection procedures should consult their attorney immediately.

By understanding the legal framework of collecting delinquent assessments, along with the guidance of good legal counsel, many community associations can avoid having to specially assess their members just to "keep the lights on".

Thank you,

--**Joshua Gerstain, Esq. & Kelly Blum, Esq.**



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