



Nuts & Bolts of Association Collections

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Associations have the obligation to collect assessments. An association's Board of Directors has a fiduciary duty to the owners within the condominium or community development to collect assessments and properly handle the association's financial affairs. To comply with this mandate, the Board of Directors relies on the timely payment of assessments. If owners fail to pay lawfully imposed assessments as required, the Board must take action to secure payment from these delinquent owners. A comprehensive collections strategy that incorporates all of the tools in the association's arsenal will efficiently and effectively deal with these issues.

Several methods are available to the Board to ensure their compliance with their duty to collect assessments. The Board should establish a collection policy and distribute this policy to all owners. The policy should include the amount of the unit or lot owners' assessment and the due date. This policy should also include the consequences to the owners for failure to pay their assessments in a timely manner. Depending on the authority of the association's governing documents, the association may assess late charges and/or interest against the delinquent owner. The Board may also choose to include information as to when the delinquent account is forwarded to the association's attorneys for collection action and that all attorneys' fees actually incurred by the association will be assessed against the owner, as provided in the association's governing documents. Once the policy is distributed to owners, uniform enforcement is critical to the Board's success. The Board should work with the association's managers and attorneys to ensure uniform implementation of the policy.

If the association utilizes a management company to handle its accounting, the Board has the responsibility to oversee the record keeping of the management company. Accounting records should be closely monitored and payments should be timely posted to owner's accounts. If the Board decides to change their management company, the Board must be certain that all financial records are properly transferred to new management and that owners are notified of the new address for the submission of payments.

Under the association's governing documents, the Declaration and Bylaws, owners have the obligation to pay lawfully imposed assessments. Case law supports this obligation. In Georgia, there is no legal justification not to pay assessments. If an owner becomes delinquent, the association's Board of Directors has the obligation to move expediently towards legal action in order to secure funds owed to the association from the delinquent owner. Timely requests for legal action are imperative. Delinquent owners can use the statute of limitations defense to avoid this debt. In Georgia, the status of limitations in an assessments collection case is four years. This defense is an affirmative defense. If the delinquent owner fails to properly raise the statute of limitations defense in a lawsuit, this defense is barred.

What can the association collect from the delinquent owner?

When an owner becomes delinquent, the association's governing documents may grant the association the ability to assess late charges, interest, and reasonable attorney's fees actually incurred. Late charges constitute a specific one-time charge for the unit or lot owner's failure to pay on time. The Georgia Condominium Act ("GCA"), and the Georgia Property Owners association Act ("POAA") limit late fees to \$10.00 or 10%, whichever is greater. If you are part of a traditional homeowners association not governed by the POAA, your governing documents

will establish your ability to charge a late fee and the amount of that fee. Interest on the unit or lot owner's past-due balance is calculated as simple interest. The GCA and POAA provide that the association may collect interest at the rate a maximum of 10% per annum on past-due assessments. Again, for traditional homeowners associations, your governing documents will determine whether you can assess interest and the rate of interest. Some Declarations provide as much as 18% per annum interest. Interest may be calculated on the cumulative assessments owed each month. The association may not collect interest on interest or attorney's fees. Finally, if the association's governing documents so provide, and pursuant to the GCA and POAA, the association may collect reasonable attorney's fees actually incurred in the collection action to collect past-due amounts owed to the association. The fees must be "actual." Contingency fees are not actual fees incurred by the association. To date, the Courts have been reluctant to award contingency fees to associations because these are fees that are not "actually incurred" by the association.

The past-due amounts owed to the association may be collected in two ways. First, the association has its lien rights against the property pursuant to the GCA, POAA, or the paper lien filed in the county land records. Second, the association may file a lawsuit to collect from the owner who has the personal obligation to pay the assessments.

How does an association secure its lien rights?

Condominium associations have a statutory lien under the GCA. Homeowners associations subject to the POAA also have a statutory lien. The GCA and POAA establish that the association has an automatic, statutory lien for unpaid assessments, late charges, interest, and collection costs, including reasonable attorney's fees actually incurred. No physical filing of the lien is required. The GCA and POAA require closing attorneys and title examiners to contact the association for a statement of any amounts owed to the association in connection with any sale or refinance of a unit or lot within the association. The recording of the association's Declaration constitutes record notice of this automatic, statutory lien. This statement serves as the notice to the closing firm of the amount of the lien against the property. If the association is not paid out of the proceeds of a sale, the purchaser may become liable for the full amount owed to the association from the prior owner, if the association's governing documents so provide.

The GCA and POAA also establish that the association's automatic, statutory lien is superior to all other liens on the unit or lot except:

1. a lien for ad valorem taxes on the unit or lot;
2. the lien of any first priority mortgage on the condominium unit or lot;
3. the lien of any mortgage recorded before the declaration was recorded;
4. a lessor's lien; and
5. the lien of any secondary purchase money mortgage holder if his or her grantee was not the seller of the condominium unit or lot to the then owner.

If a lien superior to the association's lien is foreclosed, the foreclosure will extinguish all other liens in the chain of title behind it, including the association's lien. However, if there are excess proceeds from the foreclosure sale, the association may be paid from the overage at the sale.

Traditional homeowners associations not subject to the POAA must record a paper lien in the land records of the county in which the property is located. The land records are controlled and managed by the County's Superior Court Clerk. Under common law, priority of lien rights for traditional associations is based on the common law principal "First in time, first in right." Thus, liens are paid based in the order of their recording date. For traditional associations, the timely filing of the association's lien is critical to perfecting the association's lien rights against the property. If past-due assessments are owed to the association and the association fails to secure its lien rights against the property by filing a lien, the property may be sold without the association getting paid.

How does the association go after the delinquent owner personally?

Because the association's governing documents provide that the delinquent owner is personally obligated to pay the assessments, the association can pursue the delinquent owner for a money judgment through a lawsuit. Prior to filing a lawsuit, the Fair Debt Collection Practices Act requires that the association's attorneys send a demand letter to the delinquent owner and provide a thirty-day validation period. During this time, the owner may request verification of the debt. If the owner pays the amount due as stated in the letter within the thirty-day period, all amounts owed to the association as of the date of the letter are paid in full. If the delinquent owner fails to pay the amount stated in the letter within the thirty-day period, the association may proceed with a lawsuit after verifying ownership. The lawsuit or complaint will set forth the legal theory of recovery and the amount the association claims is due by the delinquent owner. The complaint is filed in the county where the defendant resides.

Once the complaint is filed with the Court, it must be served upon the defendant. The county sheriff, county marshal, or a private process server will serve the complaint on the delinquent owner. The timeline of the lawsuit does not begin until the delinquent owner is served. Often the delinquent owner will attempt to avoid service and delay the lawsuit. The delinquent owner has forty-five (45) days to file an answer after he is served.

The delinquent owner's response or lack thereof, determines the next course of action in the suit. If the delinquent owner fails to file an answer, the association will be awarded a default judgment. The Court may or may not require a court hearing in order to obtain the default judgment. In the majority of all assessments collection lawsuit, the delinquent owners do not file answers and the associations obtain their judgments by default.

If the delinquent owner does file an answer, depending on the defenses raised, the case may proceed down one of three paths. The association may work out a payment agreement with the delinquent owner in the form of a consent order. This is a document signed by the judge that makes the agreement the order of the Court. In the alternative, the association may proceed to file a motion to resolve the case. If the delinquent owner admits the indebtedness or their answer is legally insufficient, the association may prevail by filing a motion for judgment on the

pleadings. In other cases, the delinquent owner may raise a defense that is not supported by the law. In these cases, the association may prevail by filing a motion for summary judgment. Motions must be served on the delinquent owner by mail and the delinquent owner has thirty-three days to file their response with the Court. The Court may or may not require a hearing on the motion. If the Court grants the association's motion, the case is over and the association has a money judgment against the delinquent owner.

If the Court denies the association's motion, the case may proceed to mediation or trial. The association may conduct discovery to narrow the issues for trial and obtain information from the delinquent owner that will narrow the issues at trial and obtain information to support either side of the case. Mediation is a formal settlement process with a trained neutral present to facilitate negotiations between the association and the delinquent owner. If all other efforts fail, then the trial will be set. The association's board member or property manager who controls the financial records of the association will be called as a witness in the case to testify as to the amounts owed by the association. The judge or jury will render a decision at the conclusion of the trial. Only a small fraction of cases actually end up going to trial.

Once the litigation is complete and the association has a money judgment against the delinquent owner, what comes next?

Far more often than not, you do not simply receive a check from the delinquent owner after you obtain the judgment. Instead, you have to make an active effort to collect the judgment. To do this, you will need to locate the owner's assets.

An easy way to locate assets is to run the owner's credit report. Credit reports contain a wealth of asset leads as they list the owner's accounts, employers, lenders and potential lenders. Even if you do not find an active bank account on the credit report, you may learn of other entities to which the owner may have furnished a credit application or financial statement. You may then send a subpoena to these entities for the production of these documents, which, as you would expect, are loaded with asset information.

Another effective way to locate assets is through the use of post-judgment discovery. Post-judgment interrogatories and requests for production of documents may be sent asking for very specific asset information and documentation. These are not optional, and the owner must truthfully and thoroughly respond. If not, you may file a motion with the Court to compel an acceptable response. Should the owner remain uncooperative, a motion for contempt may be filed calling for the incarceration of the owner pending full discovery responses as well as the payment of additional attorney's fees. Further, a post-judgment deposition may be scheduled. Again, this is not optional, and the owner must appear and truthfully and completely respond to the questions asked. If not, the same remedies apply as for the failure to respond to written discovery. If neither option is effective, a private investigator may be hired to conduct a search for garnishable assets. Private investigators are often very effective at locating assets, even where all other efforts have failed.

However, the best source for locating assets is already in your file cabinet. The association can make copies of every owner's checks every four to six months. That way, the association has instant bank information if the owner falls behind. Also, simply pay attention.

Keep your eyes and ear open. Make a note of the owner's automobile and tags numbers, as well as of the owner's employer and business address. If the owner lives elsewhere, require and keep a copy of the lease for the rental of the unit. Often the best post-judgment collection efforts may be made before the owner ever becomes delinquent in the first place.

Once you have located an owner's assets, how do you collect your judgment?

The first, and best, option is to file a garnishment. A garnishment may be filed on the owner's bank accounts, wages, rental proceeds or anything else of value owed to him by another. A garnishment is filed with the Court in the county having jurisdiction over the garnishee, or the entity holding or controlling the assets belonging to the owner. Specifically, you would file with the Court an affidavit of garnishment stating the judgment information along with the present amount owing on the judgment. The garnishee then is required to file an answer to the garnishment, and pay into the Court any monies subject to the garnishment. In the case of a bank account, this means the entire balance up to the value of the garnishment. In the case of wages, this means twenty-five percent of the owner's disposable earnings after taxes and social security are paid for the six months the garnishment stays in effect. In the case of a rent garnishment, the owner's lessee pays the rental proceeds into the Court, instead of to the owner's pockets.

Since the garnishment represents such a huge hit on the owner's finances, affected owners will frequently file a proceeding called a traverse in an attempt to halt the garnishment. However, such traverse may challenge only the existence of the underlying judgment or the amount claimed owing in the affidavit of garnishment. Therefore, these traverses rarely have any legal merit, and are routinely denied by the Court. On the other hand, you, as the garnishor, also have the right to file a traverse in the event you believe the answer filed by the garnishee is untrue or insufficient. Because you verified asset information prior to the filing of the garnishment, these traverses are typically meritorious, and are routinely granted by the Court where it is shown with some degree of evidence that the garnishee's answer is false or otherwise lacking.

Even better is where the garnishee fails to file an answer to the garnishment. In these cases, a default judgment may be awarded to you against the garnishee for the full amount of the garnishment. While these judgments may be set aside fairly easily, in the event they are not, they represent a goldmine. It is always a safe bet that garnishees, usually companies or banks, have deeper pockets than your delinquent owner. They will have the financial ability, if not necessarily the enthusiasm, to pay the judgment, and once the judgment vests, are on the hook just as much as the owner.

Clearly, the attributes of the garnishment process cannot be overstated. However, there are certain categories of monies that are exempt from garnishment. Under all circumstances, social security benefits may not be garnished. Furthermore, non-IRA pensions, retirement plan benefits, and some life insurance benefits are exempt until paid out and "in the hands" of the owner. Still, these represent but a small fraction of the overall funds subject to garnishment, and subject to winding up in your own coffers.

Association collection efforts can be deterred by delinquent owners in several ways. Lender foreclosure and bankruptcy filing by the delinquent owner are the most common. Often when an owner is not paying his/her assessments, they are not paying their mortgage. In most cases, the mortgage lender has the superior lien on the property and can foreclose. The security deed allows for non-judicial foreclosure and the sale occurs after proper notice by the lender to the owner. If there is a surplus from the foreclosure sale, association can get paid depending on its priority. However, in most circumstances, there is no surplus and the foreclosure sale effectively eliminates the association's lien against the property. In most situations, the liability for the past-due assessments still remains the personal obligation of the owner who can be pursued in a lawsuit. Once the new owner (i.e. the bank or new purchaser from the foreclosure sale) takes title, the new owner becomes liable for assessments from the date of the foreclosure sale forward. The new owner is not responsible for any past due assessments that accrued prior to the sale or any attorneys fees incurred after the sale by the association in attempts to collect the past due amounts from the delinquent prior owner.

If the delinquent owner files bankruptcy, all collection action must cease against them. Chapter 7 Bankruptcy can result in the complete discharge of the personal obligation of the delinquent owner for pre-petition debt. Post-petition debts remain due. Chapter 13 Bankruptcy is a reorganization of the delinquent owner's debt where the delinquent owner seeks an allocation of assets to creditors in order of priority and over an extended period of time. In Chapter 13 cases, the association typically receives partial payment of the amounts owed. The only way to continue collections activity against a delinquent owner who is in an active bankruptcy case is to file a motion for relief from the automatic stay in the Bankruptcy Court.

What does an association do when the previous collection tools are unsuccessful?

When the association has exhausted other collection vehicles, the association may proceed to foreclose its lien. The association must file a lawsuit to proceed with judicial foreclosure of the lien. Georgia law always has allowed for lien holders, like a community association, to foreclose its lien to collect outstanding charges. However, foreclosure of an association's lien typically requires the association to first pay off any first mortgage on the delinquent owner's property. For traditional homeowners associations not subject to the POAA, you must cross this hurdle if you wish to foreclose on the association's lien. To foreclose, the association's lien must be first in line. All superior encumbrances must be paid off before the association can proceed with the sale. This requirement makes foreclosure extremely difficult for most associations.

However, foreclosure is no longer an impossible remedy for many associations. In particular, in July 2004, the Georgia legislature provided a simpler, more effective foreclosure power for communities struggling with serious delinquencies, by enacting a new law which allowed associations submitted to the GCA or POAA to have the statutory ability to get court orders to foreclose their liens without first paying off superior liens, like first mortgages. This change in the law gave a tremendous new collection power to condominiums submitted to the GCA and homeowner associations submitted to the POAA.

Under the GCA and POAA, the association must provide notice to the delinquent owner prior to proceeding with the foreclosure suit. The association must provide this notice at least thirty days prior to the filing of the complaint. This notice complies with the Fair Debt Collection Practices Act, when necessary. If the owner fails to pay the total balance owed to the association, or work out payment arrangements, within the thirty-day period, the association may proceed with the foreclosure suit.

Foreclosure suits are filed in the county in which the property is located. Prior to filing a complaint in the Superior Court, the association should complete a full title search on the property. Because the purchaser at the foreclosure sale will take ownership of the property subject to superior liens, the association needs to fully evaluate those encumbrances to determine the marketability of the property. Once the title search is evaluated and the association determines that they wish to move forward, the lawsuit is filed seeking a money judgment against the delinquent owner and a court order allowing the association to foreclose on its lien.

When the association obtains the order of foreclosure from the Court, it will proceed to work with the sheriff's office to sell the property. An advertisement will be prepared and presented to the sheriff's office for the purpose of advertising the sale. The advertisement will run for four consecutive weeks in the county's official legal organ. The sheriff will then sell the property on the courthouse steps. The association will provide the necessary documents to the sheriff to facilitate the sale and establish the starting price for the sale. A representative of the association should be present at the sale.

At the sale, either a third-party buyer or the association may purchase the property. This sale divests the delinquent owner of title to the property. The purchaser then holds legal title to the property. After purchase, the buyer will have to deal with the superior encumbrances on the property, i.e., the first priority mortgage. Typically, upon notice of the foreclosure sale, the mortgage company will call the mortgage due and the buyer will have to make arrangements to pay that debt. The buyer will also have to remedy any existing covenant violations that exist on the property.

There are several likely outcomes to the foreclosure suit because this is a drastic collection remedy that will divest the delinquent owner of title to his/her property. If the delinquent owner files bankruptcy, the foreclosure action will stop. Or, the delinquent owner may sell or refinance the property to avoid foreclosure. The association may also decide to accept a payment plan from the delinquent owner. In all of these outcomes, the association is likely to receive some or all of the amounts due to the association.

In some cases, the results of the foreclosure suit will not result in payment to the association, but will result in the owner losing title to the property. Once the unit or lot owner loses title, the amount of the delinquency no longer increases monthly or annually. The personal obligation against the delinquent owner remains. Many associations are pleased with this result because the delinquent owner is forced out of their community and the continuing increase of the delinquency stops. This result may also occur if the lender forecloses any time during the foreclosure process.

Once a money judgment is obtained, associations can levy on real or personal property owned by the delinquent owner. To levy against personal property, the association will notify the sheriff's office of the judgment and send the sheriff to collect and sell the goods. To be able to file a levy on the owner's real or personal property, the judgment must be recorded and the association must obtain a writ of fieri facias ("fi. fa."). The fi. fa. attaches to all real property owned by the judgment debtor on the county where it is recorded. This process is expensive. The association must pay the costs of transporting, storing and advertising the sale of the goods. Typically, the value of personal items is very small. A possible exception to this rule would be an automobile. To levy on an automobile, or any personal property, the property must be owned outright by the delinquent owner at the time of the levy.

An alternative to the foreclosure process for traditional homeowners associations is to levy the owner's real property to satisfy a previously obtained judgment against the delinquent owner. Levy against real property is possible and the association may seek equitable relief from the Court to proceed with the levy even if they cannot afford to pay off the first mortgage. Because we are seeking an equitable remedy, the judge may find that the amounts owed to the association may not warrant divesting someone of title in their home. A judge may not find it "fair or equitable" to sell the property. However, if the Court grants the association's order to sell the property, the sale takes place through the sheriff's office as described above.

Delinquencies are a serious concern for many associations. Because the association has the obligation to collect assessments and the association's board has the responsibility to manage the association's finances in a fiscally responsible manner, boards must utilize all collection tools at their disposal to achieve their goals. From proper monthly oversight, collection letters and collection calls, to lawsuits for money judgments and judicial foreclosure, the association's Board must utilize their business judgment to determine the best tool to use at any given time. Association boards should utilize the experience of their managers and the association's attorneys to determine the best course of action to develop a strategy for success.