CONTINUING EDUCATION FOR FLORIDA CAM LICENSEES

FORECLOSURE AND INSURANCE UPDATE

Insurance and Financial Management Topic

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Insurance and Financial Management Topic: Foreclosure and Insurance Update

Introduction

The Florida community association management industry continues to experience dramatic changes in the marketplace and in the regulatory realm. This course examines foreclosure and insurance, items that affect all community associations and, therefore, all community association managers.

Learning objectives:

Upon completion of this course, students should be able to:

- Discuss the types and characteristics of community association property insurance
- List statutory requirements for condominium and cooperative insurance coverage
- Understand fidelity bonding and liability insurance for directors and officers
- Explain flood insurance, performance bond and workers' compensation insurance
- Describe the requirements for insurance policy access
- Describe the power of the association to bring an action to recover a money judgment
- Explain the notice requirements in order to record and foreclose a lien for assessments
- Understand the foreclosure process
- Describe the required contents of a claim of lien
- Describe recent court decisions related to association rights and responsibilities
- Explain new foreclosure rules issued by the Supreme Court of Florida
- Describe what happens when an association acquires title by foreclosure
- Explain the dangers of attempting to foreclose when a prior lien exists
- Discuss the steps that may be taken by an association when an owner is delinquent and the unit is occupied by a tenant

I. PROPERTY INSURANCE

Insurance is designed to protect property and individuals in the event of injury or property damage or destruction. The Board of directors of the community association is responsible for protecting the association's assets, specifically the common property. The cost of the insurance is specified in the budget and is included in the owner's assessments.

A. The Condominium Act, INSURANCE §718.111(11), F.S.

Property, fire and casualty insurance is replacement cost coverage based on the insurable value. Homeowners' associations and cooperative associations provide coverage as defined by the documents. This subsection of Chapter 718 applies to every residential condominium in the state, regardless of the date of its declaration of condominium.

1. Adequate property insurance must be based on the replacement cost of the property to be insured as determined by an independent insurance appraisal at least once every 36 months or an update of a prior appraisal.

2. An association or group of associations may provide adequate property insurance through a self-insurance fund.

3. A deductible is the amount of money the insured party must pay before the insurance company's own coverage plan begins. Statutes dictate the treatment of deductibles by community associations.

    a. Must be consistent with industry standards

    b. May be based upon available funds, including reserve accounts, or predetermined assessment authority at the time the insurance is obtained.

    c. Established by the board at a meeting based upon the level of available funds.

4. Freestanding buildings need not be insured by the association if the declaration requires the unit owner to obtain adequate insurance for the condominium property.

5. Primary coverage "must" be provided for all portions of the condominium property in accordance with the original plans or alterations.

6. The coverage must exclude

   a. All personal property within the unit or limited common elements

   b. Floor, wall, and ceiling coverings

   c. Electrical fixtures

   d. Appliances

   e. Water heaters

   f. Water filters

   g. Built-in cabinets and countertops

   h. Window treatments

7. Limited common elements may either be insured by the unit owner(s) or by the association at the users cost

8 Section 718.111(11)(j) Reconstruction

   a. Condominium property that must be insured by the association shall be reconstructed, repaired or replaced as necessary by the Association as a common expense (regardless of insurance proceeds.

   b. Absent an opt-out vote, any repairs necessitated by a casualty loss which must be insured by the Association must also be repaired by the Association even if insurance proceeds are unavailable.

   c. A unit owner may undertake reconstruction work on portions of the unit with the prior written consent of the board but may be conditioned upon:

      i. the approval of the repair methods,

      ii. the qualifications of the proposed contractor, and

      iii the unit owner obtaining all required permits and approvals in advance.

   d. All deductibles, uninsured losses and other damage in excess of insurance coverage are the responsibility of the association as a common expense

   e. However, a condominium association may opt-out of the law and allocate repair or reconstruction expenses in the manner provided in the Declaration as originally recorded.

INSURANCE CASE STUDIES

Case #1: Condominium Air Conditioning Damage Caused by Lightning

The outdoor air conditioning unit servicing a condominium unit owned by Jones was struck by lightning and inoperable. Jones immediately notified the management company to make repairs. A representative refused, explaining that the declaration defines the air conditioning equipment as "limited common elements" and that as owner of the property, Jones was required to "maintain, repair, and replace" these items. Based on that information Jones turned the claim into her insurance company. The insurance carrier denied the claim stating that the damage to the air conditioning unit was the responsibility of the association.

Q: Is Jones out of luck or is someone making an incorrect representation?

Case #2: Condominium Water Damage from a Leak

Harris, the owner of a condominium unit on the ground floor of a three-story building, suffered water damage resulting from the extreme overflow of a bathtub in a unit above. Harris did not have insurance. Harris decided to file a claim to the insurer of the unit above for damage to personal property and notified the association that it would be responsible for repairing the drywall. Both told him that it was his own risk to be uninsured and he was out of luck. In particular, the association representative told Harris that the drywall damage was the result of routine wear and tear and was his own responsibility.

Q: Is Harris out of luck or is someone making an incorrect representation?

Case #3: Condominium Board Says Owner Must Carry Insurance on the Unit

Tshida, a unit owner in a high-rise condominium, received a notice from the board stating that she was required to deliver a current copy of an HO-6 Certificate of Insurance or face penalties. Tshida owns the property outright and when she purchased the property she wasn't aware of a requirement to purchase insurance.

Q: Does the law require that Tshida carry insurance on her condominium unit? What legal action can be taken against Tshida if she chooses not to have insurance on the unit?

SOLUTION

Case #1: Condominium Air Conditioning Damage Caused by Lightning

A: The management company representative made an incorrect representation. The association is obligated to insure the condominium property and to repair the condominium property following damage caused by an insurable event.

Chapter 718 provides that the association's property insurance policy must provide coverage for all portions of the condominium property as originally installed or replacements of like kind and quality, in accordance with the original plans and specifications. The statute then lists excluded items (listed at item 6 above): all personal property within the unit or limited common elements; floor, wall, and ceiling covering; electrical fixtures; appliances; water heaters; water filters; built-in cabinets and countertops; window treatments and replacements of any of the foregoing which are located within the boundaries of the unit and serve only such unit.

The outdoor air conditioning unit is part of the "condominium property as originally installed" and is not on the list of "excluded items" and is therefore the insurance responsibility of the association.

This is true even if the declaration defines air conditioning equipment as limited common elements and require the owner to maintain, repair, and replace these items.

The duty to maintain, repair, or replace is in the declaration, but the duty to insure and repair after an insurable event is set by statute.

Because the air conditioning unit was damaged by an insurable event, it must be reconstructed, repaired, or replaced as necessary by the association and must absorb any deductible as a common expense shared by all unit owners.

SOLUTION

Case #2: Condominium Water Damage from a Leak

A: The association insures the drywall and is responsible for the cost of repair or replacement.

The Association is required to insure "all portions of the condominium property as originally installed or replacement of like kind and quality." Drywall is part of the original condominium property as originally installed and is not on the list of items that are excluded from the association's insurance responsibility. Therefore, if drywall is damaged due to an "insurable event," such as the overflow of a bathtub, the Association is responsible to repair or replace it. The deductible is a common expense paid for by all owners.

But here are a couple of twists:

1. If there was negligence or a violation of the condominium documents by the owner above, Harris may seek contribution for his personal property loss and the association may seek contribution for the drywall.

2. If the damage results from something other than an "insurable event" - such as a slow, continuous leak - then the work necessary due to routine wear and tear will be covered by the maintenance provisions of the declaration.

SOLUTION

Case #3: Condominium Board Says Owner Must Carry Insurance on the Unit

A: There used to be a requirement in Chapter 718 requiring unit owners to carry HO-6 insurance coverage. However, that provision was created in 2008 and removed in 2010. The current version does not contain an express requirement that unit owners carry insurance.

The condominium association has the legal obligation to maintain insurance on all of the condominium improvements, both inside and outside the unit, with some exceptions. The statute expressly excludes from the association's insurance responsibility "all personal property within the unit or limited common elements, and floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of the unit and serve only such unit. Such property and any insurance thereupon is the responsibility of the unit owner." This language clearly makes the owner responsible for the property but in no way requires the purchase of insurance.

It is possible that the association documents require owners to carry insurance. The fact that Tshida "wasn't aware of a requirement to purchase insurance" doesn't excuse her from compliance. Some documents go on to state that in the event an owner fails to carry insurance, the association has the ability to 'force-place' the insurance and seek to collect the cost from the owner.

B. Fidelity Bonding

The association MUST maintain (at its cost) insurance or fidelity bonding of all persons who control or disburse funds of the association.

1. Must cover the maximum funds that will be in the custody of the association or its management agent at any one time.

2. The fidelity bond covers the association for losses incurred as a result of fraudulent or dishonest acts of the president, secretary and treasurer plus the management agent and employees who control or disburse funds of the association.

C. Association Liability Insurance for Directors and Officers

An association MAY obtain liability insurance for directors and officers.

1. Provides protection to the association against legal liability which it may incur through the conduct of its activities or the provision of services by its Board.

2. Covers basic incidents and defense in lawsuits against the association

Directors and Officers Liability Lawsuits

There have been a number of lawsuits filed by members against the association for such things as reimbursement for costs sustained as a result of damages to property due to inappropriate Board decisions. In many cases the amount of money sought by the unit owner or owners is less than what it costs to defend the claims. Is the association's Board of directors protected against claims of negligence or breach of fiduciary duty?

In a recent lawsuit an owner sued the association claiming the Board failed to adequately maintain the roof and other portions of the property. The Court determined that the Board was NOT covered because of an exclusion for loss in connection with any claim arising out of any damage, destruction, loss of use or deterioration of any tangible property including mold, toxic mold, mildew, fungus, or wet or dry rot.

The owner was successful in gaining reimbursement for costs sustained as a result of damages to property that would not otherwise exist if the Board had appropriately attended to the needs of the property. Liability claim denials are becoming more prevalent, so check your policy so you understand what is EXCLUDED from coverage and compare policies before renewing.

D. Flood Insurance

An association MAY obtain flood insurance to provide coverage for buildings and contents.

Condominium Flood Insurance: "may" or "shall"

An association is clearly required to purchase flood insurance if mandated in the governing documents. But what if the documents are silent?

The Florida Condominium Act provides that an association "may" obtain and maintain flood insurance for the condominium property, but it also states that an association "shall" obtain and maintain adequate property insurance. Clearly flood insurance is property insurance. So which is it: may or shall?

Some are making the "must" argument, claiming that adequate property insurance would include flood insurance, particularly if the condominium is located in a FEMA Special Flood Hazard Area (SFHA). This may be a matter for the Board to discuss with association legal counsel and its insurance agent.

E. Performance Bond

A performance bond is a surety bond issued by an insurance company to guarantee satisfactory completion of a project by a contractor.

1. Association may require contractors to provide a performance bond
2. Labor and material payment bond is usually issued with performance bond to cover contractor failure to pay labor, materials, etc.

F. Workers' Compensation

Employers are required to provide workers' compensation insurance to cover employees who are injured while working or who contract an illness as a result of the work. The insurance pays for all medical expenses and provides benefits for lost wages.

1. An employer in the non-construction industry who employs 4 or more part- or full-time employees must obtain workers' compensation coverage
2. Corporate officers are considered employees, unless they elect to exempt themselves

G. Insurance Policy Access

Association insurance policies are official records of the association and may be inspected by members and their representatives.

H. Florida Department of Financial Services

The sale of insurance in Florida is regulated by the Florida Department of Financial Services.

I. How to Review Your Condo Association Master Insurance Policy

1. **Each building's replacement cost.** Make sure you factor in type of construction, year built, square footage, number of stories, and other features of your building. Building in an inflation factor to your master policy can help mitigate some of this, but the condo association should still review each building's value every few years.

2. **Directors & officers coverage.** Not all condo associations have this coverage. Considering its minimal cost, it is a wise investment to protect the interests of the association.

3. **Employee dishonesty limit.** This limit is equal to the amount of money the condo association has in the bank. This value should be regularly reviewed.

4. **Sewer or drain back-up.** Sewer and drain back-up actually happens quite frequently with condo associations, and this coverage would pay for the ensuing damages/repairs. Typically, this coverage must be added to the master policy and has limits of $25,000, $50,000, and $100,000.

5. **Umbrella.** This coverage kicks in when the limits of the **general liability policy** are exceeded. Umbrella coverage could be critical in the event a large claim is made over a drowning in the condo pool or an accident on the playground, for example.

6. **Flood coverage.** If you are in a flood zone, make sure you work with your insurance agent to consider flood coverage.

7. **Wind coverage.** This coverage might be included in your master policy, but in Florida it is typically purchased separately. The price for this coverage is usually considerable because it pays for all wind-related damage, including hurricanes.

8. **Wind deductible.** If you have a wind deductible, it's important to find out if it is a per season or per occurrence deductible.

9. **Your agent.** Many condo associations assume that they are stuck with an agent, even if they don't feel he/she is competent or trustworthy. In reality, you can keep the same coverage with the same insurance company and switch agents.

10. **Premium.** Are you paying too much for your master insurance policy? If so, don't be afraid to negotiate.

II. ASSOCIATION LIEN FOR ASSESSMENTS AND FORECLOSURE—

A. 718.116 Assessments, Liability, Lien and Priority

1. A unit owner, regardless of how his or her title has been acquired, is liable for all assessments which come due while he or she is the unit owner.

2. The liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lesser of:

    a. The unit's unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

    b. One percent of the original mortgage debt

3. An association that acquires title to a unit through the foreclosure of its lien for assessments is not liable for any unpaid assessments and fees that came due to any other association before the association's acquisition of title.

4. The person acquiring title shall pay the amount owed to the association within 30 days after transfer of title.

5. If the unit is rented prior to the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent.

6. The association has the power to purchase the condominium parcel at the foreclosure sale and to hold, lease, mortgage, or convey it.

7. A first mortgagee acquiring title to a condominium parcel as a result of foreclosure must pay some (?) or all of the common expenses coming due during the period of such ownership.

8. Within 15 days after receiving a written request, the association shall provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association.

9. A unit owner may not be excused from payment of the unit owner's share of common expenses unless all other unit owners are likewise proportionately excluded from payment (with some exceptions for developer-controlled associations).

B. Owner is Delinquent and Unit is Occupied by a Tenant

1. If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay to the association the subsequent rental payments and continue to make such payments until all monetary obligations of the unit owner

related to the unit have been paid in full to the association. The tenant must pay the monetary obligations to the association until the association releases the tenant or the tenant discontinues tenancy in the unit.

a. The association must provide the tenant a notice, by hand delivery or United States mail, in substantially the following form:

> Pursuant to section 718.116(11), Florida Statutes, the association demands that you pay your rent directly to the condominium association and continue doing so until the association notifies you otherwise.
>
> Payment due the condominium association may be in the same form as you paid your landlord and must be sent by United States mail or hand delivery to (full address), payable to (name).
>
> Your obligation to pay your rent to the association begins immediately, unless you have already paid rent to your landlord for the current period before receiving this notice. In that case, you must provide the association written proof of your payment within 14 days after receiving this notice and your obligation to pay rent to the association would then begin with the next rental period.
>
> Pursuant to section 718.116(11), Florida Statutes, your payment of rent to the association gives you complete immunity from any claim for the rent by your landlord for all amounts timely paid to the association.

b. The association must mail written notice to the unit owner of the association's demand that the tenant make payments to the association.

c. The association shall, upon request, provide the tenant with written receipts for payments made.

d. A tenant is immune from any claim by the landlord or unit owner related to the rent timely paid to the association after the association has made written demand.

2. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord.

3. The association may issue notice under s. 83.56 and sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment to the association after written demand has been made to the tenant. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no obligations under s. 83.51.

C. Filing and Foreclosure of the Association Lien

If regular or special assessment payments are in default, the Board has the power to bring an action to recover a money judgment without waiving their right to file a lien. If they choose to file a lien it may be foreclosed in the same manner as a mortgage. There are strict notice requirements in order to record and foreclose a lien for assessments.

1. The association may accelerate, file and foreclose on defaulted assessment payments, interest and collection costs but not late fees

2. The lien must be recorded with the Clerk of Circuit Court in the county where the property is located

3. Advance notice by first class and/or certified mail (or personal delivery cooperative) is required prior to recording the lien AND prior to foreclosing

   a. Homeowners' association
      45 days

   b. Condominiums and cooperatives
      30 days

NOTICE OF INTENT TO RECORD A CLAIM OF LIEN

RE: Unit ___ of _____ (name of association)

The following amounts are currently due on your account to_____ (name of association) and must be paid within 30 days after your receipt of this letter. This letter shall serve as the association's notice of intent to record a Claim of Lien against your property no sooner than 30 days after your receipt of this letter, unless you pay in full the amounts set forth below:

Maintenance due__ (dates) $_____ .

Late fee, if applicable $_____ .

Interest through __ (dates) * $ _____.

Certified mail charges $_____ .

Other costs $_____ .

TOTAL OUTSTANDING $_____ .

*Interest accrues at the rate of _____ percent per annum.

4. A unit owner may record a NOTICE OF CONTEST OF LIEN requiring the association to enforce the recorded claim of lien within 90 days

NOTICE OF CONTEST OF LIEN

TO: (Name and address of association) You are notified that the undersigned contests the claim of lien filed by you on , (year) , and recorded in Official Records Book at Page , of the public records of County, Florida, and that the time within which you may file suit to enforce your lien is limited to 90 days from the date of service of this notice. Executed this day of , (year) .

Signed: (Owner or Attorney)

5. A Notice of DELINQUENT ASSESSMENT must be given at least 30 days (condominium) or 45 days (HOA) before a foreclosure action is filed

   a. Notice must be delivered or by certified or registered mail

   b. If brought current before a final judgment of foreclosure, the association shall not recover attorney's fees or costs

DELINQUENT ASSESSMENT

This letter is to inform you a Claim of Lien has been filed against your property because you have not paid the (type of assessment) assessment to (name of association) . The association intends to foreclose the lien and collect the unpaid amount within 30 days of this letter being provided to you.

You owe the interest accruing from (month/year) to the present. As of the date of this letter, the total amount due with interest is $_____ . All costs of any action and interest from this day forward will also be charged to your account.

Any questions concerning this matter should be directed to (insert name, addresses, and telephone numbers of association representative) .

6. An action to enforce the lien must be commenced within 1 year after the lien is recorded

    a. The 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a filed bankruptcy petition

    b. The lien secures all unpaid assessments that are due and that may accrue after the claim of lien is recorded plus

        i. interest,

        ii. administrative late fees, and

        iii. all reasonable costs and attorney fees incurred by the association incident to the collection process.

7. The enforcement action is the forced sale of the property by the clerk of circuit court.

    a. A Certificate of Sale is issued to the high bidder who 10 days later receives a Certificate of Title.

    b. The Certificate of Title transfers the foreclosed party's interests in the property **subject to prior liens, claims or encumbrances such as a bank mortgage or construction lien.**

8. Upon payment in full, the person making the payment is entitled to a satisfaction of the lien

RELEASE OF LIEN

The undersigned lienor, in consideration of the final payment in the amount of $, hereby waives and releases its lien and right to claim a lien for unpaid assessments through , (year) , recorded in the Official Records Book at Page , of the public records of County, Florida, for the following described real property:

UNIT NO.____ OF (NAME OF CONDOMINIUM) , A CONDOMINIUM AS SET FORTH IN THE DECLARATION OF CONDOMINIUM AND THE EXHIBITS ANNEXED THERETO AND FORMING A PART THEREOF, RECORDED IN OFFICIAL RECORDS BOOK , PAGE , OF THE PUBLIC RECORDS OF COUNTY, FLORIDA. THE ABOVE DESCRIPTION INCLUDES, BUT IS NOT LIMITED TO, ALL APPURTENANCES TO THE CONDOMINIUM UNIT ABOVE DESCRIBED, INCLUDING THE UNDIVIDED INTEREST IN THE COMMON ELEMENTS OF SAID CONDOMINIUM.

(Signature of Authorized Agent) (Signatures of Witnesses)

Sworn to (or affirmed) and subscribed before me this day of , (year) , by (name of person making statement) .

(Signature of Notary Public)

III. FLORIDA CONSTRUCTION LIEN LAW

Chapter 713, Florida Statutes, establishes the requirements for placing and enforcing a construction lien on real property. The lien law authorizes those that furnish labor and material to improve real property and those that perform professional services, such as architects, landscape architects, engineers, interior designers, land surveyors and mappers to file a lien as security for payment.

1. The association should record a Notice of Commencement that identifies the name and address of the owner and requires all persons that furnish labor and materials to send a "Notice to Owner".

2. To claim a lien, the general contractor is required to include a "Notice to Owner" in the contract.

3. Any other person is required to deliver a "Notice to Owner" not later than 45 days from the date of first labor, services, or materials delivered to the job site.

4. The association can protect itself from paying twice for improvements to the property by requiring a contractor to furnish releases of lien from all persons that served a "Notice to Owner."

5. If partial payments are made, a partial payment affidavit will certify to the association that all potential lienors have been paid to the extent payments have been made by the association to the contractor.

6. Actual/verbal notice to the owner by a subcontractor is NO substitute for the written notice to owner.

WARNING! FLORIDA'S CONSTRUCTION LIEN LAW ALLOWS SOME UNPAID CONTRACTORS, SUBCONTRACTORS, AND MATERIAL SUPPLIERS TO FILE LIENS AGAINST YOUR PROPERTY EVEN IF YOU HAVE MADE PAYMENT IN FULL.

UNDER FLORIDA LAW, YOUR FAILURE TO MAKE SURE THAT WE ARE PAID MAY RESULT IN A LIEN AGAINST YOUR PROPERTY AND YOUR PAYING TWICE.

TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN RELEASE FROM US EVERY TIME YOU PAY YOUR CONTRACTOR.

NOTICE TO OWNER

To (Owner's name and address)

The undersigned hereby informs you that he or she has furnished or is furnishing services or materials as follows:

(General description of services or materials) for the improvement of the real property identified as (property description) under an order given by .

Florida law prescribes the serving of this notice and restricts your right to make payments under your contract in accordance with Section 713.06, Florida Statutes.

IMPORTANT INFORMATION FOR YOUR PROTECTION

Under Florida's laws, those who work on your property or provide materials and are not paid have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

If your contractor fails to pay subcontractors or material suppliers or neglects to make other legally required payments, the people who are owed money may look to your property for payment, EVEN IF YOU HAVE PAID YOUR CONTRACTOR IN FULL.

PROTECT YOURSELF:

—RECOGNIZE that this Notice to Owner may result in a lien against your property unless all those supplying a Notice to Owner have been paid.

—LEARN more about the Construction Lien Law, Chapter 713, Part I, Florida Statutes, and the meaning of this notice by contacting an attorney or the Florida Department of Business and Professional Regulation.

(Lienor's Signature) (Lienor's Name) (Lienor's Address) Copies to: (Those persons listed in Section 713.06(2)(a) and (b), Florida Statutes)

7. The lien must be recorded in the county in which the property is located within 90 days from the date the lienor last furnished consequential work - not minor punch list type repairs.

8. A copy of the Claim of Lien must be served on the owner within 15 days from the date it is recorded.

WARNING!

THIS LEGAL DOCUMENT REFLECTS THAT A CONSTRUCTION LIEN HAS BEEN PLACED ON THE REAL PROPERTY LISTED HEREIN. UNLESS THE OWNER OF SUCH PROPERTY TAKES ACTION TO SHORTEN THE TIME PERIOD, THIS LIEN MAY REMAIN VALID FOR ONE YEAR FROM THE DATE OF RECORDING, AND SHALL EXPIRE AND BECOME NULL AND VOID THEREAFTER UNLESS LEGAL PROCEEDINGS HAVE BEEN COMMENCED TO FORECLOSE OR TO DISCHARGE THIS LIEN.

CLAIM OF LIEN

Before me, the undersigned notary public, personally appeared , who was duly sworn and says that she or he is (the lienor herein) (the agent of the lienor herein), whose address is ; and that in accordance with a contract with , lienor furnished labor, services, or materials consisting of on the following described real property in County, Florida:

(Legal description of real property)

owned by of a total value of $, of which there remains unpaid $, and furnished the first of the items on , (year) , and the last of the items on , (year) ; and (if the lien is claimed by one not in privity with the owner) that the lienor served her or his notice to owner on , (year) , by ; and (if required) that the lienor served copies of the notice on the contractor on , (year) , by and on the subcontractor, , on , (year) , by .

(Signature)

Sworn to (or affirmed) and subscribed before me this day of , (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

9. Upon receipt of a Claim of Lien, check your records to determine whether a "Notice to Owner" has been furnished to you within 45 days from the date a lienor first furnished labor and material to the project.

10. Thereafter, a lienor must file a lawsuit to foreclose the Claim of Lien within one year from the date it is recorded unless a "Notice of Contest of Lien" is served on the lienor.

11. A "Notice of Contest" shortens the statute of limitations to 60 days after it is recorded.

NOTICE OF CONTEST OF LIEN

To: (Name and address of lienor)

You are notified that the undersigned contests the claim of lien filed by you on , (year) , and recorded in Book , Page , of the public records of County, Florida, and that the time within which you may file suit to enforce your lien is limited to 60 days from the date of service of this notice. This day of , (year) .

Signed: (Owner or Attorney)

The lien of any lienor upon whom such notice is served and who fails to institute a suit to enforce his or her lien within 60 days after service of such notice shall be extinguished automatically. The clerk shall serve, in accordance with s. 713.18, a copy of the notice of contest to the lien claimant at the address shown in the claim of lien or most recent amendment thereto and shall certify to such service and the date of service on the face of the notice and record the notice.

12. Do not make final payment until receipt of a "Builder's/Contractor's Affidavit" that releases all lien rights.

BUILDER'S / CONTRACTOR'S AFFIDAVIT

STATE OF FLORIDA
COUNTY OF XXXXXXXX

_____, As _____Of
_____,being first duly sworn deposes and says as follows:

That he is the Owner/Builder and/or Contractor who constructed or repaired, or caused to be constructed or repaired, the improvements on the property described below, being in Highlands County, State of Florida.

That all charges and costs for labor performed, material furnished and fixtures installed on said premises have been fully paid; that said premises are free and clear of all lienable claims whatsoever arising under and by virtue of said construction.

That no chattel mortgages, conditional sale contracts, security agreements, financing statements, retention of title agreements, or personal property leases have been given or are now outstanding as to any materials, fixtures, appliances, plumbing, heating, lighting and other equipment is fully paid for, including all bills for the repair thereof, except as follows:

That _____ Hereby waives and releases (its)(his)/(their) right to file a mechanics' or materialmen's lien against said property.

That said construction was completed on
._____

NOTE: Where the general contractor is a corporation, the name and signature of the affiant should be that of an officer of the corporation, preferably the President.

_____Owner/Builder Contractor

Subscribed, and sworn to before me on this day of_____ , 20___ . Notary Public
My Commission expires:

FOR USE WITH CORPORATE CONTRACTOR:

_____A Corporation of the state of Florida, joins in the execution of this instrument for the purpose of adopting all the representations of fact made in the foregoing affidavit and joining in the indemnity agreement therein contained.

NAME OF CORPORATION By _____ (Officer)

IV. FORECLOSURE LAWS AND CASES

Supreme Court of Florida Issues New Foreclosure Rules

Amendments to the Florida Rules of Civil Procedure Largely Derived From Recommendations of the Task Force on Residential Mortgage Foreclosure Cases.

Some of the changes are as follows:

Verification of Mortgage Foreclosure Complaints: This requires the Plaintiff (lender) to attest to the truthfulness of the allegations in the complaint. It is intended to minimize erroneous filings, conserve judicial resources by reducing the number of cases with "lost note" issues and provide the court with greater authority to sanction lenders that make false allegations.

Changes the Affidavit of Diligent Search: When the defendants cannot be served personally, the law allows the foreclosure case to proceed after publication of a notice. This new form requires the person that conducted the search to sign the Affidavit (instead of the lender) and to provide more information about the search.

New Form - Motion to Cancel and Reschedule Foreclosure Sale: Associations wait and wait for a lender to foreclose and then wait for the sale to bill the new owner (whether lender or third party) for the appropriate amount. More importantly, Associations need the property to be sold to start collecting assessments from the new owner going forward. The number of sales canceled at the last minute seems to be on the rise. This new form requires the lender to explain why they want to cancel the sale. It also directs the Court to set a new sale date, rather than keeping properties in an "extended limbo between final judgment and sale". [Quote from Task Force]

There are some slight changes to the Final Judgment of Foreclosure that weren't published before so interested persons have sixty (60) days to comment before they become final. All of the other changes are final and in effect.

Unit Owners Cannot Refuse to Pay Assessments

The unit owner's obligation to pay valid assessments is separate from the association's obligation to maintain the property and otherwise fulfill its fiduciary duties.

Case Study: Coral Way owned several condominium units in the 21/22 Condominium. It challenged both the need and the validity of a special assessment levied by the Board of Directors. Coral Way claimed that it had evidence that the association paid for items that were not common expenses. It alleged that the association paid legal fees that were not incurred by the association. It also contended that the financial records did not reflect a lump sum payment made to the association in connection with a roof top lease. This unit owner took the position that a special assessment would not have been necessary and the association would have had the funds to accomplish the repairs identified if it accounted for the income associated with the rooftop lease or spent money for non-association expenses.

1. The 4th District Court of Appeal ruled that the Board's breach of its fiduciary duties does not relieve the owner's obligation to pay legally adopted assessments.

2. A unit owner's duty to pay assessments is conditional solely on whether the unit owner holds title to the condominium unit and whether the assessment conforms to the Declaration of Condominium and By-Laws of the Association

A. Bank is Foreclosing; Association is a Defendant

Associations are named as defendants in mortgage foreclosure cases because of their power to levy assessments on the titleholder. As defendants, associations have 3 tools to move mortgage foreclosure cases towards a conclusion:

1. Case Management Conference. The judge will call the attorneys on the case into court to ensure that the action is moving toward a final resolution. Your association attorney may ask the judge to set a date for trial (or hearing on summary judgment) or, if the case isn't ready for trial, to set hearing dates on outstanding motions.

2. Pretrial Conference. Once a case has been set for trial, the judge will usually schedule a Pretrial Conference. The judge requires the attorneys to attend in person. The judge may review the pleadings and determine if the parties can agree on facts or documents ahead of time to avoid unnecessary testimony at trial. The association attorney's goal is to drag the bank's attorney into court and get the judge to pay attention to this case. If a party fails to attend

one of these conferences, the court may dismiss the action, strike the pleadings, or take other appropriate actions as punishment.

3. Order to Show Cause. Here the association pushes the owner to show why a final judgment of foreclosure should not be entered. This procedure is intended to give associations standing to move the mortgage foreclosure case to conclusion. If the association wants to file the motion, it would have to know what the owner has paid on the mortgage, the interest calculation, penalties or other fees that may have been charged, and what the final amount for the proposed judgment should be. None of this information is typically available to a junior lienholder unless the bank files it in the court docket, or the association obtains it through discovery.

B. Money Judgment as an Alternative to Foreclosure in an Association

Florida Statutes §718.116, §719.108, and §720.3085 all allow an association to "bring an action in its name to foreclose a lien for assessments in the same manner in which a mortgage of real property is foreclosed and may also bring an action to recover a money judgment for the unpaid assessments without waiving any claim of lien." An association may plead both the lien foreclosure and money judgment counts in the same action. The association is entitled to recover its reasonable attorney's fees incurred in either a lien foreclosure action or an action to recover a money judgment for unpaid assessments.

1. Generally, foreclosure is better than a judgment. Lien foreclosure directly threatens a defendant's ownership interest and, therefore, provides motivation for recalcitrant owners to pay their past due amounts. This is especially true when depriving an owner of the title also threatens an income stream, such as investor owners who rent out their units.

2. Money judgments can be difficult and costly to try to collect, especially from owners who don't have enough cash to pay off their delinquent balances in the first place.

3. When there is a superior lien (usually a mortgage) that wipes out the association's assessment lien a money judgment may be the only way to get paid.

4. Homestead property cannot be attached to collect on money judgments.

C. All Assessments Due Association If A Third Party Purchases A Unit At A Foreclosure Sale

1. The amount an association is entitled to recover depends on who purchases the unit at the foreclosure auction, the lender or a third party.

2. Chapter 718 provides that any unit owner who takes title to a condominium unit owes all the unpaid assessments due from the prior owner.

3. However, there is one exception. If a first mortgage on the unit is foreclosed, and the holder of the first mortgage takes title, the mortgagee only owes the lesser of twelve months of "regular periodic assessments" or one percent of the original mortgage debt.

Condominium Cannot Collect Add-on Charges from Mortgagee after Foreclosure

Individualized charges, such as interest, late fees, collection costs and attorney's fees do not fit within the statutory or common sense understanding of "regular periodic assessments"

The United States District Court for the Southern District of Florida joined a number of other Florida District and Circuit Courts by ruling that add-on charges such as late fees, collection fees, interest and attorney's fees are not collectible from a first mortgagee that obtained title as a result of a foreclosure or deed-in-lieu thereof.

When a first mortgagee forecloses due to non-payment, the bank or financial institution is entitled to a "safe harbor." The law says a first mortgagee only has to pay the lesser of:

1. The unit's unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

2. One percent of the original mortgage debt.

In this particular case, there was both a condominium and a HOA that governed the individual properties that became the subject of the dispute. The first mortgages on both units were backed by the Department of Housing and Urban Development (HUD). When HUD became the owner of both of these properties, it asked for estoppel certificates so the properties could be sold to end-users. The estoppel certificates asked for 300% more than what should have been billed.

The associations argued they were entitled to all the extra fees, costs and charges. It was reported that if the associations revised their estoppels and just charged the "safe harbor" amounts, HUD was likely to pay and then go ahead and sell the properties to end users. Instead, by arguing they were entitled to extra fees, costs and charges the case went to court.

The Federal District Court not only ruled that the extra fees, charges and costs were improper, it ruled that the language of the declaration precluded any payment at all!

The declaration in this case contained a mortgagee protection clause that said (in relevant part):

NON-LIABILITY OF MORTGAGEE OF RECORD: When the mortgagee of a first mortgage of record obtains title to a unit as a result of foreclosure of its first mortgage …. Such acquirer of title … shall not be liable for the share of common expenses or assessments by the Association pertaining to such unit, or chargeable to the former owner of the unit, which became due prior to the acquisition of title as a result of the foreclosure or the acceptance of such deed in lieu of foreclosure.

The court held that this language precludes the association from collecting anything from HUD for past due assessments. This ruling shows it is more important than ever to amend the governing documents to remove these types of impediments to collecting assessments against banks, homeowners, the U.S. government, investors, etc.

What Happens After the Association Acquires Title by Foreclosure?

Case: A small community (65 units) HOA, has foreclosed on 3 units and soon to be 5. All but one have a mortgage and all 4 mortgages are above the value of the property. The banks are not accepting short sale offers without involvement from the mortgagor which in cases is close to impossible. Three of the banks are in foreclosure with the longest process exceeding 3 years. Motions to compel are denied and we are looking for creative ways to speed this process and begin to collect from a new homeowner or at least get my 1%/12.

One attorney's opinion: A motion for case management conference can be a useful tool on behalf of any association involved in a mortgage foreclosure action. In this motion, the association's counsel asks the court to establish reasonable deadlines to bring the case to conclusion, ultimately resulting in a foreclosure sale whereby either the mortgagee or another party will take title to the property. In instances where the association has already foreclosed and taken title to the property, and the mortgagee has filed its own foreclosure, the association may be able to simply consent and stipulate to a judgment and either bring about a sale or transfer of title much sooner. Particularly when the foreclosing party plaintiff is the mortgagee and the defendant owner is the association, and there are no other parties to the action.

What about the 'short sale' option?

The U.S. Treasury announced new federal guidelines that give lenders a 10-day limit in which to respond to short sale purchase offers. These rules may provide much needed relief, as the Sun-Sentinel reported approximately 40% of South Florida homeowners owe more than the property is worth. The rules also provide financial incentives for both sellers and lenders.

Is the Association really entitled to any payment from a first mortgagee when it forecloses its mortgage after the Association has foreclosed its claim of lien?

Remember, the statutes provide for joint and several liability with the previous owner (with the exception of the safe harbor provisions for first mortgagees). Thus, once the Association takes title to a unit or home after completing a lien foreclosure case, it technically becomes liable for the debt of the previous owner and cannot necessarily seek to collect that debt from a subsequent owner, even if the subsequent owner is a mortgagee. Any subsequent owner (mortgagee or otherwise) bears responsibility for payment of all assessments from and after the date title is acquired.

Delaying Foreclosure

The Court can Sanction an Attorney for Delay of Foreclosure

The Fourth District Court of Appeal recently upheld an award of attorney's fees, costs and sanctions against a law firm in an amount over thirty-eight thousand ($38,000.00) dollars. The Court found Section 57.105, Florida Statutes applied to attorneys representing borrowers in foreclosure cases if 1. actions taken in the lawsuit were shown to be for the primary purpose of delaying the case (allowing the borrower to stay in the home without paying) and 2. the attorney knew or should have known those actions were not supported by the material facts of the case.

In one case the bank filed a foreclosure lawsuit against the borrowers. The borrowers hired an attorney/law firm to represent them in the case. The attorney filed documentation with the Court claiming that the bank violated certain aspects of the Federal Truth in Lending Act. The bank responded with proof it did comply with the Federal Truth in Lending Act, demanding a retraction. After several hearings the judge lost patience and issued an order requiring payment of the bank's attorney's fees, costs and sanctions for the delay. The appellate Court affirmed the ruling.

While this case involved a bank, the same issues often arise in cases filed by condominium or homeowners associations. The Courts are awarding sanctions in favor of community associations when lenders or debtors use the system to delay a case when they know their position doesn't have merit.

Foreclosure Aid Program

Community leaders struggle with budget shortfalls every day. What if there was something you could do when owners fall behind in maintenance payments, mortgages and other expenses? Do you agree that a six month reprieve from mortgage payments can enable homeowners to bring their account with the association current? If so, you need to learn about the financial assistance available.

The state received close to a billion dollars in federal funds to help struggling homeowners fend off foreclosure. The program, administered by the Florida Housing Finance Corp., is designed to provide homeowners with some "breathing room" by giving them a temporary break on mortgage payments. By raising awareness of the program and offering assistance to qualified applicants, community leaders can help improve residents' financial situations while improving the association's financial condition at the same time.

Eligibility Criteria: Applicants must be eligible to receive assistance. Help is limited to those Floridians that are unemployed or under-employed, not those suffering financial hardships as a result of divorce, disability or death of one of the borrowers. An applicant ...

- Must be a Florida resident;
- Must occupy property as primary residence (the property cannot be vacant, abandoned or rented);
- Borrower/co-borrower must be unemployed or underemployed through no fault of his/her own, which makes the first mortgage unaffordable;
- Must have documented total household income at or below 140% of the area median income (AMI), adjusted for household size;
- Must have an active checking/savings account that can be debited by the ACH method of funds transfer;
- May not have unencumbered assets of $5,000 or more, or three times the current monthly mortgage payment (whichever is greater);
- Cannot have a bankruptcy that has not been discharged or dismissed; and
- Cannot have been convicted of a mortgage-related felony in the last 10 years.

Can Complaints About Association Operations Become a Defense Against Foreclosure?

Recently the appellate court overturned a summary judgment ruling in favor of an association. The ruling in E. Qualcom Corp. v. Global Commerce Center Association, Inc. is not final yet.

Qualcom owned a unit in a commercial condominium and stopped paying assessments. One of its defenses to the association's foreclosure included a claim for set-off. The owner alleged that the association's failure to fix the roof led to damages to its property and loss of revenue. The owner claimed it should be entitled to a reduction (or set-off) in the amount owed based on its losses. How many times have you heard something similar?

The appellate court found it was improper to grant a summary judgment for the association in light of these unrefuted allegations. The court said the association should have been required to refute these allegations or to show that the defense was legally insufficient.

Injunction Against Master Association that Suspended Use

A Palm Beach County Circuit Court Judge ruled that the Master Association governing the Quail Run community was not entitled to suspend use of the recreational facilities by all of the owners in one of the condominiums within the community. The Court found that Section 718.303, Florida Statutes did not allow the Master Association to suspend the use rights of the compliant, paying owners, due to delinquencies on the part of a few. Part of the Order says:

"The statute requires that each delinquent member be treated singularly as the Court finds that the statute does not provide that a member who is current in his or her obligations be penalized for payment failure of another member who is delinquent."

Suspension of Use Rights and Bankruptcy Protections

Most community association leaders are familiar with the fact that they have to hold off on collection activities (such as sending further demand letters, filing a lien or prosecuting the association's foreclosure case) when an owner files for bankruptcy protection.

One important protection offered by the bankruptcy law gives the debtor an automatic stay (a 'time out'). Creditors cannot initiate or continue any actions designed to collect the debt included in the bankruptcy petition. The creditor cannot begin or continue action with respect to:

1. lawsuits,
2. efforts to gain control of the debtor's property,
3. perfecting or enforcing a lien, or
4. efforts to set-off the debt.

2010 changes to the condominium and homeowners' association acts gave boards of directors additional enforcement tools, including the right to suspend use of recreational facilities when the owner's debt is more than ninety (90) days past due. The association can suspend use rights by corporate action in compliance with the procedures set forth in the applicable statute, without filing any pleading or lawsuit in court, filing a petition for arbitration with the state or filing a Claim of Lien securing debt.

So, the question becomes: can the association suspend use rights if the owner filed bankruptcy? At least one bankruptcy Court said "no".

An association in Miami suspended an owner's internet service and deactivated the key fob (or other entry device) for recreational amenities at the condominium pursuant to Section 718.303, Florida Statutes. The owner immediately filed an Emergency Motion for Contempt in the bankruptcy court, claiming this action violated the automatic stay. The Court agreed. It held that suspension of privileges to use common areas was "in effect an act of coercion to compel the debtors to pay the past due association assessments". The Court ordered the association to reinstate all privileges forthwith.

The association can participate in the bankruptcy proceeding to ensure the amounts claimed are correct and in some cases ask the court for permission to proceed with collection activities, especially if the debtor does not reside in the property.

Foreclosure Mediation

The Florida Supreme Court mandated mediation for all circuit court residential mortgage foreclosure cases involving homestead property. The Florida Supreme Court initiated a task force review of foreclosure cases in 2009 and the findings were not surprising, at least not to community association board members dealing with delinquencies. The task force recommended mediation to manage "the massive volume of residential mortgage foreclosure cases".

Mediation increases costs for the mortgagee (at least $750 for the program plus attorney's fees), delays the process and may actually work against the borrower that participates in the program in the long run.

First, the program coordinator must contact the borrower. The borrowers typically don't respond, so a second notice is sent and sometimes even a third notice is sent. That all takes time. Once contact is established the borrower must meet with an approved mortgage foreclosure counselor, that takes more time. Then the borrower must assemble and provide certain financial information to the mediation program coordinator before mediation will be scheduled.

"Pro-se" borrowers (borrowers without legal counsel) often are not aware they may request documents from the mortgagee, such as:

- Evidence it owns and holds the note and mortgage sued upon;
- An account history showing the application of all payments by the borrower during the life of the loan;
- The mortgagee's determination of present net value of the mortgage loan; and
- The most current appraisal of the property.

A reporter for the Palm Beach Post found foreclosure mediation only had a 6% success rate. The article quotes a report indicating program coordinators established contact with less than half of the borrowers that qualified for the program. Less than half of those borrowers actually participated in mediation. All of this must take place before the Court will act on any notice for trial, motion for default final judgment, or motion for summary judgment filed in the case.

Fannie Mae recently announced its plan for pre-litigation mediation in Florida. Fannie Mae requires mortgage servicers to refer delinquent mortgage loans to one of its approved attorneys along with contact information for a primary liaison/team that can make decisions regarding loan modifications or other avenues for resolution of the delinquency. If the circumstances meet Fannie Mae's mediation requirements, the servicer must offer mediation to the borrower. It can fine servicers for failing to comply with the program.

Forcing the Bank to Foreclose

Almost every association has been through it. A deadbeat unit owner has stopped paying their mortgage and the lender brings a foreclosure action against them to enforce the note and mortgage. Not surprisingly, this same owner stops paying his maintenance fees to the association and the association finds itself stuck between a rock and a hard place: bring its own foreclosure action and attempt to obtain title, knowing that ultimately the lender will recapture this title from association as a superior lien holder, or wait for the bank to finish its foreclosure action and hope the new owner begins to pay all future maintenance fees.

For those associations opting for the latter option, a great deal of frustration arises when they see just how long it takes for the average bank foreclosure lawsuit to reach its resolution. While under the Tadmore decision an association can no longer force a lender to pay monthly maintenance fees while its case is pending, since they are not the "legal" owner of the property, all hope is not lost.

Associations have rights when mortgagees foreclose. Don't let these mortgage foreclosures drag on and on and on ….

Ask for a Case Management Conference. This gives the association's attorney the opportunity to request hard deadlines in the case. Judges can enter Orders requiring summary judgment motions filed and hearings set within a short period of time, generally 30 days or less. Summary judgment is key because once this is granted, the case is essentially over and all that is left to be done is to sell the property.

With the order on the case management conference in hand, the association now has a powerful tool in its arsenal that can only lead to positive results. If the lender's attorney complies with the order, the final judgment clears the way for the property to be sold. If not, the door is wide open for the association to seek and recover sanctions against the lender for the delay.

Bank attorneys are often unable (or possibly unwilling?) to comply with scheduling orders. Judges hate when parties do not follow their orders and are often very quick to sanction or fine those plaintiffs. Sanctions can range from a one-time lump sum payment all the way up to daily fines that accrue every day until they take action. In short, associations can finally have the upper hand when a bank drags its feet in violation of a court order.

This is crucial - if an association finds itself in a situation where a lender's case is in a standstill, set a case management conference as soon as possible. It is important to authorize counsel to act fast once the initial case management conference order deadline expires. Judges around the state are becoming more sympathetic to associations that get caught in the middle of lender foreclosure cases that go on forever.

Association Victory in Mortgage Foreclosure

LR5A-JV v. Little House LLC, Fifth District Court of Appeal, Case No. 5D09-3857

The lender named Matanzas Shores as a defendant in order to foreclose the Association's liens. The Association's lien is subordinate to a first mortgage. The Court entered Final Judgment of foreclosure against the property in 2008.

The Association didn't want to wait around for lender to act - so its counsel filed a Motion to Schedule the Sale. The lender objected - claiming it was entitled to set the sale and if it wanted to wait that was its choice. This is the issue that went up on appeal.

The Association argued:

1. The Court has the authority to schedule the sale pursuant to §45.031, Florida Statutes;

2. Since foreclosure cases involve the equity jurisdiction of the Court, the Court should consider the interests of all of the parties to the case when setting the sale date; and

3. Since the Supreme Court's Task Force on Residential Foreclosures recognized that Associations suffer when foreclosures take longer than they should, the Court can and should facilitate prompt resolution of these cases when possible.

The Lender objected - still claiming it, as the plaintiff in the case, had control over the process. The Lender also argued that even if the Court did have authority to schedule the sale, doing so at the Association's request was an abuse of discretion. The Appellate Court completely rejected the lender's arguments.

The Task Force report prompted the Supreme Court of Florida to Issue New Foreclosure Rules. One of those rules created a new procedure and form for use to change the sale date initially set by the clerk. This new form is called the Motion to Cancel and Reschedule Foreclosure Sale. Associations need the property to be sold to start collecting assessments from the new owner going forward. This new form requires the lender to explain why it wants to cancel the sale. It also directs the Court to set a new sale date, rather than keeping properties in an "extended limbo between final judgment and sale". [Quote from Task Force]

What Will the Lender Pay?

Counsel for the Association fears that the dispute between the lender and the Association is far from over. The statutes require the lender to pay assessments upon acquisition of title. Well, here the Court said that the sale should have taken place in 2008. Should the Association be penalized for the gap between the initial sale date and the date the sale actually occurs? Should the lender pay assessments for the two plus years it took to appeal? We may hear more about this case in the future.

This ruling brings welcome relief to many Associations throughout the state. If your community is waiting for the Court to re-schedule a sale or waiting for a lender to ask the Court to schedule a sale, wait no longer. Speak to your counsel about filing a Motion to Set the Sale. Along those lines, if your community is waiting for a lender to set its summary judgment hearing or re-schedule its summary judgment hearing - speak to counsel. You have options to push these cases to conclusion - take advantage of them!

Adverse Possession

Squatters Occupying Abandoned Homes May Have Claim Against Owners While Authorities Charge Adverse Possession Filers With Fraud.

A company called Helping Hands Properties, Inc. claimed 48 properties in Broward, including a $1 million house in Coral Springs. Another, Saving Florida Homes, Inc. filed notice in official county records that it was taking possession of 100 homes in Broward and three in Palm Beach County - up to 10 properties were claimed in just one day. The company owners say that taking possession of dilapidated properties improve the neighborhood. Authorities say they are just trespassing and stealing. Are these companies just manipulating the system for their own benefit or are they performing a public service? What can you do if this happens in your neighborhood?

Adverse Possession - What is it?

Florida statutes address adverse possession - a process to obtain title without buying a property. To acquire title by adverse possession, such possession must be adverse, hostile, open or notorious, exclusive and uninterrupted, for seven years.

There are two types of adverse possession. Adverse possession under "color of law" (§95.16, Florida Statutes) means the possessor’s ownership claim is based upon a written document in the county public records. Adverse possession without "color of law"(§95.18, Florida Statutes) means there is no recorded document purportedly creating ownership.

To claim adverse possession under color of law, the document (deed, etc.) does not have to be valid. However, the possessor must have accepted the instrument in the honest belief that it conveyed ownership. Possession means that the property has actually been used or enclosed.

Adverse possession without color of law is not based on any recorded document, but mere use of the property is not enough to claim ownership or entitlement. The possessor must pay the property taxes and installments of all special improvement liens levied against the property by the state, county and city. The additional requirement of tax payments not only evidences the possessor claims ownership, but places the record owner on notice that property taxes are being paid by someone else. That gives the record owner an opportunity to investigate and take action.

Remember - possession must be open, notorious and hostile to claim adverse possession. Permissive use, like when you allow kids to play soccer, use motorbikes or camp on the property, means the possession is not adverse.

In a New York Times article, one of the company owners explained he allowed tenants to fix up the property instead of paying rent. Strategic defaults create plenty of opportunities to seize abandoned homes. Letters sent to property owners and banks notifying them of the plan to take over the home were reportedly ignored. He now faces up to 15 years in prison.

This tactic can pose problems for community associations. More and more community associations have acquired title to homes as a result of foreclosures. Those associations must monitor the use of the property and file eviction actions to remove unauthorized occupants to avoid claims of adverse possession. The same is true for bank-owned properties. A lender may not be aware of the actual use or condition of the home, especially if its not actively marketed for sale. The association needs to remain cognizant of the actual use and take action to verify whether that use complies with the governing documents. Ignoring use violations creates even further problems, especially when the association tries to take action much, much later.

SAFE HARBOR PROVISION

The Safe Harbor provision (Fla Stat. 718.116(1)(b)) is a Florida specific legal creation that provides guidance when collecting past due Condominium assessments after a mortgage foreclosure has been completed. The provision limits the liability of the foreclosing party as long as they take title at the foreclosure auction. The Association used to be restricted to recovering the lesser of 1% of the original mortgage or 6 months of assessments, plus whatever assessments and costs accrued after the foreclosing party took title.

The "safe harbor" of § 718.116 places a cap on the liability for the unpaid assessments due prior to the foreclosure. The cap only applies to the first mortgagee and the first mortgagee (or first lender) may actually be defined in the condominium declarations. In most foreclosures, there is one mortgage on the property. If the mortgagee acquires title to the condominium through foreclosure, it will be responsible for 12 months of unpaid common expenses or 1% of the original mortgage debt, whichever is less. The "safe harbor" amount must be paid by the mortgagee within thirty (30) days of the issuance of the certificate of title. Thereafter, the first mortgagee who takes title by foreclosure is now the record title owner of the condominium unit and is responsible for all condominium assessments *on a going forward* basis.

However, if another individual or entity acquires title to the condominium unit, that new third party will be responsible for the entire balance of the unpaid assessments before the foreclosure went into effect. *See* § 718.116, Florida Statutes. Regardless of who takes title, the condominium association, through its retained counsel should immediately make a demand for the "safe harbor" or the entire amount of the assessments after it knows who took the property at the sale.

Homeowners' Associations

Section 720.303(6), Florida Statutes, part of the Florida Homeowners' Association Act, has been amended regarding budgets and reserves, but those changes likewise impact the year-end financial reports. The 2010 changes distinguish between "statutory" and "non-statutory" reserves. There are different disclosures required, depending on the type of reserves established.

HOAs that do not include "statutory" reserve schedules and funding for those reserves in their annual budgets must include the following disclosure in the year-end financial statements:

THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO SECTION 720.303(6), FLORIDA STATUTES, UPON OBTAINING THE APPROVAL OF A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION BY VOTE OF THE MEMBERS AT A MEETING OR BY WRITTEN CONSENT.

HOAs that include "non-statutory" reserve funding in their annual budgets must include the following disclosure in the year-end financial statements:

THE BUDGET OF THE ASSOCIATION PROVIDES FOR LIMITED VOLUNTARY DEFERRED EXPENDITURE ACCOUNTS, INCLUDING CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE, SUBJECT TO LIMITS ON FUNDING CONTAINED IN OUR GOVERNING DOCUMENTS. BECAUSE THE OWNERS HAVE NOT ELECTED TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO SECTION 720.303(6), FLORIDA STATUTES, THESE FUNDS ARE NOT SUBJECT TO THE RESTRICTIONS ON USE OF SUCH FUNDS SET FORTH IN THAT STATUTE, NOR ARE RESERVES CALCULATED IN ACCORDANCE WITH THAT STATUTE.

The Foreclosure Decision

In nearly every case where a first mortgage of record exists on a property, the association's lien is subordinate or inferior to that mortgage. This means if an association elects to foreclose its lien and takes title to the property, it will take title subject to the right of the first mortgagee to foreclose its mortgage. Associations in the past were reluctant to foreclose when the mortgagee already commenced its own foreclosure action or when the value of the property did not exceed the amount of debt secured by the first mortgage. That's changing now.

Associations are now making the decision to foreclose more often under these circumstances. The primary reason for this is serious delay in the prosecution of the mortgagee's foreclosure case. These delays are brought on by a variety of factors including the sheer volume of cases handled by the mortgagee's law firm, protracted efforts to work with the borrower either to short sale the property or modify the loan, problems associated with serving necessary parties with the foreclosure complaint or locating original documents that are to be filed with the court, back log in the courts and even strategic decisions by mortgagees to slow down the process.

In some cases, associations can obtain favorable results when foreclosing, even against properties that have fair market values below their mortgaged amount. Sometimes the homeowner has the means to pay the association but has elected to spend money on other concerns. Because foreclosure results in the owner losing title to the property, if the owner has the means to pay and does not desire to walk away, they pay rather than lose title. Foreclosure can be a powerful deterrent for owners who have the means to pay but elect not to or to pay late because they hear others doing the same. Another option is the association's right to rent the property once it takes title, if permitted by the association's governing documents. For some associations, the rental market is favorable and significant income can be recovered before the mortgagee forecloses and takes title.

Many times the owner cannot or will not pay and rental is not a viable option. However, associations still make the decision to foreclose for any number of reasons. Because so many mortgage foreclosures are being contested by owners raising defenses unique to the mortgage foreclosure action, and thus stalling the mortgage foreclosure case for months or even years, the association can effectively render those defenses moot as they relate to the mortgagee's foreclosure by foreclosing the association's lien. When the owner is divested of title by the association, the owner will drop or lose the fight against the lender in the mortgage foreclosure action, thus paving the way for the lender to take title and begin paying assessments.

Another option for associations taking title is negotiating a short sale with the lender or tendering a deed in lieu of foreclosure to the lender. I have also filed motions in mortgage foreclosure actions notifying the court that the association has taken title and does not contest the mortgagee's foreclosure, therefore, speeding up the lender's acquisition of title. These associations understand the key is getting a paying owner into the property sooner rather than later. That way, more in terms of future assessments are recovered rather than lost while a mortgage foreclosure lingers on for years and no one pays the assessments.

Each case is different and the association is well served if it carefully considers all of its options and selects a strategy that works best in any given case. In this ever changing environment, there is no one size fits all approach.

Associations Facing Mortgage Foreclosures Head On

In the wake of Attorney General investigations, self-imposed lender moratoriums on foreclosures and a mounting back up of pending mortgage foreclosure cases, community associations are searching for alternatives to waiting out the storm. It was once the norm that associations would take a wait and see approach when an owner delinquent in the payment of assessments was also facing a mortgage foreclosure. Particularly, in this economy when the amount due on the mortgage exceeds the fair market value of the property. However, now it is too often that associations are left withering on the vine while the mortgage foreclosure action goes on for months or even years.

The delay in these mortgage foreclosure actions can be the product of many problems faced by the lender, such as difficulty in proving it holds the original note and mortgage, lost assignments of mortgage (which are not always recorded and not required by law to be recorded to be effective), or the sheer volume of pending cases slowing down the prosecution by the lenders' counsel. Additionally, owners often raise any number of defenses to slow the prosecution so they can stay in their homes longer. In a judicial foreclosure state like Florida, delay can be significant.

Many owners are also exploring loan modification possibilities with the lenders. These programs generally begin with a trial period before the lender will agree to modify the loan and can take several months to evaluate. Meanwhile, delinquent assessments continue to accrue.

When the mortgage foreclosure is concluded and the first mortgagee takes title, it is generally only obligated to pay a limited amount of unpaid assessments incurred by the previous owner. Most associations are no longer willing to idly sit back and wait for this process to unfold and are taking measures to conclude the litigation sooner rather than later.

The most commonly used mechanism for advancing a mortgage foreclosure is noticing the case for a case management conference. The Florida Rules of Civil Procedure provide that any party to litigation can call for a case management conference before the court. The purpose of the case management conference is for the court to establish a schedule for certain events to occur so the litigation can be concluded within defined time frame. Even though lenders may want to place their foreclosures on hold while they conduct further investigation into their own internal procedures, or to explore legitimate loan modification opportunities with the borrower, the court can require deadlines to progress the case in a reasonable fashion.

Another very difficult problem facing associations is post judgment foreclosure sale cancellations by the lenders. Most sales are cancelled so the lender can explore a loan modification with the borrower. However, the Florida Supreme Court has recognized abuses in the foreclosure sale procedure and has issued form orders for lenders to use when cancelling the sale. Essentially, the Court has said the lender should file a motion to cancel the sale and simultaneously move to reschedule it within a reasonable time. The problem the Court has recognized is that these foreclosure cases cannot indefinitely sit in limbo between final judgment and sale. Associations should authorize counsel to file motions to reschedule foreclosure sales when appropriate to do so, that is when the lender has not moved to reschedule the sale and establish a timeframe to bring the matter to conclusion and transferring title to a new owner.

Compensation by Cable Operators for Exclusive Marketing Rights

Some associations have been approached by cable operators with a request for an exclusive access agreement or marketing agreement. Many times these are exclusive agreements, although in my recent experience the provider has limited the exclusivity portions to on-site marketing to residents. Many times these agreements contain references to voice, video and data services or simply broadband services, without a specific explanation of what those services entail. Other types of service providers are also offering community associations, especially large community associations, lump-sum "loyalty" payments in connection with a renewal or extension of the contract. The association may be very happy with the upfront lump-sum payment.

The money isn't free - there are corresponding obligations of the association in these agreements which, if violated or not performed, subject the association to liability for damages.

Considerations:

1. Term/Length of Agreement: Will this technology change? Will your community be stuck with a provider for what seems like forever when dozens of new companies have entered the market and those have better services for better prices?

2. Easement vs. License: An easement is generally a non-revocable interest in land - it is a valuable property right. A license, on the other hand, is revocable and allows use without conveyance of property rights. Does your community have the authority to grant an easement? Over what property exactly?

3. Exclusivity: The association is prohibited by law from entering into certain kinds of exclusive contracts.

4. Marketing Rights: What exactly does the Association have to do to comply? Does it have to distribute flyers door-to-door by hand? Who's going to do that? Do you have to allow the company to go door-to-door? What about your non-solicitation rules? What about your security?

5. Prohibit Unauthorized Use: Most of the bulk-contracts contain a provision requiring the association to prohibit unauthorized use of the service. Let's take cable for example - is the association going to inspect each unit or home and turn on every t.v. to determine whether the resident has access to channels outside his/her subscription agreement? Is the association even permitted to undertake this action?

Judgments Against Bank-Foreclosed Owners

Bank foreclosures continue to be an impediment to collection of unpaid assessments in many communities. Although community associations are entitled to collect either 1% of the original mortgage debt or 12 months' worth of assessments from the mortgagee (whichever is less), that will probably not cover the entire indebtedness.

A unit owner is personally liable for all unpaid assessments. The Association may seek to collect the balance on the account from the former owner. More and more, people who do have assets make choices to abandon properties because there is no equity. If there is a possibility that an owner has assets to satisfy a judgment, a community could take action against a former member to collect those unpaid assessments.

If the association doesn't have a lawsuit pending, it needs to file a lawsuit. There are attorney's fees, filing fees, costs associated with service of process, etc. If the association already has its lawsuit pending, most of those costs have already been absorbed. The association could wait for the bank to foreclose, collect the bank's statutory obligation, and then continue to pursue the balance against the former owner. A judgment is recorded in the county and with the State's registry; it is initially valid for 10 years and can be renewed for another 10 years. During that time if the debtor desires to buy another property, obtain financing for purchase of a vehicle, college, etc., the judgment will appear.

While the debtor/former owner may not have sufficient cash-flow right now, they may in the future. If the debtor has significant assets in another state, the association can even take the extra step of domesticating the judgment in another state and pursue collection efforts there.

Tax Assessment Protest

Now may be the time to establish a lower base assessment for yourselves and your owners. How? Pursuant to Section 194.011(3), Florida Statutes, condominium, cooperative and homeowners associations can file a joint petition. The relevant portion of the statute says:

A condominium association, cooperative association, or any homeowners' association as defined in s. 723.075, with approval of its board of administration or directors, may file with the value adjustment board a single joint petition on behalf of any association members who own parcels of property which the property appraiser determines are substantially similar with respect to location, proximity to amenities, number of rooms, living area, and condition. The condominium association, cooperative association, or homeowners' association as defined in s. 723.075 shall provide the unit owners with notice of its intent to petition the value adjustment board and shall provide at least 20 days for a unit owner to elect, in writing, that his or her unit not be included in the petition.

Once the Board of Directors passes a resolution it may file the tax appeal petition with the Value Adjustment Board. The Value Adjustment Board will appoint a Special Magistrate to conduct a hearing to determine whether the market value of the property set forth on the TRIM notice was higher than the actual market value on January 1 of this year.

The collective power of the association is useful in the appeals process. First, the per property fee for filing is less. The fee may be paid by the Association, in fact §718.111(3), Florida Statutes and §720.303(1), Florida Statutes specifically authorizes the association to protest ad valorem taxes for the common facilities. The common elements and facilities are nominally valued for tax purposes, since the actual value is included in the value of the homes/units.

Factors to Consider in a Protest:

- Part of the property may qualify for an exemption
- Foreclosure & delinquency rates
- Structural or storm damage / construction work limiting use of the property
- Changes in the surrounding area i.e. blocked views from new construction
- Increased property insurance costs
- Changes in use - chinese drywall & other limitations on use

Each unit or home owner is given the opportunity to opt-out of the appeal if they want to pursue an appeal on their own or don't want to participate. Use professionals to assist in the tax appeal process.

Lenders Cannot Ignore Foreclosure Cases With Impunity

From the Manatee Observer

Action on the part of a community association can achieve good results in bank foreclosure cases. The Bank of New York was recently ordered to pay a condominium association over Thirteen Thousand ($13,000) Dollars in sanctions, representing assessments that accrued during the stalled foreclosure case.

In the most recent case, a Florida attorney filed a Motion to Compel after six (6) months of little or no activity in a bank foreclosure case. The Court granted the Motion and entered an Order requiring the bank to proceed. Later on the Court found that the bank did not show 'good cause' why it disobeyed the earlier ruling. The association incurred attorney's fees and costs for attendance at hearings, writing several letters demanding compliance and additional motions, including the Motion for Contempt - all sent without any response from the bank or its counsel. It took almost four (4) months for the bank's attorney to acknowledge the motions, letters and rulings. Another three (3) months went by before the bank filed any responses with the Court.

The responses were apparently too little too late. The Court granted the association's Motion for Contempt and awarded attorney's fees to the association.

Court Rules HOA Cannot Turn Off Water

An association in Hillsborough County amended its documents to ostensibly allow it to take these actions if any of the homeowners failed to pay assessments. HOA's have the authority to suspend use of common areas and facilities if the governing documents contain appropriate language.

The Court found that the association went too far and ordered the association to restore water service to the townhome of the delinquent owner.

Many communities are struggling to make ends meet. If water/sewer is paid for as a common expense because there is only one meter, it may be advisable to investigate whether sub-metering is an option. Of course, there are legal issues that need to be addressed and therefore please consult with your community association attorney before making any changes to the property or utility services.

Q&A: Condominium and Homeowners Association Bankruptcy
From Bankruptcy Attorney Aleida Martinez Molina

The Maison Grande and other bankruptcy filings by community associations have spurred interest in reorganization of debt. Is bankruptcy an option for your cash strapped community? What issues do you need to consider? Bankruptcy Attorney Aleida Martinez Molina answers the following questions for community associations struggling with bills and bad debt.

CAN CONDOMINIUM OR HOMEOWNERS ASSOCIATIONS FILE FOR BANKRUPTCY? Yes. Under certain circumstances, condominium associations have successfully reorganized under Chapter 11 of title 11 of the United States Code, 11 U.S.C. sections 101, et seq. ("Chapter 11" and "the Code," respectively). This phenomenon is not unique to Florida – there have been successful condominium association reorganizations throughout the United States.

WHAT IS A BANKRUPTCY IN THE CONTEXT OF A COMMUNITY ASSOCIATION? The first point to understand is that Chapter 11 is a reorganization process – not liquidation under Chapter 7 of the Code. As such, it can provide associations the protections of the automatic stay and other relevant Code provisions while allowing them to formulate a plan of reorganization to extricate themselves from the particular financial situation.

UNDER WHAT CIRCUMSTANCES DOES IT MAKE SENSE TO REORGANIZE? The Code has unique provisions which in essence give associations a more level playing field to negotiate with creditors. A number of associations find themselves with daunting contracts or leases which they might renegotiate or simply reject if able to do so. A reorganization could, under the appropriate circumstances, accomplish this goal. Another example is filing for bankruptcy protection in order to prevent a judgment creditor from seizing or garnishing bank accounts. An association with a judgment or upcoming trial could turn to a reorganization as a way to automatically stay the lawsuit/collection of the judgment and permit a realistic settlement. Finally, associations finding themselves threatened with the shut-off of service by utilities or other providers can, under certain circumstances, resort to reorganizations to temporarily prevent this drastic action.

WHAT IS REQUIRED FOR AN ASSOCIATION TO REORGANIZE? Proper authority from the Board and appropriate attorney fees and costs. In addition, an association should file a reorganization with a clear understanding of its exit strategy (i.e., a plan of reorganization).

COSTS ASSOCIATED WITH A REORGANIZATION: Reorganizations are not inexpensive and simple matters – filing fees to the bankruptcy court alone exceed $1,000. The debtors also need to pay quarterly fees to the United States Trustee while the reorganization is pending. Any debtor (association or otherwise) needs to contact competent counsel in time to prepare budgets and plan accordingly. It can

and is done – even in dire situations where utility services are about to be interrupted. Counsel can advise how to properly prepare the necessary documents, authority and budget to reorganize under the Code.

WHAT HAPPENS TO ASSOCIATION RESIDENTS WHEN A COMMUNITY ASSOCIATION REORGANIZES? Ideally, nothing directly. If the association files with appropriate board authority and a reasonable game plan, the association should be able to function and provide the necessary services to the association property and residents.

CDD Defaults More Prevalent; Understand Community Development District Operations

Developers Often Use Community Development Districts (CDD) to Fund Community Infrastructure and Amenities.

Newspapers are filled with advertisements for homes in neighborhoods that have wonderful community amenities. The streets are lined with sidewalks, beautiful trees tower above medians, there are neighborhood parks and tot-lots, lakes, maybe even a clubhouse with an exercise facility and meeting rooms. At the sales office you learn that these facilities are solely for the use of the owners within the community. It is not unreasonable to think that all of these features were built by the developer, at its expense, in order to justify the price of the homes and to encourage sales.

Well, the latter may be true, but if the property is located within a Community Development District purchasing a home is likely to include a long-term obligation to fund the initial construction of those amenities.

Community Development Districts (CDD) are not new in Florida but use of this mechanism to fund infrastructure and recreational amenities has increased exponentially in recent times. A CDD is a special-purpose unit created primarily for the purpose of financing and then operating and maintaining community-wide improvements in new communities. A landowner (usually a developer) petitions the local government to create a CDD with broad powers that enables the CDD to generate revenue. Bonds are typically issued and payable by the land-owners (purchasers of homes and other properties) in the district over a period of time - up to thirty (30) years. Additional revenue is generated through special assessments and other fees paid by the property owners in the district.

It is not unusual for a developer, through the use of a CDD, to fund development and construction of the roads, the surface water management systems, parks, clubhouses and other community facilities such as entry features and the like with the initial lump-sum of revenue obtained from the issuance of bonds. The CDD maintains, operates and administers the property and improvements subject to its control and establishes the fees or other financial obligations of the land owners.

Chapter 190, Florida Statutes became effective in 1980, but CDD's were not very popular in the early years. Approximately 100 CDDs were created in Florida during the 1990s and then over 200 new CDDs came into existence between 2000 and 2005. There are currently close to 600 CDDs active in Florida at the present time according to the website maintained by the Department of Community Affairs.

While the Board of Supervisors for each CDD is elected by the landowners, the exercise of the powers and duties of the district, as well as the use of revenue produced by the special assessments and fees, has often come into question. The developer of the Cory Lake Isles community in Hillsborough County reportedly controlled CDD operations for 18 years. Residents complained that the developer mismanaged the district's finances and spent CDD money on the developer's personal projects. When CDD meetings became tumultuous, it hired off-duty police officers to keep the peace, as a CDD expense. Residents in Cory Lakes have had to pay higher fees, but now have control of the District.

Defaults associated with CDDs have increased, presumably as a result of the downturn in the housing market. An Orlando based Firm indicated that more than 10% of the CDDs in Florida did not fulfill their obligations. Defaults may mean even more of the costs will be passed on to homeowners.