CORNERSTONE
LAW FIRM

Collections 101

Assessments are the cornerstone of an association and the necessity of an association to collect delinquent assessments is of utmost importance – the association cannot be run without assessments being paid! Community associations are non-profit corporations, and as such, the cash flow provided by payment of assessments is necessary to function and fulfill its obligations to the community.

An association's ability to collect delinquent assessments is provided primarily from three sources: the Colorado Common Interest Ownership Act ("CCIOA"), the association's Declaration of Covenants, Conditions and Restrictions ("CCR"), and the association's collection policy. In addition, debt collectors are bound by both the state and federal Fair Debt Collections Practices Acts ("FDCPA").

I. Discussion of Governing Documents: CCIOA, Your Association's CCR and Collection Policy

The Colorado Common Interest Ownership Act or CCIOA, is the statute that governs community associations in Colorado. It is located at Colorado Revised Statutes § 38-33.3-101 *et seq.* (full text of CCIOA can be found here). CCIOA authorizes associations to 1) levy assessments, 2) collect delinquent assessments, and 3) assess penalties for nonpayment of assessments, some of which include late fees, interest, attorney fees, and costs. CCIOA also provides that there is a statutory lien (a lien created automatically by law) on an owner's unit for any assessment levied against that unit or fines imposed against its unit owner.

Your association's CCR, along with its collection policy, will more specifically govern how the board may collect against owners who are delinquent. The CCR will provide limitations for increase of assessments, how assessments are to be billed (annually, monthly, quarterly, etc.), dates upon which the assessments are due, late fees (typically state to be determined by the board), an interest rate, and will further provide notice of what additional consequences may arise from nonpayment of assessments, such as restrictions on use of amenities or voting rights. This latter part may also be found in your association's Bylaws.

The association's collection policy further specifies and delineates the process of collecting on delinquent assessments. What if your association does not have a collection policy? If your

association does not have a collection policy (it's a required document), adopt one. Since 2005, associations have been required to have a collection policy in place. However, in the 2013 legislative session, the Colorado legislature passed House Bill 1276 ("HB 1276"), otherwise known as the HOA Debt Collection Bill, which required additional provisions to be included in the policy. In addition to laying out the procedure for notices that must be sent to an owner, HB 1276 required that prior to an account being turned over to an attorney or collection agency, the association must send the delinquent owner a written notice that offers an opportunity to enter into a payment plan for a minimum of six months. Also, the association must notify the delinquent owner of what action is required to cure the delinquency and failure to do so within thirty days may result in collection efforts.

The collection policy will specify what late fees may be assessed when an assessment becomes delinquent. This is because generally, the CCR for an association states that late fees are "to be determined by the Board." It will also include the interest rate as provided for in the CCR as well as the amount an association may charge when there has been a check returned due to insufficient funds. The collection policy will also provide for the time frame for collections (i.e., the dates upon which notices will be sent and when an account may be turned over to an attorney). A typical time frame for collections may look like this:

Due Date: 1st day of the month
Past Due Date: One day after due date
First Notice: Any time after 10 days after due date
Second Notice: Any time after 60 days after due date
Turned Over for Collections: Any time after 90 days after due date

Another provision that may be provided for in the collection policy is acceleration of assessments. Acceleration allows a board to accelerate the entire fiscal year's debt against the owner's account, rather than just the current delinquency. By accelerating assessments against an owner's account, the association is able to more economically pursue collections against an owner. This is because a single collection action (and a single set of legal fees and court costs) is brought, rather than multiple actions throughout the year. Associations should be mindful, however, that this remedy can backfire against an association in the case of a subsequent bankruptcy or foreclosure. Therefore, the ability to decelerate assessments in such event is also an important protection against the loss of future assessments.

When considering whether to accelerate assessments against an owner's account, the board must first ensure it has a legal right to accelerate (which should be set forth in the declaration or collection policy). Second, the decision must be documented in the board's records. The decision can be made on a case-by-case basis for repeat debtors or because other circumstances warrant

acceleration. The board can also choose to make a blanket decision for acceleration. For example, all accounts turned over to the attorney's office for collections are accelerated per the association's policy. Whatever the board's policy, decisions should be well documented.

II. Collection Process Once Turned Over for Collections

Once an account is turned over for collection efforts to the attorney, the attorney must take required steps in order to comply with the FDCPA (both state and federal). The FDCPA defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." As such, attorneys collecting debt on behalf of a community association are going to be subject to the law, and classified as debt collectors.

A. Demand Letter

First, a demand letter must be sent to the delinquent owner ("debtor") stating the amount of the debt, the name of the creditor, and that the debtor can dispute the debt within thirty days. If a debtor fails to respond to the demand letter, the attorney will review the account to determine the next step for collection of the delinquent assessments. Typically, the matter will move to "lawsuit" stage. Most cases brought against delinquent owners are brought in county court, where the jurisdictional limit for the court is under $15,000.

B. Summons and Complaint (also known as Lawsuit)

Once the debtor has been served with the lawsuit, he or she is required to appear in court on the specified date. This is called the "return" date. The return date is the date that appears on the Summons which requires the debtor to "return" ("appear") in court on that date. That date is picked based upon the appearing attorney's and the court's schedule, but cannot be more than 63 days from the date of the lawsuit. At the return date, the debtor has the opportunity to discuss the matter with the attorney present in court on behalf of the association and pay it in full, enter into payment arrangements, or otherwise dispute the debt. If a debtor disputes the debt, he or she will file an answer with the court. The answer is the debtor's response to the lawsuit. Once an answer is filed, the court will typically require the parties to participate in mediation, a pre-trial conference, and then if the matter has not been settled, the parties will proceed to trial.
If a debtor fails to appear in court and/or file an answer on the return date, the association may obtain a default judgment due to the debtor's failure to appear in court and respond to the initial lawsuit. Failure to appear at any one of the court-mandated appearances (mediation, pre-trial conference, or trial), allows the association to ask the court for a judgment.

C. Post-Judgment Collections

Once judgment is obtained, there is a common misconception that the court requires the debtor to pay the amount immediately. This is not correct. The judgment represents a legal obligation to pay a debt. The manner in which the creditor's attorney proceeds to collect on that obligation is between the attorney and its client, the creditor. So, what happens once a judgment is obtained? Once judgment is obtained, if the creditor has information about a debtor's assets, those assets can be attached through the court process to satisfy a judgment. Common methods include wage, bank, and tenant garnishments.

1. Wage Garnishment

For a wage garnishment, the attorney will request that the court issue a garnishment for the judgment amount, plus post-judgment costs and interest (less any payments made). Once issued, the garnishment will be sent for service on the debtor's employer.

Serving an employer is typically much simpler than serving an individual debtor with a lawsuit or other pleadings because an employer will generally have a registered agent in the state that is authorized to accept service. Once the employer is served, it is required to start withholding funds from the debtor's paycheck to pay to the creditor (generally 25% of the debtor's disposable earnings (wages left after the employer has made deductions required by law). A wage garnishment will remain in place for 182 days unless the judgment is satisfied prior to the expiration. If the judgment is not satisfied within 182 days, a new request for garnishment may be filed with the court.

2. Bank Garnishment

With a bank garnishment, the attorney will again request that the court issue a garnishment (same as above) and once issued, the garnishment will be sent for service on the debtor's bank (typically on or around a pay day, in order to hopefully capture the most amount of funds in the account). Once the bank is served with the garnishment, it must "freeze" funds in any account held by the debtor (even jointly with another person) up to the amount of the garnishment, if available.

Once the bank freezes the funds, it has seven days to answer the garnishment. That means that the attorney will not typically find out how much is being held by the bank until seven days after service of the garnishment (even though the debtor is usually made aware of it immediately, especially if he or she no longer has access to any funds in the account).

When the attorney receives the answer, it has to send the garnishment, the bank's answer, and a claim of exemption form ("garnishment package") for service on the debtor. This cannot be mailed. Like the lawsuit, it must also be served and as we know, service can often be a

significant obstacle in the collections process. Once the debtor is served with the garnishment package, he or she will have fourteen days to claim an exemption or otherwise object to the funds being held.

If a debtor files an objection, the court will order that a hearing takes place (typically set within fourteen days, but can be more) in order to make a decision on the debtor's objection. If there has been no objection after fourteen days of service on the debtor, or once the judge makes a decision on any objection made by a debtor, the court will issue an order for the bank to release the funds to the creditor or its attorney. Actually, getting the funds released can take anywhere between seven days and three months or more!

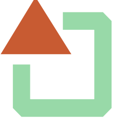
3. Tenant Garnishment and/or Receivership

With a tenant garnishment, the attorney will again request that the court issue a garnishment (same as above) and once issued, the garnishment will be sent for service on the debtor's tenant. Once the tenant is served with the garnishment, rental income from that property, up to the amount of the garnishment, must be sent to the court's registry of the association's attorney. For whatever reason, in my practice, I've not found tenant garnishments to be very successful. Typically, once served with the tenant garnishment, the tenant just moves out of the property and then there are no longer rents to garnish.

However, there is an option that has worked very successfully that is similar to a tenant garnishment. That is a receivership. A receivership is a court ordered appointment of a rental manager for a property. The receiver must be a disinterested person and the property must not be owner-occupied.

The remedy of a receivership is a creature of law in county court and depending on the jurisdiction, the court may not recognize it as an allowable remedy. However, it is allowed specifically in the rules of civil procedure, so can always be pursued in district court.
The procedure, briefly, is that the attorney would request that the court appoint a receiver. The receiver is, again, a disinterested person, but is recommended by the attorney requesting the receivership. Once the court approves the receivership, the receiver will serve the court's order of appointment on the existing tenants, if any. If the property is vacant, the receiver will prepare the property for rent and market to obtain a new tenant.

The receiver basically steps into the owner's shoes in management of the property. The receiver will collect rents, apply the money to the receiver's fee first, and then to satisfaction of the debt. The receiver will also be required to file periodic reports with the court. Once the debt is satisfied, the receiver will be released by the court.



Receiverships are effective ways to collect delinquent assessments, penalties and other charges when the property is not owner-occupied. Note also that we are discussing post-judgment collections, but receiverships can be effective tools pre-judgment as well.

Of course, these "involuntary" remedies keep the vicious cycle of collections. Unless an owner is voluntarily paying through a payment plan or stipulation, there are always going to be additional assessments, late fees, interest, attorney fees, costs, etc. that were not included in the judgment.

Collection of delinquent assessments from non-paying members of your community can be frustrating. Circumstances of each case can lead to different decisions about the strategy for collections and your attorney should discuss the options available to you based on the facts of each case.

If you have questions about delinquencies in your community, please contact us at mail@yourcornerstoneteam.com or 720.279.4351.