

WHAT'S A HOMEOWNERS' ASSOCIATION TO DO?

COLLECTING DUES AND ASSESSMENTS DURING DIFFICULT FINANCIAL TIMES

Jill Mazirow Eshman
Jill Eshman Law

Without dues and assessments a homeowners' association cannot function. The funds are necessary for maintaining common area landscaping, exterior building maintenance and repair, common area spaces (such as gyms or other recreation areas), management fees for the property manager and for all other related common area issues. Yet, when a homeowner is strapped financially, payment of homeowners' association dues and assessments (collectively, "assessments") is likely to be a low priority. This is primarily because the homeowner will continue to receive the benefits of common area maintenance for quite a while (and possibly continually) without paying assessments. Further, if the homeowner has a loan on the property that is more than the market value of the property, payment of assessments is even less likely to occur. Foreclosure of a lien for assessments and taking the property subject to a loan that exceeds the market value of the property is not a reasonable option for the association, as the association will not want to own a property with debt that exceeds the value. So, what is a homeowners' association to do?

Homeowners' associations tend to be passive and patient in pursuing payment of assessments because all of the members of the homeowners' association are neighbors, and it is natural for members to be sympathetic. The prudent course of action for a homeowners' association, however, is to diligently implement consistent procedures with very short time frames for collection of assessments, and then pursue all of the association's rights and remedies. Passive or selective enforcement may lead to a breach of fiduciary responsibility on the part of the association's board members. Aggressively pursuing unpaid assessments, before such delinquent amounts accumulate with additional assessments and interest, in a consistent manner will resolve the delinquencies before there is risk of extinguishment by foreclosure or bankruptcy.



Jill Mazirow Eshman

Homeowners' associations tend to be passive and patient in pursuing payment of assessments because all of the members of the homeowners' association are neighbors, and it is natural for members to be sympathetic.

In Idaho, a homeowners' association has rights created by statute set forth at Idaho Code section 45-810 ("association lien statute"). However, if a property is subject to and governed by the Condominium Property Act, then the condominium association will look to Idaho Code section 55-1518, which sets forth the lien rights for condominium association assessments.¹ This article will focus on homeowners' associations, unincorporated or incorporated, (hereinafter referred to as "the association" or "an association") that are not governed by the Condominium Property Act, but rather the association lien statute. In addition to the rights created by the association lien statute, an association has rights created by contract pursuant to recorded declarations setting forth covenants, conditions and restrictions, which govern the property in question.

Since 2002, associations have had the association lien statute to look to for a framework for liens arising from assessments. The legislative history indicates that there was a case challenging the right to file a lien in a county recorder's office absent a lien right in the Idaho Code. Therefore, according to the legislative history, the association lien statute was enacted to afford associations a statutory lien right so that associations have the same legal basis as condominium associations to pursue unpaid assessments from owners.²

An important issue to consider is whether an association is limited solely to the statutory lien provisions, or whether an association, which provides for additional contractual rights in its declarations that are more favorable and/or provide greater rights to the association than authorized in the association lien statute, are enforceable. The language of Idaho Code section 45-810 does not specifically limit the association's rights solely to the statute. For

example, the language found in its introductory phrase does not include "notwithstanding the provisions of the declaration" or words of similar meaning. However, the statute also does not indicate that there may be rights other than the statutory rights by providing language such as "unless the declaration provides otherwise." Association declarations have been construed as legally enforceable contracts with owners upon the owner's acceptance of title to the restricted property, and normal rules governing the interpretation of contracts apply.³ Since the statute has no limiting language and since it was only recently enacted in 2002, it may be reasonable to conclude that an association is entitled to collect assessments as may be provided by contract in its declarations as well as under the statutory framework of the Idaho Code.

Statutory framework

The association lien statute gives an association rights to file a lien and/or to pursue a money judgment; however, there are specific stated limitations to these rights.

Idaho Code section 45-810(1) provides lien rights to associations for unpaid assessments for "reasonable costs incurred in the maintenance of common areas"; the statute does not specify that the lien may include interest, costs and attorney's fees and penalties. In addition, associations' rights to lien are limited to a lien for "unpaid assessments accrued in the previous twelve (12) months."⁴ If the homeowner fails to pay subsequent assessments, Idaho Code section 45-810(2)(b) provides "then so long as the original or any subsequent unpaid assessment remains unpaid, such claim shall automatically accumulate the subsequent unpaid assessments without the necessity for further filings." Further, Idaho Code section 45-810(3) provides that when subsequent unpaid assessments

have accumulated under a filed claim, the claims regarding each subsequent unpaid assessment "shall be deemed to have been filed at the time such unpaid assessment became due." Idaho Code section 45-810(2)(c) also requires the association to serve by personal delivery or certified mail a copy of the recorded lien within twenty-four (24) hours after recording it. The association lien statute does not expressly provide that the lien can be enforced non-judicially under the rules for deeds of trust.⁵ Self help, such as eliminating landscape maintenance or turning off water to a home, is also not authorized by the statute.

Analysis of the association lien statute, especially when compared to the Condominium Property Act statute governing liens,⁶ gives rise to the following questions: (1) whether interest, costs, attorneys fees and penalties may be included in the assessment and the lien; (2) once a lien is filed and there are subsequent unpaid assessments that become part of the original lien, whether they can be wiped out by intervening liens; and (3) if the association fails to provide notice of the recorded lien within twenty-four (24) hours of its recording, whether the lien is invalid. With respect to providing notice of the lien within twenty-four (24) hours of recording, recent legislation modified this time period to five (5) business days and the change will be effective on July 1, 2010.⁷

The association lien statute specifies the requirements of a written lien at Idaho Code section 45-810(2)(a). A lien filed in accordance with the statute is valid for one (1) year, but may be extended by recording an extension for an additional one (1) year period.

Idaho Code section 45-810(5) specifies that in addition to the recording of a lien, an association may maintain an action to recover a money judgment for the unpaid assessments or may take a deed in lieu of foreclosure in satisfaction of the lien. Recovery on an action for such unpaid sums will satisfy the lien, or the portion thereof, for which recovery is made. The association lien statute further indicates that the association may be incorporated or unincorporated, but that it must have the authority pursuant to the recorded covenants, bylaws or other governing instruments to assess and record liens against the real property of its members.⁸ The statute also has additional requirements for unincorporated associations.⁹

Based upon the foregoing, an association will have a valid statutory lien on property only after complying with the statutory provision, which requires,

It appears that under the association lien statute, the association does not have the right to foreclose under the power of sale. Therefore, an association must foreclose judicially if it elects the remedy of pursuing a lien.

among other things, recordation of the unpaid amounts claimed for the prior twelve (12) months. It appears that under the association lien statute, the association does not have the right to foreclose under the power of sale. Therefore, an association must foreclose judicially if it elects the remedy of pursuing a lien. The association needs to comply with the statute in a timely manner as unpaid assessments that have accrued beyond a one (1) year period are not specifically included in the recoverable amounts under the statute. If the association is pursuing foreclosure of the lien judicially, the attorney for the association should file a notice of lis pendens¹⁰ after the commencement of a foreclosure lawsuit, but prior to entry of judgment to provide constructive notice of the foreclosure of the lien.¹¹ When foreclosing judicially, the lawsuit should name the record title owner and any junior lien holders. Ultimately, a junior lien holder may pay the delinquent assessments to protect its interest in the property.¹² At the same time as the association pursues the statutory lien foreclosure, the association may pursue a money judgment, presumably for the same limited unpaid assessments for which a statutory lien may be obtained against the non-paying owner.

Governing documents

Associations should have their declarations and bylaws reviewed to determine compliance with the association lien statute and to clearly identify the rights and remedies available to the association. At a minimum, the governing documents should meet the requirements of the statute to avoid prejudicial and/or costly mistakes in collecting assessments on behalf of an association. In addition to the statutory rights, the declarations may provide for additional rights that may be pursued on a contract claim basis. As noted above, however, it is not entirely clear if these additional rights will be enforceable.

Most assessment provisions in the governing documents will provide that assessments are a personal obligation of the owner and will constitute a lien against

the home in question. Similar to the association lien statute, the declarations may provide the association with an opportunity to pursue foreclosure of the lien and/or to pursue an action for money damages against the owner under a breach of contract claim. Other common provisions that are found in or that may be provided for in the declarations include the following: (i) the right of the association to include all costs of collecting the assessments (attorneys fees, penalties and interest); (ii) the right of the association to pursue all unpaid assessments, not just those that accrued in the statutory twelve (12) month period; (iii) the right to foreclose non-judicially; (iv) perfection of the lien at the time the declarations are recorded rather than when notice of a delinquent assessment is recorded; and (v) identify what liens, if any, will have priority over the association's lien. Since these provisions provide greater rights to the association than the association lien statute, it is unclear if such rights are enforceable. As a practical matter, it will be difficult for an association to foreclose non-judicially, even if authorized and agreed to in the declarations. It is unlikely a title company will agree to serve as trustee or provide services and/or reports for such a sale. Consideration should also be given as to whether certain provisions, such as lien perfection and priority provisions, will affect an owner's ability to obtain financing.

Assessments should be due and payable more frequently than once a year. The declarations should clearly specify this and when such payments become delinquent. As a result, the cause of action will accrue more frequently than once a year and allow the association to be more proactive with respect to collection of the assessments. Finally, the association may want to consider providing in their declarations that after a stated period of time, notice, and procedure that the association board has the discretion to declare the unpaid and uncollected assessments as common area expenses. The declarations could further provide that, at such

time, the association may reallocate the unpaid and uncollectible assessments on a prorata basis and collect from all other owners and from subsequent owners of the delinquent owner, or its successors or assigns.

Pursuing a lien and/or money judgment

Under the association lien statute or a provision of the governing documents, the association does not necessarily have to elect which remedy to pursue. The association may pursue a lien against the property and a money judgment against the owner. When considering remedies, the cost to pursue both should be considered by the association as well as the likelihood of recovery, bankruptcy and foreclosure. Pursuing owners personally for a money judgment may be preferable because as noted above, taking property subject to a senior lien for a may not make sense for a variety of reasons. Also, foreclosure is a harsh remedy for collecting a generally nominal amount of money in comparison to the value of the real estate.

Depending upon the amount of money in question, a small claims action may be available and less costly to the association to pursue. The benefit of a money judgment is that it may become a lien against the property once the judgment is recorded. The association may also garnish wages, other sources of income and other assets of the owner without foreclosing on the property. A judgment may also be domesticated to pursue execution on the owner's assets in another state. The money judgment will remain valid for five (5) years and is renewable¹³ whereas the statutory lien is valid for one (1) year and is renewable for only one (1) additional year. Even if the property is foreclosed by a senior lien holder, and the association's lien against the property is extinguished, the money judgment remains collectible until it is discharged or satisfied for five (5) years, or longer if renewed. If the non-paying owner does not declare bankruptcy, patience and perseverance will also payoff for the association because money judgments accrue interest. When the owner eventually sells the property or refinances it, acquire other property, or obtain credit for personal property purchases, the recorded judgment will be an obstacle and may result in a payoff to the association at that time.

If an association obtains a money judgment, it may be discharged in bankruptcy. The secured lien in the real property, however, may not be discharged provided the association recorded the lien prior to the bankruptcy filing.¹⁴ Post-bankruptcy fil-

As difficult as it may be when dealing with neighbors and friends, associations must be diligent, disciplined, timely and consistent in pursuing unpaid assessments.

ing assessments may not be discharged in bankruptcy so long as the debtor has a "legal, equitable or possessory ownership interest in" the property.¹⁵ In addition to the foregoing, the judgment lien may be subject to the homestead exemption provided under Idaho Code section 55-1003.¹⁶ As with the statutory provisions, recording the lien and acting quickly may provide an association with some bankruptcy protection.

Fair debt collection practices act

An association, as the creditor, is not bound by the federal law with respect to debt collection under the federal Fair Debt Collection Practices Act ("FDCPA").¹⁷ However, if the association hires a person or an entity to collect the debt, that third party may be bound by the FDCPA. If an association retains an attorney to collect such debt, the prudent course of action for the attorney is for the attorney to comply with the provisions of the FDCPA to avoid potential liability.

Conclusion

In summary, during difficult financial times, associations should be proactive in dealing with unpaid assessments and not delay in pursuing collection. As difficult as it may be when dealing with neighbors and friends, associations must be diligent, disciplined, timely and consistent in pursuing unpaid assessments. Declarations should be reviewed and updated to ensure that associations have identified all available methods and remedies to collect unpaid assessments. All rights available to an association should be utilized, and, at a minimum, the statutory rights for a secured lien and a money judgment should be pursued. Such actions will reduce losses due to foreclosure and bankruptcy and, more importantly, will encourage prompt payment by owners.

About the Author

Jill Mazirow Eshman practices law in the areas of transactional real estate, general business and estate planning. Her offices are located in Ketchum, Idaho. She is a member of the California State Bar and the Idaho State Bar. She can be

reached at jill@jeshmanlaw.com.

Endnotes

¹ In order for a project and/or property to be governed by the Condominium Property Act, among other requirements set forth at I.C. § 55-1504, the recorded declaration or plat must contain an expression of intent to create a project which is subject to the provisions of the Condominium Property Act.

² While an association and a condominium association have the same legal basis to pursue assessments, that being a statutory lien, the association lien statute and The Condominium Property Act lien statute at I.C. §§55-1518 are very different and provide different statutory rights. Some of the differences are noted in footnotes v. and vi., infra, however, there are other differences as well that are sufficient in number to warrant a separate article on the topic.

³ *Twin Lakes Village Prop. Ass'n, Inc. v. Twin Lakes Inv.*, 124 Idaho 132, 135 (1993).

⁴ See I.C. § 45-810(1).

⁵ Unlike the association lien statute, the Condominium Property Act statute, I.C. § 55-1518, governing a condominium lien, specifically provides the right to enforce a lien and conduct the sale of the property in the manner permitted by law for the exercise of powers of sale in deeds of trusts or any other manner permitted by law.

⁶ There are a number of differences between the Condominium Property Act statute, I.C. § 55-1518 governing a condominium lien, and I.C. § 45-810, including the right to enforce under the deed of trust rules as described in footnote v, supra, and the specific reference to allow for the collection of interest, costs and attorney's fees, and penalties.

⁷ Ch. 41, S.B. No. 1287 was approved into law on March 9, 2010 and becomes effective July 1, 2010. There were no modifications to the association lien statute by this legislation other than the change of the notice period to five (5) business days.

⁸ See I.C. § 45-810(6).

⁹ See I.C. § 45-810(7).

¹⁰ See I.C. § 5-505.

¹¹ See *Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First Nat'l Bank*, 117 Idaho 29 (1989) (holding that it is necessary to file a *lis pendens* in connection with an action to foreclose a mechanic's lien in order to give constructive notice of the foreclosure of the lien beyond the statutory six-month period required for commencing such an action).

¹² See I.C. § 45-114.

¹³ See I.C. §§ 10-1110 and 10-1110.

¹⁴ See Title 11 U.S.C. § 523(a)(16).

¹⁵ See Title 11 U.S.C. § 523(a)(16).

¹⁶ I.C. § 55-1003 provides: "homestead exemption amount shall not exceed the lesser of (i) the total net value of the lands, mobile home, and improvements as described in section 55-100, Idaho Code; or (ii) the sum of one hundred thousand dollars (\$100,000)."

¹⁷ See 15 U.S.C. § 1692 et. seq.