Dealing with Delinquency and Foreclosure

4 CE Hours

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Learning objectives

- Name some of the major factors contributing to Florida's lengthy mortgage foreclosure process.
- Recall three controversial provisions of the Mortgage Foreclosure Act and explain why they are problematic.
- List the laws that most directly address community association policies and practices on delinquency and foreclosure.
- Describe how an association can use an order to show cause to facilitate the sale of foreclosed property.
- Define a lien and explain how it is implemented by mortgage lenders and associations.
- List three ways the eviction process has changed in the past few years and its effect, if any, on community associations.
- Describe what is meant by the "Safe Harbor" provision.
- Distinguish between community association rights that can and cannot be suspended in response to an owner's delinquency.
- Describe the obligations and responsibilities of timeshare transfer companies.
- List three strategies for increasing collections with multiple delinquent or vacant units.

Introduction

Florida has earned its reputation as a national foreclosure hotspot, with foreclosures in the state totaling more than three times the national average. While times continue to be economically difficult, the foreclosure rate is slowing, both in Florida and throughout the country. The national foreclosure rate dropped 32 percent from July 2012 to July 2013, according to a RealtyTrac marketing research report.[1] As of mid-2012, more than 75 percent of loans in foreclosure throughout the country originated between 2004 and 2008.

While new cases in Palm Beach County, one of the hardest-hit areas, declined by 68 percent between 2012 and 2013, reaching the lowest rate seen since July 2006, many large metropolitan areas, including Palm Beach as well as Broward and Miami-Dade counties, still suffer the highest foreclosure rates in the nation. Florida is also infamous for the slowest foreclosures. In 2012, it took an average of 382 days for a lender in the U.S. to complete a mortgage foreclosure. In Florida, in 2013, the same process took an average of almost 900 days to complete, among the lengthiest procedures in the country.[2]

Throughout these lengthy and difficult foreclosures, community associations have had to pick up the financial slack, stuck with the bills and debt created by delinquent owners, vacant units, and banks with little or no incentive to speed things along. As a community association manager, you may be aware that property owners are more likely to be delinquent in paying assessments or other fees to the association than they are to neglect making mortgage payments to their lender.[3,4] You are also likely aware of the dangerous effects of mortgage foreclosures on the association budget, and the complications of dealing with shortfalls and delinquent association members.

Over the past few years, there has been considerable development in legislation intended to bring relief from the foreclosure crisis to many types of residences, including community associations. The past few years have brought considerable clarification of the obligations and responsibilities of associations dealing with delinquency. These laws also expanded associations' legal authority to collect or recover assessments on delinquent units.

This course will discuss current community association foreclosure law and legal judgments associated with those laws, noting provisions that give associations more legal muscle to address delinquencies, vacant units, or units rented to tenants by a delinquent owner.

NOTE: For the purposes of this chapter, the following terms are used interchangeably:

- "Bank," "lender," " mortgagee," "foreclosing entity," and "financial institution."
- "Debtor," "borrower," "owner," and "consumer."

FORECLOSURE LAW IN THE 2013 LEGISLATIVE SESSION

Real estate law in the U.S. has historically been slow to change. The same has been true in Florida. In recent years, however, a flurry of legislative activity prompted by the foreclosure crisis has created a more developed legal structure for foreclosures and delinquencies designed to bring economic relief as quickly as possible. The 2013 legislative session enacted many laws

addressing the procedures, policies, rights, and responsibilities of community associations in cases of owner delinquency and foreclosure.

Real estate law is not consistent among all forms of community associations. Although a number of provisions in Chapters 718, 719, and 720 FS appear virtually identical, some provisions may contain subtle differences, while others are entirely different. If there is any question about an association's legal obligations, confirm the law is relevant to your specific organization and consult with a legal expert.

The following laws made the most substantial changes to community association collections and foreclosure law:

- Chapter 2013-137 (HB 87): Relating to Mortgage Foreclosures.
- Chapter 2013-136 (HB 77): Relating to Landlords and Tenants.

The following three laws were introduced as companion bills and have substantial overlap among them.

- Chapter 2013-188 (HB 73): Relating to Residential Properties.
- Chapter 2013-218 (HB 7119): Relating to Homeowners Associations.
- Chapter 2013-159 (HB 7025): Relating to Vacation and Timeshare Plans.

Chapter 2013-137 (HB 87) Relating to Mortgage Foreclosures

Former House Bill 87, now Chapter 2013-137 Florida Statutes (FS),[1] was introduced as a bill in two sessions before it became law in 2013. The law substantially changes procedures and conditions for mortgage foreclosures filed in Florida.

Given the lengthy Florida foreclosure process and that delinquent owners commonly refuse to pay assessments or other fees during the two or more years required to complete a foreclosure, associations can easily lose money each day the lender waits to acquire the title, with the association forced to make up the difference to avert budget shortfalls. Among its strategies, the law targeted financial institutions because many considered banks largely responsible for delays in foreclosure and resale of delinquent units.

The law was intended to clear the foreclosure backlog in the courts by accelerating the foreclosure process, revising provisions to deter owners from unreasonably delaying foreclosures with specious arguments, and limiting the time a lender has to pursue a deficiency judgment.

In cases where proceeds from the sale of the mortgaged property are insufficient to pay the property owner's debt in full, the mortgagee creditor may obtain a deficiency judgment to recover the deficient portion of the loan. A deficiency judgment on behalf of the lender against the borrower can demand the outstanding balance of the mortgage note, plus costs and attorneys' fees, and the value of the property foreclosed.

The law also provided more muscle to community associations by giving them the authority apply for a show-cause hearing, a role formerly restricted to lenders.

The amended law includes the following main provisions:

- Lenders must submit more evidence to the court to show that they have the right to initiate a foreclosure.
- Lenders may request a "show-cause" hearing, where defendants will have to show a specific, bona fide (meaning truthful, without deceit or fraud) defense to further delay a foreclosure.
- Community associations with liens may apply for show-cause hearings if the lender does not do so.
- Innocent third-party purchasers of a foreclosed property cannot be deprived of that home even if the foreclosure is later found to be fraudulent.
- The statute of limitations to seek a deficiency judgment against a foreclosed homeowner was reduced from five years to one year.

Bringing a foreclosure complaint

The law's most substantial change for lenders is the creation of Section 702.015 FS.

To bring a complaint to foreclose a mortgage on residential real property designed principally for occupation by one to four families, including condominiums and cooperatives but not timeshare interests (according to Part III of Chapter 721, F.S), the foreclosure complaint must establish the following:

- The plaintiff holds the original note, or is a person entitled to enforce a promissory note.
- If a plaintiff has been delegated the authority to institute a foreclosure action on behalf of the person entitled to enforce the note, the complaint must specifically describe the authority of the plaintiff and the document that grants this authority to the plaintiff.
- A plaintiff seeking to enforce a lost, destroyed, or stolen note must attach to the complaint an affidavit executed under penalty of perjury, detailing the sequence of all endorsements, transfers, or assignments of the promissory note, and providing documents proving that the plaintiff is entitled to enforce the note.
- A plaintiff in possession of the original promissory note must certify, under penalty of perjury, that the plaintiff possesses the original note.
- An "original note" or "original promissory note" refers to the signed or executed promissory note, including a renewal, replacement, consolidation, or amended and restated note or instrument that substitutes for the previous promissory note. The term includes a transferrable record, but not copies of these documents.
- The required certification must be submitted along with the foreclosure complaint, providing a number of specific details, including the location of the note.
- The original note and all other relevant documents must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

Adequate protections for lost, destroyed, or stolen notes

The law creates 702.11 FS, which applies to a pending cause of action. It provides that the following items constitute adequate protection of the enforcing note:

- A written indemnification agreement by a person reasonably believed to have sufficient assets or funds.
- A surety bond.
- A letter of credit issued by a financial institution.
- A deposit of cash collateral with the clerk of the court,
- Another form of security considered appropriate by the court.

A person who falsely claims to be the holder of a note or to be entitled to enforce a lost, stolen, or destroyed note is liable to the actual holder of the note for damages, attorney fees, and costs. The law specifies that the actual holder of the note can pursue any other claims or remedies it may have against the person who wrongly claimed to be the holder, or any person who facilitated or participated in the false claim.

Reduced statute of limitations

The law significantly limits the amount of time lenders are allowed to seek a deficiency judgment on a note that is secured by a mortgage on a one- to four-family residential property. The time-period has been reduced substantially, from five years to one year. This is the case for any deficiency action initiated after July 1, 2013, regardless of when the cause of action occurred. This one-year statute of limitations begins the day the certificate of title is issued in a mortgage foreclosure case or the date the deed is accepted by the mortgagee in lieu of foreclosure.

Deficiency judgments

A deficiency judgment is an award typically in an amount equal to the difference between the funds received from a court sale of property and the balance remaining on a debt. Deficiency judgments are commonly issued when a property owner fails to pay amounts owed on a mortgage and the property securing the mortgage is sold to satisfy the debt, but the proceeds from the sale are less than the amount owed.

The law limits the amount recoverable in a deficiency judgment for an owner-occupied residential property. The new value is the difference between the judgment amount and the "fair market value" of the unit on the foreclosure sale date.

The law also limits the amount recoverable in a deficiency judgment for a short sale, stating it may not be more than the difference between the amount of outstanding debt and the fair market value of the unit on the sale date.

Finality of mortgage foreclosure judgment

The law provides that an action to challenge the validity of a final judgment of mortgage foreclosure or to establish or re-establish a lien or encumbrance of property is limited to monetary damages if all the following items apply:

- The party seeking relief from the final judgment of mortgage foreclosure was properly served in the foreclosure lawsuit.
- The final judgment of mortgage foreclosure correctly designated the property.
- All applicable appeals periods for the final judgment have expired, with no appeals or settlements during that period.
- The property has been acquired for value by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no lis pendens (a notice that shows the property is the subject of litigation) regarding the suit has been filed with the official county records The law defines affiliates of the foreclosing lender to include:
    - Any loan servicer for the loan being foreclosed and any past or present owner or holder of the loan being foreclosed, and:
        - A parent entity, subsidiary, or other person who directly or indirectly controls, is controlled by, or under common control of any of these entities; or
        - A maintenance company, holding company, foreclosure services company or law firm under contract with these entities.

The law provides that:

- The former owner can continue to pursue monetary damages against the lender as long as the former owner's claims do not affect the marketability of the new owner's property.
- In cases when a mortgage foreclosure is based on a lost, destroyed, or stolen note, once the property belongs to a person not affiliated with the foreclosing lender or the foreclosed owner, a person claiming to hold the promissory note secured by the mortgage but who was not party to the foreclosure action has no claim against the foreclosed property. This individual may, however, legally pursue the party who wrongfully claimed entitlement to the note, from the maker of the note, or any other person against whom a claim may be made, under adequate protection provisions in s. 673.3091, F.S.

Show-cause procedure

Many communities face a situation in which there is little to no equity in the unit, meaning the association will not benefit financially from the sale of the property at public auction. The association's most immediate goal is usually finding a new owner who can begin paying assessments as soon as possible. Filling those vacant units becomes more challenging and frustrating when a bank is holding things up, and has little incentive to move. This law was designed to give associations more legal "muscle" to speed up the bank's foreclosure action.

The law amends s. 702.10 FS, allowing condominiums, homeowners associations, and cooperative associations named as a party in a mortgage foreclosure action to ask the court for an "order to show cause" for the entry of final judgment. Previously, only the lender/mortgage holder (usually a financial institution) was permitted to ask the court for the show-cause order. The application of this law to community association foreclosure law is intended to give associations greater authority and control over the length of the foreclosure process. Now that they have this right, it is anticipated that the show-cause procedure will become more common among associations than traditional foreclosure procedures.

Much of the appeal of this process is that a judge is required to set a hearing date very soon after the complaint is served to the defendant, giving associations a legal mechanism to expedite a foreclosure action stalled by a bank. Because associations historically had little leverage with banks, there was not much an association could do to impel a bank to foreclose in a timely manner. This law forces a bank to commit to a short timetable, unless it produces a sufficiently compelling reason why it cannot, and substantially shortens the time in which a bank may seek a deficiency against the borrower, reducing it from five years to one year after issue of the certificate of title or delivery of a deed in lieu of foreclosure.

The law makes the following revisions:

- After filing a complaint, the plaintiff may request an order to show cause for the entry of final judgment, and the court must immediately review the request and the court file in chambers without a hearing.
- If the complaint is verified, complies with the requirements in s. 702.015, F.S., and alleges a cause of action to foreclose on real property, the court must issue an order to show cause why a final judgment of foreclosure should not be entered to the other parties named in the action. The law adds a number of elements that must be included in the court's order to show cause. These are sent to the other parties named in the action.
- The hearing is no longer required to be held within 60 days of the date of service. The amended law requires the court to set a hearing date for either 20 days after service of the order to show cause, or 45 days after service of the initial complaint, whichever occurs first.
- An alternative show-cause procedure may run simultaneously with other court proceedings.
- Before the court can enter a final judgment of foreclosure, and after the court has found that all defendants have waived the right to be heard, the law now requires the plaintiff to file the original note, establish a lost note, or show the court the promissory note is not evidence for foreclosure.
- If the hearing time is too short to complete proceedings, the court may continue the order for the show-cause hearing.
- The law exempts foreclosures of owner-occupied residences from these provisions, meaning, while the foreclosure proceedings are pending, plaintiffs cannot request the court to enter an order to:
  - Show cause why it should not pursue payments.
  - Vacate the premises.
- Unless the defendant raises a "genuine issue of material fact which would preclude summary judgment,"[5] the judge may provide a foreclosure judgment at the hearing. It has been estimated that this statute might cut in half the time required to complete a foreclosure.

Magistrate jurisdiction

This section of the law sets out procedures for expediting the foreclosure process. To implement the new law, the legislature requested the Florida Supreme Court to amend the Florida Rules of Civil Procedure 1.490, to be consistent with the law's provisions. These amendments are intended to increase the use of magistrates to help reduce the residential mortgage foreclosure case backlog.

It provides the following background and rational for the revisions:

> "A significant number of mortgage foreclosure cases are pending in the trial courts, and it is estimated that 680,000 new foreclosure cases will be filed over the next three years. In January 2013, the commission established the Foreclosure Initiative Workgroup (workgroup) to propose strategies to significantly reduce the mortgage foreclosure case backlog …"
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> "The workgroup's report identified systemic problems associated with the processing of mortgage foreclosure cases. One of the problems identified in the report is the limited availability of judicial resources to address the foreclosure case backlog, exacerbated by statutory provisions requiring retired judges to refrain from working as senior judges, except on a voluntary basis, for 12 months after retirement."

To address the shortage of senior judges, the workgroup expanded the role of magistrates to process foreclosure cases. Rule 1.490 was amended to authorize referral of residential mortgage foreclosure cases to a general magistrate with the "implied consent of the parties." Magistrates appointed to handle residential mortgage foreclosure matters only are not required to give bond or surety.

All parties have the opportunity to object to the referral within 10 days of the service of the order of referral:

- If the time set for hearing is less than 10 days after service of the order, the objection must be made before the hearing.
- If the order is served within the first 20 days after service of the order, the time period for filing an objection is extended to the time within which a responsive pleading is due.

Implied consent means the court interprets the failure to file a written objection to the referral within the applicable time period as consent by the party to the referral.

Will it speed up foreclosures?

While the mortgage foreclosure law was intended to provide associations with faster, more efficient foreclosure strategies and procedures, there is considerable disagreement about whether the law fulfills those objectives. This section will address some of the main concerns voiced by the law's opponents or concerned proponents. Three main areas have attracted the most controversy.

Critics are primarily concerned that:

- New requirements for documentation will increase, rather than decrease, the duration of foreclosures by inserting more time-consuming obstacles into the process.
- Some of the law's provisions may be unconstitutional, and are likely to face legal challenges and possible amendment in the near future, further complicating foreclosure cases.
- The law may unintentionally work against the interests of the organizations or individuals it was meant to assist, while rewarding other organizations and individuals in unanticipated ways.

Too much paperwork?

The law is specific and comprehensive in its requirements for condominium and cooperative foreclosure claims. The claim is required to contain documentation to affirm allegations stated in the lawsuit, provide evidence relating to the note's authenticity, and specify on what basis the plaintiff is entitled to enforce the note.

These new provisions found in Section 673.3091(2), F.S., require that all parties are adequately protected. This translates into a need for documentation, requiring lenders to do more paperwork that must be filed before a final judgment. Those who fail to comply with this statute are subject to sanctions.

Here are a number of its provisions:

- If the plaintiff holds the original note, then an affidavit certifying its possession is required at the time the complaint is filed. The affidavit must include copies of the original note with the proper attachments and accompanied by the certification and the complaint. The original note and accompanying materials must be filed with the court prior to foreclosure or judgment on the note.
- If the original note is lost, destroyed, or stolen, the plaintiff must attach an affidavit with copies to the complaint describing all transfers, with the goal of demonstrating that the plaintiff is entitled to enforce the note.
- The organization filing the claim must collect all the necessary documentation before it can begin the process, because all materials must be filed at one time.

Some suggest the amount of time necessary to complete these tasks and arrange logistics (obtaining an affidavit, certifying documents, request and receive documents from external agencies or individuals, etc.) is no small matter. Additionally, the process cannot begin until all materials are collected, so a single hard-to-find document could delay a filing indefinitely.

Potentially unconstitutional?

Critics cite a number of provisions that will likely be challenged as unconstitutional. The two primary areas of controversy are related to the allocation of judges and acceleration of the eviction process.

The law allocates judicial responsibilities to magistrates and retired judges, both of which may be unconstitutional. There is some question about whether the legislature has the authority to unilaterally authorize these individuals for the purpose of clearing out the foreclosure backlog and streamlining its progress through the court system. Neither the retired judges nor the magistrates would be subject to requirements established for active judges, such as re-election or re-appointment, as specified in the Florida constitution.

Opponents of the law worry that the eviction process has been accelerated to a point that puts the homeowner at an unfair disadvantage. The current law leaves little time or opportunity to pursue a range of strategies or alternatives to foreclosure, such as the use of mediation, reverse mortgages, or short sales. Shortening this transitional period, which is often psychologically difficult for the homeowner, will also limit homeowners ability to find useful resources for new housing or relocation assistance.

Other issues of concern include:

- A lack of provisions for monitoring or reporting by the Office of Mortgage Settlement Oversight, the federal authority that oversees bank compliance with provisions in the National Mortgage Settlement Act.
- Potential property rights violations associated with due process, equal protection, and retroactive portions of the law.

Who will benefit?

There is some question whether the law will affect the different entities and individuals involved in foreclosure as envisioned or create unintended or undesirable benefits and costs to various parties. Some suggest lawyers will be the real beneficiaries, but as the following examples demonstrate, many of the law's provisions will affect owners, lenders, and community associations in both negative and positive respects.

Lenders or borrowers?[6]
It has been suggested that the law works to the benefit of owners/borrowers, and to the detriment of lenders because it:

- Reduces the amount of time a lender or association can seek a deficiency judgment.
- Requires the lender to compile a number of legal documents that must be filed with the claim in a relatively brief amount of time.

However, it has also been suggested that it works to the owner/borrower's detriment, and the lender's benefit because:

- The homeowner has little time to prepare a defense after the lender files the foreclosure action.
- It makes evictions easier and faster, reducing the time the delinquent owner is in the home and delinquent.
- Procedures in the initial court proceedings may conflict with the due process rights of homeowners.

Community associations?
The law was intended to streamline the foreclosure process, to the benefit of community associations mired in foreclosure limbo for years while the delinquent owner waited it out in the unit. Accelerating the foreclosure process was expected to reduce budget shortfalls created by delinquency, but there is some concern that ambiguous and potentially unconstitutional provisions in the legislation may end up complicating the foreclosure procedure, with legal challenges to the law potentially extending rather than shortening the time required to foreclose and sell the property.

Another concern is that a streamlined foreclosure process will mean a large number of homes will be "dumped" on a real estate market unable to absorb them. Not only will the law of supply and demand mean a fall in property values, but homes that have been neglected by owners or banks also may be in some state of deterioration, which means lower property values. Because the market lacks individuals and families willing or able to buy these homes, they can be purchased economically, in bulk, by large investment companies for purposes of rental and eventual "flipping."

Mega-investors?
As the number of foreclosed properties in Florida increased and real estate prices dropped, the numbers of large investment companies purchasing blocks of property increased. A 2012 Sun Sentinel article[7] focused on one investor in particular who purchased thousands of single-family homes, many of them in community associations. While large investors, such as hedge funds and investment groups, may solve a number of immediate problems for an association, they may also bring significant costs.

Associations have concerns that these large companies will provide the minimum necessary repairs to the property in order to rent it, then sell the home when real estate prices rebound and properties can be sold at a profit.[8] This fear stems in part from an understandable uneasiness based on the fact that the owner is a big impersonal company (sometimes based in a foreign country), and the association is one among a multitude of community associations owned by the company that could easily get lost in the shuffle of so many other properties.

Many investment companies purchasing blocks of housing express a preference for homes in community associations because they provide more stability than conventional neighborhoods, Community associations have a greater incentive, in general, to attend to a home's disrepair because of the close relationship of property values within the community association. Unfortunately, this means community associations are more likely to pick up the slack when an owner is lax in maintaining a rented or empty home; a drop in one unit's value is likely to devalue others.

One aspect of institutional ownership that varies considerably is how the company chooses to be represented in operational issues, such as voting and attending meetings. Community associations should ensure that these corporate owners name a representative to vote on its behalf. Some companies are more involved in day-to-day operations than others. It is not uncommon for a large investment company's representative to run for a position on the association's board of directors, particularly if the company owns a large number of properties in the community.

Renters?[9]
Another aspect of the foreclosure crisis and association property ownership by large investors is a far larger number of renters in most associations than were ever anticipated before the economic downfall. Many homes purchased by these mega-investors are intended for the rental market. At one time, associations eschewed renters because they were thought to be far less invested than owners in maintaining a home's value, and more likely to move after a short period of time. Now, these factors are less of a concern to community association than vacant properties and past-due assessments.

With so many individuals renting community association properties, it is important that the associations governing documents address issues policies on renters as well as those for owners. Condominium associations are more likely to have provisions for rental in their governing documents than homeowners associations. Now, with so many large investors preferring to buy blocks of properties in homeowners associations for the specific purpose of renting them, HOAs should ensure their governing documents address the concerns of renters, as well as those in owner-occupied units.

As more community associations seek options to recoup fund from delinquent owners, more governing documents have allowed provisions for rental than in previous decades, when it was felt that allowing rentals might be disruptive to association members or reduce property values. Recent years have seen this law develop to clarify rights and responsibilities of unit holder/landlords, the association and the renter/tenant. In that tradition, this law amends Part II of Chapter 83, Florida Statutes, the Florida Residential Landlord and Tenant Act.

Eviction

The law authorizes eviction procedures under the Florida Landlord and Tenant Act rather than standard mortgage foreclosure procedures for circumstances, such as a case of a person occupying a dwelling based on a lease-purchase agreement. Provisions in Section 83.56 (2) FS on evictions were intended to facilitate the process by which landlords evict tenants, partly by reducing the time allowed the tenant to repair a violation, which is the tenant's right after receipt of an initial violation notice, according to 83.56 (2) FS.

Associations confronted by a tenant who fails to comply with s. 83.52 or meet financial obligations of the rental agreement must notify the tenant of the violation in writing and ensure it is communicated to the individual in an appropriate manner.

In this case, the association's notice would make a statement such as the following:

> Demand is hereby made that you remedy the noncompliance within seven (7) days of receipt of this notice, or your lease shall be deemed terminated and you shall vacate the premises upon such termination. If this same conduct or conduct of a similar nature is repeated within 12 months, your tenancy is subject to termination without your being given an opportunity to cure the noncompliance.

If an association is compelled to write a second warning because of a second violation or continuing period of noncompliance within one year of the first notice, the association is not required to provide a second notice before initiating an eviction action if the landlord provided an initial notice of noncompliance within the past 12 months.

To alert the tenant that he or she must leave the premises, the association's notice would make a statement such as the following:

> You are advised that your lease is terminated effective immediately. You shall have seven (7) days from the delivery of this letter to vacate the premises. This action is taken because (describe the violation).

Acts of noncompliance fall into two different categories. One gives the tenant a second chance; the other does not. If the noncompliant act is of certain nature, the tenant is provided an opportunity to "cure" the situation. Examples include having unauthorized pets or guests in the home; parking in an unauthorized manner or allowing others to do so; and failing to keep the property clean and sanitary, among many other possible prohibitions in the lease.

If this is the case, the association's notice should make a statement such as the following:

> Demand is hereby made that you remedy the noncompliance within seven (7) days of receipt of this notice or your lease shall be deemed terminated and you shall vacate the premises upon such termination. If this same conduct or conduct of a similar nature is repeated within 12 months, your tenancy is subject to termination without your being given an opportunity to cure the noncompliance.

Examples of noncompliance that do not give the tenant a second chance include the intentional destruction, damage, or misuse of the landlord's or other tenants' property. Any of these actions, even if they are a first violation, are legitimate grounds for terminating the rental agreement. The tenant must be given seven days (beginning on the date that the association's notice was delivered) to vacate the premises.

In this case, the association's notice would make a statement such as the following:

> You are advised that your lease is terminated effective immediately. You shall have seven (7) days from the delivery of this letter to vacate the premises. This action is taken because (describe the violation).

Chapter 83.62(1) FS applies to situations where a judgment of eviction has occurred. Under the amended Florida law, the Florida clerk must issue a writ to the local sheriff to allow the landlord to take physical possession of the property within 24 hours after a notice is posted in a highly visible location on the unit premises. Legal holidays, Saturdays, and Sundays are not excluded from the 24-hour schedule, meaning evictions may occur those days.

On attorney fees, the law:

- Provides that the right of the prevailing party to attorney fees for enforcing a rental agreement may not be waived in the rental agreement.
- Provides that attorney fees may not be awarded in a claim for personal injury damages based on a breach of duty to maintain the rental premises.

On leases, the law:

- Provides that the right to legally required notices before a landlord or tenant may terminate a lease may not be waived in the lease.
- Revises the notice the landlord is required to provide a tenant that describes how advance rent and security deposits will be held, used by the landlord, and returned to the tenant.
- Provides that a right or duty enforced by civil action under the Florida Landlord and Tenant Act does not rule out the possibility of prosecution for a criminal offense related to a lease or leased property.

- Provides that a lease requires a landlord to give advance notice of the intent to non-renew the lease if the lease requires a tenant to give advance notice to a landlord of the intent to vacate the premises at the end of the lease.

The law:

- Creates a rebuttable presumption that a new owner of a rental property receives the security deposits paid by a tenant to the previous owner, but limit's the presumption to one-month's rent. (A rebuttable presumption is an assumption made by a court, taken to be true unless someone comes forward to challenge it and provide evidence to the contrary.)
- Provides that a landlord who accepts partial payment may still pursue termination of the rental agreement or bring a civil action for noncompliance.
- Allows landlords to withdraw advance rents when the advance notice period commences without notice to tenants.
- Eliminates a landlord's obligation to make certain disclosures on fire safety to tenants.

In cases where the association is the landlord, the association should consult a legal expert to ensure the current rental agreement or lease conforms to the new law, because proper legal footing will expedite procedures if removing a tenant becomes necessary. Confirm that you have amended these forms to be consistent with current law.

The law includes a new provision, amending Section 83.64, Retaliatory Conduct, stating that landlords may not retaliate against a tenant if the tenant has paid rent to a condominium, cooperative, or homeowners association after demand is made by the association in order to pay the landlord's obligation to the association. Note the addition of (1)(e) below.

83.64 Retaliatory conduct.

(1) It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, or to bring or threaten to bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant. In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith. Examples of conduct for which the landlord may not retaliate include, but are not limited to, situations where:
   (a) The tenant has complained to a governmental agency charged with responsibility for enforcement of a building, housing, or health code of a suspected violation applicable to the premises;
   (b) The tenant has organized, encouraged, or participated in a tenants organization;
   (c) The tenant has complained to the landlord pursuant to s. 83.56(1);
   (d) The tenant is a service member who has terminated a rental agreement pursuant to s. 83.682;
   (e) The tenant has paid rent to a condominium, cooperative, or homeowners association after demand from the association in order to pay the landlord's obligation to the association; or
   (f) The tenant has exercised his or her rights under local, state, or federal fair housing laws.

The Federal Fair Debt Collections Practices Act and the Florida Consumer Collections Practice Act

The Federal Fair Debt Collections Practices Act and the Florida Consumer Collections Practice Act were designed to protect consumers from abuse or harassment in the collection of debts. Community association managers should ensure that the association's collection practices – whether the form of payment is rent from a tenant or an assessment from an owner – are in compliance with all applicable federal and state debt collection requirements.

The Florida Consumer Collection Practice Act

The Florida Consumer Collection Practice Act is found in Title 33, PART VI, Sections 559.55 to 559.785 Florida Statutes. Section 559.72 provides a list of prohibited practices, which include a variety of threats, misrepresentations, forms of harassment, publication of certain information, unreasonable employer or third-party communication, and communicating with a consumer known to be represented by an attorney or other legal counsel.

Florida law provides for the right of consumers to sue a party or parties in violation of this law for the amount of actual damages or $1,000, plus costs and attorneys' fees.

The Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692p, as amended) protects consumers by regulating the actions of certain debt collectors in their attempts to collect a consumer debt.

Some examples of debt collectors subject to regulation under this law include collection agencies that purchase debts from an original creditor, collectors who buy a debt from a bank or a finance company, law firms hired to collect a debt for a company, and collectors using a company name unlike the company that originally provided the loan.

This law applies when third-party debt collectors, such as those indicated above, attempt to collect a consumer debt from an individual. A consumer debt is one incurred for personal, family or household services, and a wide variety of debts, such as one created when a person purchases a home with a bank loan, or buys insurance for a home. The law applies to debt collection

phone calls, written communications, and conditions under which the debt will be provided to a credit reporting agency.

The law provides the following obligations and responsibilities in consumer debt collection:

- If a debt collector calls the consumer in an attempt to collect a debt, the laws dictate the debt collector must identify him/herself as a debt collector. This also applies if the collector leaves a voicemail message.
- If the consumer has disputed a debt in writing, it must be communicated to the credit reporting agency.
- The debt collector is required to give the consumer certain notices in the initial communication, or send it within the following five days. This information includes:
  - The amount owed.
  - The creditor's name (the name of the lender/bank, etc., that made the loan).
  - A notice that the debt collector will assume the debt is valid (real, unpaid) if the consumer does not dispute the debt's validity within 30 days of the date the notice was received.
  - A notice that the debt collector will send the consumer verification of the debt or a copy of a judgment against the consumer, if he or she responds to the debt collector within 30 days after receiving the notice to state that he or she wants to dispute the debt.
  - A notice that the debt collector will give the consumer the original creditor's name and address if different from the current creditor if he or she responds to the debt collector within 30 days after receiving the notice to request this information).
- The debt collector is prohibited from:
  - Lying or deceiving a consumer in trying to collect a debt.
  - Calling the consumer repeatedly with the intent to harass him or her.
  - Threaten violence or use profane or abusive language.
  - Divulging to the consumer's friends, neighbors, or employers that he or she owes a debt.
  - Threatening to sue the consumer when the debt collector does not intend to do so.
  - Charging the consumer interest or fees not expressly authorized by the agreement that created the debt, or permitted by law.
  - Threatening to deposit or actually deposit a post-dated check before the date the consumer wrote on the check.
  - Contacting the consumer at an unusual place or time that is disruptive or obviously inconvenient (such as a call at 5 a.m.).
  - Sending the consumer information on a postcard.

If a collector violates the FDCPA and a lawsuit against the person or entity is successful, the consumer could be entitled to recover actual damages, statutory damages up to $1,000, court costs, and attorneys' fees.

CHAPTER 2013-188 (HB 73) RELATING TO RESIDENTIAL PROPERTIES

Assessments liability

Florida's Condominium Act (Chapter 718) places responsibility for the payment of all assessments due during the period in which the individual legally owned the condominium unit. "Assessment" refers to a share of the funds periodically assessed against the unit owner, required for the payment of common expenses.

Florida Statute 718.116 clarifies the following liabilities for assessments and other fees:

- A unit owner, regardless of how the title was acquired (even if purchased through a foreclosure sale or by deed in lieu of foreclosure), is liable for all assessments due during the period he or she is the unit owner.
- A unit owner is individually liable as well as jointly liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is assessed without regard to any right the current owner may have to recover amounts he paid on behalf of the previous owner.
- The financial liability of the lender/first mortgagee (or those who later take title to a unit by foreclosure or by deed in lieu of foreclosure) is limited by the provisions of the condominium owner's association covenants. The question of collection depends on the language contained in applicable condominium association, mortgage, and loan documents.
- In the "Safe Harbor" provision, the liability of a first mortgagee for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lesser of:
  - 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
  - One percent of the original mortgage debt.
- These provisions apply only if the first mortgagee joined the association as a defendant in the foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent who could be served by the mortgagee.

Use of foreclosure liens

The association has a lien on each condominium parcel to secure the payment of assessments. The lien becomes effective at the time the claim of lien is recorded in the public records of the county in which the property is located. The following conditions apply to an association's claim of lien:

- To be valid, a claim of lien must be formally executed by an association officer, and state the description of the condominium parcel, name of the owner on record, name and address of the association, the amount due and due dates. The lien is not effective one year after the claim of

lien was recorded unless an action to enforce the lien is begun within a one-year period.
- The one-year period is extended automatically for any period of time the association is prevented from filing a foreclosure action by an automatic stay resulting from the parcel owner filing a bankruptcy petition, or other person claiming an interest in the unit.
- The claim of lien secures all unpaid assessments that are due and that may accrue from the time the claim of lien is recorded until the entry of a final judgment, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process.

The amended law clarifies that a condominium association that acquires title to a parcel through foreclosure of its lien for assessments is not liable for unpaid assessments and other amounts that came due before the association's acquisition of title.

Revisions to recent legislation

In recent years, Chapter 718 FS was amended to authorize community associations to demand rent directly from a unit owner's tenant if the unit owner was delinquent in its financial obligations to the condominium association. The current law clarifies that the "future monetary obligations" mentioned in past versions of the law includes all subsequent rent due from the tenant to the unit owner, which must go directly to the condominium association until all delinquent accounts are paid in full.

The current legislation also provides a revised Demand for Rent form, which must be sent to tenants by the condominium association. It explains the tenant's obligation to pay rent to the condominium association, and clarifies that the tenant is immune from any claim by the landlord/unit owner relating to the rent, as long as all payments are made directly to the association in a timely manner following the tenant's receipt of the written demand for rent.

Suspensions

In recent years, Chapter 718 FS was amended to authorize a community association to suspend the right of a unit owner to use common elements and facilities of the association if the unit owner was more than 90 days delinquent in payments to the association. The law allowed suspension of common-element use rights for nonpayment and failure to comply with condominium documents.

The current law clarifies which rights can and cannot be suspended. Suspension of an owner's rights does not apply to:
- Limited common elements that are intended for use by that owner alone.
- Common elements needed to access the unit or home.
- Utility services to the unit or home.
- Parking spaces.
- Use of elevators.

The current law also provides that a hearing is required to suspend rights for failure to comply with condominium documents. No hearing is required for suspension as a result of delinquency, but the suspension must be approved by the board at a meeting that provides sufficient advance notice.

Delinquent owners also face suspension of voting rights. The legislation clarifies that if voting rights are suspended as a result of a delinquency, the suspended vote does not count toward quorum requirements or a vote required to approve an action.

Bulk buyers

In recent years, Chapter 718 FS was amended to include the Distressed Condominium Relief Act, which provides protections to bulk buyers and bulk assignees from assuming the original developer's liabilities and responsibilities. The current law makes the following changes to this section:
- It amends the definition of a "bulk buyer" and "bulk assignee" to mean a person who acquires more than seven condominium parcels in a "single condominium."
- It clarifies that a mortgagee who acquires title of a condominium due to a judgment of foreclosure is not a bulk assignee or developer, unless the mortgagee exercises any developer rights other than those specified in the Distressed Condominium Relief Act.

Chapter 2013-159 (HB 7025): Relating to Timeshares, Relating to Vacation and Timeshare Plans

This law amends provisions of the Florida Vacation Plan and Timesharing Act. Under the revised statute, timeshare lienholders appoint a trustee to serve the required foreclosure notices and forms on the timeshare interest holder. This trustee foreclosure process is a non-judicial one that applies only to the foreclosure of liens on timeshare interests, including liens based on unpaid assessments and unpaid mortgage obligations.

These amendments provide regulation for timeshare interest transfer companies, businesses that seek out timeshare owners who may be interested in transferring the ownership of their timeshare to another individual or entity to free themselves of

the financial obligations (maintenance fees, etc.) that come with timeshare ownership.

The law requires:

- Timeshare transfer companies or their agents provide an estoppel letter to the managing entity of the timeshare plan. An estoppel letter indicates whether all assessments and other money owed to the managing entity by the timeshare interest owner have been paid.
- Timeshare transfer companies deliver a signed, written resale transfer agreement to the consumer.
    - No fees or costs will be paid before delivery to the consumer timeshare reseller and managing entity of written evidence that the transfer services have been performed.
    - The agreement must also identify the escrow agent.

The law specifies the person providing transfer services must establish an escrow account, with the following specifications:

- Funds or property must be held with the escrow agent until the transfer company has fully complied with the obligations under the agreement.
- Escrow records must be kept for five years.
- It is a third-degree felony to intentionally fail to comply with the escrow and recordkeeping requirements of this law.

Managing entities have a private right of action to recover actual damages plus attorney fees and court costs if bringing an action for a declaratory judgment or an action to obtain an injunction. The law provides exemptions for real estate brokers, licensed attorneys, title insurers, or agents who receive total consideration from a consumer reseller in an amount less than $600, as well as transfers that originate from a timeshare reseller to the developer or managing entity of that timeshare plan.

The law provides:

- That the initiation of a foreclosure proceeding against a timeshare interest does not automatically act as a lis pendens (a notice, recorded in the chain of title to real property, indicating the property is involved in litigation). The section also specifies the information that must be included in a formal notice of lis pendens.
- That the determination of whether the obligor (the individual owing the debt) is the person who signed the receipt of the notice of default and intent to foreclose follows a good-faith standard. In a related amendment, the law revises a provision on a trustee's incorrect determination of who signed the notice receipt. Previously, this error might potentially constitute a third-degree felony. Under the current law, a trustee making this error would not be penalized if he or she made a good-faith effort to find out if the obligor signed the return receipt in accordance with the good-faith standards provided in this law.
- The specific information that must be included in the publication notice that is required if the obligor cannot be served with a notice of default and intent to foreclose.

Chapter 2013-218 (HB 7119): Relating to Homeowners Associations

The law brings homeowners associations under the umbrella of the Division of Florida Condominiums, Timeshares, and Mobile Homes (within the Department of Business and Professional Regulation) for reporting purposes, and incorporates many organizational and governing elements of the Condominium Act in the Homeowners Association Act.

The law primarily provides information for homeowners associations, duplicating in Chapter 720 FS much of the legal structure of revisions made to Chapters 718 FS and 719 FS by companion bills that became law.

One very important amendment that applies to all licensed community association managers is found in Section 468.436(2)(b) FS, which states that any community association manager who violates a provision in Chapters 718, 719 or 720 FS during the course of performing their professional services is subject to disciplinary action.

The new law makes revisions relevant to delinquency and foreclosure in the following sections of the Homeowners Association Act (Chapter 720 FS).

Liability for unpaid assessments

The revised law eliminates a homeowners association's liability for assessments on any property during the time the association holds title to the property. While associations will not be able to collect funds for assessments incurred while in possession of the title, they will be able to pursue collection of other past-due assessments from the bank or subsequent owner.

The law clarifies that:

- Homeowners associations that acquire title to a property through foreclosure of a lien based on delinquent assessments are not responsible for unpaid assessments and other fees that came due before the association acquired the title.
- Homeowners associations that foreclosed on a delinquent property are still entitled to collect unpaid assessments that accrued before the association took title from third-party purchasers at the lender's foreclosure sale.
- The liability for unpaid assessments by the property owner subsequent to ownership by the homeowners association is limited to any unpaid assessments that accrued before the homeowners association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure.

Amendments on an association's legal liability for assessments were prompted in part by a significant legal judgment made in January 2013. In the case of Aventura Management, LLC v. Spiaggia Ocean Condominium Association, Inc., the court ruled that an HOA could not collect any past-due assessments from a subsequent owner (including the bank), if it foreclosed

before the bank, because this qualified the HOA as a "previous owner," as defined at the time.

Before these recent amendments, all owners were jointly and individually liable with previous owners for unpaid assessments, even in cases of foreclosure. When the Aventura v. Spiaggia decision held that an association should be treated as a "previous owner," it was requiring it to assume joint and individual liability, making the association unable to recover funds from third-party purchasers when the property is sold.

The revised law excludes homeowners associations that acquire title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The current law amends Section 720.3085 FS, changing the definition of "previous owner" to effectively exempt an HOA from liability for assessments during the period it holds title. The same section allows Florida HOAs to collect past due assessments from a subsequent owner.

720.3085 Payment for assessments; lien claims
(2)(b) A parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner. For the purposes of this paragraph, the term "previous owner" shall not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present parcel owner's liability for unpaid assessments is limited to any unpaid assessments that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure.

The provisions exempting homeowners associations from these regulations were not incorporated into Chapter 718, the Condominium Act, or Chapter 719, the Cooperative Act.

Suspension of rights

In recent years, Chapter 720 FS, was amended to provide legal authorization for homeowners associations to suspend a delinquent property owners voting rights or prohibit the owners from using the association's common areas and other association property if the owner became more than 90 days delinquent in his or her financial obligations to the HOA. The suspension may continue until the parcel owner is up-to-date in assessments and other fees.

The revised law Section 720.305(2)(a) FS, "Suspensions," clarifies that suspension of an owner's common area use rights cannot extend to the common elements needed to access the unit, utility services to the unit, parking spaces, and elevators. It cannot impede parking, vehicular and pedestrian entry or exit from the parcel, and utility services and use of common areas that provide access may not be suspended. Notably, the statute is still silent on the authority of the association to suspend cable television.

Suspension procedure
The legislation allows suspension of common-area use rights for not only nonpayment but also for failure to comply with the homeowners association documents — with a hearing required for suspension as a result of failure to comply with homeowners association documents, but no hearing required for suspension as a result of delinquency. The legislation clarifies that if voting rights are suspended as a result of a delinquency, the suspended vote does not count toward quorum requirements or a vote required to approve an action. Although suspensions of use rights for nonpayment of assessments will not require a hearing, the board has to approve such suspensions at a properly noticed meeting.

Attachment of rent
In recent years, Chapter 720 of the Florida Statutes was amended to authorize a homeowners association to require that a parcel owner's tenant pay rent directly to the homeowners association if a parcel owner is delinquent in paying monetary obligations to the homeowners association. The current legislation clarifies that what was previously referred to as "future monetary obligations" includes all subsequent rent due from the tenant to the parcel owner and must be paid to the homeowners association until all delinquent accounts are paid in full.

The legislation also provides a demand letter form that must be sent to tenants by the homeowners association that explains the tenant's obligation to pay rent directly to the homeowners association. It also clarifies that the tenant is immune from any claim by the landlord/unit owner relating to the rent, as long as the tenant pays it in a timely manner after receiving the written demand for rent from the association.

Homeowners association developers

Section 720.307 FS, "Transition of association control in a community," provides examples of events that trigger an "automatic transition" from developer to member control. These trigger events include:

- The developer abandons or deserts responsibility to pay assessments; the law assumes a situation of abandonment and desertion if the developer has unpaid assessments of guaranteed amounts for more than two years.
- The developer abandons or deserts responsibility to maintain or complete amenities or infrastructure, as stated in the governing documents.
- The developer files a petition for Chapter 7 bankruptcy.
- The developer loses title to the property through a foreclosure action or the transfer of a deed in lieu of foreclosure.
- A receiver for the developer is appointed by a circuit court and is not discharged within 30 days (unless the court determines that this would be detrimental to the association or its members).

The section also provides that members other than the developer are entitled to elect at least one board member if 50 percent of the parcels in all phases have been sold to the members.

Prohibited clauses in association documents

Section 720.3075 FS, "Prohibited clauses in association documents," already prohibited developers from making changes unilaterally (on his or her own) to HOA governing documents after 90 percent of the parcels have been sold to members. The revised law also prohibits certain changes before that point. Developers' amendments to governing documents are now required to meet certain standards; the changes must be made in good faith and with good reason, within conditions specified by the law.

Protecting Tenants at Foreclosure Act – the 90-day notice law

The Protecting Tenants at Foreclosure Act protects tenants from eviction due to foreclosure. These provisions took effect on May 20, 2009, and originally were scheduled to expire on December 31, 2012. However, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) changed the expiration date to December 31, 2014.

The tenant protection provisions apply in the case of any foreclosure on a "federally related mortgage loan" or on any dwelling or residential real property. "Federally related mortgage loan" is defined as any loan secured by a lien on one- to four-family residential real property, including individual units of condominiums and cooperatives.

Under this law, "any immediate successor in interest" in such a foreclosed property, including a bank that takes title to a house upon foreclosure, will assume the interest subject to the rights of any bona fide (legitimate or good faith) tenant, and will need to comply with certain notice requirements. The immediate successor must provide tenants with a notice to vacate at least 90 days before the effective date of the notice. The date of a "notice of foreclosure" is defined as the date on which complete title to a property is transferred to a successor entity or a person, as a result of a court order, or pursuant to provisions in a mortgage, deed of trust, or security deed.

Tenants must be permitted to stay in the residence until the end of their leases, with two exceptions:

1. When the property is sold after foreclosure to a purchaser who will occupy the property as a primary residence or,
2. When there is no lease, or the lease can be terminated at will under state law.

The 90-day notice requirement is not dependent upon the tenant, providing he or she is a legitimate tenant or paying rent. The bank is prohibited from filing an eviction for non-payment of rent without first providing the PTFA 90-day notice and waiting the 90 days.

The Case of Castro v. Charter Club Inc.

In the case of Castro v. Charter Club Inc., the court reversed a final judgment of foreclosure because it felt the Charter Club had not satisfied requirements of the constructive notice statute. Because it determined publication of the notice had been improper, it made the foreclosure judgment against the homeowners null and void.[10]

Florida law requires community associations to pursue "constructive service" on an owner who cannot be located. This includes strictly adhering to the law, making a diligent inquiry, and exerting an honest and conscientious effort as necessary to obtain the information necessary to serve the defendant. This case demonstrates a particularly egregious example of an ineffective constructive service process.

The association's process server was guilty of a large number of errors in this case, including attempting to serve the notice at what he thought was Castro's address, but was found to be his daughter's home. She provided the process server with her father's address, which the process server did not write down. The association never attempted to contact the property's tenants to see if they knew the correct address for Castro. After attempting to find Castro at one more location, no further attempts were made to locate or inform Castro.

Not only did the process server not return to the daughter's house to check the address given him earlier, he neglected to inform the daughter that he was there to serve her father with a complaint for foreclosure. Even more appalling, the association had approved that Castro lease the unit to a tenant who paid rent directly to the association, for the purpose of paying down debt related to delinquency, meaning the association received rent payments for two years before initiating the foreclosure action.

While it is a rare association that makes such a multitude of errors, it is a good reminder to always consult an attorney and thoroughly research all documentation on a potential claim of foreclosure, because the legal process is often expensive and unforgiving.

Association strategies addressing delinquency

A community association has a number of possible options to pursue when confronted with a delinquent owner. Associations can:

- Exert pressure on a bank, now more effectively using an order to show cause.
- File a foreclosure action, based upon past due assessments, against the bank that foreclosed the property, and, as the new owner, is responsible for paying assessments.

- File a deficiency judgment lawsuit against the unit owner to recover all past due assessments, regardless of whether the association or the bank filed the foreclosure of the unit.
- File a foreclosure action, based upon past due assessments, against the unit owner, using association right of lien.
- Consider options to foreclosing on a lien.
- File a reverse foreclosure notice to take the title of the property or use a short sale strategy.

Exert pressure on a bank, now more effectively using an order to show cause.
As discussed at length in this chapter, associations are better able to impel banks to move on a foreclosure, now that they have the authority to request an order to show cause. While banks have had little motivation to proceed at a faster pace, this new legislation is expected to improve the rate at which a property moves through the foreclosure process and help community associations facilitate its completion and sale of the property.

File a foreclosure action, based upon past-due assessments, against the bank that foreclosed the property, and, as the new owner, is responsible for paying assessments.
There are increasing numbers of lawsuits in which associations are pursuing banks for unpaid dues on homes the banks have repossessed.[11] Associations have a legal right under Florida law and the governing documents of the community association to act on those rights against an owner, whether the owner is a huge corporation or one individual. Banks that fail to pay their fair share have lost homes to community associations.

File a deficiency judgment lawsuit against the unit owner to recover all past due assessments, regardless of whether the association or the bank filed the foreclosure of the unit.
An association may file a deficiency judgment lawsuit against a unit owner who has stopped paying assessments. A deficiency judgment is typically in an amount equal to the difference between the funds received from a court sale of property and the balance remaining on a debt. They are issued when a property owner fails to pay amounts owed on a mortgage and the property securing the mortgage is sold to satisfy the debt, but the proceeds from the sale are less than the amount owed.

Recent changes to legal provisions on deficiency judgment lawsuits provide that community associations have the potential to recover funds from personal assets, such as the unit holder's banking and investment accounts.

File a foreclosure action, based upon past-due assessments, against the unit owner, using the association right of lien.
Community association governing documents and Florida state law provide a legal right for an association to file a lien against the property. A lien is a claim against a property for a debt.

A lien foreclosure is a lawsuit filed to foreclose a lien against a property for unpaid assessments. It allows an association to foreclose a lien in a similar manner that a bank would foreclose a mortgage. If the owner does not pay all amounts secured by the lien, then the property is sold at an open public auction.

The association is awarded a "judgment credit" to use during the auction to automatically bid on the property, up to the amount of judgment, without the association needing to provide collateral. If the association provides the only bid, it takes ownership of the property. If a party bids higher than the amount of the judgment credit, the association loses the property to that party at the auction, but receives the proceeds of the sale to satisfy the amount of judgment.

There are a number of important pros and cons to pursuing a lien foreclosure. Like other lawsuits, a lien foreclosure is a lawsuit, requiring the payment of attorney's fees and court costs, among other expenses, although these may subsequently be charged to the owner. The condition of the property and whether it is vacant or occupied should figure largely in this decision.

If an association plants to rent the property once it takes title, the property may require an additional investment of resources to make it appealing to a new tenant. Although some association members are not pleased by the trend, renting may be the best way for the association to collect assessments. The community association's governing document should be reviewed to ensure there are no provisions prohibiting rentals. If there are, new provisions should be drafted with the input of legal professionals and association members.

Relationship to the lender
An association's foreclosure claim is subordinate to that of the lender. This means if an association elects to foreclose its lien and takes title to a property, it will take title subject to the right of the first mortgagee to foreclose its mortgage. In the past, associations were reluctant to initiate foreclosure if the lender had already began a foreclosure action, or in cases where the value of the property was less than the debt secured by the first mortgage. That has changed as the foreclosure process has lengthened, encouraging associations to consider every option to recoup their losses from delinquent units.

Recent legislative changes have given associations a bit more authority and wiggle room, which they are using to their advantage by trying to get cases dismissed due to an unreasonable wait, and contemplating their own lien foreclosure of the property. While associations cannot continue with their own lien foreclosure actions when the owner is served with a mortgage foreclosure, the association's attorney can monitor the legal proceedings in case there is a change in the case's status. This happens more often than one might think.

Why file a response?
When a community association is served as a defendant in a mortgage foreclosure, association members may question the merits of filing a response. Legal experts recommend filing a response because it serves a number of important purposes. Perhaps the most important reason to do so is because filing a response with the court is necessary for the association to maintain its legal rights to the property. Failure to do so can result in a waiver of an association's lien claims.

Associations that file a response to a bank's complaint can remain part of the lawsuit. This means an association is able to monitor the foreclosure proceedings, with access to lawsuit pleadings, motions, and orders. When the bank appears to be moving more slowly than necessary, the association can file a motion asking the court to enter an order compelling the bank to free the property for sale or rent.

One situation in which filing a response and waiting paid off was in the case of the Peninsula Condominium Association v. US Bank, N.A.[12,13] In this judgment, the condominium association filed a foreclosure action for unpaid condominium fees, even though the association was aware that the mortgage lender intended to file a foreclosure action on the property. The association was able to prove that the statute of limitations for the bank to file its claim of foreclosure against the property had run out. In this case, watching and waiting paid off for the association. Banks rarely miss such important deadlines, but it would have been irrelevant if the association had not been monitoring the foreclosure process.

Options to foreclosing on a lien

The most common result of a lien foreclosure action is the association taking title to the unit. As the title holder, the association has the right to rent out the unit, according to the terms of the community association's governing documents, using association funds as necessary to bring the property into a condition in which it can be rented. In some cases, an association may prefer not to take title to a unit as the result of a foreclosure action. In that case, the association can consider some of the following alternatives to foreclosing on a lien or taking possession of a property subsequent to a foreclosure claim.

- **Rentals**

  Smart associations take advantage of empty properties and the painfully long foreclosure process to rent out the unit and regain as much of their losses as possible. While not all community associations are able to do this, it can be an effective strategy to bring in funds and fill empty units.

  Both Chapters 718 and 720 of the Florida statutes permit an association to demand rent from a tenant if the owner is delinquent to the association. Once a tenant pays the association, that tenant cannot be evicted by the landlord for failure to pay rent. Demanding rent is an efficient way to bring in financial resources to replace lost assessments. If a tenant refuses to make payments, the association can initiate an eviction process to remove him or her.

  An assignment of the right to rent can be implemented if a property is vacant and the association is in communication with the delinquent owner. This option gives the association the right to rent out the property, the funds of which are applied to the outstanding balance. In return, the association agrees not to pursue collection options against the owner through the duration of the agreement. This strategy not only keeps the property occupied and in good repair, it provides regular payments to the association. The only obstacle in obtaining the right to rent the property is that it requires the owner's cooperation.
- **Personal judgments against owners**

  Obtaining a personal judgment against the owner for the amount of unpaid assessments is another potential collection option. A personal judgment can usually be obtained in a shorter time frame than a foreclosure judgment. Obtaining a personal judgment does not result in an owner's eviction, but creates a record of the judgment against the owner. Once the record is established, the association will need to take a separate action to collect the personal judgment, which can be a complicated process.

  Suspension of use and voting rights have already been discussed as strategies to assertively encourage the delinquent owner to make payments, especially if he or she enjoys use of the pool or tennis courts on a regular basis. There are important limitations on suspension of rights. The association should confirm it is compliant with recent legislation.

  Associations should be willing to negotiate directly with a delinquent owner to collect an assessment. During these discussions, the association representative should try to determine the owner's ability to pay, the collection options available, and the expenses associated with each option. The success of direct negotiation is largely dependent on the delinquent individual. If he or she has been a reliable association member with a sound payment history, a brief financial setback can be understood and tolerated.

  Unfortunately, determining an owner's solvency and willingness to pay are nearly impossible. Delinquent owners may spend a lot of time delaying and making promises that are not realized. It may ultimately waste time if the owner does not follow through with a payment plan because it can delay further collection efforts.
- **Tender a deed in lieu of foreclosure to the bank**

  Another option for an association that takes title to the unit but does not want to take possession of the property is to tender a deed in lieu of foreclosure to the bank. A bank may refuse, but may be amenable to this option or a short sale if its case was dismissed. In rare situations, an association that has taken title to a property may choose to file a second suit following the lien foreclosure case (a "quiet" title action) against the bank to remove the mortgage against the property.

  Associations are choosing to foreclose more because of the substantial backlog in the system and banks' foreclosure cases. Delays are due to the volume of cases in the court system and the other cases competing for the attention of the lender's lawyers and efforts by the owner to delay the foreclosure.
- **Using a claim of foreclosure to compel payment from a delinquent owner**

  In some cases, a claim of foreclosure is the most effective tool for collecting delinquent assessments. Associations may be able to benefit from a completed foreclosure, but the threat and initiation of foreclosure proceedings is a persuasive means for convincing owners to pay up. Owners with a means to pay will often take the association demands more seriously once they see the repercussions of delinquent assessments. Owners tend to find associations less threatening than lenders, resulting in more consistent or frequent payments to the lender, if there is a choice to make. Most owners with the means to pay choose to stay in possession of the title.

  Owners unable or unwilling to pay assessments or negotiate a rental arrangement were once able to take advantage of the lengthy mortgage foreclosures process, adding to it with their own stalling tactics, stretching out the process for a period of years, in some cases. An association can effectively cut short the owner's efforts to delay by foreclosing the association's lien. Additionally, recent legislative changes streamlining the eviction process make removing a delinquent tenant a far less time-consuming process. When the owner is divested of title

by the association, the lender can take possession of the title and begin to pay assessments.

- **File a reverse foreclosure notice to take the title of the property, then compel the bank through legal means to take the title back, including responsibility for all association fees.**
  In some cases, a bank may be unable to sell a home because of a bank lien on the property, or the bank appears uninterested in taking possession. Some banks see no need to move quickly on mortgage foreclosures because they do not want the responsibility for upkeep required in a residential property, and prefer not to have the loss on their books, given the fact that most foreclosed community association homes are financially "under water," (of less value than the amount owed the lender).

  In such cases, an association may attempt to force the bank to take back title to the home by legal means, thereby making the bank responsible for payment of assessments and fees. A recent ruling did just that, forcing a bank in Florida pay a foreclosed home's association fees as well as its legal fees and court costs. While banks and mortgage lenders are not liable for more than 12 months of past-due payments or 1 percent of the total mortgage amount, whichever is less, this is still a considerable and welcome income stream for the association.

- **Short sales**
  Short sales have become a popular foreclosure alternative for increasing numbers of Florida community associations. An offer submitted to an association for a short sale is less than the full amount owed to the association, but may be more desirable than waiting indefinitely for the full amount. An association taking title to a unit can attempt to negotiate a short sale with the bank, although it may be a difficult and lengthy process.

  The short sale asking price is not an agreement to sell at that price. A short sale is a sale of real estate at less than what the seller owes on the mortgage balance. The owner is required to negotiate a settlement with all creditors in order to sell the property free and clear of liens. Real estate listing agents typically dictate at what price the property is listed. Some may be listed at unrealistic prices to attract attention and a range of offers. Counteroffers are common.

  Lenders provide no information or advice on a price until after a purchase contract is submitted by the seller. Listings with prices labeled "lender approved" may expedite sales for those with pre-approved financing, good credit scores, and a sufficient down payment. Associations should consult with real estate and legal professionals to negotiate a price and discuss what constitutes a reasonable offer for a short sale.

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DEALING WITH DELINQUENCY AND FORECLOSURE

Final examination questions

Select the best answer for each question and complete your test online at **CAMS.EliteCME.com**.

1. Real estate law is not consistent among all forms of community associations.

   ○ True ○ False

2. The mortgage foreclosure law substantially increased the amount of time lenders are allowed to seek a deficiency judgment on a note from one year to five years.

   ○ True ○ False

3. Deficiency judgments are commonly issued when a property owner fails to pay amounts owed on a mortgage and the property securing the mortgage is sold to satisfy the debt, but the proceeds from the sale are less than the amount owed.

   ○ True ○ False

4. The law amends s. 702.10 FS allowing condominium, homeowners associations, and cooperative associations named as a party in a mortgage foreclosure action to ask the court for an "order to show cause" for the entry of final judgment.

   ○ True ○ False

5. The Landlord and Tenant law includes a new provision amending Section 83.64, Retaliatory Conduct, stating that landlords may not retaliate against a tenant if the tenant has paid rent to a condominium, cooperative, or homeowners association after demand is made by the association to pay the landlord's obligation to the association.

   ○ True ○ False

6. A lien becomes effective at the time the claim of lien is recorded in the public records of the county in which the property is located.

   ○ True ○ False

7. An estoppel letter is a notice, recorded in the chain of title to real property, indicating the property is involved in litigation.

   ○ True ○ False

8. The revised Homeowners Association Act establishes a homeowners association's liability for assessments on any property during the time the association holds title to the property.

   ○ True ○ False

9. Developers' amendments to governing documents changes must be made in good faith and with good reason.

   ○ True ○ False

10. A "judgment credit" is required to suspend a delinquent owner's voting rights.

    ○ True ○ False

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