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ATTORNEYS AT LAW

Recent Developments/Obstacles in Assessment Collection

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Good Assessment Collection Practices

- Adopt a Collection Policy
- Timely, Aggressively and Consistently Enforce Collection Of Delinquent Accounts
- Record Liens
- Gather as Much Information as Possible Early On About Bank Accounts, Employment and Assets
- Get Mortgagee Information
- Get Copies of All Leases
- Adopt a Lease Addendum with Assignment of Rent Provision
- Suspend Delinquent Owner's Right to Use Amenities and/or Right to Vote, if permitted by the Association's governing documents

Why Adopt a Collection Policy?

- Board can adopt without owner approval based on the authority in the governing documents and by statute
- Sets forth a clear step-by-step objective process that can be followed by the Board and management
- Educates owners about their obligations, informs owners what to expect if they fail to pay and show that the Board is serious about collecting assessments
- Educates Board about what the Association is authorized to collect

Record a Lien

- Secures the Association's payment of assessments
- Provides notice of the Association's interests in the event of a sale, re-finance, bankruptcy, foreclosure or short sale
- Lien can be foreclosed just like a mortgage
- Ensures Association will receive notice of a foreclosure action by Owner's lender
- Association will be considered secured creditor in the event of bankruptcy

Adopt a Lease Addendum

- Lease Addendum is a Contract between Owner, Tenant and Association
- If Owner becomes delinquent, Tenant must send rental payments to the Association until Delinquency is satisfied
- Eliminates costly and lengthy process of filing lawsuit for rent garnishment, applies immediate pressure on non-resident owner

Maryland Lien Law

- **OBSTACLE:** Recent legislation in Maryland has made it more difficult to enforce and foreclose on assessment liens for community associations. Section 14-204(d) of the Maryland Contract Lien Act limits the authority to foreclose a lien that consists only of (i) delinquent assessments (regular or special); and (ii) reasonable costs and attorney's fees **directly related to the filing of the lien and not exceeding the amount of the delinquent assessments.** Additionally, the lien does not include any fines imposed by the Board or attorney's fees related to recovering the fines.

Maryland Lien Law cont.

SOLUTION:

- File two (2) separate liens, one lien that includes all costs and fees related to the delinquent assessments, including, late fees, interest, and attorney's fees and collection costs that may be related to legal services other than filing of the lien. This lien should be recoverable in a bankruptcy proceeding and a pay-off in the event of a sale of the property or refinancing that requires a release. In the event the Board elects to foreclose against the property, a second lien must be recorded that only includes the permissible delinquent assessments and costs and attorney's fees directly related to the filing of the lien.
- If the Board wants to collect fines, as part of the Association's collection policy include a payment application procedure that applies any payments received first to the fines and as a result regular assessments remain delinquent.
- Maryland Legislature may correct this problem in current 2014 legislative session. House Bill 602 was introduced to allow such liens to include late fees, interest, reasonable costs and attorneys' fees directly related to collection efforts.

Fair Debt Collection Practices Act (FDCPA)

- **RECENT DEVELOPMENT – VIRGINIA FAIR DEBT COLLECTIONS PRACTICES ACT LAWSUITS**: In recent years, there have been several lawsuits filed against community association law firms in Virginia asserting violations of the FDCPA. Although the lawsuits are directed against the law firm representing the Association, such lawsuit not only affects that specific delinquent owner but may adversely affect the Association's collection policies, including causing lengthy delays and encouraging similar challenges by other delinquent owners. These lawsuits may have originated in Virginia but as FDCPA is a federal statute, everyone involved in the collection of debts (including DC and Maryland) must be diligent in its efforts to comply with the requirements of FDCPA.

FDCPA cont.

- FDCPA prohibits *debt collectors* from using abusive, unfair, or deceptive practices to collect consumer debt
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- Under the FDCPA, a debt collector is someone who regularly collects debts owed to others. This includes collection agencies, lawyers who collect debts on a regular basis and companies that buy delinquent debts and then try to collect them.
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- Most management companies are considered to be agents of the association for whom the collection of debt is an incidental duty owed to the association. Because a management company is viewed as collecting debt for itself, due to its agency relationship with the association, it is not required to comply with FDCPA.

Unfair or Deceptive Practices

Debt collectors may not

- Try to collect any interest, fee, or other charge on top of the amount owed unless the contract that created the debt or state law allows the charge
- Misrepresent the character, amount, or legal status of any debt
- Make any false, deceptive or misleading representation to collect debt
- Make false representations regarding services rendered or compensation which may be lawfully received by the debt collector
- Use unfair or unconscionable means to collect or attempt to collect any debt
- Threaten to communicate to any person credit information which is known or should be known to be false

Recent Relevant Cases Involving FDCPA

- ***Sunga v. Rees Broome***, 2010 WL 3198925 (E.D. Va. August 12, 2010)
- Consolidation of 3 lawsuits arising out of 3 communications from Rees Broome P.C. to Maria Sunga on behalf of Canterbury Square Condominium Unit Owners Association
- Sunga Alleged various FDCPA violations claiming:
- Claim in demand letter was false because demanded interest of \$2.57 when under Bylaws the amount should have been \$1.16
- Misrepresented assessment amount as \$424.00 when assessments were \$408.00
- Attempted to collect attorney's fees when Bylaws only permit recovery of legal fees if association is prevailing party in a dispute, and only to extent awarded by the court
- Improperly charged interest upon interest
- Statement in letter that "liens and judgments against property could only be paid off through a payment of \$7,397.87" was false because no judgment had been entered
- Threatened to communicate false credit information by stating in letter "[y]our delinquent credit report may also be reported to the major credit bureaus for inclusion on your credit report"

Recent Relevant Cases Involving FDCPA

cont.

Hill v. Chadwick, Washington, Moriarty, Elmore & Bunn (Civil Action No. 1:12-cv-671-JCC-JFA, E.D. Va., June 19, 2012)

- Class Action Complaint filed on behalf of Alice Hill, member of Reston Association
- Plaintiff's counsel included 2 members of Virginia General Assembly, a member of the Virginia House of Delegates and a Virginia State Senator
- Hill claimed various FDCPA violations claiming:
 - False representations of the character, amount or legal status of debt
 - False representation of entitlement to attorney's fees and costs that it could not legally demand

Class Included:

- All persons after June 19, 2011, to whom defendant mailed a letter or a Memorandum of Lien on behalf of an association, where there was a demand for attorney's fees, collections costs, lien charges or court costs that were not awarded by a court

Recent Relevant Cases Involving FDCPA cont.

Tsvetovat, et al. v. Segan, Mason & Mason, P.C. (Civil Action No. 1:12-cv-510, E.D. Va.).

- Class Action brought by members of the Virginia General Assembly, among others. Pleading was similar to those in *Hill v. Chadwick, Washington, Moriarty, Elmore & Bunn*.
- Plaintiffs claimed various FDCPA violations claiming:
 - False representations of the character, amount or legal status of debt
 - False representation of entitlement to attorney's fees and costs that it could not legally demand
 - Misrepresenting interest rate and including interest at a rate exceeding that permitted by law
 - Computation used was false, deceptive and misleading
 - Calculation of interest on late fees, attorney's fees, and other amounts in addition to the assessments was misrepresentation
 - Falsely claimed debtors were liable for garnishment costs

Takeaway/Considerations from FDCPA Cases

- Ensure management provides timely and accurate account information to the Association's attorneys and reports any payments received directly to management to the attorneys.
- Confirm with attorneys that all late fees, interest, collection costs and attorney's fees are authorized by the Association's governing documents or by statute.
- Discuss any concerns/issues with the Association's attorney to confirm compliance with FDCPA.

Courts' Inconsistent Award of Attorney's Fees

- **OBSTACLE**: Inconsistency of the award of attorney's fees in collection lawsuits, particularly in Maryland and Montgomery County. Despite attorney's fees authority in the governing documents, judges may not award any attorney's fees or a de minimis amount that is significantly lower than the Association has paid the attorney to collect the debt.

Courts' Inconsistent Award of Attorney's Fees cont.

In the recent past, courts generally awarded 15-20% of the total delinquency amount as “reasonable attorney’s fees”. Although in some cases this was a fairly minimal amount, at least attorneys could advise Boards of an anticipated amount that could be collectible. A Maryland Court of Appeals case held that courts must apply Rule 1.5 of the Maryland Rules of Professional Conduct to determine the reasonableness of attorney’s fees as opposed to simply applying a percentage of the outstanding balance. Such discretion has led to absurd results particularly in Montgomery County where judges have awarded ZERO as attorney’s fees despite authority in the governing documents and supported by an affidavit from the attorney as to the reasonableness of the fees.

Courts' Inconsistent Award of Attorney's Fees cont.

SOLUTIONS:

- Board may need to be more selective in authorizing attorney to file lawsuits. Depending on the amount of the debt, Board may need to hold filing a lawsuit for another fiscal year.
- Board should work with management and its attorneys to determine a threshold outstanding balance to file a lawsuit that considers the risks of minimal recovery of attorney's fees.
- Work with debtor to negotiate an acceptable payment plan that can avoid the review of a judge, and upon default, the debtor agrees to a consent judgment for the full amount of the attorney's fees.
- Include within adopted collection policy payment application procedure that credits any payments received initially to attorney's fees, collection costs and then to penalties (i.e. late fees and interest) and finally to assessments. As a result, the outstanding principal should be higher at the time of filing suit.
- Board must have eyes wide open and understand that the Association may not recover all of the attorney's fees through a lawsuit, however, the Board has a fiduciary duty to all of the Association's members to take any reasonably necessary steps to collect assessments. The expiration of the applicable statute of limitations to file a legal action may force the Board's hand and/or seek alternative actions such as foreclosure or sheriff's sale.

Mortgage Foreclosure

- When a mortgage holder with a senior lien forecloses on the owner's property, the foreclosure will likely wipe out the Association's lien
- Nonetheless, it's important to record Association lien to secure the Association's claim and to ensure the association will receive notice of the lender's foreclosure sale
- It's important to receive this notice so the Association will know who owns the property, because the lender will be responsible to pay any priority lien amounts the Association is statutorily entitled to, and the new owner (either the lender or third-party buyer) is responsible to pay assessments and maintain the property from the date of foreclosure sale (not date of ratification or recording date of trustee's deed, if recorded)
- If there are surplus proceeds from the sale, the Association may be entitled to the funds
- If lender forecloses and Association's lien is wiped out, then Association will have to decide if it should seek a personal judgment against the owner. Primary obstacle is to locate new address for debtor to serve complaint and locate assets.

Mortgage Foreclosure cont.

PRIORITY LIEN STATUS FOR ASSOCIATIONS:

MD

- **4-month priority up to \$1,200 for association assessments.** When there is a lender foreclosure sale, up to \$1,200 of assessments will be paid **before** the mortgage debt is paid. The law applies to loans obtained after October 1, 2011.

DC

- **Priority for 6 months condominium assessments immediately preceding foreclosure action.** Condominium assessments also have priority over second deeds of trust on the unit.