

# EUGENE BURGER MANAGEMENT CORPORATION

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## ASSESSMENT COLLECTION

March 17, 2011

This article will provide an overview of the methods and procedures for collecting delinquent assessments in California. It is intended as a general guide to assist directors, officers, and managers in evaluating existing collection practices and procedures for their respective associations and is not intended to cover all legal or practical considerations in collection activity. The reader should consult with an attorney knowledgeable in community association collections for specific collection issues.

The current economy has made delinquent assessments an ever increasing problem for associations. Historically, delinquencies were generally brought current after the delinquent owner received a letter from the association or its attorney. Only occasionally would the association have to take action obtain a money judgment against the owner or to foreclose its lien

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rights. As a result, many board members felt little need to become familiar with the procedures for pursuing collection of the delinquent assessments.

Many associations now find it necessary to pursue collection through

the courts.

### GOVERNING DOCUMENTS AND STATE LAW

With a significant number of collections proceeding to judgment or foreclosure, every director and officer of an association should be familiar with the collection procedures in his or her associations' governing documents and those required by state law. The association's governing documents typically include a Declaration of Covenants, Conditions and Restrictions, ("Declaration"), Articles of Incorporation (or Association), Bylaws, Collection Policy and other rules adopted by the board of directors.

California law allows an association to record a lien against the delinquent owner's property for the amount of the assessments and all reasonable costs of collection, and to enforce the lien in any manner permitted by law. If there is a conflict between state law and the governing documents, state law will prevail and the association's conflicting collection procedures may be unenforceable.

The governing documents should be reviewed to determine whether they limit the procedures otherwise available to the association under California law. While an association has the right to recover the legal fees and costs incurred in collecting the assessments, if the

association fails to comply with all required collection procedures, not only will it not recover its legal fees, it may have to pay the delinquent owner's legal fees.

An effective collection policy should consider at an early stage whether the association is likely to collect the assessments and, if so, which procedure will be most effective.

Unless the governing documents specifically prevent it, the association has a unique right under California law to file a lawsuit to recover a money judgment against the owner and/or to foreclose an assessment lien. That special right exempts an association from the general rule in California that when a lien, such as a deed of trust, has been recorded against real property, the lien must be foreclosed and the property sold before any action can be filed to recover money directly from the owner.

Before proceeding with collection activities, the association should consider the likelihood of actually collecting the assessments and related costs. The association may incur the expense of foreclosing its lien, or obtaining a money judgment only to discover that there is not enough equity in the property or other assets (wages, bank accounts, etc.) to cover the delinquent assessments and collection costs.

When an owner becomes delinquent, he or she may also have a line of creditors looking for payment, all of whom may be ahead of the association. In the worst cases, he or she may have even filed bankruptcy.

## COLLECTION PROCEDURES

In order to protect its right to lien an owner's property for delinquent assessments and to foreclose the lien, the association must follow the procedures established under the law as well as its governing documents.

In addition to notice requirements in the governing documents, if any, California law requires specific notice to the owner within specific timelines. Failure to provide the required notice will invalidate the lien and the association will be required to begin the process all over again, at its own expense. The association may also be liable for any attorney's fees incurred by the owner.

The following discussion assumes that an assessment was duly levied and the association has complied with all requirements of California law and the Governing document, including adopting a timely distributing a collection policy to all members.

Unless the governing documents provide otherwise, the association generally has three methods of collecting delinquent assessments; 1) non-judicial foreclosure (trustee's sale); 2) judicial foreclosure (court ordered sale); and/or, 3) civil action (personal judgment against the owner).

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## NON-JUDICIAL FORECLOSURE

Notice of Intent to Lien. The formal foreclosure process begins with notification to the delinquent owner of the delinquency and of the association's intent to record a lien against the owners' separate interest for the delinquent assessments ("Pre-lien Notice"). The association's governing documents may contain additional notice requirements and should be consulted to assure full compliance with all notice requirements.

***...the owner may dispute the debt by submitting...a written explanation of the reasons for his or her dispute...or to discuss a payment plan***

The Pre-lien Notice must be in writing and must contain specific information. It must be delivered to the owner personally or by certified or registered mail at least 30 days before the lien ("Notice of Lien") can be recorded. Recording the Notice of Lien before the expiration of the 30 days will invalidate the lien and require the association to restart the process.

Within 15 days of the date of the Pre-Lien Notice is mailed or delivered personally, the owner may dispute the debt by submitting to the association a written explanation of the reasons for his or her dispute and /or a written request to meet with the association's board of directors to discuss a payment plan. The board must respond in writing within 15 days and must provide the owner with any standards for payment plans, if any exist and must generally meet with the owner in executive session within 45 days of the owner's request.

If a payment plan is arranged, collection activity ceases, unless the owner fails to make payments as agreed. If a payment plan is not reached and the assessments remain delinquent, the association may proceed with collection activity by pursuing judicial foreclosure, non-judicial foreclosure or a claim in Small Claims Court. Each of those procedures is described below.

Notice of Lien. An association may not record a Notice of Lien for at least thirty (30) days after the Pre-Lien Notice is delivered to the owner. A copy of the Notice of Lien, showing the date it was recorded, must be delivered to the delinquent owner personally or by certified or registered mail within 10 days of the date the Notice of Lien is recorded.

The association must also offer to "meet and confer" with the owner to resolve the delinquency before recording a Notice of Lien. If accepted or requested by the owner, the association must participate.

***The board must meet with the owner in executive session within 45 days of the owner's notice of dispute or request for a payment plan.***

The Notice of Lien must contain specific information, similar to the Pre-Lien Notice. The decision to record a Notice of Lien must be made by the Board of Directors and the decision must be approved by a majority vote of the Board in an open meeting and recorded in the minutes of that meeting.

The specific procedure for conducting the trustee's sale after the lien is

recorded can be found in the California Civil Code, beginning at Section 2924. This procedure allows the association to have the property sold at public auction by a trustee to satisfy the amount of the lien.

***...non-judicial foreclosure does not create any personal liability for the owner...***

The procedure is commenced by recording a Notice of Lien ("Lien") in the county recorder's office where the property is located and serving a copy on the owner. After the Lien is recorded the association must wait at least 90 days before it can proceed with the next step, which is the recording of a Notice of Trustee's Sale ("NTS"). The NTS cannot set the sale of the property for any time sooner than 20 days after the date the NTS is recorded. The owner may cure the default and pay the amounts due up to 5 days before the date set for the trustee's sale.

In actuality, the trustee's sale procedure can take a minimum of 4 months before the property can be sold, and can take longer. A "lien foreclosure specialist" has estimated that the non-judicial foreclosure process is closer to 8 months.

As a practical matter, the owner has little incentive to pay the assessment and costs until the last moment, i.e., 5 days before the trustee's sale, if ever. Once the Lien has been filed there are few additional costs for the owner to worry about and the association can take no action against the property until the date set for the trustee's sale. Unlike the judicial foreclosure, in which the owner faces a personal judgment and thereby has a

greater incentive to pay the assessment, non-judicial foreclosure does not create personal liability for the owner and therefore does not create the same incentive.

More importantly, if the lender holding the first deed of trust on the property forecloses its lien, the association's lien will be "cut off," meaning that the Lien no longer exists. In that case, the association has no foreclosure rights and must go back to court, if judicial foreclosure was not pursued, to obtain a personal judgment against the delinquent owner. By that time, other creditors may have already attached the owner's personal assets to satisfy their judgments.

#### JUDICIAL FORECLOSURE

Judicial foreclosure allows the association to pursue two remedies simultaneously; 1) foreclosure of the assessment lien and 2) obtaining a personal judgment against the delinquent owner.

***Collecting on a personal judgment ... generally takes less time and the cost is about the same as or less than non-judicial foreclosure.***

The judicial procedure begins when the association files a lawsuit and serves (personally delivers) a complaint on the delinquent owner. The complaint cannot be filed until at least 30 days after the Notice of Lien was recorded.

After the owner has been served with the complaint, he or she has 30 days to file a typewritten response with the court. Because of the relatively short time for the owner to respond,

(compared with a minimum of 90 days for a non-judicial foreclosure as described below) the owner often realizes the seriousness of the situation and is more likely to enter into an installment plan to pay the delinquent assessments.

If the owner does not file an answer within the 30 days, the association may obtain a default judgment against the owner personally for the amount of the delinquent assessments and all reasonable collection costs, including legal fees, in addition to the option of foreclosing the lien and selling the owner's property. When the owner does not respond to the complaint, a default judgment can be obtained in approximately 30-45 days after the complaint was filed.

After obtaining a judgment, the association can decide whether to satisfy the judgment by selling the owner's property in foreclosure or by pursuing the owner's personal assets, including garnishing wages, or attaching checking accounts, vehicles, or any other asset of the owner. Collecting on a personal judgment can be very productive, as it generally takes less time and the cost is about the same as or less than non-judicial foreclosure.

To satisfy the personal judgment, the association need only garnish the owner's wages and/or attach his or her personal assets, including bank accounts. Once the owner's employer receives a notice of garnishment or the owner's bank receives a writ of attachment, they are legally obligated to turn over funds to the levying officer, usually the County Sheriff, for payment to the association. Once the judgment is obtained, it is valid

for 10 years and can be renewed for additional 10-year periods.

#### Foreclosure After Judgment

The procedure to judicially foreclose the lien and sell the owner's property involves complex procedures and requires decisions on whether to waive any deficiency judgment against the owner (the right to pursue the owner personally if the sale is not adequate to pay the full amount owed) or to reserve that right. The decision will affect the time it will take to sell the property (20 vs. 120 days, approximately).

Once that decision is made, the property can be sold at public auction to the highest bidder. If the sale results in enough proceeds to pay off all liens, including deeds of trust recorded before the Notice of Lien was recorded, the association will receive the excess proceeds, up to the amount of its lien. As a practical matter, however, foreclosure sales seldom result in excess funds being available to pay junior liens.

#### PERSONAL JUDGMENT

Because of many homes being "under water," and the extra time required to foreclose an assessment lien, some associations are foregoing foreclosure and proceeding directly with a civil lawsuit to obtain a personal judgment against the delinquent owner. To assure maximum protection for the association while pursuing a personal judgment, a lien may be recorded, but not made part of the lawsuit.

In that situation, the association would;  
1) take the steps necessary to record an assessment lien AND, 2) file a lawsuit

against the delinquent owner for a personal judgment.

Ideally, the association would send the Notice of Intent to the owner and file a complaint for a personal judgment against the owner at the same time. As indicated above, a judicial foreclosure action will take approximately 120 days to obtain a judgment (assuming every step is taken promptly),

A personal judgment, however, can be obtained in about half that time. Once the owner is served with a complaint, he or she has 30 days to file a response with the court. If a response is not filed within that time, a default judgment can usually be obtained within the following 30 days. Accordingly, the total time to obtain the personal judgment is approximately 60 days.

Once the court enters judgment, the association can obtain an Abstract of Judgment that can be recorded in any county in California. Recording the Abstract of Judgment creates a judgment lien against any real property the delinquent owner owns at the time of recording and any property acquired in the next 10 years.

In that case, why go to the trouble of recording a Lien? The answer is to provide additional protection to the association in the event the delinquent owner files bankruptcy. The Lien puts the association in the category of a "secured" creditor, and gives the association priority over "unsecured" creditors in bankruptcy.

#### SMALL CLAIMS COURT

If the amount of the assessments and collection costs does not exceed \$5,000, the association may also file a claim against the delinquent owner in Small Claims Court. There is a limit of 2 large claims (\$2,500+) per year. An attorney may assist the association in preparing its claim in small claims court but is not permitted to appear in court. Generally, an officer or director of the association must appear in court to present the association's case at trial, which will usually require at least a half day of the director or officer's time.

A property manager may appear in small claims court on behalf of the association, so long as the manager's duties entail more than just appearing in court. In other words, a manager cannot appear in small claims court if that is all he or she does for the association.

Because of the potential hardship on the officer or director or the additional cost a manager is likely to charge coupled with the fact that the association is entitled to recover its reasonable attorney's fees incurred in collecting the delinquent assessments, there may be little incentive to file the claim in Small Claims Court.

#### SUMMARY

The association's governing documents should be reviewed by the association's attorney to identify any conflict with state law, any limitations or restrictions on the methods of collection available to the association, procedures required to establish a lien against the owner's property, and whether the governing documents should be amended to allow implementation of a sound collection policy.

***The association's attorney should be consulted to assure that the appropriate procedures are put in place***

on specific matters, contact your association attorney.



The policy must comply with the procedures authorized in association's declaration and those required by state law to assure a valid and enforceable lien and to avoid the delay and cost involved in having to restart the process, and to avoid having to pay the owner's attorney's fees.

The available methods of collecting the assessments (judicial foreclosure, non-judicial foreclosure, personal judgment, and small claims court) should be carefully reviewed with the association's attorney to determine whether one is better suited to the needs of the association, based on the particular circumstances of each collection. Some statutory requirements apply to all collection efforts while others apply to specific methods of collection. The association's attorney should be consulted to assure that the appropriate procedures are put in place for each method that is to be used by the association.



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