

Is Your Association Collecting All of Its Legal Fees and Costs?

by Ben Solomon, Esq.

In this financially upside-down real estate market, it is more important than ever that community associations make sure to collect every dollar that is due to them. This means especially recovering all of your association's legal fees and costs that are expended through the legal process of collecting unpaid assessments. Florida law and almost every community association declaration both contain the right of an association to recover all of its legal fees and costs incurred in the lien and foreclosure process in addition to any assessment amounts due to the association. In fact, the recovery of these legal fees and costs is critical to the overall success of an association's entire collections effort. If the legal fees and costs are not being collected on top of the assessment amounts, then the net effect is that they are coming out of the recovered assessments and may even leave the association still owing an amount due to the attorney after the attorney's fees are deducted. Owners, lenders, and their attorneys, however, do not typically just offer to pay such additional amounts of legal fees and costs to an association; the association attorney must be aggressive and demand them.

For example, by now you may be aware that the liability of a first mortgage holder (a bank) for past due assessments after it takes title through foreclosure is capped under Florida law to the lesser of twelve months of assessments or one percent of the original mortgage for homeowner associations

and the lesser of six months of assessments or one percent of the original mortgage for condominium associations. Pursuant to Florida Statutes, any amount in excess of the bank's maximum liability becomes a common expense to be paid by the other unit owners who are paying. Even if the bank stalls its foreclosure for two to three years or more, it is still legally entitled to avail itself of the statutory limit on liability and pay significantly less than what its borrower owed to the association. However, the applicable statute that limits the bank's liability for assessments does not expressly limit its liability to pay the association's legal fees and costs (and the late fees and interest) incurred in the collection process. In other words, while a bank's attorney may argue that its client's liability after foreclosure is limited solely to twelve months or six months of past due assessments in total (including the attorney's fees and costs), the law simply does not support that position. As such, even in the case of a qualified first mortgagee who forecloses on a home, the full amount of legal fees and costs incurred in the collection process by the association are still due to the association in addition to the capped assessment amount.

If you're not sure whether your attorney recovers your association's legal fees and costs on the collection matters he or she handles, then ask. If the answer is no, your association is likely suffering enormous amounts of additional bad debt unnecessarily. If your attorney is not collecting and/or



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reimbursing all of your association's legal fees and costs, you should ask him/her whether your association is entitled to the same under the applicable statute and/or your association's governing documents. The answer will undoubtedly be, yes.

In addition to recovering all of the association's legal fees and costs, an association should also make sure to recover all of its late fees, plus any accrued interest on the past due assessments, if authorized by the association's governing documents. Over time, such late fees and interest can turn into significant amounts due and can help to offset losses because of the bank's limited liability on the past due assessments. Please note, however, that the collection of late fees and interest should be applied uniformly to all delinquent owners and should also be formally adopted by the board as a rule of the association prior to implementing the collection of the same for the first time. The bottom line is that during these difficult economic times, associations need to be more aggressive than ever to pursue the full amounts due to them by law including all legal fees, costs, late fees, and interest.