

Collection of Assessments: The Various Remedies Available to a Condominium Association, with Recommendations

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I am frequently asked what are the options available when a co-owner is not paying his assessments, and which option do I recommend. The Michigan Condominium Act (“MCA”) has three legal remedies available: a suit for a money judgment, foreclosure of the statutory lien by advertisement, and judicial foreclosure of the statutory lien. Which option is “best” always depends upon the facts of the particular situation, but more often than not I recommend foreclosure of the statutory lien by advertisement.

Before discussing the remedies, it is helpful to call to mind the objectives behind any condominium assessment collection action. First, and foremost, is to collect as much of the delinquent assessments as possible at the minimum effort and expense to the association. The second objective, if the first objective is not possible, is to stop the bleeding; in other words, to get the nonpaying co-owner out of the unit as expeditiously as possible so that a new, paying co-owner can purchase it and re-start the flow of assessments.

Before pursuing any of the remedies, the association needs to obtain a title commitment for the condominium unit. This will tell the association the record owner of the condominium unit, any outstanding encumbrances, defects in title, the status of property taxes and assessments, the state-equalized value for the property, and whether the co-owner is in bankruptcy. This information can be used to make an informed decision on which remedy to pursue.

While pursuing any remedy, the association should also be open to settlement with the co-owner. If the co-owner can propose a reasonable payment plan, the board should seriously consider it. If waiver of some of the late fees or even attorney fees will result in a settlement, again, the board should give it consideration.

**Lawsuit for a money judgment.**

The first remedy, and the one usually least conducive to achieving the first objective, is a suit at law for a money judgment. This entails filing a lawsuit against the co-owner seeking a judgment for the unpaid assessments, and then collecting the judgment. There are many opportunities for the co-owner to delay this process and increase the expense to the association. A lawsuit is started by the filing of a complaint with the court. If the amount of unpaid assessments is less than \$25,000, the complaint is filed in the district court. If more than \$25,000 is owed, the complaint is filed in circuit court.

In either court, once the complaint is filed, it must be served on the co-owner. The court rules require personal service (handing a copy of the complaint to the co-owner) unless the court, upon motion and by order, allows service by an alternate means (e.g., certified mail, or posting on the property, or by serving a member of the household). Most courts require a process server to make three attempts to personally serve the co-owner (daytime, nighttime, weekend) before considering a motion for alternate service.

Simply by evading the process server, the co-owner can both delay the lawsuit and increase the expense for the association.

Once the complaint is served, whether personally or by some other means, the co-owner has 21 days (28 days if served other than personally) to file an answer. If no answer is filed, the association can file a document with the court placing the co-owner in default, and request that the court enter a default judgment.

If the co-owner files an answer, either by representing himself (called *in pro per*) or by hiring an attorney, the case enters a pretrial phase. A detailed discussion of pretrial and trial matters is beyond the scope of this article; however, during the pretrial phase, the parties may seek information from each other through a process called discovery, the parties may file various motions seeking partial or total relief (judgment or dismissal) from the court, and the court may order the parties into facilitation or mediation. Ultimately, if the matter is not resolved by mediation, facilitation, negotiation, or by motion, the case is set for trial. In the district courts, cases typically take six to nine months from the date of filing of an answer to be set for trial. In the circuit court, cases typically take nine to twelve months to be set for trial.

Whether by negotiation, by motion, or by trial, the objective in a lawsuit (if the co-owner does not pay) is to obtain a judgment. A judgment is a declaration by the court that the co-owner owes the association a specific sum of money. However, the judgment will only include assessments accrued up to the date of the judgment; assessments which fall due subsequent to the date of the judgment must be the subject of a separate lawsuit.

Once a judgment is entered, if the co-owner (judgment debtor) does not voluntarily pay, the association must attempt to collect a judgment. There are two principal methods of collecting a judgment: garnishing wages or bank accounts, or having a bailiff take away property (real or personal) from the debtor and sell it, in a process called attachment.

One does not need to fill out an application to purchase a condominium unit, as one might do if applying to lease an apartment. Unless the association makes a copy of assessment checks as they are received, the association does not know where the judgment debtor banks. Unless a member of the board has been friendly with the judgment debtor, or the debtor drives a work truck or wears a uniform, the association does not know where the judgment debtor works. The association must know the specific bank or employer in order to serve a garnishment.

While sending a bailiff to pick up and auction off property sounds attractive, there are several limitations. First, Michigan law prohibits a bailiff from entering into the debtor's home unless the debtor voluntarily allows it. Second, Michigan law allows some fairly generous exemptions in personal property; if the property cannot be sold for enough to pay the exemption, the bailiff cannot seize it. Finally, the property must have equity. While the debtor may be driving a new car, if the debtor financed the purchase price, the dealership or bank has a lien against the title that must be satisfied in any sale before the association sees a dime. If the vehicle sells for less than the lien, the association is liable for the difference.

All retirement-type assets are exempt bylaw from the collection efforts of judgment creditors. This includes pensions, 401(k) plans, IRAs of any kind, as well as government benefits (SSD, SSA).

There are practical drawbacks as well: the debtor can store his boat in his buddy's back yard, or his stamp collection at his mother's house, effectively hiding the assets from the bailiff.

The bailiff can also auction off real estate, but the process lasts a minimum of 15 months and involves a second "mini-lawsuit" giving the debtor another opportunity to delay. Under Michigan law, the bailiff must first attempt to seize personal property and certify to the court that he was unable to locate any non-exempt assets before he can seize real estate. Again, the property must have equity in order to make it worthwhile to seize and sell.

If the property to be sold is the condominium unit itself, then foreclosure of the association's lien either judicially or by advertisement is faster and easier than first obtaining a money judgment, having the bailiff determine there is no personal property to seize and sell, and then pursuing a sale of the condominium unit.

It is extremely difficult to forecast attorney fees and costs in a lawsuit, because they can vary greatly depending upon how hard the co-owner decides to fight. Preparing and filing the lawsuit and obtaining service of process on the co-owner will cost approximately \$2,500 to \$3,000 in attorney fees and expenses. However, if the co-owner decides to fight the association, I have seen associations spend \$25,000 and more in attorney fees and costs to take a case to judgment. While a successful association is entitled to recoup its costs and attorney fees from the defaulting co-owner, the association has to lay out the fees and costs in advance and hope to recover them by collecting the judgment.

I rarely recommend pursuing a money judgment against a delinquent co-owner. This remedy is usually a last resort, and then only when the co-owner owes the association a large sum of money but no longer owns the unit (as when his mortgagee has foreclosed). Even then, the association should diligently investigate whether the co-owner has any assets which can be used to satisfy the judgment prior to filing suit.

### **Foreclosure by Advertisement**

The MCA provides for a statutory lien against all condominium units owned by a single co-owner for assessments owed on any of the units. The lien is perfected by recording an affidavit and notice, in the form prescribed by the MCA, with the register of deeds. The association can foreclose the lien 10 days after it is served on the co-owner.

Foreclosure by advertisement is a fairly simple and straight-forward process. Once the 10-day waiting period has passed, the association simply begins advertising the property for a sheriff's sale. Notice of the sale is published in the county legal newspaper for 4 weeks, notice of the sale is posted on the property (usually on the front door) and a sale is held at the end of the publication period. The co-owner has six

months from the date of the sale to redeem the property by paying the sale amount, plus interest. If he does not, the association can evict the co-owner and put the property on the market to sell and recoup the debt.

There are a couple of downsides: first, by bidding at the sheriff's sale, the association is agreeing to take an interest in the property in satisfaction of the balance due. If the property cannot be sold for enough to cover the debt, then the association cannot go back and seek a money judgment against the co-owner. Second, the association's lien is junior to the first mortgage and any federal or state tax liens on the property. If the first mortgagee forecloses or the taxes are foreclosed, the association's interest in the property is extinguished.

However, the benefits are substantial. First, the process from beginning to end is fairly quick: from recording of the lien to expiration of the redemption period can be as short as nine months. Second, it puts the onus on the co-owner to do something: if the co-owner does not pay, his home will be sold at public auction. Most people like having a roof over their head; when there is a threat to take that roof away, those who CAN come up with the money to reinstate the account WILL do so to avoid the sale. Third, while not inexpensive, foreclosure by advertisement is usually cheaper than either of the two other alternatives. I currently quote a flat fee of \$1,275 in attorney fees to foreclose a condominium lien. The publication fees, posting fees, sheriff's fees, recording fees, and transfer taxes usually add another \$700-\$800 in out of pocket costs.

Finally, foreclosure forces the co-owner to fairly quickly make a decision: either he pays, or he moves. If he does neither, at the end of the redemption period the association can force him to move by evicting him.

I recommend foreclosure by advertisement 9 out of 10 times, because it is faster, cheaper, and easier than the other remedies. If the co-owner cannot pay, it also satisfies the association's second alternative, because the association obtains title to the property through the foreclosure process and can force the nonpaying co-owner out and sell the property to put a paying co-owner in, stopping the bleeding.

## **Judicial Foreclosure**

Judicial foreclosure is a hybrid between a suit at law for a money judgment and foreclosure by advertisement. After recording the lien, the association files a lawsuit in the circuit court (only the circuit court has jurisdiction to foreclose a condominium lien). The lawsuit contains two counts: one for foreclosure of the lien, and the other for a money judgment for the unpaid assessments. It has two primary advantages: first, it delays the time when the association has to choose between trying to collect a judgment or forcing a sale of the property until entry of a judgment. Second, it allows the association to obtain additional information about the debtor and his other assets to satisfy a judgment if there is no equity in the condominium unit.

The downsides are the same as for seeking a money judgment: it gives the co-owner many opportunities to delay collection, and it can be very expensive if the co-owner decides to contest the matter.

I recommend judicial foreclosure only in two circumstances: first, when the title commitment indicates there is some other defect or cloud on title that can only be resolved by a lawsuit, such as an undischarged mortgage that predates the current co-owner's ownership, a gap in the chain of title, or some other defect that can only be cured by a judgment. Second, judicial foreclosure is appropriate in those rare instances when there is no equity in the condominium unit but the association has information indicating that the co-owner has other substantial, unencumbered and non-exempt assets which can be garnished or seized to satisfy a money judgment.

Neither the board nor the attorney has a crystal ball to determine the likelihood of collection of assessments at the outset of a delinquency. The best that the board can do is pursue the best remedy given the circumstances and modify its strategies as additional information comes to light.