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Collections Issues

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Our community association clients often ask us about the laws that may apply to the collection of delinquent assessment accounts. This memorandum will answer several of the commonly asked questions.

1. Is the Board of Directors required by law to discuss the status of delinquent assessments accounts only in executive session?

No. The Board may discuss delinquent accounts in open session. Neither state nor federal law requires the Board to discuss delinquent accounts in closed session or to avoid discussing the names of the delinquent owners in open session; however, we believe it is a good practice to generally do both. Many Boards that discuss delinquent accounts in open forum have opted to “disguise” the name of the owner so that the discussion can be open but the identity of the delinquent owner is not unnecessarily published.

2. May the Association lawfully publish a list of owners against whom a judgment has been entered in court?

Yes. Judgments are matters of public record. The Association may publish this information if the Board is inclined to believe that such a practice would be in the best interest of the Association.

Contrary to popular belief, there are no privacy rights which protect debtors from the publication of this type of information. Of course, the Board of

Directors must be sure to publish only truthful and public information. Here is an example of a permissible form of publication:

“On April 20, 1995, the Association obtained a judgment (which has not been appealed) in the XYZ County General District Court against the following owners in the following amounts: Jones (\$1,000.00), Smith (\$500.00) and White (\$2,000.00).”

If a Board of Directors is inclined to publish delinquent account information, we strongly recommend that the Board limit its publication of judgment information that is a matter of “public record”. In other words, the Association should not publish any specific information about a debtor’s case until the Court has ruled in the Association’s favor.

If the Board decides to proceed with publication, it should also confirm that the Association maintains insurance coverage to protect the Board and the Association from suits which allege defamation, slander, or invasion of privacy. In fact, such coverage is recommended whether the Board publicizes delinquent account information or not.

Publication of debtor information, from our vantage point, is only pursued by a minority of associations. Many boards do not like the risks or potential liability associated with negligent publication, defamation, etc. Some clients, however, have advised us that they have found the practice to be effective. These clients believe the threat of publication has encouraged

owners to be vigilant about staying current; others have advised us that publication did not have any beneficial impact and, in fact, generated criticism from members of the community, delinquent and current on their assessment obligations.

In sum, it is up to the Board to determine whether the benefits of such a practice exceed the risks. If publication is considered, the Board should take the time to establish written policies to establish: a) what information will be published, b) when and where the information will be published, and c) other protocols necessary to ensure the integrity of the reporting.

Finally, the Fair Debt Collection Practice Act (described in more detail immediately below) would make it unlawful for “debt collectors” to make public any information about someone’s debt if the purpose in making the information public is to pressure someone to pay off the debt. Our firm is considered a “debt collector” and management firms may also be considered a “debt collector” under the Act. Since the Board and the Association are not considered “debt collectors” under the Act, any publication of debtor information should originate from the Association’s board.

3. Are there any statutes which restrict the type and manner of communication that can be used by property managers or Board members in the collection of assessments?

The Fair Debt Collection Practices Act is a federal statute that strictly regulates the collection practices of consumer debt. Congress enacted the Act in 1978 for the purpose of protecting consumers from deceptive and “unfair” debt collection practices, such as communicating with the consumer at unusual times, using abusive or profane language, misrepresenting the amount due, and threatening

action which cannot legally be taken. As a means of accomplishing these objectives, Congress enacted a number of restrictions upon the practices of debt collectors. Generally, we advise our community association clients and their managing agents to comply with the regulations set forth in the Act even though the precise scope of the applicability of the Act to the collection of community association assessments is still being determined in the courts.

While there are many regulations set forth in the Act, the regulations regarding the mandatory disclosures in written communications to debtors are probably the most used and, thus, the most important to know. To that end, the following is a sample disclosure statement that we believe should be included in a conspicuous location in every written form of communication with a debtor, including e-mail:

This is an attempt to collect a debt, any information obtained will be used for that purpose.

Additionally, we recommend that our clients include a statement in their initial written demands for payment advising the debtor of his or her right to dispute the validity of the debt. An example of such a disclosure is:

If you dispute the validity of this debt and cannot make payment at this time, you may request verification of the debt within (30) days of the date of this letter.

Again, the Act only applies to those persons of entities collecting debts on behalf of another. Thus, to the extent that an Association is self-managed, communications to the debtor (even if from employees of the Association) will not be covered by the Act. However, communications from the Association’s legal counsel and (in some cases) third-party management firms, should comply with the Act.

If you have any questions about any of these issues, please do not hesitate to contact one of the community association attorneys of Rees, Broome & Diaz, P.C.

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