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Basic Information Regarding Third Party Foreclosures

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Years ago when our clients or our attorneys received notification that a mortgage company had scheduled a public foreclosure sale auction of a property within a community association that we represented, we regarded it as a “death knell” for the Association’s liens and the debt secured by those liens. Generally, the property reverted back to the mortgage company, extinguishing the Association’s liens without any recovery, and the Association could only pursue the debt against homeowners personally. However, over the years, the real estate market has strengthened, which has increased the possibility that Associations will recover on a delinquent assessment account when a mortgage company forecloses on a property. This memo seeks to address some of the questions that we regularly receive when a mortgage company or other third party forecloses its liens against a property within a community association.

Q: How do we receive notice from a mortgage company that they are going to foreclose on a property?

There are essentially two ways that we learn about a pending foreclosure on one of the properties. First, if we have recorded a lien against the property at least thirty (30) days prior to the date that the mortgage company checks the title of the property before instituting a foreclosure, they are required to send us written notification that a foreclosure sale has been scheduled. We must be given the date, time and location of the public auction. If there is no lien against the property, the mortgage company is not on notice that the Association has outstanding assessments. Accordingly, we learn about these sales usually by catching the advertisement in the paper. Fortunately most Associations record a lien as soon as possible on the property, thus we generally receive direct notification from the mortgage company.

Q: What if we do not receive any notice and the mortgage company forecloses without notifying us?

When a mortgage company forecloses, they are required to submit an accounting to the Commissioner of Accounts and the Commissioner maintains a file on the matter for several months. Even if we learn of the foreclosure after the auction has been conducted, if we determine that there are excess proceeds from the sale, namely money left over after the mortgage company's debt has been satisfied, the Association may be entitled to payment from those proceeds. Accordingly, we can then submit a claim to the Commissioner and await payment.

Q: What if there are not any excess proceeds from the sale?

This generally occurs when the mortgage company takes the property back because there are no interested bidders at the public auction. Ten years ago, it was common for the mortgage company to be the only bidder at a foreclosure auction; however, in light of the increased value of homes in the local real estate market, we are seeing this situation occur much less often. If the mortgage company is the sole bidder at the foreclosure auction, it is typical that the bid received at the foreclosure sale auction will not satisfy the Association's liens against the property let alone the mortgage company's liens against the property. Yet, if the Association has a personal judgment against the homeowners for the debt

owed to the Association, then the Association may still be able to pursue the former owners individually for the debt.

Q: What is happening when the mortgage company sets a sale date and then cancels it?

This action by a mortgage company indicates that the company has decided not to foreclose on the property for one reason or another. Sometimes it indicates that the homeowner has entered into a payment plan to pay the delinquent mortgage payments while making current monthly payments. Sometimes the mortgage company agrees to modify the terms of the mortgage in order to allow the homeowner to make smaller payments at a higher interest rate over a longer period of time in order to allow the homeowner to keep the property. When a homeowner enters into an agreement with the mortgage company, it is not uncommon for the homeowner to contact our office as well in an attempt to enter into a payment plan for the unpaid assessments. If the homeowner does not contact us, we review the account to ensure that the debt owed to the Association is adequately secured because we know that the homeowner is likely to be in a precarious position with their mortgage company.

Also, the cancellation may occur because the homeowner has filed a petition with the bankruptcy court seeking protection or relief from its creditors. When this occurs, the

mortgage company is prohibited from foreclosing on the property unless it receives permission to do so from the bankruptcy court. If a petition for bankruptcy protection is filed, we routinely monitor the status of the bankruptcy case and as such, we are generally aware of whether the mortgage company has filed the necessary motion to seek permission from the bankruptcy

court to proceed with its foreclosure auction of the property.

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.