CONDO ASSESSMENTS RECOVERABLE DESPITE FORECLOSURE
(Public Act 094-1049)
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Effective January 1, 2007, the Illinois Condominium Property Act (the “Act”) is amended so that condominium associations may be able to recover some assessments which could be otherwise lost in the mortgage foreclosure process.

Typically, if a unit owner is delinquent in paying the mortgage loan on his/her unit, that unit owner is also delinquent in paying his/her condominium assessments. If the lender (mortgagee) forecloses on the unit, the association’s lien for the delinquent assessments is often wiped out and left unsatisfied. On rare occasion, the foreclosure sale generates surplus proceeds which may be accessed to pay the condominium assessment lien. In the vast majority of cases, the condominium association gets nothing. The new law provides some limited relief.

WHO PAYS?

In essence, under the right set of circumstances, the condominium association will be able to recover six months’ worth of assessments from the purchaser (other than the mortgagee) of the unit at the foreclosure sale who takes possession of the unit pursuant to a court order, or the purchaser of the unit from the foreclosing lender. In any event, the foreclosing lender (or mortgagee) itself is not obligated to the six months’ worth of assessments.

HOW MUCH?

The maximum amount of assessments recoverable seems to be the assessments (plus related attorney’s fees) which are due for the 6 month period immediately before commencement of assessment collection action and which remain unpaid by the original unit owner. If the original owner pays those delinquent assessments, then logically the association cannot collect those same assessments again. Accelerated assessments are not included. What type of “collection action” is involved? Possibly filing an eviction lawsuit or filing a lien foreclosure (either as part of the mortgage foreclosure case or independently) or filing a lawsuit for a personal money judgment against the unit owner (again, either as a part of the mortgage foreclosure case or independently). However, there must be a collection action for unpaid assessments; if the association has taken no collection action, it will not be entitled to anything. Note that there is possible ambiguity as to whether the 6 months of assessments can be applied to each collection action which remains unpaid (in others, accumulate multiple 6 month periods of assessments to be claimed from the foreclosure purchaser); and, conversely, as to whether a unit owner’s paying off one collection action eliminates all responsibility for any prior assessments on the part of the purchaser.
WHEN SHOULD THE ASSOCIATION TAKE COLLECTION ACTION?

Assuming that regular assessments increase over time, all things being equal, it is better to begin your collection action shortly before the judgment is entered in the foreclosure case. In that situation, it is also highly unlikely that the unit owner will pay the delinquent assessments covered by that collection action.

WHAT IF THE ORIGINAL OWNER PAYS THE ASSESSMENTS AFTER COLLECTION ACTION IS COMMENCED, BUT BECOMES DELINQUENT AGAIN?

The association can and should institute another collection action, preferably after six months of assessments have accumulated, in order to maximize the recovery under the new law.

DOES IT APPLY TO CURRENT CASES?

The law goes into effect on January 1, 2007. Does it apply to a case which started before January 1, 2007 but still continues (either the foreclosure sale or the resale by the foreclosing lender) in 2007? Unknown. Most likely not; but it may be worth arguing, if all other preconditions have been met. Who wants to be the test case?

WHAT MUST THE ASSOCIATION DISCLOSE?

In providing the unit account statement (typically, “paid assessment letter”) pursuant to Section 18(i) of the Act, the association must disclose the amount of assessments and any legal fees which are subject to being paid under this law. The association must make a similar disclosure in response to a request under Section 22.1 of the Act (in unit resales). Keep in mind that this disclosure is tied to the assessments which are collectible under this amendment to the Act. If the association is not entitled to those assessments (for example, because it failed to take any collection action or its collection action resulted in the original owner paying the delinquent assessments or the association improperly included accelerated assessments), then the association may be liable for making a false statement of the unit’s account.

ARE ATTORNEY’S FEES INCLUDED?

Yes, the law suggests that attorney’s fees related to the collection action should be included with the six months of assessments.

ARE LATE CHARGES, FINES OR CHARGEBACKS INCLUDED?

Probably not. Even though it may be arguable that fines and chargebacks may be treated as “assessments” under the condominium declaration and bylaws, the Act itself does not treat them in that manner. Instead, the Act refers to the unit owner’s portionate share of the common expenses. In the Act, fines are clearly distinguished from assessments. Chargebacks are not really addressed at all, except in very limited references (for example, insurance premiums). Late charges are also not treated as assessments under the Act.
ARE ONLY CONDOS COVERED?

Yes, only condominium associations. Logically, it should also be extended to master associations and common interest community associations (a/k/a townhome or homeowners associations) but that must await future legislation.

CONCLUSION

A good start but many questions which need to be resolved either by follow-up legislation or judicial rulings.