

CAPITOL ♦ TITLE

SURPRISED OWNERS FIND THAT PERSONAL LIABILITY LOOMS FOR UNPAID HOA AND CONDO FEES (AND CAN RESULT IN ADDITIONAL CLOSING COSTS FOR PURCHASERS)

When owners of property that is subject to the payment of mandatory HOA or condominium dues and assessments fail to pay, the “traditional” collection method employed by most associations is to file a lien against the property. The lien remains in place and must be paid if and when the owner sells the property. The association also has the option to institute an action to foreclose on the lien (in a fashion similar to a mortgage foreclosure) but this remedy is rarely elected. When the property on which the lien is placed is “underwater” (i. e. the existing mortgage debt exceeds the fair market value of the property) many property owners simply ignore it, since they have no equity in the property and feel, therefore, that there is no reason to pay the fees in order to protect an asset which has no value.

Recently, however, we have seen an increase in the number of HOA and condominium associations that have elected (in addition to or in lieu of the “lien remedy” described above) to institute personal, civil lawsuits against homeowners for unpaid HOA or condominium fees. Many homeowners are surprised to learn that, in addition to the right to file a lien against their property, the documents filed in the land records which create the authority for condominium and homeowners associations to impose fees and assessments on property owners and to file liens against the properties in the event of non-payment, ALSO normally provide these associations with the right to institute a personal, civil action against owners who do not pay the assessments which accrue during the period of their ownership. The documents customarily provide that anyone who takes title to any property which is subject to the document creating the assessment (e. g. the Declaration and By-Laws of the Condominium or the Declaration of Covenants and Restrictions for a development subjected to a homeowners association), personally agrees to pay the assessment and is personally liable for such fees and assessments, plus all costs of collection (including attorney’s fees) in the event of non-payment. If the owner is sued and a judgment is entered, that judgment can be used to garnish the owner’s wages or bank accounts or filed as a lien on other real property that the owner then owns or subsequently acquires. The personal liability for unpaid HOA and condominium fees which have accrued during the period of ownership continues (subject to any applicable statute of limitations) even if the property is foreclosed upon! Therefore, even an owner whose property has been foreclosed may be sued for the unpaid assessments that accrued during the period of their ownership.

Another “ugly issue” that can raise its head in the event of a default in payment of HOA or condominium fee is “ACCELERATION”. If an owner defaults in payment, most HOA and condominium documents on record permit the association to elect to “accelerate” payment of

- (i. e. call due) all fees through the end of the year or fiscal period. Therefore, if property is listed and sold and the fees have been accelerated, the Seller will be required to pay all of the accelerated fees through the end of the fiscal year at closing, AND THE BUYER WILL BE REQUIRED TO REIMBURSE THE SELLER FOR THE FEES THAT HAVE BEEN PREPAID, which can result in a significant increase in closing costs.

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