

## Collecting Assessments: Remedies and Risks

A homeowners association is entirely funded by the assessments of its members. This means that an owner's delinquency in paying assessments directly affects the association's ability to operate. Owners who do pay their assessments unwittingly subsidize the delinquent owners who are not paying. For instance, if there are ten homeowners in an association and two are not paying their assessments, there is only one way to make up for the shortfall. The remaining eight members have to pay more money than they would otherwise have to. The unfairness of this reality is striking on many levels. First, the delinquent owner is not paying his or her proportionate share of expenses. Then, the paying owners have to pay more than their fair share to make up for the delinquencies. Worse still, the delinquent owners continue to benefit from the association. The situation could be made worse yet if the paying owners had to pay more money to implement collection remedies against delinquent owners.

Fortunately, laws have been enacted in Utah so that the costs of collection against the nonpaying owners do not put added strain on an association's budget. These laws provide that community associations are entitled to recover their attorney's fees and costs from the delinquent owner. With these laws, there are few excuses for making paying owners compensate for deadbeats. Accordingly, no matter what the situation is in the broader economy, it is always crucial to periodically review your association's collection policy or develop a new one.

Associations have several alternatives for collecting delinquent assessments. It is the board's duty to understand and use these remedies effectively. Fortunately, professionals are available who will do the work

for you and because of the laws mentioned above which allow for the recovery of attorney fees and costs, there is little excuse for not utilizing these professionals. Failing to use professionals can lead to more cost, time, and liability for the association than if they had been utilized from the beginning.



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An owner's responsibility to pay assessments is not contingent on the association fulfilling its responsibilities as long as assessments represent legitimate association expenses. In other words, an owner may not legally withhold assessment payments even if the association is not providing maintenance or other services required by the association documents. Courts have held that an owner may use various legal channels to compel the association to

perform its duties, but withholding assessments is never permitted. In other words, an owner's obligation to pay assessments is independent of the association's obligations to owners.

Problems collecting assessments arise when an association has insufficient or ineffective procedures for collecting delinquencies. To avoid problems, boards should implement and follow a written collection policy that includes procedures for: 1. identifying accounting errors, 2. maintaining accurate mailing addresses of owners, and 3. identifying potential claims the owner may make against the association.

When an owner becomes delinquent and fails to respond to notices and letters, it is important that the board preserve the association's rights by pursuing its legal remedies. These remedies include, among other things, attorney demand letters, liens, lawsuits, and foreclosures.

Properly recording a lien as early as possible is the single most important remedy, as it secures the association's interests and gives notice of such interests in the event of bankruptcy, foreclosure or short sale.



**The unfairness of delinquencies affects the association on many levels.**

If demand letters and liens are ignored by a homeowner, a collection action is generally pursued through one of two options. One option is "non-judicial" foreclosure of the association's assessment lien. This option is "non-judicial" because there is no court oversight or involvement. This option does not involve pursuing the debt as a personal debt of the owner, but rather as a debt against the property itself.



A lien burdens the property itself, but a personal court judgment binds the debtor directly.

A second option is "judicial." It involves a lawsuit against the owner. This second option can provide more remedies, such as garnishing the owner's wages or selling the owner's property if a judgment is obtained. Further, a judgment is typically picked up by credit reporting agencies which means it should show up on the owner's credit report, which can lead to payment by the owner at some future date. The options that arise from obtaining a court judgment against an owner are particularly helpful in a depressed economy when properties are declining in value and many owners are simply walking away from their mortgage and assessment obligations. Such owners may walk away from a lien recorded against their property, but they cannot walk away from a court judgment that is obtained against them personally. This is an important concept because Utah law makes owners personally liable for paying assessments, a fact that many owners do not understand or forget when their bank forecloses. Since the association is entitled to recover its attorney fees directly from the owner, the costs of pursuing legal action should not be a deterrent. It is important to note that only "reasonable" attorney fees are recoverable. What this means generally is that fairness and good sense have to be utilized when deciding what costs are expended in relation to the amount owing.

Because of the difficulty predicting foreclosures by banks and personal bankruptcies of owners, it is crucial that associations take timely action on delinquent accounts. If a mortgage is successfully foreclosed, the association lien will be removed and it is unlikely that the association will be able to recover

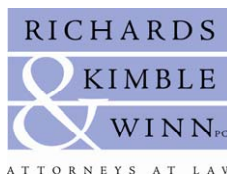
much from the homeowner. Similarly, a bankruptcy may discharge the debts of a homeowner forcing the association to write-off all of the pre-bankruptcy amounts due. Therefore, taking action quickly—within the first 90 days overdue—significantly improves the association's chances of recovery.

It is always important to keep in mind other remedies when collecting delinquent assessments. These other remedies do not apply to every case, but they can be effective when the circumstances are right and when authorized by your governing documents. These other remedies include acceleration of the entire year's assessment amount, collecting rent from the tenant of a delinquent owner, and shutting off a delinquent owner's common utilities. A powerful tool in prompting deadbeat owners to respond to payment demands is to turn off their cable. Some people can go without use of the recreational facilities, voting privileges, or even water, but the moment they can't tune into their favorite CSI Miami episodes, they fly into action. If your association pays the cable bills, you should ensure you have the ability and procedures in place to take advantage of this important remedy. Remember, however, the law strictly governs the use of these remedies, and they must be authorized in your governing documents.

**“It is always important to keep in mind other remedies when collecting delinquent assessments.”**

It is important to know what your remedies are when pursuing collections. Apply these remedies early on and consistently, and you will minimize the unfairness and inconvenience of delinquencies.

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