

What a difference a year makes!

Last year at this time, we were all starting to see establishments and businesses slowly reopen. We were getting used to the idea of wearing a mask everywhere we went. Now, we are in the Bridge Phase as we wait for the State of Illinois to move to Phase 5 and fully reopen in likely just a few weeks. Please know we are closely monitoring the situation and will continue to provide updates and our recommendations as to what community associations should do to fully reopen (and how to make adjustments should mitigation measures be put back into effect at any point).



In the meantime, our lead article in this newsletter continues our focus on maximizing an association's ability to collect the money due and owing to it. This month, we explain what it means for an association to foreclose on its lien and why this may be a good option for an association.

We continue to remain open to any suggested topics for our articles or webinars. We also continue to remain thankful for your continued support of our firm.

Chuck, Dawn & Gabby

KEOUGH & MOODY WEBINAR: WHAT WOULD YOU DO??

June 16, 2021 at 12:00 p.m.

How many times have you seen a situation arise within the association that you manage or live, and you thought, "I wonder what the attorney would do?" How many times did you have a question and want to know what would the attorney do, but were a bit gun shy to ask during the presentation? How many times did you want to know what the attorney would do, but the budget did not warrant incurring the attorney's fees? And how many times did you just want to try and stump an attorney? Well, June 16th is the day when you will have your chance for all of the above!! Join the attorneys of Keough & Moody in a webinar where YOUR questions will be the subject of the presentation and the fun!

In addition to registering for this webinar, to participate, you must email your questions in advance to Jonathan Wassell at jdw@kmlegal.com. Please clarify whether your association is a condominium, townhome, or homeowners association. Jon is the only one who will review your questions in advance. He will then randomly present the questions to Gabby and Dawn. The person with the most challenging questions who truly stumps (or comes close to stumping)

Gabby or Dawn will win a prize! Please remember, questions cannot require the attorneys to be familiar with an association's governing documents. In addition, the answers to the questions are not intended to be and should not be considered legal advice to any specific situation or association.

Please submit your questions by June 14, 2021. We hope you join us for what will likely be a fun and different webinar!

Attendees can register here: <http://events.constantcontact.com/register/event?llr=gyjn4vdab&oeidk=a07ei2v1lrd2e25dbac>

ILLINOIS EVICTION MORATORIUM UPDATE

On May 17, 2021, Governor Pritzker announced that it is his intent to begin phasing out the eviction moratorium by August, 2021. On May 28, 2021, Governor Pritzker entered a further Disaster Proclamation due to the ongoing pandemic. With that, Executive Order 2021-11 was entered, which continues the eviction moratorium through June 26, 2021. We expect additional modifications to the eviction moratorium in the upcoming month.

By way of a reminder, while associations (and landlords) are generally unable to actually evict an owner (or occupant) at this time, changes to the moratorium implemented in November, 2020 through Executive Order 2020-72 permit associations to pursue an eviction action against "non-covered persons" and to obtain an order of possession. In order to determine whether an individual is a "covered person," associations (or its legal counsel) must serve a COVID Declaration form on the owner/occupant, providing the person with the opportunity to attest, under the penalty of perjury, that they meet **all** qualifications set forth in the Executive Order. If a signed COVID Declaration form is not returned, an association is able to proceed with an eviction action and to obtain an order of possession. For more information on this process, please see our November 16, 2020 newsletter, which is available on our website <https://kmlegal.com/news>.

Ultimately, in the latter half of 2021, we will likely see the return of enforcement of orders of possession. As enforcement has been stayed for the last fifteen (15) months, Boards are cautioned that it may take an extended amount of time for the Sheriff to actually conduct an eviction. Therefore, our attorneys continue to recommend that Boards work with their owners to establish reasonable payment plans to address past due arrears.

We will continue to keep our clients updated as Executive Orders are modified.

MAXIMIZING AN ASSOCIATION'S ABILITY TO COLLECT ASSESSMENTS: Should the association foreclose on its lien against the Unit?

In last month's newsletter, we discussed how a common interest community association can

maximize its ability to collect assessments when a Unit Owner files for bankruptcy protection. We often hear about a Unit Owner's lender foreclosing on its interest against the Unit. This happens when the Unit Owner defaults on his/her payments to the mortgage company. The mortgage company then files suit in an effort to obtain a judgment against the borrower, to terminate any liens against the property which are inferior to the lender's interest, and to eventually terminate the borrower's ownership interest in the property. Next month, we will further discuss what an association can do to maximize its ability to collect assessments when the mortgage company initiates and completes a foreclosure.

The mortgage company is not the only entity that can foreclose on its lien against a unit. The Illinois Condominium Property Act specifically states that a lien is created in favor of the condominium association when a unit owner defaults on his/her payment of assessments to the association (765 ILCS 605/9). Most declarations, including those for non-condominium associations, also contain similar language. Most declarations also contain language that allows a common interest community association not only to pursue an eviction action, but also to foreclose on its lien against the unit. But how does an association know whether to file an eviction or foreclosure action and why should it even consider pursuing a foreclosure action?

Whether a community association should pursue a foreclosure action will depend on what other liens exist against the Unit Owner's property. For this reason, the first step in this decision-making process is to order a title report or 'minutes of foreclosure' from a title company. These documents will identify any outstanding mortgages and liens recorded against the property. They will also identify the status of the real estate taxes related to the property and whether the Owner is current on his/her tax payments to the county. A review of this report allows legal counsel to determine if a foreclosure is a viable option. Typically, foreclosure is a viable option when the association's lien is the superior lien against the property, i.e. no other lienholder is entitled to be paid before the association, or if there is a superior lien, the amount due is low enough that it would justify the association (or a third party) taking title subject to that lien. Once foreclosing on the association's lien is confirmed to be a viable recommendation, the following is a summary of the steps to be taken.

A Complaint for Foreclosure will be filed in the county where the property is located and all named defendants, those who have an interest in the property, will be served with a summons and the complaint. In addition, a lis pendens will be recorded against the property so all third parties know about the association's foreclosure action. Similarly, notice of the lawsuit will be published in a local newspaper to ensure that any interested party is aware of the pending foreclosure. Since terminating one's ownership rights in property he/she owns is a serious action, courts want to be sure everyone and anybody with an interest has been given the opportunity to "learn" about the pending foreclosure action. Once all defendants have been served, they will have the opportunity to respond to the complaint.

Thereafter, the association will move for entry of judgment of foreclosure. The amount of the

judgment will include all amounts due and owing to the association. The judgment includes attorney's fees and costs incurred by the association. The judgment of foreclosure will make it clear that any lienholder who has an interest that is inferior to the association's lien will be terminated once the entire foreclosure process is completed. The judgment will also include a date that is known as the redemption period. This date is the day by when the owner of the property must satisfy the judgment to avoid the property from being sold. During the redemption period, no action is taken by the association. Of course, if an Owner requests a payoff, the association will provide this information. The redemption period can be as short as thirty (30) days, if the property is vacant, and as long as seven (7) months from the date the judgment was entered. If the Owner fails to redeem the property or satisfy the judgment entered in favor of the association, the association can proceed with scheduling a judicial sale.

At the judicial sale, the association does not have to advance any proceeds. Instead, prior to the sale, we must calculate the full amount due and owing to the association. This amount will be used as the "opening bid" at the judicial sale. This ensures that no third party will take ownership unless it pays the minimum amount due to the association. Any third party can bid at the sale. Since the judicial sale is published in the paper, it may attract third parties to bid. This does happen when the value of the property greatly exceeds the judgment amount. The party who submits the highest bid at the judicial sale, eventually, will then become the owner of the property. If the association's bid remains the highest or if no one else bids at the sale, the association will be the owner of the property. Typically, an association only presents the opening bid and does not take action to outbid any third parties. After all, the association's goal is not to own the property, but to have its debt satisfied. If the association is trying to become the owner of the property, it is recommended that the Board of Directors seek the advice of its accountant prior to the sale. The association wants to be certain it does not take any action that will unnecessarily increase its tax consequences and/or jeopardize its status as a not for profit corporation.

After the judicial sale, a motion is filed with the court where the association asks the court to enter an order approving the sale. This means we are asking the court to confirm all legal requirements were met before and at the judicial sale and to enter an order declaring the highest bidder at the sale is now the owner of the property. This is the final step in most foreclosure cases. It should be noted that such an order once entered must include language that stays the right of possession in favor of the purchaser, for at least thirty (30) days. This means the owner can remain in the property until the stay on possession expires. Once the order is entered by the court, the foreclosure action is completed. A deed will be issued conveying title to the property to the highest bidder at the sale. The deed must be recorded in the county where the property is located. Once the sale is confirmed, the new owner has the duties and responsibilities of any other property owner, including to maintain it and pay the real estate taxes. Since the purchaser takes the property in an 'as is' condition, it is important for all bidders at the sale, including the association, to learn as much as possible about the condition of the property. After all, on paper foreclosing on a lien can appear to be a good idea, but once the cost to complete all needed repairs is considered, a different picture could be painted. Of course, the new owner also has the duty to comply with the association's

community instruments and to pay assessments. (Next month, we will address when the duty to pay assessments begins for the new owner.)

Foreclosure actions can take well over twelve (12) months and even longer, especially right now due to the pandemic. They are also more expensive than a typical eviction matter, but the additional expense can be warranted if it terminates one's ownership. A foreclosure may be a more ideal collection tool when a significant amount of money is owed to the association. It can also be ideal when a unit is vacant and/or involves a repeat offender, who unfortunately does not have the means to pay the association the debt owed to it.

In any event, pursuing a foreclosure action is not always the answer and the decision to proceed should be done with the advice of legal counsel. In addition, the Board should obtain an approximate value of the property through a professional appraiser or real estate agent, prior to deciding it wants to proceed with a foreclosure action or at least prior to bidding at the judicial sale. Again, it is important for the association to ensure that the cost to foreclose is in the association's best interest.

If you have any questions about any of the information within this newsletter, please do not hesitate to contact us.

Chuck Keough (cmk@kmlegal.com); Dawn Moody (dlm@kmlegal.com), & Gabby Comstock (grc@kmlegal.com)

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Naperville

630-369-2700

Chicago

312-899-9989

Tinley Park

630-369-2700

www.kmlegal.com

info@kmlegal.com

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**Keough & Moody, P.C.,
114 East Van Buren, Naperville, IL 60540**

