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COUNSELORS TO COMMUNITY ASSOCIATIONS

FEATURING:

- PROTECTING ASSOCIATION RIGHTS IN THE CURRENT FORECLOSURE FLURRY

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Protecting Your Association's Rights in the Current Foreclosure Flurry

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As a result of the recent volatility in the credit markets, our clients, along with a number of community associations nationwide, are experiencing an increased number of foreclosures by banks and other holders of first mortgages. This phenomenon, unfortunately, is beginning to affect not only a community association's ability to collect delinquent assessments, but the community association's ability to provide vital services to its clients. This article is meant to explain what a community association should do when faced with a house being foreclosed by the first mortgage holder.

The first question that comes to mind concerning first mortgage holder foreclosures is "when does a community association know a house is being foreclosed by a first mortgage holder?" Pursuant to law, first mortgage holders, prior to conducting a trustee sale (which is where the property will be foreclosed and sold to remedy the delinquent mortgage), must send the community association a "Notice of Trustee Sale." The Notice of Trustee Sale must also be recorded in the county where the property is located. The Notice of Trustee Sale must be sent to anyone who has a recorded interest or lien (such as a community association) in the property.

Once the association has received the Notice of Trustee Sale, the community association should determine whether the owner is delinquent in their assessments. If the owner is delinquent in their assessments, the

community association may make a claim to the Trustee for any excess proceeds if the property is sold at a Trustee's sale. Excess proceeds are monies obtained by selling a property at a Trustee Sale that are over and above the amount owed to the first mortgage holder. Since in most cases a community association's lien for delinquent assessments is second in priority to that of the first mortgage holder, any excess proceeds should go to the community association to satisfy any delinquent assessments and other statutorily collectible amounts owed.

In order to secure excess proceeds, the community association, pursuant to A.R.S. §33-812 must make a written claim to the Trustee (who is the person who will be holding the money once the Trustee Sale takes place) requesting that the Trustee release any excess proceeds gained to satisfy the owner's delinquency with the community association. The letter should include:

1. The amount of the delinquency and proof of the delinquency (a customer ledger will usually suffice as proof of the delinquency);
2. A statement as to the community association's lien priority;
3. A statement showing the association is entitled to excess proceeds (reference to the CC&Rs or appropriate statute regarding the assessment lien of the association should suffice).

If the Trustee, after receipt of the above notice letter, fails to deliver any excess proceeds to the community association, the community association's right to collect attorney's fees should it have to institute legal action to collect the excess proceeds will be saved. It is because of this that the above notice letter is so important and should be sent upon receiving a Notice of Trustee sale.

In the event that after the Trustee Sale there are no excess proceeds and the property has reverted to a third party, then the association's lien will be extinguished. Consequently, the association would not be entitled to collect any assessments or attorney fees incurred prior to the date of the Trustee Sale from the new owner. Nonetheless, the association may still pursue the previous homeowner in justice court by obtaining a money judgment in the hope that the homeowner will obtain future assets that the association could garnish in order to recover what it is owed.

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*and our staff wish you
and yours a
Happy Holiday Season
and a prosperous 2008.*

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QUESTIONS? COMMENTS? IDEAS?

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Ask the HOA GUY is a monthly column for HOA board members or managers to submit questions and receive relevant information on HOA issues. If you are an HOA board member or manager, you may submit questions or comments to the HOA GUY at hoaguy@hoaguy.com.



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