

# When Owners Fall Behind

## How to Collect Condo Arrears

BY STEPHEN M. LASSER, ESQ. 2003 OCT

BOARD OPERATIONS



A common problem facing condo associations, boards and managers is how to compel unit owners who fall behind in their common charges to pay their arrears. In a condominium association with only a few units, if even one unit owner falls behind in common charge payments, the building may have trouble meeting operating expenses. When unit owners in larger condominium associations with many units fall into arrears, although the impact may not be felt

immediately, eventually the shortfall will have to be borne by the other unit owners via increases in common charges or assessments.

The good news is that there are several effective legal methods a condo association's attorney can use to collect common charge arrears on behalf of a building once non-judicial methods of collection have been exhausted. Which method or combination of methods will be best for a particular situation will depend on the circumstances.

### **A Variety of Methods**

When a person purchases a condo unit, he or she becomes contractually bound to abide by the condominium's declaration and by-laws, which set forth when common charges are due. As a result, if a unit owner falls into arrears on his or her common charges, the board of managers (on behalf of the unit owners of the condominium association) may sue the delinquent unit owner for breach of contract to obtain a money judgment. Additionally, the New York State legislature has enacted several laws, which, among other things give condominium boards the ability to bring foreclosure actions and take back a unit from a unit owner in arrears, similar to a mortgage bank's ability to foreclose a mortgage.

## **Breach of Contract for Money Judgments**

A simple way to attempt collection of common charge arrears is by suing the delinquent unit owner for breach of contract due to his or her failure to pay common charges pursuant to the by-laws of his or her condominium. Assuming the unit owner has no valid defense or fails to raise a defense to his or her lack of payment, the board of managers will be awarded a money judgment, which will be docketed against the unit owner in the county clerk's office.

Next, the board can attempt to enforce the judgment by having a marshal or sheriff levy on the judgment. When a marshal or sheriff levies on a judgment they can confiscate the debtor's personal property, sell the property at auction, and then use the proceeds of the sale to pay off the judgment debt. The marshal or sheriff can also freeze the money in a judgment debtor's bank accounts. Lastly, the judgment debtor's employer can be contacted in order to garnish his or her wages.

With such a variety of resources a creditor with a money judgment is able to levy upon, commencing an action for breach of contract can be an effective means to collect common charges. However, to a large extent, the utility of obtaining a money judgment will depend on whether the debtor is employed and whether his or her personal property and other assets can be located.

## **Statutory Solutions**

In addition to commencing a lawsuit to obtain a money judgment, a board of managers can simultaneously pursue statutory remedies to collect common charge arrears, which are contained within New York State Real Property Law. Which statutory method or methods should be used depends on whether the unit is occupied by the unit owner, is leased, or is vacant, and whether the unit is encumbered by mortgages or other liens.

## **Rent Collection under Section 339-kk**

In the situation where a condominium unit owner leases his or her unit rather than occupying it and the unit owner fails to pay his or her common charges, Real Property Law Section 339-kk authorizes condo boards to collect rent payments directly from the unit owner's tenants. This is

accomplished by simply sending a notice to the tenants, in accordance with the statute, advising them to start making monthly rental payments to the condominium rather than the unit owner. The condominium can continue collecting monthly rent directly from the tenants until the unit owner's common charge arrears are cured. An ancillary benefit of sending the 339-kk notice to the unit owner's tenants is that it may cause the unit owner some embarrassment, which by itself may spur the unit owner to pay his or her arrears.

Unfortunately, sometimes out of fear of some form of retaliation from the unit owner, or if the unit owner's tenants are similarly financially irresponsible or insolvent, the unit owner's tenants may disregard the board of managers' 339-kk notice. If this happens, based on relevant case law, it appears that the board of managers can sue the unit owner's tenants to compel them to make use and occupancy payments to the condominium while simultaneously pursuing legal remedies against the unit owner. In essence, Real Property Law Section 339-kk gives boards of managers an additional financial resource to tap for payment. Accordingly, authorizing the condominium's attorney to prepare and serve a 339-kk notice is a good first step towards collection of common charge arrears in the scenario where a unit owner leases his or her unit.

### **Lien Foreclosures**

A board's ultimate weapon for collecting common charge arrears is filing a lien against the unit and foreclosing on it pursuant to Real Property Law Section 339-aa. Real Property Law Section 339-aa enables a board of managers to foreclose a common charge lien as if it were a mortgage and eventually take title to a unit if the owner can't pay - or refuses to pay - what is owed. Whether to pursue a lien foreclosure will depend on a variety of factors, including, but not limited to, the amount owed to the condominium, whether other liens were previously filed against the unit, and the fact that lien foreclosures can be costly and can take several years to complete. However, even if a board of managers opts not to pursue a lien foreclosure, it should still file a lien against the unit.

Filing a common charge lien against the unit in the recording office of the county where the condominium's declaration is filed serves as a quick and relatively inexpensive method of protecting the condo. Once the lien is filed, it serves as notice to the world of the unit owner's

debt owed to the condominium. The unit owner will be unable to sell or refinance his or her unit without first paying off his or her arrears to the condominium. Additionally, in the event that any superior lienholder forecloses on the unit, the superior lienholder will be required to give the condominium's board of managers notice of its foreclosure. Ultimately, this will enable the condominium to share in any surplus monies if the superior lienholder sells the unit at foreclosure for an amount greater than the lien it foreclosed. (A discussion of lien priorities is beyond the scope of this article; however, generally, a lien recorded prior to another lien will be superior to the later recorded lien - with some exceptions for liens filed by government entities.)

Lastly, when the condominium's lien is filed, the condominium becomes a secured creditor under the Federal Bankruptcy Code. In the event the delinquent unit owner files for bankruptcy, the condominium will ultimately get a higher percentage of the debt paid as a secured creditor than if it didn't file a lien.

### **Receiverships under Section 339-aa**

Assuming a condominium's board of managers files a lien for unpaid common charges and commences a foreclosure action against a delinquent unit owner under Real Property Law Section 339-aa, the statute also provides that the condo may apply to the court for a receiver to be appointed while the foreclosure is proceeding, if such remedy is provided for in the condominium's bylaws. (A provision authorizing the appointment of a receiver is standard in condominium bylaws.) A receiver is an individual appointed by the court to protect a property that is being foreclosed from damage or neglect caused by its owner, by authorizing the receiver to collect rent for the property and manage the property while the foreclosure action is proceeding. (It is a good idea to request that the building's property manager be appointed as the unit's receiver because he or she will be familiar with the property and will already have a bookkeeping system in place.)

Once the court approves the appointment of the receiver, the receiver can start collecting rent from the unit's owner if the unit owner resides in the unit, or from the unit owner's tenant if the unit owner rents the unit out. If the unit is vacant at the time the receiver is appointed, the receiver can renovate the apartment, if necessary, and then rent it out for the benefit of the condominium. Whether or not applying to the court to have a receiver appointed will be cost-effective will depend on a variety of factors such as whether the unit is currently owner occupied

or leased, the condition of the unit and the climate of the apartment rental market.

### **A Proactive Approach**

It is critical for boards of managers to take a proactive role in collecting common charge arrears to ensure that their condominium associations remain financially stable. As soon as a unit owner misses a monthly common charge payment without explanation, the board of managers should instruct their property manager or attorney to send a letter to the unit owner advising them that their account is in arrears. If no repayment schedule can be established with the unit owner, the board of managers should confer with the condominium association's property manager and attorney in order to choose the best method or methods of collecting the arrears. Regardless of the method or methods of collection chosen, prompt action will save the condominium money in the long run.

*Stephen M. Lasser is an associate of the Manhattan law firm of Rosen & Livingston, specializing in cooperative and condominium law. Bruce A. Cholst, Esq. and Steven L. Einig, Esq., contributed to this article.*

### **29 COMMENTS**

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K MANCINI on THURSDAY, JANUARY 3, 2008 11:46 AM

for how long is a condo lien good assuming there is a superior lien ie money mortgage lien  
this is a state test question that i can not find an answer for new jersey law



JEFFREY R. SMITH on MONDAY, DECEMBER 22, 2008 9:27 AM

I am a unit owner who fall behind in arrears. The condo is up for sale. They have filed receivership.  
How long does the process take and what should I do?

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DAVIS on THURSDAY, JANUARY 15, 2009 11:36 AM

Article was very helpful on commoncharges but how about fines or fees imposed on condo owners for breaches of the by-law provisions, such as pet clauses, trash removal, noise etc... can you file liens based upon that

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MIKE on SUNDAY, FEBRUARY 8, 2009 11:05 AM

Very instructive article. Is there any information on what happens to owed common charges in the event of a bankruptcy and a mortgage cram down?

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TERRY on SATURDAY, JANUARY 23, 2010 8:40 PM

I would like the answer to all these comments. The information was superb...

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LOO on SATURDAY, AUGUST 14, 2010 5:57 PM

is there a nj govt website showing names of owners in arrears?

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MICHAEL C on FRIDAY, DECEMBER 24, 2010 12:48 PM

Can the board charge for the lawyer letter  
Warning of a potential lien?how far behind do you have to be in the arrears to have s lien put on your property?

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ANONYMOUS on SUNDAY, MARCH 6, 2011 1:07 PM

Our assn is mandated to provide appropriate insurance. One building is in a flood plain and the assn paid for the flood insurance the past four years. this year the board & membership decided not to pay the insurance. The affected bldg occupants paid the insurance and now are withholding their condo fees to recoup their expense (they are paying the statutory reserve amount \$20). Board is threatening to put liens on the property of the owners who are withholding. 1) how expensive to place lien in WI? 2) will lien affect our credit rating? We are prepared to fight in court should they place a lien, thinking we will win because they reneged on their obligation to provide insurance. Your thoughts?

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KRIS on MONDAY, APRIL 4, 2011 10:11 AM

I am interested in the answer to Davis' question above. My fiance's condo association said they'd put a lien on his condo for a \$25 fine for noise violation. It's a long story, but we have renters who made noise while they were MOVING OUT (late at night). It seems like a waste of time/money. He doesn't want to pay, because the noisy tenants are gone...

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GRAN on SATURDAY, JULY 9, 2011 12:28 PM

statement of condominium lien on condo owner for arrears in fees. owner filed for chapter 7 bankruptcy and states associations' lien is no longer valid and he has an accepted offer for the purchase of his property. does the lien still hold as a secured creditor under the federal bankruptcy code? will association be paid for the full amount on the lien?

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REBECCA on SUNDAY, AUGUST 28, 2011 7:05 AM

I PURCHASED A CONDO A YEAR AGO AND A RELATIVE OF MINE HAS BEEN LIVING THERE . IS THERE A WAY FOR ME TO FIND OUT, BY THE INTERNET' IF THE MONTHLY FEES ARE BEING PAID. I AM CURRENTLY NOT LIVING IN THE USA.

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TENANT on TUESDAY, SEPTEMBER 27, 2011 9:30 PM

Hi,

I am a tenant and my owner has some disputes with the condominium board. Today, I have received a letter from County Civil Court in my name and asking me to pay the rent directly to Court instead of unit owner.

As it came as a surprised to me, I talked to the owner but he is insisting me to send the rent to him. He is also indirectly threatening me of the security deposit, if don't pay him the rent.

My lease agreement was till 31-July-11. And as per verbal agreement with owner, I am staying on Month on month basis. There is no written document to confirm this.

I don't want to stay any more in this disputed property and want to move to some other property.

Please advice what steps I should follow:

1. Pay the rent to Court
2. Send a legal registered letter to owner informing him of paying the rent to court
3. Also send a advance one month notice to owner for leaving the apartment and request for my security deposit refund after I leave the apartment.

I had a good relationship with him so far, but today it was different. Should I first talk to him and explain to him about my decision. Not sure whether he will agree or like it as he tends to explain his mortgage dependency on the rent and that's why he wants the rent to him.

Please advice.



WIL on SUNDAY, APRIL 22, 2012 8:03 PM

Tenant: If you received a letter from the court, then it has already ruled against the owner, so you should pay the court rather than your landlord. Step 2 of your proposed course of action is unnecessary, as the court has already notified the owner of this decision (probably due to delinquency of his own association fees). As your month-to-month tenancy is by verbal agreement, giving a 30 day intent to vacate notice is probably a good idea.

Whether he likes it or not is not the issue. Nor is whether YOU like it. If you have been ordered by the court to pay the court, that supersedes your agreement with the landlord. Don't pay him directly. The consequences are his, not yours.



MIKE KAAIZER on FRIDAY, MAY 4, 2012 5:21 PM

if i do not agree pay the legal fees the association asset in my account, the association can put a lean or fourclose on me.

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BGMAUIGIRL on THURSDAY, JULY 19, 2012 5:14 PM

My condo has not been maintaining the property as an owner I understand that I cannot withhold maint fees. Now they have passed two resolutions, one for fee collection policy and priority payment application. If I state on my check that I wish the payment to go toward maint fees only, how can they pass a resolution which ignores this request. Is it permitted to apply payments to attorney fees, fines, late fees, first? Especially since our bylaws do not address any fines or penalties, only interest.

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ANONYMOUS on SATURDAY, SEPTEMBER 29, 2012 12:39 AM

my condo board goes for money judgement 'cause i, as the unit owner has dispute(for unknown erasable dirt stain on the wall of common area) over fines (valid defense or raise a defense). the condo board will use legal lawsuit to compel owner, me to pay the fines based on weak evidence and retaliation (questioning them)  
so as an owner like me, please tell me how to get a relief in the court to protect me from bully and abusive by condo board, the fine is growing for six months over a thousand. thanks a bunch

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CINDY on FRIDAY, OCTOBER 5, 2012 9:55 AM

A person owns 4 condos.  
The owner is disputing fees on 1 unit.  
Can an association restrict the use of common areas (parking spot/laundryroom storage) on the other 3 condos when there are no monies owing for those condos? What if tenants are affected?

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EFRAIN RODRIGUEZ JR on THURSDAY, JANUARY 10, 2013 12:13 AM

For the past three years, the Board of managers are refusing to accept my common charges. In the past I always qwrte in the note section of the check; "comon charges paid in full no arrears". The Board had imposed fines against me for issues and levied fines without ever having a hearing. So I refused to pay the fines until a hearing was held. Each check I write for the common charges is sent back to me by the condo attorney with a note saying you are prohibited from writing any comments on the check or the coupon. I finally sued the Board, and in court the judge, my attorney and the Boards attorney agreed on a settlement of \$5000 to settle all actions. The Board president refuses to acknowledge and accept that deal. So I continue to write on the check " common charges paid in full no arrears". I received a second lien from the board raising my arrears to \$26,000. I own my unit with no mortgage. Can a Board president unilaterally dismiss a settlement endorsed by a judge ? There is nothing in the bylaws giving her this power. I have suggested to the owners the easiest way to resolve all of the financial sanctions the Board has imposed by removing her from the Board. Bylaws say only the Board can remove the president and they are in lock-step with her

tactics. My question is: does a Board president have the authority to refuse and dismiss a agreed to and so-ordered order of the court?

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ANONYMOUS on THURSDAY, MAY 23, 2013 11:39 AM

Condo unit was sold/transferred while the assn was attempting to collect past dues etc from the unit owner. The new unit owner was then billed. In the mean time the new unit owner also sold the property. When the closing attorneys ofc contacted the HOA they were informed of the balance due. The current seller was furious and insisted he was not responsible for the previous owners balance. But eventually an escrow acct was set up to hold onto these funds enabling sale of the property. It has been 3 yrs and the funds are still sitting in escrow at the closing attorney's ofc... the individual responsible will not release the funds. Any suggestions?

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TJOLEO on MONDAY, AUGUST 12, 2013 7:42 PM

is it legal for a condo president, know how much a person owes the assn fee. if the management tells them?

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BOBBI on MONDAY, MARCH 10, 2014 2:33 PM

There is a Levey and possible sherrif sale against me. the debt is in my name. can they sell a vehicle that is paid off but registered in both my name and my husband's?

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CONCERNED on WEDNESDAY, JULY 16, 2014 1:25 PM

If you are a condo owner who as made partial payments over the past year (and have stayed in touch with the management co. regarding only having a part-time job) and now can make full payments to stay current. Can the board put a lien on you for the balance even if you do not have the money to pay it back now?

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ANONYMOUS on FRIDAY, AUGUST 1, 2014 11:45 PM

I BOUGHT 2 CONDOES IN FOECLOSUE SELL ...WHEN I WENT THERE The city had demolished all 120 condos and I saw a big land what must I do ?

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COLLEEN on SATURDAY, SEPTEMBER 20, 2014 3:22 PM

Can my landlord evict me for nonpayment of rent if the courts have ordered me to pay my rent to them. The courts are threatening to put a lien on my bank account if I don't pay them. My owner/landlord is in arrears to the condo board. I have a lease. Someone please answer. I don't want to be evicted and don't know what to do. Can't afford a lawyer

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ROBERT MIODONSKI on MONDAY, DECEMBER 15, 2014 1:31 PM

We have a condo that's been vacant over three years and owes the association thirty thousand .The owner passed away who live out of state,her sons inherited the property and never made any payment.They say our hands are tied be caused it became bank owned and their is a big second mortgage .Please give us help, thank you

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HELP on SATURDAY, MARCH 28, 2015 11:51 PM

Can the association place lens in me personally and garnish my wages? I always believed the lien had to be placed on the unit.

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CRAIG GARON on MONDAY, MARCH 30, 2015 1:01 PM

if im not paying rent and live in a condo that has a maintenence dispute with the owner can they throw me out of the apartment

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ANONYMOUS on WEDNESDAY, MAY 6, 2015 1:49 AM

Our 6 unit condo association is stuck managing a unit for which we got an Order of Possession from the owner for failure to pay HOA fees back in 1996. We have been paying the monthly assessments out of the proceeds of renting out the unit, but we do not want to keep on being saddled with this unit. Do we have the legal right to force the sale of this unit even though the HOA fees are not in arrears (because the rent money has been paying for it) and the property taxes or up to date and

there is no mortgage on this unit? The long-ago evicted owner will not respond to any attempts for us to contact her to find out her intentions. We are thinking of just keeping the unit empty and not renting it out anymore since there are enough funds in the rental account to pay the HOA fees for the next 20 years. But we do not know if we are legally allowed to keep the place empty or whether that would make us negligent given that the Association was given the Order of Possession, however long ago that was.

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M. DONALDSON on THURSDAY, FEBRUARY 16, 2017 9:25 PM

we have a condo owner with 2 condos that she rents out. she at one time was president and we allowed \$100 fee for that position. she also insisted on \$25 for each phone call or email as she insisted we needed a "construction mgr" (her) during the time we had the roof redone. after that she tried to give herself a raise of another \$100 per month and we stopped that and eventually voted her off the board as she was impossible to work with, not to mention not paying condo fees. She refused to do the few duties she was supposed to be taking care of also during the time she was pres. the board takes care of most of the things that come up and we have a company that does our taxes, pays our bills and takes care of paperwork. since she thought she was entitled to get paid one way or another she has stopped paying condo fees for past 4 months and is still collecting rent while her tenants are using common areas for free and having snow removed etc. what is the best and simplest way to get these fees collected.

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