

NEWS

COMMUNITY LAW NEWSLETTER

LETTER

Vol. 20 No.9
December, 2009

PAVESE LAW FIRM

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Winter 2009

Should Your Association Assign Delinquent Accounts to a Factoring (Funding) Company?

In the past year, a number of our clients have sought our advice after having been contacted by various companies offering creative options to for the collection of delinquent account.

Often, these companies offer to forward fund a substantial portion of the unpaid assessments, with a percentage of the remainder to be paid upon actual collection, or to purchase some of the Association's accounts for a portion of the total outstanding debt. In return, the company that purchased the debt is entitled to retain any interest, late fees, and attorney fees collected. This is called factoring where the Association sells its debt at a discount. Generally, the Association is asked to assign the account to the factoring company, who is then the owner of the debt and entitled to collect the account on its own behalf. The company then hires its own attorneys to collect the account. In such a case, it is important to understand that at this point, the attorney who collects the debt represents the factoring company and its interests, not the Association. Therefore, communication with the Association regarding the accounts will be limited, if not terminated. Likewise, the Association will have no control over how much the company charges your delinquent fellow members, the collection or the collection methods employed by the factoring company in relation to the account once assigned.

There are also other factors that should be considered in determining if this is the best option for your association. For instance, these companies are often quite selective in the accounts that they are willing to "purchase" or be assigned. They may "cherry pick" and only purchase and take on the accounts where collection is almost guaranteed and reject accounts

where collection is unlikely. So actually, the Association is selling and the factoring or funding company is buying at a discount those accounts which are collectible and leaving the Association with the uncollectible accounts.

Beyond this, there is some question as to the legality of the practices engaged in by some of these companies. Some are promising to collection 100% of the unpaid assessments from foreclosing lenders, as opposed to the 6 or 12 months, not to exceed 1% allowed under Chapters 718 and 720 of the Florida Statutes. Their argument for collecting 100% is based on a distortion of the statutes and generally not supported by the vast majority of community association attorneys in the state of Florida. This raises potential for exposure of the association to banks for attempting to collect more than what is legally owed. Years later, once the dust settles, you can be sure these lenders will pursue claims for being overcharged and Association's do not need this exposure.

While the collection of delinquent accounts is a business decision that each Association must make on its own facts and circumstances. Each Association must evaluate whether assigning accounts to a factoring company is wise.

Between the fact that they only take accounts that are likely to be collected, that the Association forfeits a great portion of the monies it is entitled to collect, and the questionable legal practices employed, the overall negatives seem to outweigh the benefit of immediate, up-front cash.

This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Stacy L. Bennings (stacybennings@paveselaw.com) is an Associate with the Pavese Law Firm. Each attorney practices in the area of Real Estate Development and Community Association Law. Ms. Schwinn also specializes in Labor/Employment Law. Please feel free to contact them via the e-mail addresses listed above.