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The Association and Small Claims Court:

**Why “Going it Alone” to Collect Assessments
May Not be a Community Association’s Best Option**

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The recent real estate crisis has caused an increase in assessment delinquencies for both condominium and homeowners’ associations alike. In order to stay solvent and provide for the needs of the community, it is important for associations to pursue delinquencies vigorously and to ensure that each owner is paying his or her fair share. Payment of assessments is, of course, needed to cover the various ongoing costs and expenses for operating the association. Unfortunately, delinquencies can (and do) progress to the point where legal action is necessary in order to collect the amounts owing. Many associations attempt to collect unpaid assessments by using the services of an experienced community association attorney. Other associations choose to forego the use of an attorney entirely (most often because of cost concerns), and instead attempt to collect the unpaid assessments by filing an action in small claims court. This article takes a deeper look at the viability of the latter option.

At the onset, bringing an action in small claims court may seem to be a faster and cheaper alternative. All that is required to initiate a small claims action is the filing of a one-page form with the court and payment of the filing fee. The court then sets a hearing date and everything is done “in one shot.” A judgment is entered at the hearing, and the matter is closed. Upon closer review, however, it is clear that while pursuing unpaid assessments in small claims court may be *cheaper* for the association than hiring an attorney to file suit, it may not in fact provide the Board with its desired result over the long-term.

First, the Board should consider several factors before filing a small claims action to collect assessments. For example, all condominiums and homeowners’ associations are legally established as non-profit corporations. Under

Michigan law, corporations are required to be represented by an attorney in court. There is, however, an exception to this rule for corporations that choose to file suit in small claims. This exception allows a full-time employee for the corporation to pursue a small claims suit on behalf of the corporation. The problem is that many associations do not have any “full-time employees” in the traditional sense, so having such an employee handle the association’s small claims suit is probably not possible. Rather, a director/officer of the Board is the most likely representative to be delegated the task of pressing forward with the small claims suit for the association. Since most Board members serve without compensation on a strictly volunteer basis, it may be difficult to find an officer/director who has the time, or the desire, to pursue such claims effectively. Moreover, no compensation can be added to the claim for the Board member’s time spent in pursuing the small claims judgment, making the task even less desirable for those directors who choose to undertake (or who are delegated) the assignment. Thus, an association must have a director/officer available who has the desire, ability and time available to pursue a small claims action before it should even consider this approach.

Second, before filing suit, the Board must also review the jurisdictional limit for small claims court, determine the proper court in which to file the action under the Court rules (i.e., the proper venue), and also review the limited types of pleadings allowed in small claims court. Currently, the jurisdictional limit for a small claims action is \$5,000.00; the plaintiff in a small claims action waives the right to recover any amount over that limit. The amount of damages that a plaintiff is permitted to include on the small claims form is the amount of the claim owing *as of the date of the filing of the case*, up to the jurisdictional limit. Therefore, if it takes the association a month or two to have the hearing, it may ultimately end up obtaining a judgment for less than the total actual amount that is owed to the association by the end of the proceedings. Also, venue in Michigan is generally where the defendant is “found,” so if the owner has moved into a different jurisdictional district, it may be necessary to pursue that person wherever he or she has moved, rather than in the district in which the Condominium/Subdivision is located. Most importantly, in small claims actions *pleading is limited*, so it is likely that any judgment obtained by the association will not provide it with all of the potential relief/legal remedies that are available to it, such as a judgment of foreclosure (which can only be obtained in circuit court). Many times in legal proceedings, it is necessary and/or desirable to include any banks holding

a mortgage on the unit/home, and possibly others, in the proceedings. Occasionally, the association can recover the debt owed on the account from the mortgage holder (e.g., if the mortgagee never responds to the lawsuit and gets defaulted, if the association has a claim for lien priority, etc.). By choosing to file an action in small claims and not pursuing all possible avenues of legal relief that might otherwise be available to it in district or circuit court, the association may well be “leaving money on the table.”

Once the small claims action is filed, other steps must be completed to bring the matter to a final judgment. After filing suit, service of process must be completed on the defendant. The court *may* have process servers available to complete service for an additional charge. In many instances, though, defendants are able to evade service, and if they are not served, no judgment can be rendered. While there is a process for dealing with defendants who evade service, it may be difficult for a lay person to complete that process in small claims court.

Once the lawsuit has been properly filed and the owner has been served, the association will “have its day in court.” The owner may not appear for the hearing and, in that case, the association will automatically get its judgment by default. However, if the owner appears to contest the matter and a hearing is held, it may result in a less-than-satisfactory experience/result for the Board. Generally, a small claims hearing is short and held by a magistrate, not a judge. Magistrates are attorneys that are appointed by the district court judges to assist them in day-to-day court operations. They have limited jurisdiction, and are not elected officials. It is fair to assume that a magistrate deciding a small claims matter will have little or no experience with condominium/homeowners association law. A particularly articulate or persuasive owner may well be able to convince the court that, for whatever reason, he or she is not obligated to pay the amounts requested. Also, in these sorts of proceedings there tends to be an approach which favors compromise, rather than the issuance of a legal decision that is completely in favor of one side or the other. This may result in the association receiving less than it might otherwise be entitled to receive (or would receive) in a regular district or circuit court proceeding before a judge. If that happens, the association already is “stuck” within the small claims process and the ability to appeal the decision is limited; the chance that the association can get an unfavorable small claims decision overturned is minimal.

Finally, even if the association receives a favorable judgment at the small claims hearing, it must now collect on the judgment. **Receiving a judgment against a defendant does not automatically equal cash in hand.** The court does not have the authority to force a defendant to pay a judgment. It is up to the Board members/officers to collect on the judgment. Although there are many legal tools available to do this, each has its own specific set of procedures that may be difficult to navigate for a layperson.

Small claims court is not a “court of record”, and as such, the judgment may not be reported to credit reporting agencies. By comparison, if a District/Circuit Court Judgment, which is “of record,” appears on the person’s credit report, a future lender might require that the debt be paid off before extending credit to that individual.

Lastly, even if the association is able to successfully collect on the small claims judgment, any new debts that accrue on the owner’s account after the date on which suit was filed are not included in the judgment amount. Thus, even if the original judgment amount is collected, by the time such collection efforts are completed, the owner may be delinquent again in his assessment payments. Likewise, collection on the judgment will involve further costs, but the association may have difficulty collecting such post-judgment costs as they will not have been included in the small claims judgment amount. As a result, the association may have no alternative but to begin the entire legal process all over again to collect all of the owner’s newly-accrued debt. By comparison, if the association obtains a money judgment in Circuit Court, the judgment also will include all debt that accrues on the owner’s account subsequent to the filing of the lawsuit and entry of judgment.

One final (and very important) consideration for the Board is that the association has a huge advantage over most other types of plaintiffs by virtue of the typical association documents/covenants and the Michigan Condominium Act in regard to the association’s right to recover attorneys’ fees and costs from the defaulting owner. The general rule in the American judicial system is that each party pays its own attorneys’ fees. Most community associations, however, enjoy the special privilege of being able to add the association’s attorneys’ fees to the delinquent owner’s bill, and to recover those amounts in court as part of the judgment. The association should utilize every advantage available to it during these lean times; the ability of most associations to charge their attorneys’ fees and costs incurred in a collections matter back to the delinquent co-owner/homeowner is certainly a significant and distinct advantage. This unique and

powerful remedy should greatly facilitate every association's efforts to retain qualified legal counsel to assist it in collections matters for the purpose of making the association as financially "whole" as possible.

The decision of whether or not to proceed in small claims court should be made carefully, and only after the Board has given due consideration to all relevant factors. For the reasons explained above, pursuing a small claims action may not be the best available method to resolve the association's delinquencies. As always, no one article can address all potential situations. Board members should seek appropriate advice and counsel from qualified professionals before embarking in any particular direction in regard to collections matters.

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