

## Foreclosing When Owners Don't Maintain: From Small Claims to a Lien

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This article is part of an ongoing series in which we'll take your questions from the [HOAleader.com discussion forum](#) and get you the answers you need from experts who specialize in association management. If you have a question you need answered, [post it on the message board](#).

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An [HOAleader.com reader writes](#), "I am the president of a small, 22-house HOA. Our bylaws and covenants are specific regarding our homeowners keeping up the overall condition of their properties. Very sadly, we have one HOA member who simply refuses to do so, will not communicate with me at all, and my attempts to work with her have been going for years.

"This past week, I filed a lawsuit in small claims court stating the cost to bring her property into minimum compliance of \$8,000, and I have no doubt my HOA will be awarded a judgment....I assume the homeowner will simply ignore the judgment and I will then have to take this further, and that is my question. I understand that if we are awarded a judgment, we can then file a lien against the homeowner personally and also against the property, is that correct?

"Twelve years ago this HOA member refused to pay her annual dues and we sued her, got a judgment, and filed a lien. Her mortgage company did[n't] like the idea of a lien and so increased her mortgage payments and put the extra in escrow until there was enough to pay her dues and court costs. However, this time I expect a much larger judgment, and there is a limit, is there not, by law of how much her mortgage payment can be increase by?...

"Our HOA members want to foreclose, fix the property up, and then sell it and be done with this problem. But how does this work?..."

Here, we help this reader understand the process of getting a small-claims judgment against an owner and then enforcing it through a lien.

### Money Judgment Doesn't Always Translate Into a Lien

The big question here is whether the HOA's judgment—assuming a judge agrees with our reader in the case—can be transformed from a money judgment into a lien against real property. The answer differs based on state and local laws.

"In Florida, if you get a judgment for an owner's failure to comply with your governing documents or to make payments they owe, you can move forward and do what's called executing on the judgment," says Alessandra Stivelman, an associate attorney who specializes in community association law at Eisinger Brown Lewis Frankel & Chalet in Hollywood, Fla. "That's where you attempt to [collect on the judgment](#). But it's not like a foreclosure process, where you file a lien and can foreclose. You can't foreclose on someone's house because you have a judgment against them for \$8,000."

That's not the case in Chicago. "In Illinois, getting a judgment and a lien are different things," says Barry Kreisler, founder of Kreisler PLLC, a Chicago law firm that represents 70-100 associations, most of which are condos. "But they're not very different. Assume this HOA is in Cook County, where Chicago is, and the reader does get a judgment against the homeowner. By recording a memorandum of judgment—which the judge will readily sign—that creates a lien against all real estate that individual owns in Cook County."

But if our reader's in Texas, it's an entirely different ball game. "In Texas, one of the issues with a judgment lien is that it doesn't have the same priority status as an assessment lien," explains Gregory S. Cagle, a partner at Savrick Schumann Johnson McGarr Kaminski & Shirley in Austin, Texas, and author of *Texas Homeowners Association Law*, written for homeowners and association leaders.

"An assessment lien is created by an [association's governing documents](#), and it's the equivalent of a contractual lien," says Cagle. "A judgment lien attaches to all real and personal property where it's filed. But in Texas, we have a state constitutional homestead protection, which precludes creditors from foreclosing on a home unless you fall under one of a few exceptions, which HOAs don't. So judgment liens won't be effective against homestead property. Texas is a debtor's haven."

### Five More Tips to Keep in Mind

Our reader asks a number of other questions, and our experts have additional advice:

#### 1. Check whether you truly can handle this in small claims.

"Here locally, the courts wouldn't allow this reader to bring a small-claims action without an attorney," says Kreisler. "A HOA is a corporate entity; it's a not-for-profit entity. An individual who isn't a lawyer can't represent a corporation in small claims court."

#### 2. It might be easier to evict—if you have that right.

"Depending on this entity and its declarations, there are probably other ways to go about getting to where this person wants to be," says Kreisler. "If this were a condo, probably their best bet if they want to get this owner out without having to do the work to the property themselves would be to [set up a fine proceeding and then fine the owner](#) for not doing the work. Then they can file an eviction action against the owner to collect the amount of the fines. Illinois law allows a condo, but not a townhome or an HOA for single-family homes, to file against the owner personally if money is owed to the association."

#### 3. Don't rely on the mortgage company to collect for you.

"A mortgage company can pay the lien and add the cost to the owner's mortgage payments," explains Kreisler. "All mortgages provide that the homeowner can't do anything to impose a lien on the property that might interfere with the mortgage lien. So the lender would have the right to advance the money to pay the lien and the collect it back from the owner. But they generally don't do that." (Read [more on mortgage related issues](#).)

#### 4. Foreclosing and selling to recoup your debt can be complex.

"That's another big issue," says Cagle. "Whatever lien it is—whether it's a contractual assessment lien or an abstracted judgment lien—is going to be inferior to any existing mortgage's lien. Even if the association is able to foreclose, the foreclosure wouldn't invalidate the mortgagee's deed of trust lien. The association's title will be subject to that lien. The HOA will have to market that property for sale being subject to the mortgagee's lien. In addition, the owner may have statutory rights of redemption." (Read more on [HOAs and foreclosures](#).)

#### 5. Don't be penny wise and pound foolish.

"I recommend hiring an attorney in this situation," says Stivelman. "People are very scared of attorneys. But you need to get the right one, one who'll be honest with you and be able to give you the scope of the land. The right attorney might say, 'You can do the small claims piece on your own, but then come to me when you have a judgment, and we'll do XYZ.' Remember, you have a [fiduciary duty to your members](#), and often acting in their best interest would be to hire an attorney."