



STATUTE CONTROLS HOW PAYMENT MUST BE APPLIED

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Q: The by-laws for our homeowners' association state "all payments received will be applied to the oldest dues, fees, fines, charges or assessments in the order of their date of assessment." When a fine becomes the oldest outstanding assessment, and is paid from the next maintenance fee payment received, can that member then be considered to be in arrears on a portion of his/her maintenance fees? **J.K. (via e-mail)**

A: The short answer is no. The application of payments by a homeowners' association to a property owner's account is controlled by Section 720.3085(3)(b), Florida Statutes, which provides that "any payment received by an association and accepted shall be applied first to any interest accrued, then to any administrative late fee, then to any cost and reasonable attorney's fees incurred in the collection, and then to the delinquent assessment." The term "assessment" as it is used in Chapter 720 is defined by Section 720.301(1) as "a sum or sums of money payable to the association, to the developer or the owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of the parcel, can result in a lien against the parcel." Accordingly, Section 720.3085(3)(b) applies to the application of payments to

assessments and as previously stated assessments are only those charges which may become a lien against the property. This is an important distinction because while 720.305(2) allows an association to charge fines, if allowed under the governing documents of the association, such fines may not become a lien against the property. Furthermore, Section 720.305(2) also provides that attorney's fees and costs are recoverable in an action to recover a fine as determined by the court. Therefore, an association must account for assessments and the related accrued interest, costs and attorney's fees separately from fines and their related costs and attorney's fees.

Therefore, turning to the specific question asked, the fine would not become the oldest outstanding assessment, because the fine cannot become an assessment where a fine cannot be secured by a lien on the property. Accordingly, a payment received by an association for the payment of assessments must be applied as provided by the statute. First, to interest accrued on the unpaid assessment, then to any administrative late fee as authorized by the documents and the statute, then to any costs and reasonable attorney's fees incurred in the collection of the unpaid assessments and then finally to the delinquent assessment. Other charges which are owed to the Association but are not assessments, as assessments are defined by the statute, would not be paid out of a payment for

assessments even if those amounts are older than the assessment being paid. Therefore, under the statutory structure governing homeowners' associations, a property owner can pay their regularly accruing assessments and be current with the association with regards to assessments and have an unpaid fine.

Q: I have heard that there is a new requirement requiring directors to certify they have read the condominium documents and will attempt to uphold them. Specifically what documents would comprise the "condominium documents" in this context? **P.M. (via e-mail)**

A: Actually, the condominium statute requires a candidate for the board to certify that he or she has read and understands, to the best of his or her ability, the "governing documents of the association" and the provisions of the condominium statute and "any applicable rules." The term "governing documents" is not defined in the condominium statute, but I believe it means the declaration of condominium, the articles of incorporation of the association, and the bylaws of the association. In this context, it probably also includes the rules and regulations of the association, but that is not clear. The statute uses the term "any applicable rules". This could be interpreted to mean the association's rules and regulations or the administrative rules promulgated by the Division of Condominiums, Timeshares, and Mobile Homes ("Division"), which is the state agency that regulates condominiums.

The statute further requires that the association send out the blank certification form with the first notice of the annual meeting. The Division has taken the position that all candidates must sign and return the certification form in order to be eligible to be included on the election ballot. The statute also requires that the signed certification forms received from the candidates be mailed to all of the owners along with the second notice of the annual meeting and election.

Q: For associations that have two-year staggered terms in their current bylaws, is a majority vote required by the unit owners to "opt in", or can the board make the decision to "opt in" with the staggered terms? **F.V. (via e-mail)**

A: Although the 2008 statute is not a model of clarity, it does say that in order for two-year terms to be valid, the provisions for two year, staggered terms must be contained in the association's bylaws must receive "approval of a majority of the total voting interests." My interpretation of the statute, and I have seen no decisions nor convincing arguments to the contrary, is that a condominium association which currently has two-year staggered terms contained in its bylaws must take a "ratification vote", approved by a majority of all unit owners, in order to continue using two year, staggered terms. Conversely, associations with three-year terms in their bylaws, or term provisions other than two year, staggered terms, require an amendment.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.