

*Generally a litigant may only recover attorney's fees from an adversary upon: (1) statutory grounds; (2) contract grounds; and (3) by use of procedural rules.*



## FORCING YOUR OPPONENT TO PAY YOUR BILLS: A PRIMER ON AN ASSOCIATION'S ABILITY TO RECOVER ITS ATTORNEY'S FEES

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The recovery of attorney's fees can be a significant factor in determining how an Association approaches its problems, both real and potential. Whether it be an unruly tenant who breaches the Association's governing documents, a devious director who helps himself to Association funds, or an unscrupulous contractor who pads bills with numerous "unforeseen" markups, the ability to recover attorney's fees can help to assess the risks and rewards of the gamut of sticky situations that confront Associations on almost a daily basis.

There are three general methods of recovering attorney's fees: (i) on statutory grounds, such as Florida's "sanctions statute" for frivolous or dilatory conduct during litigation; (ii) pursuant to an "attorney's fees" provision in a contract; and (iii) pursuant to the procedural rules that parties must follow when conducting litigation. Each provides an independent means of recovering attorney's fees under certain circumstances.

### **I. Statutory Grounds: Sanctions, Stolen Money, and More**

As you probably know, the Florida Statutes are the repository of many—perhaps thousands—of the state's laws. (You can find the Florida Statutes online at <http://www.flsenate.gov/Statutes/>.) Sprinkled in amongst these laws are several statutes that allow an Association to recover some or all of its attorney's fees from the opposition, but only under certain circumstances.

Perhaps the most important of these statutes is Florida Statutes Section 57.105, commonly known to attorneys throughout the state as the "sanctions statute" or simply "57.105". Section 57.105 provides the court with broad authority to impose sanctions on a party to a lawsuit for engaging in frivolous conduct or meritless delay tactics. Frivolous conduct is that which "was not supported by the material facts necessary to establish [a] claim or defense" or "[w]ould not be supported by the application of then-existing law to those material facts". Fla. Stat. Sec. 57.105(1)(a) and (b). An example would be a tenant who defends against an Association's lawsuit to foreclose a lien for a valid and unpaid assessment by claiming that the Association has no authority to impose assessments. Notably, sanctions for frivolous conduct can be imposed against the opposition's attorney when he or she knew or should have known that the conduct was frivolous; however, such a claim can be defeated by the opposing attorney if, in asserting the claim or defense, he or she relied in good faith on the client's representations. Fla. Stat. 57.105(1). Section 57.105 also allows for a party to recover its attorney's fees where the opposition engages in action "primarily for the purpose of unreasonable delay". Fla. Stat. Sec. 57.105(3). Dilatory tactics logically include conduct such as the repeated filing of motions that the court has already resolved.

The procedure for obtaining sanctions requires the service of a motion for sanctions upon the opposition, who is then afforded 21 days—often referred to as the "safe harbor" period—to withdraw or appropriately correct the offending conduct. See

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Fla. Stat. Sec. 57.105(4). Upon the expiration of the safe harbor period, the moving party may file the motion with the court and have a hearing to determine the outcome. If successful, the court may award the moving party a “reasonable attorney’s fee”. Importantly, what is a “reasonable” fee to the court may only be a fraction of the attorney’s fees actually spent in defending against the frivolous/dilatory conduct or obtaining sanctions.

Other statutes exist that allow a party to recover its attorney’s fees. One example pertinent to Associations exists in Fla. Stat. Sec. 718.125, which provides that if a condominium Association or unit owner is the prevailing party in any litigation arising from a contract or lease which provides that the developer will receive attorney’s fees, then the Association or unit owner may also be awarded reasonable attorney’s fees. In essence, Sec. 718.125 transforms one-sided attorney’s fees provisions—i.e., where only one party, usually the developer, is awarded attorney’s fees in the event the contract is breached—into reciprocal ones where any party to the contract may seek its attorney’s fees.

Attorney’s fees are also recoverable in the event of “civil theft”, which occurs when a person or entity interferes with another’s right to possess property, including money. Fla. Stat. Sec. 772.11. Accordingly, any time money is stolen from an Association, a claim for civil theft should be considered in addition to any other applicable theories of relief. Perhaps the money was not stolen but was instead tendered falsely through a “bad check”—i.e., where the maker has insufficient funds to cover the amount of the check or dishonors the check prior to the time the Association cashes it. Under Florida Statutes Sec. 68.065, a party who receives a bad check may recover his or her attorney’s fees (and triple damages!). A note of caution, however, to parties seeking to bring claims for civil theft or bad checks: Secs. 772.11 and 68.065 have procedural requirements that must occur before a claim is brought, including the issuance of a demand letter with particular wording. Thus, it is best to consult your attorney to ensure you have met these requirements.

## II. Contractual Grounds: The “Attorney’s Fees” Clause

A second means of recovering attorney’s fees is by contractual agreement. Here, there need not be a governing statute that allows for attorney’s fees to be recovered. All that is necessary is a valid and enforceable contract containing an attorney’s fees provision. Attorney’s fees provisions come in many different forms. These provisions are often found in an Association’s governing documents, such as its Declaration, Bylaws, and Rules and Regulations.

As a caveat, an Association must be careful while enforcing its governing documents. The Third District Court of Appeals in *Seagull Townhomes Cd’m. Ass’n, Inc. v. Edlund*, 941 So. 2d 457 (Fla. 3d DCA 2006), held that the Association was not entitled to recover attorney’s fees in its action to nullify a conveyance of a unit on the grounds that the Association’s prior consent was not obtained and that the seller failed to provide the Association with the right of first refusal, as provided by the governing documents. In this case, although the Association was the prevailing party as the court recognized the Association’s right of first refusal, because the Association failed to respond

to an owner’s written inquiry during the conveyance dispute, the court held that the Association was not entitled to recover its attorney’s fees. *Id.* As you may know, an Association must respond to a unit owner’s written inquiry within thirty (30) days of receipt of the same. See Fla. Stat. Sec. 718.112(2)(a)(2). Thus, it is paramount that when enforcing the governing documents, the Association complies with the other requirements pursuant to Florida Statute Chapter 718.

## III. Procedural Rules: Leave It to the Lawyers

The third means of recovering attorney’s fees exists in the procedural rules that parties and attorneys must follow when engaging in civil litigation in Florida. Fully understanding these rules, which are known as the Florida Rules of Civil Procedure, often requires legal training and is a task best left to your attorney. Nevertheless, it is important to know that the Rules of Civil Procedure provide a basis for recovering attorney’s fees in Rule 1.380, which governs the court’s ability to sanction improper conduct, particularly during “discovery”. (Discovery is the process by which a party gains information on the merits of the opposition’s case. It can include requests for documents, requests to admit facts, written questions that the opposition must answer, and depositions.) In general (and at the risk of oversimplification), Rule 1.380 is triggered when a party must involve the court to compel the opposition to comply with a legitimate discovery request. Perhaps because discovery abuses often arise during the course of litigation, courts are generally reluctant to award sanctions pursuant to Rule 1.380 without affording the offending party multiple opportunities to rectify the improper conduct. ■



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## TOUGH CHOICES: IMPACT OF FORECLOSURES ON ASSOCIATIONS

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The U.S. foreclosure rate has climbed to the highest it has been in over fifty years. Many Florida cities rank among the top 25 cities with the nation's highest foreclosure rates. Some economists speculate that Florida will not get any relief from the surge in new foreclosure filings, caused in part by the slump that hit the once-hot Florida housing market in 2005, for several years.

Community Association Boards of Directors are becoming far too familiar with the foreclosure process, as Associations are more frequently being involved in bank foreclosure suits filed against their members. When a unit owner's first mortgage holder files a bank foreclosure suit, the Association is usually joined as a defendant in the case. This forces the Association to make decisions regarding how it will respond to the bank foreclosure. An Association may choose to monitor the bank foreclosure, temporarily discontinue its own efforts to collect delinquent assessments from a unit owner or do nothing at all.

The frequency with which Associations are filing their own foreclosure actions against homeowners for delinquent assessments has also increased substantially in the last few years. In Florida, an Association has a statutory right to record a claim of lien against a unit for an owner's failure to pay assessments. The Association ultimately has the right to foreclose on the claim of lien. The choice of whether to file its own foreclosure action is sometimes viewed as a Hobson's choice by an Association. On one hand, if there is little or no equity in the property, the Association may have to bear the cost of ousting a non-paying owner without recovering any money. On the other hand, taking no action at all could allow the non-paying owner to remain in the unit indefinitely, especially if the owner pays the mortgage.

It is also common these days for both a bank foreclosure suit and Association foreclosure suit to be simultaneously pending against the same property. Many times temporarily discontinuing its efforts to collect past due assessments while a bank foreclosure is pending can save an Association from duplicating foreclosure efforts and incurring additional attorney's

fees. The bank is often able to obtain a foreclosure judgment and, once a foreclosure sale is completed, the Association will most likely be no better off by pursuing its own foreclosure if the bank moves expeditiously. In the last year, the bank itself has more often become the new owner of the property because of the inability to attract third-party bidders to the foreclosure sale due to very little equity in the property or no equity at all. In such cases, depending on the type of Association, an Association's claims could be "wiped out" if there are no surplus funds to cover the amounts due to it.

In cases where there is little or no equity in the property, an Association may be faced with the inability to collect the entire amount of past due assessments owed to it by a unit owner. The decrease in the number of homeowners who resolve the foreclosure by refinancing or settling the suit and the lack of interested third-party bidders at the foreclosure sales also creates a problem for Associations in their own foreclosure suits, as it is becoming more common for Associations to be the successful bidders at foreclosure sales. As a result, an Association could end up the owner of a property that has little value because it is subject to the superior lien-holder's right to foreclose.

If there is significant equity in the property but the bank foreclosure is not moving along quickly, it is often in the Association's best interest to begin or to resume its own collection efforts to collect past due assessments. In such a scenario, it is likely that the Association will obtain a foreclosure judgment and recover the past due assessments, attorney's fees incurred, late fees and interest.

With the proverbial light at the end of the tunnel perhaps years away, Community Associations should definitely become better informed and more aware of the most efficient and effective ways of responding to bank foreclosure actions filed against its members and handling its own foreclosure suits because the days of 100% collection have come to a close. ■

*Editor's note: For those readers in the Southeast Florida area, please be advised that Ms. Mitchell will participate in a legal panel regarding Association collection and foreclosure practices and trends on January 26, 2007. More information about the event is available on [www.callbp.com](http://www.callbp.com)*

# REQUIREMENTS FOR CONTRACTS WITH PUBLIC ADJUSTERS

In the last few years, several public insurance adjusters have helped Community Associations that suffered significant hurricane damages to recover significantly more money from the insurance company than what the insurance company initially offered. However, a few public adjusters also took advantage of some Community Associations by providing little if any services to the Association in exchange for a large percentage of the Association's insurance proceeds. To better protect its interests, a Community Association should know what provisions need to be included in a contract with a public adjuster, to better avoid confusion (at best) and litigation (at worst) in the future.

Rule 69B-220.051, of the Florida Administrative Code, provides for certain terms that must be included in a public adjuster's service contract, and a Community Association should ensure that these terms are present before signing anything presented by a public adjuster. First, all contracts for public adjuster services must be in writing, and must be signed by the public adjuster who solicited the contract. In addition, the contract must provide for the following terms:

(a) legibly states the full name of the public adjuster signing the contract as specified in the records of the Department of Financial Services;

- (b) the public adjuster's permanent business address, phone number, and Florida Department of Financial Services license number;
- (c) the Association's full name and street address, as the insured;
- (d) the address of the loss;
- (e) a brief description of the loss;
- (f) the Association's insurance company's name and policy number, if available;
- (g) the date the contract with the public adjuster was actually signed by the Association as the insured or claimant; and
- (h) the full compensation to the public adjuster.

If the compensation is based on a share of the insurance settlement, the exact percentage must be specified in the contract. Furthermore, if the public adjuster is to be reimbursed for any costs out of the insurance proceeds, Rule 69B-220.051(6)(e)3., F.A.C., requires that the costs be specified in an addendum to the contract. Consult your Association attorney to determine whether the public adjuster proposal submitted adequately comports with Florida law and whether other provisions should be included based on the circumstances involved. ■

## FACTS ABOUT FLORIDA INSURANCE GUARANTEE ASSOCIATION (FIGA)

The Florida legislature established the Florida Insurance Guarantee Association in 1970 through the enactment of Florida Statute section 631.50 et seq. The FIGA, as it is known, essentially services and pays pending insurance claims made by Florida policy holders of member insurance companies that have become insolvent and ordered liquidated. In order to receive relief from FIGA, the policy holder must have a "covered claim" which means an unpaid claim that arises out of and is within the coverage (and not in excess) of the applicable limits of an insurance policy from an insurer that has been declared insolvent. The maximum amount that FIGA will cover in the cases of condominium and homeowners Associations claims will be \$100,000.00 multiplied by the number of units in the Association. All claims are subject to a \$100.00 deductible, above and beyond any deductible identified in the policy holder's policy. If your Association's insurer is insolvent and in liquidation or bankrupt, you should contact FIGA

immediately to determine whether coverage is available in your circumstance. You may contact FIGA at 1-800-988-1450, P.O. Box 10366, Jacksonville, FL 32247-0366 or visit its website at [www.FIGAFacts.com](http://www.FIGAFacts.com), where you can review frequently asked questions about FIGA, a list of active insolvencies being handled by FIGA and other very helpful information. ■



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