

Condominium Collection Practices (MA)

A Practical Guidance® Practice Note by Douglas A. Troyer, Moriarty Troyer & Malloy LLC



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This practice note explains the steps and procedures that must be followed to collect common area fees from delinquent condominium unit owners in Massachusetts. This practice note provides tips for navigating statutory requirements and also identifies traps that should be avoided when proceeding with a collection action in Massachusetts.

For more on condominium practice in Massachusetts, see *The Massachusetts Condominium Act, M.G.L.c. — Mass. Ann. Laws ch. 183A*.

For general condominium resources, see [Residential Condominium Resource Kit](#).

Legal Framework and Overview

Mass. Ann. Laws ch. 183A, § 6 is critical to the operation of a condominium as it relates to the obligation of the unit owners to pay their common expense assessment and the consequences for failing to do so. Common area expenses are the lifeblood of the condominium. The Massachusetts Condominium Act defines “common expenses” as “expense of administration, maintenance, repair, or replacement of common areas and facilities.” Mass. Ann. Laws ch. 183A, § 1. Common area expense assessments are made to the unit owners in accordance with their percentage beneficial interest. Mass. Ann. Laws ch. 183A, § 6. The obligation to

pay the assessed common area charges is not subject to offset, withholding, or defense. Owners who contest an assessment must pay it under protest and bring a separate legal action to determine their propriety. Mass. Ann. Laws ch. 183A, § 7; *Blood v. Edgar’s Inc.*, 36 Mass. App. Ct. 402 (1994); *Prince Condominium Trust v. Prosser*, 412 Mass. 723 (1992).

A lien for condominium expense assessments arises at the time the assessment come due. Mass. Ann. Laws ch. 183A, § 6(a)(i). The organization of unit owners may also assess attorney’s fees, costs, and interest are also enforceable as a common expense assessment. Mass. Ann. Laws ch. 183A, § 6(a)(ii).

It is imperative that an association establish a process for levying and collecting the charges in a timely manner to preserve its statutory lien.

The following steps must be taken by an association to protect its interests and the priority lien afforded under Mass. Ann. Laws ch. 183A, § 6(c), from drafting and sending the initial notice of the lien to obtaining judgment of its lien under Mass. Ann. Laws ch. 254, §§ 5 and 5A.

Notice of Lien to Unit Owner

Under Mass. Ann. Laws ch. 183A, § 6(c), if a unit owner is more than 60 days in arrears, the first step in any collection matter is to send a Notice of Lien to the unit owner. This notice must be sent to the unit owner by both certified and first-class mail and state that there is a lien on the unit for unpaid common expenses, of which certain amounts are at least 60 days past due. A copy of the current ledger for the unit, stating the outstanding balance owed, should be sent with the notice.

In preparing the Notice of Lien, practitioners should talk with the client, carefully review the file, and be wary of the following traps:

- Be sure that the Notice of Lien is mailed via both certified and first-class mail.
- Ask if the unit is owner-occupied or tenant-occupied. Many ledgers fail to advise if the unit owner resides in the unit. Thus, a copy of the deed for the unit should be obtained from the appropriate Registry of Deeds to confirm who should receive the letter. Performing this simple search will ensure that the proper party receives notice and helps prevent violation of the Fair Debt Collection Practices Act (FDCPA) as the notice of lien must not be sent to the unit occupant—it must be sent to the owner of record. For further guidance, see [Fair Debt Collection Practices Act](#).
- If the unit's record owner is a trust, determine who the current trustee is by reviewing the records at the Registry of Deeds, pursuant to Mass. Ann. Laws ch. 183A, § 6.
- If the unit's record owner is a corporation, be sure to send the Notice of Lien to either the president, treasurer, clerk, or registered agent. Use the Secretary of State's office website to obtain this necessary information.
- If the owner is an estate and the unit owner is deceased, the Notice of Lien should be sent to the "Estate of _____" at the last known address of the owner and to the personal representative of the estate. If no probate has been filed, obtain the obituary and death certificate and send the notice of lien to the "Estate of _____" at the last known address and to any heirs named in obituary or on the death certificate.
- If the owner is a bank, the Notice of Lien should be sent to **both** the registered agent and address identified on the foreclosure deed to avoid an insufficient service defense that the notice was not sent to the registered agent and/or to the address identified on the foreclosure deed or assignment of mortgage. Additionally, be aware that some banks have issued memoranda advising of the address they wish to receive notice for lien enforcement actions, such as the Mortgage Electronic Registration Systems, Inc. (MERS).
- A quick Pacer check should also be conducted at the beginning of any collection matter and before sending the Notice of Lien to determine if there was a prior bankruptcy. Remember, if a unit owner does not reside in Massachusetts, you should also check the national Pacer for any possible bankruptcies.

- The Notice of Lien must also contain the FDCPA language. In fact, it is best to include FDCPA language on all correspondence sent to the unit owner. A sample of this necessary language is as follows:

NOTICE OF IMPORTANT RIGHTS TO CONSUMERS

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of the lien amount or any portion thereof, this office will assume the lien amount is valid. If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of the lien amount or any portion thereof, this office will obtain verification of the lien amount or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request of this office in writing within 30 days after receiving this notice, we will provide you with the name and address of the original creditor, if different from the current creditor.

NOTICE

The law firm of _____ is a debt collector. We are attempting to collect a debt. Any information obtained will be used for that purpose.

- If the Notice of Lien is returned, don't just throw it in the file and shrug that the owners didn't pick up the certified mail. Look at the postal service message that is provided: does it provide a forwarding address, tell you the owner is deceased, or inform you that there is no such address? You may need to do some internet sleuthing and find alternative addresses.

Title Examination

If the unit owner remains delinquent after the initial notice, obtain a title examination from the date the unit owner purchased the unit through the current date. This is necessary to ensure that the statutory notices are sent to the correct persons and mortgage holders.

When running the title, the following tips should be kept in mind:

- If the bank is the owner of the unit, it may be worth looking back at the foreclosure sale process.
 - If the current owner obtained title from an ex-spouse, run the ex-spouse as well to see if any outstanding mortgages are under that name.
 - If unit owner is deceased, obtaining the probate documents for information on heirs is also advisable.
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Notice of Lien to Lender – 60-Day Notice

Once the title examination is performed, and the unit owner remains more than 60 days in arrears, Mass. Ann. Laws ch. 183A, § 6(c) requires that a 60-day notice of the lien to lender (60-day Notice) be sent by both certified and first-class mail, to the first mortgage holder of record. This notice cannot be sent until the unit owner is at least 60 days in arrears.

In preparing the 60-day Notice, practitioners should be aware of the following traps:

- Pursuant to the statute and Massachusetts case law, late fees, interest, collection costs, and attorney's fees are all collectible under the lien process. The law also provides that other financial obligations of a unit owner—for instance, fines—may be so enforced. However, the priority lien over the first mortgage is only for regular monthly common area fees and collection costs. It does not cover interest, late fees, fines, or special assessments. Copy of the ledger that identifies the total balance due and owing should be provided along with the 60-day Notice to the lender.
- Verification that the mortgagee, as listed of record, is still in existence, and to confirm if changes have been made to its name.
- If title has not already been run for the unit, obtain title to verify the correct name of the bank and the appropriate address of the bank.
- As with the Notice of Lien that is sent to the unit owner, unless the address on the assignment of the mortgage is a known valid address, it is safer to send 60-day Notice to both the address identified on the assignment of the mortgage and to the Resident Agent.
- Remember that under Mass. Ann. Laws ch. 183A, § 6(c), failure to send the 60-day Notice does not affect the lien or the priority of the lien over that of a first mortgage holder, but it will take away the ability to claim any attorney's fees incurred to enforce the lien as priority.

Notice of Intent to Initiate Lien Enforcement Action to Lender – 30-Day Notice

Should there be no response from the unit owner or lender and the lien remains unpaid, the next step under Section 6(c) is to issue a 30-day notice to the first mortgage holder (30-day Notice) of the condominium association's intent to

commence a lien enforcement action within 30 days should the delinquency continue, by filing a complaint with the appropriate court. This notice must also be sent certified and first-class mail.

In preparing the 30-day Notice, follow the tips provided for above for the 60-day Notice. Practitioners should also be aware of the following tips and traps:

- For the 60-day Notice and the 30-day Notice, depending on the length of the delinquency on the unit owner's ledger (e.g., the unit is already (6) months in arrears), to protect the priority lien, practitioners may want to consider sending the 60-day and 30-day Notices at same time, and further consider filing the complaint before the expiration of the 6-month priority lien.
- A copy of the current ledger that identifies the total balance due and owing, including all late fees, interest, collection costs, and attorney's fees incurred by the association in seeking to enforce the lien should be identified on the ledger.

Commencement of the Lien Enforcement Action – The Complaint

Should the notices to the unit owner and mortgagee not result in payment of the lien, the next step is to commence the lien enforcement action by filing a complaint with the appropriate court. To maximize the benefits under Mass. Ann. Laws ch. 183A, § 6(c), suit should be commenced no later than after the sixth monthly payment is missed. A complaint is prepared and filed in the appropriate court stating that the unit owner has a lien on their unit that must be satisfied. The Massachusetts district courts, housing courts, and superior courts all have concurrent jurisdiction and consideration as to which court makes the best sense for the association's situation to be undertaken before filing suit.

The complaint must name the association, the unit owner(s), and all other lienholders of record, such as the mortgagee(s), attaching creditors, taxing authorities, and heirs of an estate if the unit owner is deceased. The complaint further requests that the court allow the association's lien to be enforced by foreclosure and grant the association priority over the various lienholders, including the priority lien over the first mortgagee. The unit owner and all lienholders are then served with a copy of the complaint and a summons. An attested copy of the complaint must also be recorded with the Registry of Deeds. Under Mass. Ann. Laws ch. 254, § 5, the complaint

must be recorded with the appropriate Registry of Deeds within 30 days of the commencement of the action.

When preparing the complaint, practitioners should again review the file and be aware of the following:

- Update the title search prior to filing to make sure no changes in ownership of the unit and no assignments or other liens have been recorded since last title update.
- Conduct a Pacer check for any bankruptcy filings prior to filing the complaint to avoid violating any bankruptcy stay orders. This search should include not only the record unit owner, but any individuals named as defendants/ parties-in-interest as well.
- Be sure to identify the correct town/city the association is located to make sure the court you are filing with is the correct court for that town/city. As discussed above, the district courts, superior courts, and housing courts all have jurisdiction to hear and decide upon the lien enforcement action. District courts tend to move cases faster than superior courts, especially if an answer is filed that then requires all motion practice to be conducted in compliance with ALM Super. Ct. Rule 9A. However, deciding which court to file the complaint with should be made on a case-by-case basis. Also, keep in mind that if the amount of the lien being sought is \$50,000 or more, the underlying issues in lien actions must be handled by a superior court judge.
- Be sure that appropriate service under the Massachusetts Rules of Civil Procedure is used when serving the complaint on the defendant and keep in mind whether the record title owner of the unit is an individual, trustee of a trust, corporation, LLC, or estate. Again, it is important to confirm the correct mailing address for the unit owner. If the mailing address is a P.O. Box, be aware that sheriff/process servers cannot serve a P.O. Box—a physical street address is needed.
- Be sure to identify the name of all mortgage holders by using their complete and legal names, otherwise, you may open up the door to an insufficient service claim as a defense.
- If the owner is an estate, be sure to name as defendants/ parties-in-interest all known and identifiable heirs and any unknown heirs and devisees.
- Consider hand-delivering or mailing the complaint to the court by certified mail to have proof of the date the complaint was filed.

Record and Serve the Complaint

Once the complaint is filed, practitioners should calendar the matter to follow-up within 14 days as the complaint will need to be recorded with the appropriate registry of deeds pursuant to Mass. Ann. Laws ch. 254, § 5, which requires recording “within 30 days of the commencement of the action.”

If you receive the certified mail green card back showing the date the complaint was received by the court but after 10 days do not receive the attested copy of the complaint and summons, contact the court clerk’s office for the status of the attested copy and summons of the complaint. If necessary, set aside enough time to go to the court and obtain the attested copy of the complaint to ensure that it can be timely recorded with the registry of deeds to protect the lien.

If the defendant is located within the commonwealth, it is good practice to have the complaint served by the sheriff’s office. If the defendant resides out of state, use of a process server is recommended as issues of service can arise if you rely on service via the long-arm statute. Process servers are better able to locate the defendant’s correct location/address and to ask other pertinent questions that ensure proper service is obtained.

Typically, there is no need to have the court appoint a process server appointment because in the commonwealth, sheriff’s service is adequate and out of state, process servers authorized in their particular state to serve are preferred. A few courts such as Dedham District Court, Norfolk Superior Court, and Quincy District Court typically do not even accept long-arm as adequate service.

Be sure to give sheriffs and process servers a deadline by which to make service, and calendar same so you can remember to follow up on it.

If the commonwealth or a state agency is the defendant party-in-interest, the complaint must be served at its Boston office of the Attorney General and to the agency chair or secretary/clerk at its main office. Pursuant to ALM R. Civ. P. Rule 4(d)(3), service can be by certified mail, but it is always recommended to serve the complaint via the sheriff’s office.

Return of Service and Request for Default Judgment and Hearing

Once all parties are served with a copy of the complaint, they have 20 days after the date of service to file an answer with the court.

Once 20 days have passed after service of the last defendant and no answer has been filed, you should file a motion pursuant to ALM R. Civ. P. Rule 55(a) requesting that the court enter a default against the defendant. Upon the entry of the default by the court, the next step is to file for a default judgment pursuant to ALM R. Civ. P. Rule 55(b) by filing a motion and entry of default judgment with the court, along with the necessary affidavits and memorandum in support of the motion. Counsel should also be sure to schedule a hearing on the motion with the court.

Practitioners should also be aware of the following consideration when requesting a default and default judgment under ALM R. Civ. P. Rule 55(a)-(b):

- Review of the sheriff and/or process server's return to make sure all information is correct as to who was served, where, and on what date and time they were served should be undertaken to identify any service issues, and if any are identified, address such issues as soon as possible.
- Once service is made, calendar out for 21 days from date of the last service to follow-up on the matter. Be aware that Massachusetts courts allow 90 days for service, thus if service is taking too long, it is advised to file a motion to extend the time to serve the complaint and summons and provide the reasons why additional time is necessary.
- Before filing a request for default pursuant to ALM R. Civ. P. Rule 55(a), conduct a quick check of the court's docket to determine if any party has filed an answer that was not served on you or your client.
- Prior to preparing the motion and entry of default judgment pursuant to ALM R. Civ. P. Rule 55(b), request an update on the title of the unit to make sure that no mortgage assignments have been recorded, and another check on Pacer is advisable.
- When submitting the memorandum of law in support of the motion, attach a copy of the unit deed to show the nexus between defendant and association. You should

also attach a copies of the portions of the condominium's declaration of trust that identify the powers and duties of the trustees and address the association's collection of common expenses. Attaching the unit deed as an exhibit allows you to reference the deed, which will most likely contain language that the unit owner took title to the unit subject to the association's documents. Having the relevant portions of the declaration of trust attached as an exhibit will also assist in showing the court that the association has the power to assess fees and collect same.

- Most judges have knowledge of the condominium collection practices set forth in Mass. Ann. Laws ch. 183A, §§ 1 through 23 and will want assurance that service of the complaint was properly effectuated on the defendant. Thus, to demonstrate that the defendant was fully aware of the lien and the proceeding, having the certified mail return receipt green cards in your file at the hearing to show proof of when the unit owner received the notice of lien can be helpful. If the certified return receipt green card is not available, a simple check of the tracking feature on the U.S. Postal Service's website can be done and a printout of this information can be used.
 - Practitioners should be knowledgeable of the clients, defendants, and the facts of each case in case the motion judge asks questions (e.g., how many units at the condominium, what is the special assessment for, how are late fees calculated if by interest, what is included in the monthly condominium fee—is water/sewer part of the fee, has there been any communication with the defendant, any communication from the first mortgagee, is the unit owner occupied or investor, has the owner indicated they are surrendering unit, has the first mortgagee commenced a foreclosure proceeding, etc.).
 - If the unit owner has previously filed bankruptcy and relief from stay was obtained, it is advisable to have a copy of the order permitting the action to proceed in the file for the court.
 - If the judge allows a motion for default judgment, make sure they sign the judgment and order contained with the motion. Some judges think allowing the motion is sufficient, however, the judgment and order authorizing the trust to foreclose on the unit must be executed by the court. Pursuant to Mass. Ann. Laws ch. 254, § 5A, "when the amount of a lien under sec. 6 of c. 183A has been established by a court, the court **SHALL** enter an order authorizing the sale of the real estate to satisfy such lien." (emphasis added).
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Motion for Summary Judgment

If a defendant files an answer to the complaint, and settlement of the matter is not possible, it is advisable to file a motion for default judgment as to all non-responding defendants and file a motion for summary judgment with accompanying memorandum and affidavits for the answering defendant. This will indicate that there are no genuine issues of fact in the case and that the association is entitled to judgment as a matter of law. A hearing is then scheduled, and the process outlined above for conducting motion hearings on a motion for default judgment should be followed.

If the court finds genuine issues of material fact exist and summary judgment is denied, the matter will then proceed to trial.

Judgment and Order

The next step in the proceeding is to obtain a determination of the debt and an order of sale. Thus, at the time of the hearing on either the motion for default judgment or summary judgment, make a request to the court to enter a judgment and an order allowing the association to foreclose its lien upon the unit. For complaints filed in the district court, there is a 10-day appeal period after judgment enters. For superior court matters, the appeal period is 30 days. Once the appeal period has expired, the association can then proceed to foreclose on the lien against the unit and obtain the collection of the outstanding balance on the unit owner's account.

Practitioners should consider preparing a draft judgment and order for the court's review and approval. To avoid any issues when proceeding with the foreclosure of the unit, ensure that the following necessary elements are contained in the judgment and order:

- The proposed judgment and order should contain a description of the unit including the unit number, street address, and the town/city where it is located so that the property can be properly identified.

- The proposed judgment and order must contain language stating that a lien has been established and authorizing the association to foreclose its lien against the property.
- It is advisable during the appeal period to conduct another title rundown from a title examiner and obtain a municipal lien certificate so you can proceed with the foreclosure as soon as the appeal period has expired.
- It is also advisable to go obtain an attested copy of the judgment and order as this will need to be recorded along with the foreclosure deed.

After the above-referenced steps are taken and while the judgment and order for sale are in hand, the association must still proceed with the foreclosure process to foreclose on the lien against the unit. This process contains its own procedures which are beyond the scope of this practice note.

As discussed in detail above, while the collection of condominium common area fees may at first seem a simple process, it is one of the most important functions any condominium attorney will perform for their association clients. Collection of common area fees is essential because it ensures that the association is appropriately funded so its trustees can properly maintain and oversee the common areas and facilities and faithfully perform their duties in overseeing of the operations of the association.

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Doug is a founding member of the firm and focuses his practice on condominium and real estate litigation, real estate development and permitting, land use litigation and employment law. He has successfully tried numerous cases before state and federal courts at both the trial and appellate levels and has represented clients in a variety of administrative proceedings and private dispute resolution forums. In a wide-ranging practice, Doug has represented condominium associations, homeowner associations and property management companies in disputes of all kinds including; actions against unit owners, enforcement actions, common area conflicts, phasing and development matters, construction defect claims, developer transition and contract disputes. He has also represented individuals, condominium associations, developers, and multinational corporations in land use disputes involving small parcels and huge tracts. Doug further guides individual owners and developers through local and state permitting processes for various types of real estate development projects. A specialist in employment law as well as in land use and condominium law, Doug has advised employers (including condominium associations and management companies) on employment practices and regulatory compliance issues and represented them in litigation involving; Employment discrimination claims, unfair competition claims, wage disputes, severance agreements, noncompetition provisions and employee dismissals, among other matters.

Doug has lectured on condominium, real estate development and litigation, and employment litigation for various organizations, including the Community Associations Institute New England Chapter and Real Estate Bar Association, and frequently writes articles for CondoMedia, the official publication of the New England Chapter of the Community Associations Institute and REBA News.

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