

MEMORANDUM

TO: GENERAL DISTRIBUTION

FROM: MATTHEW L. WINTON^{PLLC}

SUBJECT: COMMUNITY ASSOCIATION COLLECTIONS; LIENS

To whom it may concern:

1. **Introduction.** As a courtesy to community association managers and as legal counsel to a significant number of community associations within the State of Oklahoma, our firm has developed this memo to assist with navigating the sometimes thorny issue of debt collections, including the preparation and filing of assessment liens. This memo is not legal advice to anyone; we have specifically advised our clients when requested on these issues. It is intended to raise a duty of inquiry on the part of its readers.
2. **The Fair Debt Collections Practices Act, 15 USCA §1692, et seq.** Debt collectors are required under Federal law to comply with certain minimum collections practices when it comes to collecting consumer debt. Third party communications are forbidden. Adequate statutory notice is required. Collection of debt barred by statute of limitations or simply made-up/fictitious debt is absolutely prohibited. For example, “late fees” not provided for within the governing documents are made-up debt. Likewise, charging interest at a rate higher than provided for under the governing documents is fictitious debt.
3. **The U.S. Bankruptcy Code, 11 USCA §101 et seq.** The purpose of bankruptcy is to give a debtor a “fresh start,” which is why the Code provides for an automatic stay of collections activities at certain times in a bankruptcy, and significant punishments for debt collectors who violate a debtor’s bankruptcy rights. Sending demand letters, filing liens, and otherwise attempting to collect pre-petition debt in a bankruptcy violates the Code.
4. **Oklahoma law on agents signing liens.** Oklahoma law is very clear and has been for decades on an agent’s authority to sign and file real property instruments, which would include condo and HOA liens. In short, an agent may sign and file a lien against a third party’s property (the lot or condo unit owner) only where the corporate association has granted that agent a power of attorney and that power of attorney is recorded along with the lien:
 - 4.1. **16 O.S. §3.** 16 O.S. 3 allows for an attorney-in-fact to sign instruments affecting real estate.
 - 4.2. **16 O.S. §20.** 16 O.S. 20 requires a power of attorney to be recorded along with a conveyance or any instrument affecting property, including releases.
 - 4.3. **16 O.S. §79.** Provides significant penalties for slander of title, including costs, attorney’s fees, and treble damages.
 - 4.4. **16 O.S. §85.** Provides significant penalties for filing false affidavits, which may apply to false liens. Penalties include actual damages, costs, attorney’s fees, and punitive damages.
 - 4.5. **TES 6.7.** Title Examination Standard 6.7 provides that conveyances of record for 5 years without a recorded power of attorney are effective to vest title, but the standard does not speak to other interests in property.

- 4.6. **TES 12.3.** Title Examination Standard 12.3 “cures” a managing agent signing defect, so any lien that was improperly signed and filed by a managing agent would be “cured” 5 years after recording for authority of signing purposes, but not for other infirmities such as violation of FDCPA, Bankruptcy Code, and slander of title.
- 4.7. **TES 12.5.** Title Examination Standard 12.5 speaks directly to corporations issuing powers of attorney for agents to sign instruments affecting property and includes the 5 year curative language, which again would cure recording defects but not other infirmities such as violation of FDCPA, Bankruptcy Code, and slander of title.
5. **Governing Document language on authorized lien signers.** If the Governing Documents specify that a lien shall be signed by a director or officer, it may be that a court would find the signing of a lien by an agent improper even with a limited power of attorney.
6. **Other general lien considerations.** Apart from the requirements of the FDCPA, Bankruptcy Code, and authorized signer issues, the lien itself must be accurate: owner name, legal description, amounts. Also, it is common to use “continuing lien” language so that a new lien need not be recorded year after year – one lien with continuing lien language may be filed and thus not incur repeated costs. Of course, the governing documents must actually provide for lien rights in order for a lien to be filed. *Warwick Estates Ass'n, Inc. v. Anderson*, 1989 OK CIV APP 65; *Falconhead Property Owners Association v. Fredrickson*, 2002 OK CIV APP 67.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matthew L. Winton". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

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