

## Using Assignment of Rents Provisions in the CC&Rs to Collect Delinquent Assessments

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Collecting delinquent assessments from defaulting homeowners has been an ongoing problem for community associations which, in recent years, has only escalated. While most managers and directors are likely familiar with the most common methods of collecting outstanding delinquencies, such as small claims court and foreclosure, there is yet another option to collect delinquent assessments from the owners who rent their units – an assignment of rents. Section 2938 of the California Civil Code authorizes and regulates assignment of rents. Although Section 2938 was intended to provide lenders with a means to protect their interests in a property prior to foreclosing on their loans, an association may also use the statutory procedures to collect rents from a delinquent owner - if the CC&Rs so provide.

If an association seeks to collect rents from the tenant of a delinquent homeowner, the CC&Rs must contain an express assignment of rents provision. Note, however, that even if an association pursues this means to try to recover delinquent assessments, the association must still record a lien for the delinquent assessments. The recordation of the delinquent assessment lien gives the association priority over later-recorded liens and will help secure the debt.

When the CC&Rs authorize an assignment of rents, the association is entitled to enforce the assignment upon the default of the owner/landlord in his or her payment of assessments and collect and receive: (i) all rents that have accrued but remain unpaid and uncollected, and (ii) all rents accruing after notice to the required parties and compliance with the enforcement steps that follow.

Generally, enforcement of an assignment of rents can be accomplished through a court-ordered appointment of a receiver. However, enforcement can also be accomplished without the expense and delay of a court order and receiver by sending a “Demand to Pay Rents to Party Other Than Landlord” directly to the tenant (if the tenant does not comply with this demand, then court action may be necessary). Section 2938 contains the exact language which must be used in the “Demand to Pay Rents to Party Other Than Landlord.” A copy of the Demand must be delivered to the owner/landlord and all other assignees of record (*i.e.*, lenders). Just as with any disciplinary action, an association should provide the owner/landlord with a notice and hearing before sending the assignment of rents letter to the tenant.

In addition, it may be advantageous for an association to obtain a copy of the lease prior to an owner/landlord becoming delinquent, so the association will know how much rent the tenant is actually paying to the owner/landlord. This way, the association will know how much rent to expect from the tenant. The requirement for the owner/landlord to provide a copy of the lease to the association must also be included in the association’s governing documents.

Notably, under Section 2938(g), if an association is receiving rents from the tenant and no receiver is appointed, the owner/landlord may demand, in writing, that the association “pay the reasonable costs of protecting and preserving the property, including payment of taxes and insurance and compliance with building and housing codes, if any.” This means that an association may have an obligation to pay taxes and insurance on the property, in addition to other affirmative obligations. That said, however, an association’s obligations under Section 2938(g) will not exceed the amount of rents received under the assignment.

While an assignment of rents may be an effective tool for an association if it is used properly, it should be used conservatively and cautiously. This is because demanding rents from a tenant may prompt threats of lawsuits by the owner/landlord or cause the tenant to terminate the tenancy. Termination of the tenancy would result in the termination of income from the property to the owner/landlord, which in turn would cause the owner/landlord even more financial hardship, without providing assessment income to the Association. Alternatively, however, demanding rents from a tenant may prompt the tenant to contact the owner/landlord to resolve the dispute. For these reasons, if an association’s CC&Rs contain an assignment of rents provision, we recommend each case be analyzed independently to determine if this remedy would be an effective way to collect delinquent assessments.

The above general information is for educational purposes only. If the Board needs further guidance or has specific questions on this issue, please contact your legal counsel.