

Arrears in Co-op and Condo Communities

Mark Axinn, Partner, Phillips Nizer

Nobody likes it when a shareholder or unit-owner isn't paying their monthly fees on time — or isn't paying them at all. But dealing with arrears is a common concern for co-op and condo boards. When trying to resolve nonpayment issues, it's important to contact anyone who might have an interest in the apartment and be in a position to make the payment. Oftentimes this is a lender under a recognition agreement. It is crucial to act promptly when arrears are identified. Delays in recovering funds can lead to substantial debts that impact a building's financial stability.

Collecting arrears. The first step in recovering unpaid maintenance or common charges is to notify the owner. Early communication allows for potential hiccups like missed payments due to travel or temporary glitches in payment systems to be resolved amicably. Rather than immediately involving legal professionals, managing agents should take the lead, reaching out to people when they are more than one month in arrears to understand the reasons behind the non-payment. Sometimes when people purchase apartments, they put a year's worth of maintenance in escrow. This might be a possible route to payment. Another situation might arise where a sponsor is subletting the unit and not paying the maintenance. In this scenario, a co-op has a remedy to demand the rental payment directly from the subtenant. This can also be achieved in condos under the Real Property Law. (*cont. below*)

Extended nonpayment. If the arrears extend to two months or 60 days, the co-op or condo should take formal action, issuing a default notice under the proprietary lease or bylaws. This notice should not only be sent to the owner but also to their lender. Contacting the lender is contractually important because the shareholder will have signed a recognition agreement, recognizing the lender has an interest in the apartment. Lenders aren't obligated to pay, but they often have a vested interest in protecting their security. In a condo, the lender's lien is ahead of the condo's lien for unpaid common charges. In a co-op, the corporation's lien takes priority over the lender's lien. So the lender is very likely to come back to the co-op, and either make payment, or put pressure on the shareholder. For this reason, it's very important to be pursuing the lender as soon as possible.

Identifying the lender. It can be a challenge to identify the lender, but the board will often have records from the original purchase or from any refinancing. In these situations, the lender often signs a recognition agreement. The transfer agent, which is usually one of the building's attorneys or managing agents, maintains essential files containing lease agreements, stock certificates, and recognition agreements. Once arrears become an issue, legal counsel is often involved in coordinating notices and actions. Another path to finding out this information is through publicly available data on sites like ACRIS or by engaging a title company.

Legal paths to payment. If the arrears situation continues after issuing a default notice, a co-op has the right to initiate a summary proceeding in landlord-tenant court to recover arrears without necessarily pursuing eviction. Co-ops must follow landlord-tenant rules, complying with the Tenant Protection Act and proprietary lease terms. For more severe cases, such as prolonged arrears, which might be the case if it's an estate, or if the shareholder is untraceable, the co-op has the right to commence a non-judicial foreclosure under the Uniform Commercial Code. This method involves public notices, title searches, and potential auctions to recover unpaid fees. In a condo you'd have to go to court, but in a co-op you can avoid going to court. The goal is really debt recovery and transitioning to a new shareholder.