By John F. Baumgardner

Subsequently Accruing Assessments:
SECURED OR UNSECURED?

A bankruptcy opinion by the 9th Circuit Court of Appeal has thrown another obstacle into an association's right to collect delinquent assessments owed by its members who have declared bankruptcy. In *Highland Greens Homeowners Ass'n v. de Guillen* (Bankr.9th Cir. 2019) 604 B.R. 826, the 9th Circuit held that liens "purport[ing] to secure future assessments [over the $1,800.00 threshold] . . . [are] impermissible under the Davis-Stirling Act, which limits the lien to the amount specified in the notice." (*Id.* at 837.) The *de Guillen* Court reasoned that "the Davis-Stirling Act reflects the legislature's intent to impose and rigorously enforce its procedural requirements to protect the interest of the homeowner." (*Id.* at p. 839.) Based upon this legislative intent, the notice requirements for delinquent assessments over the $1,800.00 threshold "must be strictly construed." (*Id.* at 837.) While the opinion generally prohibits securing future delinquent assessments in a recorded lien, it acknowledges there is a statutory exception. If an association records a lien securing less than $1,800.00, the association "may include such [future delinquent] assessments without requiring a new notice" until all delinquent assessments reach $1,800.00. (*de Guillen*, *supra*, 604 B.R. at pp. 838-839.) Additionally, the ruling does not exclude other secured recoverable costs from accruing after the lien is recorded (i.e. interest and reasonable collection costs). (*Id.*)

Under *de Guillen*, associations should consider recording successive liens to ensure that delinquent assessments are secured in bankruptcy matters. This is especially true following 2018 9th Circuit opinion in *Goudelock v. Sixty-01 Association of Apartment*

Owners (9th Cir. 2018) 895 F.3d 633 which found that unsecured delinquent assessments, whether pre-petition or post-petition, are dischargeable under 11 USC section 1328 (a). If the debts are unsecured, the association may lose its right to collect the delinquent assessments from a homeowner once a bankruptcy case is filed.

It is unclear how California Courts will respond following *de Guillen.* The 9th Circuit opinion is not binding on state courts and, to date, no California case has relied upon its reasoning. Furthermore, as noted in *de Guillen*, there is a published California Appellate decision which held that Davis-Stirling authorized continuing liens. (See *Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470.) However, the *Bear Creek* opinion also relied upon the language of the CC&Rs which expressly stated that "any demand or claim of lien or lien on account of prior delinquencies shall be deemed to include subsequent delinquencies and amounts due on account thereof." (*Id.* at p. 1488.) If an association's CC&Rs do not permit continuing liens, a California Court following the reasoning of *de Guillen* may find the subsequently accruing assessments to be unsecured.

Although both *de Guillen* and *Bear Creek* note the burden imposed by filing successive liens, either the legislature or California Supreme Court will need to resolve the conflict in the law. At a minimum, associations are on notice that bankruptcy courts will find unnoticed and subsequently accrued delinquent assessments unsecured. Until the conflict is resolved, associations should consult with their general counsel, property managers, and trustee services to ensure that delinquent assessments can be properly secured and recovered.

JOHN F. BAUMGARDNER is an attorney with Chapman & Intrieri, LLP in their Roseville, California office. His practice focuses on representing Homeowners Associations in construction defect disputes, judicial collections, general counsel matters, general civil litigation, and revision of governing documents.