



# Deadbeat Neighbors Cost You Money! How Condo Boards CAN Collect Arrears

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Every condo board, it seems, has the same story: "We've got thousands of dollars in arrears from condo-owners who don't pay their common charges — and there's nothing we can do because A) It's too expensive to take them to court, and B) it takes years anyway."

**Wrong.** Yes, some condo-owners game the system because of those two factors — and when those deadbeats don't pay, *you* have to pay *for* them, whether through common-charge increases, assessments or the board just plain having to put off repairs, improvements and amenities.

**Well, no more.** In an exclusive, in-depth *Habitat* report being presented in two weekly installments, we're going to tell you cheap, easy and effective means for your board to get deadbeat condo-owners to pay — and what to do in hardship cases that can actually help those people. So if any condominium board is serious about collecting arrears, there are no more excuses. Here's what to do.

"Condominiums are very weird creatures," says Dan Wurtzel, president of Cooper Square Realty. "Co-ops in arrears you can foreclose on in a matter of months," since it's simply a matter of recalling shares in a corporation. "But a condo" — which is real property — "is one of the hardest forms of ownership to foreclose on, even harder than a house. Something needs to be done at the state level," he says, "because people can stack up substantial arrears, and foreclosure proceedings take years."

Two things condo association boards should realize off the bat: You *can* collect arrears, and you *should* collect arrears. You might be hesitant to do so because foreclosure litigation can be expensive and time-consuming, but you've got other avenues. You can:

- **Create payment plans**
- **Cut off amenities**
- **Make names public** to create peer pressure
- If the apartment is being rented, **collect rent directly from the tenant**
- **Hire a lower-cost expeditor** rather than an attorney for the initial paperwork

- Or **just go to Small Claims Court**, which handles amounts of up to \$5,000. For most condo apartments, that's well over three months' arrears. And you can file multiple times if you hit the \$5,000 cap.

### Step One: Get the Basics Out of the Way

The first step is for your board to have a consistent policy in place. This generally means initiating action after 60 days. At the end of the second month without a common-charge payment being made, a savvy, serious board *will* have your managing agent or attorney send a certified letter, return-receipt requested, notifying the condo-owner that he or she is in arrears. It should state neutrally and non-threateningly that payment must be made immediately or a payment plan worked out. Otherwise, it should warn that a **Lien of Unpaid Common Charges** will be placed on the apartment.

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"Nine times out of ten, when an attorney's letter is sent to an owner, all of a sudden the arrears are paid up and everything's satisfied and everyone's happy," says Arline Kob, a principal at Key Real Estate Associates.

Best-selling author and veteran real estate attorney **Adam Leitman Bailey** agrees. "Most everybody finds the money to pay," he says. "A lot of these unit-owners are able to borrow from friends and relatives. The key," he stresses, "is that if you don't put pressure on them to pay, then they'll pay every other bill first. If you set a

tone to the building where they know you're going to go after them if they don't pay, they'll pay their common charges before their car payments."

### Step Two: Offer a Payment Plan

Attorney [REDACTED], a partner at [REDACTED], says that during the 30-day payment window such delinquency letters typically offer, "It's not unusual for us to receive a telephone call from the unit-owner and we then offer them a payment plan," known as a stipulation in legal parlance. "Usually, we will get some money up front. We like to collect 50 percent of the arrears as a condition of entering into the payment plans."

Roz Sackoff, president of Bayside Mews, a 142-unit condominium in Queens' Bay Terrace neighborhood, says that method works so long as both sides are flexible. "We have a couple of apartments severely in arrears," she says. "We negotiated a little bit with one owner who owed us money for a couple of years, close to \$9,000. So the property manager called her and said we needed to get this resolved. We ended up taking off the late fees and she paid up most of the arrears, from \$9,000 [she's down] to just \$524 she hasn't paid yet."

Negotiation and compromise are especially important in hardship cases. Sackoff recalls a longtime owner who'd lost a leg to diabetes and was in the hospital and then in rehab, and became so depressed she fell months behind on all of her bills. Sackoff reached out to a friend of the woman's, who notified the woman's nephew on the West Coast. When he flew in to deal with matters, the board "took off the late charges. In situations like that, I err on the side of compassion. These are your neighbors, and you try to deal with things in a kind and compassionate way." And the arrears got paid.

"People may have lost their jobs and need some time... we're all neighbors and we want to get along," **Bailey** says. "But we still have to pay our heating and trash and electric bills, and we need everybody to contribute."

If you've made good-faith efforts and the delinquent owner appears to be stalling — refusing to enter into a payment plan, for instance, or to make some other good-faith gesture — then it's time to file a lien, a security interest placed on a property that has to be paid off before the owner can sell it, refinance, or do most anything else. If you do, make sure you notify the unit-owner's bank that there's a lien — it can't hurt, and in some cases it might even spur the lender to apply pressure.

### **Lien and Mean**

"Collecting arrears is a bear," observes Sackoff, "but it doesn't cost that much to place a lien — a couple of hundred dollars usually, including legal fees. We pay it up front and that gets back-charged to the owner."

Cooper Square president Wurtzel followed that same legal path at his own Long Island condominium, where he's president of the board of directors — and ran first hand into a legal wall all too familiar to condo boards. "One person in my development in **Nassau County** hasn't made a common-charge payment in two and a half years," he says ruefully. "We've gone to court, but she's paying her mortgage," and so her bank won't foreclose, leaving that difficult task up to the board.

And you can fight back. The mechanism to do so in **New York State** is Real Property Law Article 9-B, Section 339-AA ("Lien for Common Charges; Duration; Foreclosure"), which says, in part: "In the event that unpaid common charges are due, any member of the board of managers may file a notice of lien... if no notice of lien has [already] been filed within sixty days after the unpaid charges are due... Such lien may be foreclosed by suit authorized by and brought in the name of the board of managers...."

Again, notify the bank. In rare cases, some may even choose to pay the arrears and add that amount to the mortgage balance, according to Washington, D.C., attorney and columnist [REDACTED].

And as with any lawsuit, of course, the wheels of justice grind slowly — and expensively. All this has made some boards reluctant to pursue arrears. "The legal fees preclude the avenue of taking these people to court," says Sackoff, angry at a system that, given the relatively low amounts involved, is easy for a delinquent owner to game. "It costs too much and there's no guarantee the court will grant you legal fees."

### **Step Three: Small Claims Court**

That's why condo boards, say attorneys, are slowly becoming aware that condo common charges are usually low enough (under the \$5,000 threshold) that you can turn to Small Claims Court. "The liens of condos are relatively small because condominium common charges don't include an underlying mortgage for the building or taxes for the building — each unit is taxed separately," says [REDACTED].

When you win the judgment — it's highly unlikely a judge will say, "Sure! They can live there for free indefinitely!" — the first step to collecting is to notify the unit-owner. Even if he or she has ignored your attorney's letter, seeing a court judgment is different. If they still ignore it, you can garnish the debtor's wages or bank account or even seize assets like the debtor's car.

Locating the bank account, for example, is simple if the person had been paying his common charges by check. Armed with this and other relevant information, you notify a city marshal, who is authorized to seize bank accounts, wages, real estate, automobiles, stocks, and bonds, and upon satisfactory completion sends the board a check. The marshal may request mileage and other nominal fees, which can be added to the original judgment amount.

## Part 2

Last week in Part 1 we began *Habitat's* in-depth report on cheap, effective ways for condo boards to collect arrears and get deadbeat owners to pay what they owe on common charges — because otherwise, you and other condominium owners have to pay for them to make up the difference. We talked about payment plans, handling legitimate hardship cases and how boards have a secret weapon: Small Claims Court.

But if you still have those inevitable hardcore types who always have some excuse not to pay their fair share, your board can still wear them down at no cost. It all comes down to: There's no constitutional right to have doormen accept your dry cleaning, or to send up food deliveries. There's no right to use the pool, gym or community room if you refuse to pay. This week, we learn how to cut off amenities — legally and ethically — and what the courts think about making public the names of owners in arrears, who make you, you and you shoulder their burdens. Here's what to do....



Step one: Get medieval on their assets. That's what the condo board did earlier this year at the six-story 95 Greene Street in Manhattan's tony Soho neighborhood, doing the equivalent of village-square public shaming with two alleged deadbeats: celebrated photographer and TV-commercial director Ken Nahoum and his supermodel wife, Basia Milewicz Nahoum, the owners of four multimillion-dollar penthouses there. According to the board's lawsuit, the couple owes \$40,000 in arrears and late fees — and since their property comprises about a fifth of the building's interest, that's meant increased monthly common charges for everyone else.

Not surprisingly, those other owners voted on February 17 to change the bylaws to:

- Allow information about seriously delinquent unit-owners to be posted in the lobby and sent by mail to other owners
- Prohibit seriously delinquent owners from serving on the board or voting at annual or special meetings
- Require delinquent owners to have their tenants' rent sent directly to the board,
- Allow the board to change the key-code for the elevator so that it cannot be used by delinquent owners. (At six stories, the building isn't required to have one; this might not be applicable in taller buildings.)

The board also removed Nahoum's name from the intercom and installed in the lobby a framed photo of Nahoum and Milewicz with a headline asking why they weren't paying their common charges. Nahoum countersued the board on June 17, but the court essentially side with the condo board in July (when Nahoum was arrested).

### **What Other Boards Have Done**

Elsewhere, boards have prohibited the use of such amenities as gyms, pools, and clubhouses for delinquent owners. And while receiving U.S. mail is a federal right, that doesn't mean doormen have to accept dry cleaning, food deliveries, or messenger or other private delivery services, such as UPS.

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"Read the bylaws to see if you can prevent them from using the amenities," says veteran real estate attorney and author **Adam Leitman Bailey**. "If that's permissible, it's a great idea. We've posted the names of those in debt on [one building lobby's] bulletin board," he says. "That was extremely aggressive and in bad taste, but it worked within months. I like public embarrassment much better than not being able to pay my sanitation and utility bills." He doesn't believe limiting elevator access is legal, however. "You can't make it harder for them to get to their apartment."

Dan Wurtzel, president of Cooper Square Realty, agrees. "You can't say they have to use the service entrance," he says. "We were going to stop a delinquent owner from going through the EZ Pass lane and make them go through the gate house every time," he says, "and our lawyer said to forget about it, that it will really piss the judge off" in the ongoing foreclosure case. "Use common sense. And don't make it personal, since you have to live with these people. Let management handle enforcing the rules."

Incidentally, the federal Fair Debt Collection Practices Act regulates *only* what actions a *debt collector* can take — it specifically makes an exception for *creditors* such as condo boards: "The term 'debt collector' ... does not include any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor...." So don't harass, but feel free to be assertive.

### Lieu Tenet

One other creative possibility is using a **Deed in Lieu of Foreclosure**. This is a document the board asks a seriously delinquent owner to sign, in which the board agrees to a payment plan and signs a document that assigns the apartment deed to the condominium association. Should the owner pay off the arrears, the DILF is nullified. Should the owner not, he or she loses the apartment.

Not everyone is convinced this is practical. "Why would a unit-owner sign such an agreement?" asks attorney [REDACTED], a partner at [REDACTED], noting that a delinquent owner could drag out foreclosure proceedings for years while keeping the apartment. "If there's any equity in the apartment," the attorney says, "there's no way anyone with a modicum of intelligence would sign a Deed in Lieu of Foreclosure."

"I wouldn't sign that in a million years," says one delinquent outer-borough apartment owner, speaking on condition of anonymity. "I've been on a payment plan with my board ever since they sent me papers four years ago," when he was five months behind. "We've been able to work it out on a friendly basis," he says, and he's been diligent not to let the arrears amount exceed 90 days' worth.

An attorney who strongly advocates the use of DILFs says that his firm has "done a lot of these, once every two weeks at least... We won't give them a payment plan unless they give up their rights." He declined, however, to name any boards that have ostensibly used a DILF. "[W]e negotiate the deal, so a board member really can't add anything," a representative of the firm wrote in an e-mail turning down *Habitat's* request for comment.

Another way to go is to hire an expeditor for at least the initial paperwork. "We'll file the lien, go into court, notify the owner, take care of all that part of it," says Anthony Giaimo, executive vice president of New York Condo Lien. "It's much, much cheaper using us than involving an attorney," he says, noting that his upfront fee, which the board pays, gets added to the amount of common charges owed. "We're a legal service," he describes, though he confirms, "No one here is a lawyer, per se."

## Foreclosure, for Closure

If lien pressure, a payment plan, small-claims court, limiting access to amenities, and public shaming don't work, foreclosure remains an option. It's no panacea — a condominium association is usually third in line to get paid, after federal/state/local taxes and the bank, whereas a cooperative corporation is generally first. There are costs to a foreclosure, such as advertising and auction fees, and if the apartment's equity is less than the mortgage, it can be quite difficult to find a buyer. The condo association may then file a DILF, though whether that amount will cover mortgage payments, real estate taxes, and, ironically, the common charges is an open question.

But not pursuing foreclosure gives a free pass to unit-owners who are abusing the system — and tells all the other owners that as long as they pay their mortgage, it's okay not to pay their common charges. And legal expense works both ways, after all — unless the delinquent owner has a lawyer provided at low cost by a union, fighting foreclosure may be too expensive and time-consuming for an owner, who may decide it's cheaper and easier to pay what he or she rightfully owes.

"It's persistence," says Roz Sackoff, president of Bayside Mews, a 142-unit condominium in Queens' Bay Terrace neighborhood. "You must be persistent. Document everything in writing. Get your property manager to make those calls. If that doesn't work, send the documentation to your attorney."

Indeed, you may have to take action whether you want to or not. "I've rarely seen condominium bylaws that don't require the board to take action," says [REDACTED]. "You can bring an action for foreclosure. You can bring action for money judgment. You can do both in the same lawsuit. If you do nothing, you are violating your fiduciary responsibility."