INSTALLMENT PURCHASE CONTRACTS AND COLLECTION OF DELINQUENT ASSESSMENTS

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There continues to be uncertainty within the residential real estate marketplace, and financing has become a primary concern. A variety of new requirements and regulations have been issued by FHA, HUD, Fannie Mae and Freddie Mac, which have both imposed new restrictions on the ability of banks to lend to buyers, and also attempted to ease some of the existing restrictions. Banks have also begun to review their own lending requirements. Overall, in the present economic climate, it has become more difficult for buyers, particularly first-time and low to medium income buyers, to obtain adequate financing. Without readily available financing, the pool of potential purchasers begins to dry up, leaving sellers unable to sell their property. In the wake of traditional financing difficulties, alternative methods of financing the sale and purchase of a home will likely be considered.

One such alternative method of financing that has been popular in the past is the "installment land contract", also known as an "installment contract for the purchase of real estate," or a "contract for deed," or "articles of agreement for deed." For the purpose of this article and for simplicity, we will refer to all such agreements as an "Installment Purchase Contract."

As a prelude to discussing how the Installment Purchase Contract may impact the collection of unpaid assessments, we should briefly discuss what an Installment Purchase Contract is. Generally speaking, an Installment Purchase Contract is an agreement whereby the seller agrees to sell property to the buyer, but the seller retains legal title to the property until the buyer has paid the contract purchase price in full, plus interest. Under an Installment Purchase Contract, the buyer typically pays a modest down payment and thereafter must make monthly payments to the seller over a term of given years. Also, the buyer takes possession of the property. Upon final payment, the buyer receives the deed for the property, and thus, becomes the legal title holder of the property. An Installment Purchase Contract may also deal with obligations to third-parties, such as payment of property taxes and payment of Association assessments. Under the Installment Purchase Contract, the buyer may assume the responsibility for payment of Association assessments, but that contractual obligation between the seller and buyer is not binding on the Association. However, as a practical matter, the arrangement may not be a concern of the Association until such time that the assessment payments stop. Upon the cessation of assessment payments, the question is against whom, the seller or the buyer or both, should the Association institute a collection action?

If the Installment Purchase Contract provides that the buyer is responsible for payment of assessments, then the initial conclusion may be that the Association should take action against the buyer. One may also come to this conclusion because the buyer, more often than not, actually lives in the property, and (in the context of a condominium unit) the buyer may be the party exercising the voting rights related to the property[1]. However, one must recall that under the Installment Purchase Contract, the seller remains the legal title holder, and therefore, remains

the legal unit owner. As the unit owner, the seller retains the basic obligation to pay assessments.

The Association may be able to take action against both seller and the buyer for unpaid assessments under a theory that they are jointly and severally liable for the assessments, provided that the Installment Purchase Contract expressly provides that the buyer is responsible for payment of assessments under the agreement. If the Installment Purchase Contract is silent as to the responsibility of assessment payments, but the buyer was paying the assessments, then it is questionable whether the Court would find that the Association can take collection action against the buyer. When the Installment Purchase Contract is silent as to the responsibility of assessment payments and the seller made all past payments, then clearly the seller is the appropriate target for a collection action, not the buyer.

Note that the ability to take action against the buyer for unpaid assessments is not certain unless there is an express contractual relationship between the buyer and the Association. Typically, the buyer assumes the payment of assessments without any express contractual relationship between the buyer and the Association. This raises the question of whether the Association can regulate Installment Purchase Contracts by requiring the buyer to sign an agreement stating that he/she (along with the seller) is also obligated to pay assessments to the Association. Such an agreement should not release the seller from his/her obligation to pay assessments; rather, it should clarify that the buyer and seller are jointly and severally liable.

With regard to the possession aspect of a collection action (i.e. the forcible entry and detainer or eviction lawsuit), both the seller and buyer should be named as defendants. The seller should be named because he/she is the owner, while the buyer should be named because he/she is in actual possession of the property. In the event that either buyer or seller files for bankruptcy, the Association would have to modify the automatic bankruptcy stay before proceeding with its collection action because the property (either title or possession) would be considered part of the bankruptcy estate.

In summary, although it may appear that a seller may have no responsibility to pay assessments pursuant to an Installment Purchase Contract, the seller in fact remains responsible for payment of assessments because he/she remains the legal owner of the property. In the event that the Installment Purchase Contract expressly provides that the buyer is responsible for payment of assessments, then the buyer may be an additional party against whom the Association may take collection action, especially if the buyer makes such an agreement with the Association.

With the possibility of an increase use of the Installment Purchase Contract as a source of alternative financing comes a more complex relationship among the Association, the seller/unit owner, and the buyer/occupant, which must be taken into consideration when instituting a collection action for unpaid assessments[2].

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[1] Section 18(b)(11) of the Illinois Condominium Property Act provides that a buyer under an installment contract to purchase a condominium unit from a seller, other than the developer, shall have the right to vote in elections for board members and shall have the right to serve as a board member while the buyer resides in the unit, unless the seller expressly retains in writing such rights. The seller and buyer shall not have such rights concurrently.

[2] Another issue of concern to associations, which is beyond the scope of this article, is the use of Installment Purchase Contracts to circumvent leasing restrictions and prohibitions.