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Selling Association Accounts Receivable Legally

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Due to the high number of assessment delinquencies, association boards have been reviewing their options with regard to the collection of income. With the sheer number of industry lawsuits, competing advisory opinions, and court and arbitration decisions, regarding proper lien calculation, and the questionable state of title after a foreclosure sale, some boards have considered options other than foreclosure. As a result, a cottage industry of businesses offering foreclosure alternatives has developed. While some of these businesses offer potentially viable solutions, they may not be a legal option for particular associations.

We've all seen the commercials on television for J. G. Wentworth. That company purchases structured settlements and annuities, typically settlements from personal injury lawsuits, which are paid in installments over time. They pay a discounted amount on the value of the future payments, but you *"get your cash now."* In business terms, those payments are accounts receivable. Corporations who need cash flow and have accounts receivable can generally also sell them at a discount. Associations have accounts receivable in the form of annual assessments paid in installments over the course of the year (future income), and past due assessments (delinquencies).

When a corporation sells accounts receivable, the practice is known as "Factoring" or "Debt Buying." Factoring involves the corporation ("Seller") transferring its ownership rights to future payments from a Debtor, to the buyer ("Factor"), for a discounted price. The Seller may continue to collect the payments for the Factor, or the Factor may collect them directly from the Debtor. The price paid by the Factor is determined by the payment risk involved. In Debt Buying, a Buyer typically purchases delinquencies, or charged-off debts, at a fraction of the dollar value, and then collects the debt from the Debtor on its own. There are many agreements which contain hybrid variations of these two concepts.

For an association considering selling its accounts receivable, there is an important distinction that needs to be made between future income and delinquencies. NRS 116.3102(1)(p) states that, except as otherwise provided in NRS Chapter 116, and subject to an association's CC&R's, an association *"May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides."* In other words, an association's CC&R's must expressly provide that the association has the right to assign (sell) its right to future income for it to do so legally.

CC&R's which contain an express right to assign future income may do so in different ways. For example, some CC&R's will state, as a board power, that the board may act on behalf of the association to *"Assign the Association's right to future income, including the right to receive Common Expense Assessments,"* without condition. Other CC&R's require member or mortgagee approval; *"The*

Association may assign its future income, including its right to receive Common Expense Assessments, only upon the approval of a Majority of Owners, at a meeting called for that purpose, and with the Eligible Mortgagee consent.” However, if the CC&R’s are silent on the right to assign future income, then the board may not enter into an agreement to sell the association’s right to future income without violating NRS Chapter 116.

Finally, some agreements for the purchase of association accounts receivable I have reviewed include provisions which attempt to describe the present sale of future delinquencies in a manner such that it is purportedly not an assignment of future income. Other agreements I have reviewed contain confidentiality provisions which would require the association to violate the disclosure requirements of NRS 116.31175. Due to the complicated and litigious nature of assessment collections, an association considering selling its accounts receivable would be well served if advised by its Community Manager, pursuant to NRS 116A.630(4), to have an attorney review its CC&R’s, and any accounts receivable purchase agreements, for compliance with NRS Chapter 116, before entering into any such agreement.

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