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Page printed from: [Daily Business Review](#)

[Back to Article](#)

Justice Watch: Suit challenges state law redirecting rent payments

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Who would have thought financially strapped condo owners and banks would be on the same side?

Leave it to the Florida Legislature to find a way.

Lawmakers amended the Condominium Act last year to allow condo and homeowner associations to direct tenants — under threat of eviction — to redirect rent payments to associations to cover unpaid maintenance fees.

A lawsuit filed April 29 in U.S. District Court in Fort Myers challenges the constitutionality of the law, saying it violates the 14th Amendment due process rights of property owners.

"The Legislature bestowed a private cause of action upon associations empowering them to garnish rent payments due from unit owners without any due process protections," the 11-page lawsuit stated. "The Legislature has 'turned back the clock' and re-enacted a prejudgment garnishment scheme mirroring those held unconstitutional" by the U.S. Supreme Court in the 1970s.

The lawsuit was brought by TCR Holdings, whose principals are two longtime Miami residents. Orlando Machado and Guillermo Navarro bought eight units at the Windsor West Condominium complex in Fort Myers in 2002 with plans to rent them for a steady source of income.

But TCR Holdings struggled to pay monthly fees of \$250 to \$300 per unit to the condo association when the housing bubble burst. It was hard to enough to pay the mortgages.

Under the new state law, the association could demand TCR's tenants pay their rent to the association to cover overdue fees.

"They are basically snatching TCR's money," said the investors' attorney, Katherine Amador-Fortuny of Infante Zumpano in Coral Gables. "Relying on this law, the association has taken it upon itself to say, 'This is my rent, and this is my money.'?"

TCR cannot make its mortgage or association payments and considers the association fees excessive.

The association has not responded to the lawsuit, and calls for comment went unanswered.

The lawsuit names the association, its board and its management company as defendants. TCR is asking U.S. District Judge John E. Steele for temporary and permanent injunctions to stop the association from garnishing the tenants' rent.

Bankers Object

TCR maintains the associations need to file a lawsuit just like Visa and MasterCard would against a delinquent shopper or a bank foreclosing on a house. The lawsuit also claims associations have used the law to usurp property rights by evicting tenants who don't fork over the rent to them, assuming the role of landlord without the benefit of a lease.

"They have been allowed to exercise property rights by filing eviction actions," said Amador-Fortuny, who filed the case along with attorney Vanessa Marie Bertran, an associate with the firm who researched the issues.

Mortgage lenders are at a loss, literally and figuratively.

"It's very hard to explain to the banks why someone else is taking their money," she said. "Many lenders are finding themselves being told by associations that they are the second position or trying to negotiate something with the association to get a portion of the rents that banks say is owed to them."

Alex Sanchez, president of the Florida Bankers Association in Tallahassee, said associations forget there would be no condos to maintain if it weren't for mortgage lenders. He said part of the problem is associations want banks to move faster to foreclose on properties.

"The associations tried to get ahead of the lenders," Sanchez said. "They are worried about the condo fees, and we are worried about keeping Florida families in their residences."

He said the "chickens have come home to roost" for lawmakers who ignored precedent set by the U.S. Supreme Court.

Amador-Fortuny cites several Supreme Court cases in the 1970s that found it was unconstitutional to garnish wages to pay a debt.

Sanchez worries about a wider industry impact.

"We don't want to discourage condo lending, do we?" he asked. "We want to encourage condo lending. This needs to be carefully thought through."

Squeeze On Tenants

Association attorney Ross Toyne, a partner at Toyne & Mayo in Miami, said the arguments need to be put in perspective and considers it appropriate for his clients to be at the head of the line.

"The bank made an investment, they took the risk, they analyzed the property value, they analyzed the credit risk," he said. "The association is taking care of business, paying for the maintenance. It's paying for the security, it's cutting the grass and keeping the pool clean. If there's an equitable side of this argument, it's not in favor of the profit-making banks."

Amador-Fortuny said the same issue is being fought in bankruptcy court where receivers who have taken over condo complexes are using the law to force tenants to pay rent to them.

"The tenants are put in a very difficult position because they receive a demand letter from the association saying, 'You need to pay us, or we are going to evict,'?" she said. "Many times they don't pay."