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PRACTICE FOCUS: REAL ESTATE

Community associations may collect from delinquent homeowners, writes Jed Frankel of Eisinger Brown Lewis Frankel and Chaiet.

Associations may collect from delinquent homeowners

Commentary by Jed Frankel

Writing for the unanimous U.S. Court of Appeals for the Eleventh Circuit, Judge Adalberto Jordan said an association management company was not subject to liability under the FDCPA because it fell under a statutory exemption for people or entities whose efforts to collect a debt were incidental to a bona fide fiduciary obligation.

One result of the collapse of the residential real estate market and subsequent foreclosure crisis has been the dramatic increase in unit owners unable — or unwilling — to pay assessments to their community associations. This in turn has created a crisis for associations which are forced to operate their communities with less, increase assessments on responsible owners who pay, and act affirmatively to collect from delinquent unit owners.

To collect those amounts, associations frequently turn to their attorneys and outside management companies because the collection process is a lengthy one containing many legal requirements. By assisting in the collection of these debts, association attorneys and outside managers may make themselves subject to the Fair Debt Collection Practices Act, 15 U.S.C. §1692, et seq., and potential class action lawsuits brought by debtors' attorneys.

On Dec. 19, 2012, the U.S. Court of Appeals for the Eleventh Circuit held in Harris v. Liberty Community Management, Inc., that an association management company was not subject to liability under the FDCPA because it fell under a statutory exemption for persons or entities whose efforts to collect a debt owed were incidental to a bona fide fiduciary obligation.

Ms. Harris and four other plaintiffs were homeowners in a townhouse community outside Atlanta managed by Liberty, an outside management company. Faced with a growing collections crisis, the association, through Liberty, warned owners more than $750 delinquent in past due assessments that their water service for which the association paid would be disconnected if they failed to bring their accounts current. A number of owners agreed to payment plans, but others — including plaintiffs — refused. Their water service was suspended accordingly.

After unsuccessfully seeking relief in Georgia state court, the plaintiffs brought suit in federal court claiming Liberty was a "debt collector" subject to the FDCPA and was civilly liable for violating the act. The federal district court entered summary judgment in the management company's favor and the plaintiffs appealed.

The Eleventh Circuit affirmed the district court decision in favor of the management company finding that Liberty, was exempt pursuant to §1692a(6)(F)(i) because it was "collecting or attempting to collect any debt owed or due or asserted to be owed or due to another to the extent such activity is incidental to a bona fide fiduciary obligation."

Under its management contract with the association, Liberty was the "sole and exclusive agent" for the community responsible for maintaining common areas and facilities, maintaining the books and records, preparing a budget, and overseeing the association's finances. These duties included

the collection of assessments as the association's "agent" as they became payable from homeowners.

Circuit Judge Adalberto Jordan (who previously served as a district court judge in the Southern District of Florida), writing for a unanimous panel, looked to Georgia law as to whether Liberty's contractual duties created the "confidential relationship" that would support a fiduciary obligation and exempt the management from FDCPA liability.

Citing several Georgia state court decisions and the Georgia Code, the court determined that the management company in fact owed a fiduciary obligation to the association and that the collection of unpaid assessments was "incidental" to that "bona fide fiduciary obligation." Liberty's collection efforts were incidental because it did much more that just collect assessments for the association; rather, it ran the association on a day-to-day basis, maintained common areas, contracted with vendors, obtained utilities, and kept ledgers and bank accounts. Based on this analysis, the Court affirmed the summary judgment because the management company was entitled to the statutory exemption.

Florida law regarding fiduciary duty is similar to that cited by the Eleventh Circuit and it is likely that a court in Florida hearing a similar claim would follow Harris.

One Florida court observed that a fiduciary relationship requires "some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." This is characteristic of the type of relationship typically found between Florida community associations and their outside management companies.

This is a good opportunity for outside management companies to seek legal counsel to ensure their contractual relationship with community association clients meets the requirements established by the Eleventh Circuit for an exemption of liability under the FDCPA.

Jed Frankel is a shareholder in the Florida community association law firm of Eisinger Brown Lewis Frankel and Chaiet. The firm represents more than 600 condominium and homeowners associations throughout Florida. Frankel heads the firm's litigation department and also handles appellate work.