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DailyBusinessReview.com
An ALM Publication
DAILY BUSINESS REVIEW

October 6, 2010

Board of Contributors

Are new condo and homeowner association delinquency laws working?

New Florida legislation has had a positive effect in permitting condominium and homeowner associations to collect from delinquent owners who fail to pay their community assessments — assessments that are critical to the basic operation and financial well-being of residential and commercial community associations.

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Most notably, a new provision found in both Florida's Condominium Act and Florida's Homeowner Association Act now permits community associations to require tenants of delinquent owners to remit their monthly rent checks directly to the association until the owner's delinquency is fully paid.

Before a demand upon the tenant can be made, the law requires that the owner be delinquent for more than 90 days. The new law, which became effective July 1, provides for direct eviction rights in favor of the association for those tenants who do not comply with the demand. Association remedies arguably include monetary judgments against non-compliant tenants.

While some tenants have been reluctant to remit their rent monies directly to the association for fear of retribution from their landlords, the newly enacted statute expressly protects tenants from landlord claims when the tenants are acting in "good faith." According to our clients, the "success rate" in receiving tenant monies after appropriate demand has been in excess of 70 percent. Of course, given the very recent enactment of this new law, it has not yet been judicially challenged. However, it is doubtful that judges will be very sympathetic to delinquent owners regarding its enforcement in the event of alleged ambiguity.

Another new remedy in the legislation relates to usage of the community's common areas and common facilities. Specifically, community associations now are permitted to suspend the right to use those areas for owners (and their tenants, guests, and others) when the owner's delinquency exceeds 90 days. This includes areas such as swimming pools, exercise rooms and clubhouses. The law, however, does make exception for actual owner access to the community, elevator usage, access to parking spaces and utility services.

Still, there is ambiguity in the new Florida legislation. Our firm has generally taken an aggressive approach on behalf of our clients with respect to the interpretation of certain common areas, facilities and services. For example, we believe that while owners are entitled to access their community, access probably can be limited through “visitor” lanes for those communities that maintain entrance security gates. We argue that impeding access by forcing delinquent owners to present identification to a security gate attendant is not a denial of access.

We also believe that concierge services and bulk cable television access can likely be denied to delinquent owners, although we acknowledge ambiguity in the new law regarding what might constitute a “utility service.”

We do not believe that suspension of access to common areas and to facilities is going to be entirely effective. While we believe that all owners should be notified of the intent of the board of directors to enforce suspension of this access, we believe that actual enforcement of the new law will be difficult in many instances and we advise our association clients to avoid any confrontations with owners that can lead to violence. As an example, a physical fight between an 80-year-old resident and a board member at an Aventura condominium swimming pool has already been reported.

The new Florida legislation makes another significant attempt to aid associations. Prior to July 1, condominium associations’ monetary entitlement — upon a successful first mortgage foreclosure resulting in the mortgagee’s acquisition of title — was limited to the lesser of 6 months of past assessments or 1 percent of the original mortgage amount. The new law increases the 6-month limitation to 12 months. Arguably this should put additional money in the coffers of the condominium associations. However, we expect that some mortgagees will argue that the new law cannot interfere with any mortgages in place prior to July 1. Ultimately a court will have to decide upon the possible retroactive effect of that particular monetary limitation.

While the Florida Legislature apparently believes that it can determine the amount of statutory entitlement of community associations in cases of mortgage foreclosure, it is really the underwriting guidelines of the federally controlled secondary mortgage agencies of Fannie Mae and Freddie Mac that dictate and limit just how much a community association can recover in the event of a mortgage foreclosure. Therefore, those who seek an expansion of an association’s assessment recovery in the event of a mortgage foreclosure should concentrate their lobbying efforts in Washington, as that is where true reform must come from. However, in light of the extremely strong banking lobby at the federal level, it is probably unlikely in the foreseeable future that greater financial protection to community associations will be legislated at the expense of the banking industry.

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