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HOA Ordered to Pay Bank's Legal Fees: Could You Be on the Hook?

In August, a Florida appellate court penalized an HOA for overreaching when it came to overdue attorneys' fees. The court in Ocean Bank v. Caribbean Towers Condo Association held a bank was entitled to recover its attorneys' fees from an association in a dispute over the proper amount of unpaid assessments owed for two properties in the foreclosure process.

Here we explain the case and assess whether it's possible for an HOA to push too hard in collections cases against lenders.

The HOA-Bank Battle over Past-Due Assessments

The dispute in *Ocean Bank* stems from an argument between a lender that repossessed two units through foreclosure and the association in which the units were located. The battle centered on the amount of past-due assessments the bank owed to the association for each unit.

Under Florida law, a lender that takes a condo unit through foreclosure is capped at paying past-due assessments of no more than the 12 immediate months before taking title or no more than one percent of the original mortgage debt. However, the association in this case, Caribbean Towers, demanded nearly nine times the statutory maximum for one of the units in foreclosure and more than 13 times the maximum for the second unit. The bank argued the association's repeated demands for payments grossly exceeding the amount permitted under the statute forced it to delay closings on the units.

The bank filed a motion asking the court to apply the statutory caps in the statute and for attorneys' fees as allowed under Florida law for prevailing parties in fee disputes between unit owners and condo associations. In both cases, the court granted the bank's motion, with one even calling the association's argument on the amount of assessments due frivolous. However, both courts also declined to order the association to pay the bank's attorneys' fees.

The appellate court, however, ruled the bank was entitled to the attorneys' fees it incurred in successfully pursuing its claim that the association's assessments were capped at the statutory maximums, not the dramatically higher amounts the association demanded.

Big News in Florida

This case is reverberating throughout the Florida condo community. "At the end of the day, there are lawyers and collection companies who will tell you there's enough wiggle room in the Florida statue that allows condo associations to demand more than the assessments due," says Brad van Rooyen, a partner at Home Encounter, a Tampa, Fla., company that manages 15 community associations totaling about 3,000 owners.

"This association just got slapped very hard, and everybody's going to pay the price for it," says van Rooyen. "Our attorneys bill at, say, $250 an hour, but the banks' attorneys aren't cheap. This is going to cost the association an absolute fortune. Here we have a decision binding on all trial courts throughout the state of Florida warning condos to be careful and not push the envelope. This has changed the collections landscape in Florida."

It has, but there's a silver lining, argues Jed L. Frankel, a partner at Eisinger, Brown, Lewis, Frankel & Chaiet PA in Hollywood, Fla., who advises community associations. "At first blush, an expensive appeals court loss for Caribbean Towers Condominium Association would seem to bode poorly for other homes and condo associations," he says. "But a closer look suggests a more orderly handling of foreclosures in South Florida.

"The hefty legal bills—two trials and an appeal—will no doubt impact theassociation's finances," explains Frankel. "More important than finding the association responsible for attorneys' fees is the appeals court affirmation of how state law is supposed to work in foreclosures. We've all read about how foreclosures move slowly because lenders have problems proving ownership and coming up with paperwork. Other homes are simply caught in a logjam of litigation.

"The process can become more drawn out when condominium and homeowners associations are involved," says Frankel. "They're owed dues that cover legitimate expenses like mowing lawns, cleaning hallways, and setting aside funds for major repairs. Florida law is clear they're entitled to collect one year's worth of assessments or 1 percent of the mortgage debt, whichever is less from a lender that forecloses and takes title.

"When an association demands more than it's entitled to, it risks turning that improper demand into a huge liability, as Caribbean Towers Condominium Association discovered. Knowing the courts will apply the law—and hold those who demand in excess of what they're entitled to financially responsible for those who act improperly—is good both for the integrity of the law and as another piece to help resolve the foreclosure crisis that still involves so many homes and condominiums."

What About Your State?

Of course, a Florida case isn't binding on courts or associations not within that state. So does this case mean anything outside of Florida? Technically, no, since each state has its own rules, either explicitly or by omission.

"I'm not aware of a provision in Texas like the one in Florida that limits banks' liability for assessments post foreclosure," says Jenny Key, the Austin, Texas--based vice president of RealManage, a San Rafael, Calif., association management firm that oversees properties in Arizona, California, Colorado, Florida, Louisiana, Nevada, and Texas. "Typically we write off past due assessments after the bank takes title. There's not much we can do in Texas."

Nevada, on the other hand, has a statute addressing the issue, and there are aspects still subject to debate, as Florida's law was. "We have a superpriority lien here in Nevada," says Corbin Seti, senior vice president of community and lifestyle services at FirstService Residential (formerly known as RMI Management) in Las Vegas "It's a hot topic of discussion and lawsuits. It covers nine months of assessments, but there are various arguments over whether that includes legal fees and collections costs. Also, is it the nine months immediately preceding the lender taking title, or does the time period begin when the delinquency started? There may have been an increase in assessments over time.

"These issues are actually going to our state supreme court for a decision," adds Seti. "Our local real estate division is in conflict with the opinion of the state's common interest community division. One says legal fees and collection costs are included, and the other says they're not. But to make them not part of a superpriority lien is detrimental for an association. Nobody will do collection for you if they're not going to get paid."

The Lesson of *Ocean Bank*

Even if you're not in Florida, you can still walk away wiser because of the Ocean Bank case. It's at least a warning that boards need to make sure they're getting credible legal advice when it comes to the amounts they can pursue against banks taking title to units in their association.

Whether your state has no statute on the issue or has passed legislation capping the amount for which banks are liable post foreclosure, if a legal advisor suggests you demand more than permitted or an amount that seems high to you, start asking tough questions. What legal authority is the advisor relying on for such a demand? Has the argument been successful before? What are the risks of pursuing such a strategy? Could we be on the hook for our opponent's legal fees if we lose? Ultimately, the fallout from collections decisions fall on you and your owners' financial shoulders, not those of your legal advisors.