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LEGAL RIGHTS OF CONDOMINIUM OWNERS IN FLORIDA

By Gary A. Poliakoff, J.D.

1. A purchaser from the developer has a right to receive from the developer a complete set of condominium documents as well as disclosure documents, and to rescind the contract to purchase at any time within 15 days from receipt of all required documents.

2. Right of a re-sale purchaser to receive a complete set of the condominium documents, rules and regulations, the most recent year-end financial report, as well as the right to rescind the contract within 3 days of receipt of said documents.

3. A new condominium unit comes with an implied warranty of fitness and merchantability, as well as a common law implied warranty that the unit will be constructed in accordance with the approved building plans, code specifications and with sound workmanship.

4. A unit owner is entitled to the exclusive possession of his/her unit.

5. A unit owner and his/her invited guests are entitled to use the common elements, common areas and recreational facilities serving the condominium in accordance with the purposes for which they are intended, but no use may hinder or encroach upon the lawful rights of other unit owners.

6. Unit owners have the right to invite candidates for public office to appear and speak on the common elements, common areas and recreational facilities, subject to reasonable rules adopted by the association.

7. Unit owners have the right to peaceably assemble on the common elements, common areas and recreational facilities.

8. Unit owners have a right of access to any available franchised or licensed cable television service and, pursuant to the

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TiDBiTS

Did You Know ???

The Florida Administrative Code requires condominium associations to maintain a Frequently Asked Question and Answer (Q&A) sheet as part of its official records.

✔ The Q&A sheet must be updated once every 12 months

✔ It must provide information to the unit owners regarding:

- Voting rights;
- Restrictions affecting the use of a unit;
- Leasing restrictions;
- Amount and due date of assessments;
- Any mandatory memberships in other associations and assessments related thereto (such as a master association or country club);
- The existence of a recreational facility or long-term land lease and, if so, the amount each unit owner is required to pay per year; and

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LEGAL RIGHTS...

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Telecommunications Act of 1996, to install a satellite dish on property exclusively owned or controlled by the unit owner.

9. Unit owners are entitled to have certain delineated disputes, such as an attempt by the board to require the unit owner to take any action regarding his or her unit, or altering the common elements, submitted to arbitration before the Division of Florida Land Sales, Condominiums and Mobile Homes.

10. Unit owners have a right to receive 30 days notice of an alleged delinquency before the board initiates a foreclosure on a lien securing the obligation owed to the association.

11. The Association is prohibited from changing a unit owner's share of the common elements, voting rights or unit appurtenances, without the unit owner's written consent.

12. A unit owner has the right of peaceful possession of the unit, free from unwarranted nuisances.

13. Unit owners have the right to notice, with a posted agenda, of board and membership meetings and the right to speak to the agenda.

14. Unit owners have the right to audio and video tape meetings of the board and membership meetings

15. Unit owners have the right to notice and attendance at meetings of committees, which take final action on behalf of the board and/or make recommendations to the board regarding the association budget issues, and all other committee meetings unless excluded by an amendment to the condominium documents.

16. Unit owners have the right to inspect a copy of each insurance policy in effect.

17. Unit owners have the right to inspect the official records of the association, and make or obtain copies of the records. The right of record inspection is subject to reasonable rules of the association regarding the frequency, time, location, nature and manner of record inspections and copying.

18. Unit owners have the right to receive a complete financial report of actual receipts and expenditures for the previous 12 months, within 60 days following the end of the fiscal or calendar year, or annually.

19. Unit owners have the right to maintain a warranty action.

20. Unit owners have the right to make one written inquiry every 30 days, by certified mail, to the board, which must be responded to within 10 days.

21. Unit owners have the right to vote by limited proxy on the waiver or reduction of statutory reserves, on amendment of the condominium documents and to waive the Division accounting requirements.

22. Unit owners have the right to receive personal notice of any board meeting where the board will consider non-emergency assessments or rules regarding unit use.

23. Unit owners have the right to elect and recall the board, at any time, with or without cause.

24. In situations where the condominium documents grant the board fining authority, unit owners have the right to notice of the alleged violation of the covenants and/or the rules and regulations, an opportunity to cure it and a hearing, before a fine can be levied.

25. Unit owners have a right to qualify for the board. And, pursuant thereto, the right to have a single sided 8 1/2" x 11 1/2" information sheet, prepared by the candidate, mailed with the ballots to all unit owners.

26. Unit owners have the right to display one portable United States Flag in a respectful way.

27. Unit owners have the right to install hurricane shutters.

28. Hearing impaired or sight impaired unit owners living alone can opt out of any obligation for compulsory cable television.

29. A tenant residing in a building being converted from rental to condominium is afforded the right-of-first refusal and disclosure of the building condition.

30. Unit owners are entitled to notice of any special assessment, including the specific purpose or purposes for same.

31. Unit owners have the right to recover legal fees in any action between the unit owner and the association, when the unit owner prevails in the action.

32. Unit owners collectively have the right to cancel contracts for maintenance, operation or management, which were entered into by developer-controlled boards.

33. Unit owners have an entitlement, that any grant, reservation or contract entered into by a developer-controlled board, prior to assumption of control by the unit owners, be fair and reasonable.

TiDBiTS

Did You Know ???

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- Any litigation the association is involved in where it may face liability in excess of $100,000.

✔ Information may be summary in nature and must refer to identified portions of the condominium governing documents.

✔ The "Question and Answer" sheet must be printed on a single piece of paper; however, the association may use both sides of one sheet of paper.

✔ The Q&A sheet is no longer required to be included as part of the package of documents which must be delivered by an association in connection with unit re-sales.

COLLECTING NEW ASSESSMENTS AFTER BANKRUPTCY

By C. John Christensen, Esq.

Can an association collect regular and special assessments after an owner liable for assessments has filed for bankruptcy? The answer is a qualified "yes," but watch out how you go about doing it.

In a typical suit to enforce a lien for payment of assessments by the owner of a unit or lot, or for a judgment against the owner, the association sues the owner both personally for the money he or she owes, and also sues to foreclose its claim of lien against the property. The first count is based upon the theory that the owner, when he or she purchased the property, entered into a contract to personally pay to the association the assessments described in the declaration or bylaws; in this regard, the documents are characterized as a type of contract.

The second count is based on the fact that the documents give the association a lien against the property in order to secure or collateralize the assessments; this lien attaches directly to the real property (e.g., the unit or lot) and improvements, irrespective of the documentary "contract" with the property owner.

In more legalistic terms, the first count is called *in personam*, meaning "against the person" because it is a claim against the person, the owner; the second count is called *in rem*, meaning "against the thing" because it is a claim to foreclose a lien against a thing, the real property itself. While the bankruptcy may, as discussed below, affect the owner's *in personam* (contractual) obligations, it will not eliminate the association's right to bring an *in rem* (lien foreclosure) action against the property.

In this regard, there have been two opposing schools of thought on what happens to a property owner's *in personam* duty to pay assessments following the filing of a bankruptcy. Many Courts have previously ruled that a unit owner's in personam obligation to pay future assessments was extinguished by the bankruptcy. These courts held that the bankruptcy could erase the owner's personal duty to pay the assessments, which were created by the documents. Many other Courts took a completely different interpretation, and ruled that the unit owner's personal duty to pay assessments after filing for bankruptcy was non-dischargeable as a "covenant running with the land," meaning that the duty to pay was an **integral** part of owning the real property itself (like an easement) and therefore the duty could not be extinguished by the bankruptcy. These two different theories led to considerable confusion, so Congress tried to clear the matter up by changing the Bankruptcy Code in 1994 to state that an owner's personal contractual obligation to pay assessments, coming due after a bankruptcy is filed, is not erased **if** the person actually occupied the unit or lot, or rented it for profit after filing for bankruptcy protection.

The bottom line is that there are cases which state that the owner's personal contractual duty to pay assessments after filing bankruptcy is extinguished, and there are cases which state that an owner's personal duty to pay assessments after bankruptcy is not extinguished, and finally, there is a federal law that provides that an owner's personal contractual duty to pay assessments is not extinguished after bankruptcy **if** the owner lives in his unit or lot, or rents it out for profit.

Given this complicated scenario, how can an association make sure its assessments are paid after an owner's bankruptcy? One relatively straightforward way to proceed is to forgo pursuing a count against the owner personally and focus instead on a count to foreclose the association's **lien** against the property itself.

The two different theories in the case law, along with the bankruptcy code change, leave many questions. Because of these questions, any *in personam* lawsuit for unpaid assessments after bankruptcy could be complex, expensive and could go either way. It could also violate the bankruptcy discharge (which is why it is so important that qualified counsel prepare any demand letter for new assessments following a bankruptcy). It is for this reason that associations may desire to only pursue an *in rem* action against the property to foreclose its claim of lien against the property. In this way, the association could potentially take title to the property, or at least force the owner to start paying assessments to avoid losing the property in a foreclosure sale; in effect, achieving the same result without the risk of running afoul of the bankruptcy laws.

To reiterate, when it comes to assessments which come due after bankruptcy has been filed, an owner's bankruptcy does not affect the *in rem* (lien foreclosure) action. Thus, the association can accomplish what it needs to without facing the risks and uncertainties of proceeding against the owner *in personam* under the personal contract theory. The association can usually achieve its end by only pursuing foreclosure of the lien against the property. Of course, each case must be weighed on its individual merits and circumstances with counsel's advice.

CASENOTES

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AD HOC COMMITEE STILL STANDING

In the case of *Westwood Community Two Association, Inc. v. Barbee*, 293 F.3d 1332 (11th Cir. 2002), the United States Court of Appeal for the Eleventh Circuit held that an unofficial committee of homeowners had standing to appeal an order requiring each homeowner in the Westwood Two Community to pay a $7,250.00 special assessment or risk having their homes liened. The Westwood Community Two Association, Inc. (the "Association") had previously filed for bankruptcy protection in the United States District Court for the Southern District of Florida as a result of successful litigation brought against the homeowners' association alleging violations of both the Federal and Florida Fair Housing Acts. After conducting a trial on the adversarial claims, the bankruptcy court allowed the discrimination claims to stand, which resulted in the Association facing liability in excess of one million dollars, including sums for compensatory and punitive damages.

The court-appointed trustee of the bankruptcy estate sought reconsideration of the bankruptcy court's decision to allow the claims. When the bankruptcy court denied the motion for reconsideration, the trustee elected not to file an appeal to the district court, and instead took the position that, pursuant to the Association's governing documents, the trustee had authority to specially assess each homeowner their pro rata share of the Association's liability ($7,250.00 per home) in order to satisfy the judgments.

After the trustee sought collection of the special assessment, a group of homeowners calling themselves the "Unofficial Ad-Hoc Committee for Westwood Community Two" filed an action in the bankruptcy court challenging the special assessment by claiming its members did not engage in any of the wrongful conduct that led to the claims. The bankruptcy court ruled in favor of the trustee, finding that the trustee had the power to impose the special assessment, and authorize its collection. The Unofficial Committee appealed the bankruptcy court's rulings to the federal district court, but their appeal was denied under that court's determination that the committee lacked standing to challenge the bankruptcy court's ruling. The Committee then appealed to the Eleventh Circuit Court of Appeal in Atlanta, Georgia.

The Eleventh Circuit held that the Unofficial Committee did have standing to appeal the bankruptcy court's order as its members were "personally aggrieved" under the bankruptcy court's order. The court noted that "generally, only the bankruptcy trustee may appeal an order from the bankruptcy court." However, the court recognized an exception to this rule for purposes of appeal where a person's interests are "directly and adversely affected pecuniarily by the [bankruptcy court's] order." The court indicated that standing may be conferred in bankruptcy matters where the appellant has a financial stake that the challenged order diminishes, increases, burdens, or impairs rights. Based on that holding, the Eleventh Circuit remanded the matter to the district court for consideration of the Unofficial Committee's claims that they should not be specially assessed their pro rata share of the claim amount since the members alleged they did not participate in any of the wrongdoing which resulted in the claim.

WATCH YOUR STEP

In the case of *Tresize v. Holiday Apartments Condominium Association, Inc.* (Case No. 02-4660), the Division of Florida Land Sales, Condominiums and Mobile Homes analyzed the issue of whether an association was required to install a sidewalk as an accommodation to an owner's disability. The unit owner alleged that he had difficulty walking on certain stepping stones located outside of his unit.

The Arbitrator conducted a hearing, and found that the stepping stones were not flawed, but that the particular unit owner had difficulty walking on them. Further, since the stones were not defective in any way, the Association was not required to take any curative action. On the other hand, the Arbitrator ruled that if the unit owner desired to install a new sidewalk at his own expense, the Association would be required to permit the installation as an accommodation to the owner's handicap. This decision was based upon federal regulations promulgated under the Fair Housing Act, which permit a handicapped person to make reasonable modification of existing premises at that person's expense.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.