PUBLICATION UPDATE

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Condominium Law and Practice: Forms

Publication 235 Release 142 June 2023

HIGHLIGHTS

Release 142 contains updates and revisions to reflect the latest developments in condominium law. New and updated material includes:

- New § 9.11, titled, "Military Lending Act," discusses this federal law. This Act regulates the terms of certain credit extensions to active duty service members and their dependents.
- New § 44.06[3][d][ii][D], titled, "Enforcement Action During a Declared State of Emergency." This subsection discusses a California statute which prevents an association's pursuit of an enforcement action during a declared state of emergency. This statute does not apply to an enforcement action regarding an owner's nonpayment of assessments.
- New § 45.01B, titled, "Association Websites & Electronic Payment of Assessments." Though many associations voluntarily maintain websites, some states statutorily impose requirements on these websites and may require that certain associations allow electronic payment of assessments.
- Updated Index. The publication's comprehensive Index has been revised to reflect the contents of this revision.

Coverage of New Cases. As part of our regular updating, we have added coverage of recent federal and state cases:

Under Nebraska statutory law, a judgment lien against an association is a lien in favor of the judgment lienholder against all units at the time the judgment is entered. However, Neb. Rev. Stat. § 76-

875(a) does not authorize the judgment lienholder's execution against individual units. This provision does not state that affected individual unit holders are to be treated as judgment debtors for execution purposes. McGill Restoration, Inc. v. Lion Place Condominium Ass'n, 313 Neb. 658, 2023 Neb. LEXIS 34 (ch. 1).

Under the Uniform Condominium Act (UCA), an agreement to settle a subrogation claim asserted by the association's insurer against the owners' insurer was unenforceable as the UCA required that the association's insurer waive its right to subrogation against a unit owner. The UCA applies to the association's insurance company as Tex. Prop. Code § 82.111 provides a tightly regulated scheme that mandates condominium insurance coverage. So long as the required coverage is available, associations cannot alter this coverage. Great American Insurance Co. v. Nationwide Mutual Ins. Co., 2023 Tex. App. LEXIS 840 (Feb. 9, 2023) (ch. 1, ch. 7, ch. 47).

Under the District of Columbia's Tenant Opportunity to Purchase Act (TOPA), a "sale" of a housing accommodation is a term of art that extends beyond the immediate, absolute transfer of title. A ground lease that transfers only a leasehold interest rather than absolute title does not prevent the lease from constituting a sale under TOPA. Rights created under TOPA are determined by examining the transaction's substance. Foster House Tenants Ass'n v. New Bethel Baptist Church Housing Corp., 275 A.3d 303 (D.C. 2022) (ch. 3A).

The wording of the tenant's assignment of his right to purchase under the District of Columbia's TOPA conferred two distinct rights. When the sale did not settle in a timely fashion, the owner had to comply anew with TOPA's requirements. The tenant's assignment covered the first offer of sale as well as an assignment of the tenant's future right to purchase the property when the owner had to comply anew with TOPA. Bowyer v. Reinhardt, 277 A.3d 1259 (D.C. 2022) (ch. 3A).

An overriding provision in the condominium's declaration established a mechanism whereby the association's board of directors had the last word on the interpretation of the declaration. Pursuant to this provision, the board's interpretation was binding upon all parties unless the interpretation was "wholly unreasonable." An opinion of legal counsel that any interpretation adopted by the association was not unreasonable, conclusively established the validity of the board's interpretation. Risman v. Seaside Villas Condominium Ass'n, 2023 Fla. App. LEXIS 989 (Feb. 15, 2023) (ch. 7).

The association had no obligation to pay a unit owner's out-of-pocket expenses when she was forced out of her unit for a two-year period while extensive repairs were made to the building's foundation. The declaration obligated the

association to pay the foundation repair costs and "any incidental damage" that occurred to a unit during the repair work. The owner's out-of-pocket expenses to live elsewhere were not damages to her unit. Gehrke v. Gates at Quail Hollow Homeowners' Ass'n, 881 S.E.2d 643, 2022 N.C. App. LEXIS 953 (2022) (unpub. op.) (ch. 7).

The broadly worded indemnification provision in the condominium association's bylaws did not limit its application to third-party claims. The plaintiff-trustee was entitled to indemnification in his lawsuit against his fellow trustees. This provision covered any action as long as the trustee was a party due to being or having been an association trustee. However, the plaintiff was not entitled to attorneys' fees incurred in connection with his derivative claim as he was acting as a unit owner rather than a trustee when he asserted the claim. Boyle v. Huff, 2023 N.J. Super. Unpub. LEXIS 85 (App. Div. Jan. 20, 2023) (ch. 7, ch. 26).

An association did not create a private nuisance as the association did not engage in wrongful conduct with respect to a tree planted and maintained by the association in a common area. The tree had grown large enough to partially block the unit owner's lake view. Wrongful conduct is a threshold factor in finding a private nuisance. With respect to the maintenance of the tree, the association's board exercised their duties in accordance with Minnesota Uniform Common Interest Ownership Act § 515B.3-103(a) and acted in good faith. Under this Act and its bylaws, the association had the authority to adopt its Good Neighbor regulations regarding members' conduct at meetings. The failure to plant a tree in the exact location as shown in the final landscaping plans did not constitute a breach of the association's declaration as the plan's accompanying planting notes permitted field adjustments to the plants' actual locations. Sirota v. Villas of St. Albans Bay Ass'n, 2023 Minn. App. Unpub. LEXIS 215 (Mar. 27, 2023) (ch. 7, ch. 43).

While the rules of contract interpretation are used to interpret a condominium declaration, a condominium's declaration and other governing documents do not apply to a guest in the absence of the guest's voluntary manifestation of an assent to be subject to these documents. A unit owner's assent arising from the purchase of a unit cannot be imposed on guests by characterizing them as owners. While an exception may be found when a guest is placed on notice that his or her presence on the property constitutes a waiver of rights, nothing in the record indicated that the injured guest was informed of the association's rules and regulations. Since a property owner cannot unilaterally establish its duties to the public, summary judgment in the association's favor was reversed and the case was remanded. Floyd v. Parkview Council of Co-Owners, 2023 Ky. App.

LEXIS 23 (Mar. 31, 2023) (ch. 7, ch. 48).

A loan financing a timeshare purchase to a U.S. Army active-duty soldier and his wife is not a residential mortgage that is exempt from the federal Military Lending Act (MLA). A timeshare interest is a transient vacation accommodation rather than an interest in a residential structure. The federal district court denied the lender's motion to dismiss since the plaintiffs' complaint alleged facts indicating the timeshare loans plausibly are not secured by interests in a dwelling. The court also denied the defendant lender's motion to compel arbitration, as the MLA's text rendered arbitration illegal and unenforceable in all its forms for disputes involving transactions governed by the MLA. Steines v. Palace, L.L.C., 2022 U.S. Dist. LEXIS 234304 (M.D. Fla. Dec. 14, 2022) (ch. 9).

In Puerto Rico, the Department of Consumer Affairs has primary and exclusive jurisdiction over matters involving owners of apartments in condominiums when at least one apartment is intended for residential use as well as over any complaint filed against the Managing Agent. The U.S. District Court lacked the jurisdiction to hear the plaintiffs' claims against their council of unit owners, the condominium's management company and other defendants. Arroyo v. Consejo de Titulares Condominio Playa Dorada, 2023 U.S. Dist. LEXIS 7010 (D. P.R. Jan. 12, 2023) (ch. 16).

The Americans with Disabilities Act and the Fair Housing Act (FHA) each provide a cause of action. While these actions are similar, these actions have separate legal standards. Under the FHA, housing providers are permitted to ask for more substantiation. Heimkes v. Fairhope Motorcoach Resort Condominium Owners Ass'n, Inc., 2023 U.S. Dist. LEXIS 38136 (S.D. Ala. Mar. 6, 2023) (ch. 24).

The county tax assessor was required to value the taxpayers' one-tenth fractional interest in a condominium unit as a proportion of the value of the entire condominium unit. The unit was valued at $309,500. The taxpayers' bought their interest for $12,000. The real market value of the fractional interest was irrelevant except to the extent it might indicate the real market value of the entire unit. Deriving the assessed value based on an undivided interest's independent real market value was inconsistent with Ore. Rev. Stat. § 308.232 & 308.125 which require the proportional payment of taxes based on the value of the entire unit. Kiersky v. Deschutes County Assessor, 2023 Ore. Tax LEXIS 5 (Feb. 16, 2023) (ch. 36).

A developer has a common law duty to create a homeowners' association and to turn over association control after a period of time reasonably necessary to protect the developer's interest in completing and marketing the project. Conn v. Donlon, 2023 Tenn. App. LEXIS 90 (Mar. 8, 2023) (ch. 41).

Although a California associa-

tion lacked standing under California's Right to Repair Act with respect to construction defects in the units, the association could pursue contract and fraud claims outside of this Act. When certain requirements are met, Cal. Civ. Code § 382 confers standing on an HOA to sue in a representative capacity on behalf of its members for damage to individual units. The association could seek leave to amend its complaint to bring a representative action pursuant to Cal. Code Civ. Proc. § 382 for Right to Repair Act claims because an amendment under Code Civ. Proc. § 473, substituting the real party in interest would relate back. River's Side at Washington Square Homeowners Assn. v. Superior Court, 88 Cal. App. 5th 1209 (2023) (ch. 42).

Under Texas law, a unit owner's right to inspect certain books and records is limited to a proper purpose. Once an owner has stated a proper purpose, the association must establish the absence of a proper purpose. The owner's obligation to pay assessments is independent of the association's duty to maintain the common areas. McKeough v. Camelot Townhomes Ass'n, 2023 Tex. App. LEXIS 1238 (Feb. 27, 2023) (ch. 42, ch. 45).

Renting a home for short-term use is a commercial use even though the renters' activity is residential in nature. A property owners association passed a resolution prohibiting the rental of homes unless the lease was for a period of six months or longer. A restrictive covenant provided that the lots and condominiums in the development were limited to "residential purposes only." Aldrich v. Sugar Springs Property Owners Ass'n, 2023 Mich. App. LEXIS 273 (Jan. 12, 2023) (subdivision lot) (ch. 44).

Continuous, year-long short-term leasing of the premises does not constitute use of the home as a single-family residence. Use of the home for temporary housing of transient guests was a commercial purpose as that term is commonly understood. Although leasing of the premises was permitted, a lot owner could not deviate from using the premises as a single-family residential home. Advertising the property on the web for lease to up to 16 people on a year-round basis changed the character of the use from single-family residential into a business operation of the premises. Apache Hill Property Owners Association v. Sears Nichols Cottages, LLC, 2022 Mich. App. LEXIS 7206 (Dec. 22, 2022) (unpub. op.) (subdivision HO) (ch. 44).

Pursuant to Nev. Rev. Stat. § 116.340(1)(a), members of a common-interest community may use their units for transient commercial use, such as a short-term vacation rental, even when the association's governing documents contain a "residential use" restriction, so long as the governing documents do not prohibit transient commercial use. Elk Point Country Club Homeowners' Ass'n v. K.J. Brown, LLC, 515 P.3d 837 (Nev. 2022) (ch. 44).

In Hawai'i, an association's right to possession of a unit after it has foreclosed on its assessment lien is terminated by the foreclosure judgment obtained by the mortgagee. However, Haw. Rev. Stat. § 514B-146(n) entitles the association to continue receiving rent after this subsequent mortgage foreclosure. This entitlement continues even when the court appoints a commissioner, subject to paying any rent receipts in excess of the total amount of reimbursements listed in Haw. Rev. Stat. § 514B-146(n)(1) to (4) over to the lienholders in their order of priority. The Hawai'i high court disagreed with the Intermediate Court of Appeals' conclusion in *Bank of N.Y. Mellon v. Larrua*, 150 Hawai'i 429, 444, 504 P.3d 1017, 1032 (App. 2022), that while Haw. Rev. Stat. § 514B-146(n) may contemplate the association receiving rental income from a unit after the entry of a foreclosure decree and judgment, it does not entitle an association to such income. The Hawai'i Supreme Court held that the statute authorizes an association's receipt of post-foreclosure rents and entitles the association to those rents up to the sum of the amounts listed in Haw. Rev. Stat. § 514B-146(n)(1) to (4). Nationstar Mortgage, LLC v. Ass'n of Apartment Owners of Elima Lani Condominiums, 2023 Haw. LEXIS 64 (Mar. 15, 2023) (ch. 45).

An association was not entitled to recover its attorneys' fees after the unit owners' untimely wrongful foreclosure claim was dismissed. The association had used nonjudicial foreclosure to collect on its assessment lien. However, the association lacked the power of sale to foreclose in this manner. After the owners' action was dismissed, the association unsuccessfully sought to recover its attorneys' fees under Haw. Rev. Stat. § 514B-157(b). This statute did not apply as the owners did not seek to enforce any affirmative action on the part of the association to comply with its governing documents or Haw. Rev. Stat. ch. 514A. Instead, the owners had filed a "garden variety" tort action against the association. Wetsel v. Ass'n of Apartment Owners of One Waterfront Towers "AOAO," 2023 U.S. Dist. LEXIS 10410 (D. Haw. Jan. 19, 2023) (ch. 45).

In an owner's breach of contract claim against his association regarding its bylaws enforcement procedures, due process was not a constitutional matter since due process in this context does not require perfect adherence to the bylaws. Rayner v. Yale Steam Laundry Condominium Ass'n, 289 A.3d 387 (D.C. 2023) (ch. 45).

Even though a condominium's declaration may obligate the association to procure an insurance policy providing primary coverage, the association's insurer is not bound by the terms of the declaration. A contractual obligation to obtain primary coverage does not mean that this is what the association did. The association's insurer was not a contractual party to the declaration. The association's declaration cannot

supersede the terms of the policy. Metropolitan Property & Casualty Ins. Co. v. West Bend Mutual Insurance Co., 2023 Ind. App. Unpub. LEXIS 269 (Mar. 13, 2023) (ch. 47).

Coverage of Articles, Notes and Comments. The following articles, notes and comments may be of interest to readers:

Rubin Danberg Biggs & Patrick Holland, *Familial-Status Discrimination: A New Frontier in Fair Housing Act Litigation*, 132 Yale L.J. 792 (2023). The authors assert that Fair Housing Act (FHA) exemption for Housing for Older Persons Act (HOPA) has allowed municipalities to weaponize senior housing to discriminate against families, obstruct affordable housing, and perpetuate race and class segregation. They discuss Arlington, Texas City Council and its use of power over state Low-Income Housing Tax Credits funding decisions to influence the type of affordable housing built within its borders and the City Council's adoption in 2016 of a housing tax-credit review policy stipulating that the city had a preference for new development of senior housing or redevelopment of senior and/or workforce housing. The authors discuss the Department of Justice's (DOJ) and the Department of Housing and Urban Development (HUD) "first-of-its-kind action" charging Arlington with violating the FHA s ban on familial-status discrimination and the city's entering into a consent decree with DOJ. The city agreed to repeal its discriminatory policy but refused to admit wrongdoing.

Saige Culbertson, Note, *Your HOA Does Not Work for You: Why HOAs Are Not Agents and Do Not Owe Fiduciary Duties*, 47 Okla. City U.L. Rev. 113 (2022). This Note explains why neighborhood HOAs cannot be agents of their members and why these HOAs do not owe fiduciary duties to homeowners.

Maureen E. Lally-Green, Annemarie Harr Eagle & Bridget M. Green, *Doing the Right Thing, the Right Way, the First Time: Decision-Making in Public and Private Arenas Regarding the Use of Service Animals*, 45 U. Ark. Little Rock L. Rev. 77 (2022). The authors discuss service animal laws and regulations and unresolved issues relevant to litigation involving service animals.

Caroline Silverstein, Comment, *Treece v. Perrier Condominium Owner's Association: The Struggle for Fair Housing in the Fifth Circuit After Inclusive Communities Project, Inc. v. Lincoln Property Co.*, 97 Tul. L. Rev. 319, 321 (2022). This Comment examines how the Fifth Circuit's decision in *Inclusive Communities Project, Inc. v. Lincoln Property Co*., 920 F.3d 890 (5th Cir. 2019), insulated a condominium association from claims that it violated the FHA. The case at issue was *Treece v. Perrier Condo. Owners Ass'n, Inc*., 519 F. Supp. 3d 342 (E.D. La. 2021). The association's restrictive occupancy rule requiring 250 square feet per person, operated to the detriment of a family consisting of two parents and four children

who had rented a three-bedroom unit.

Kenneth Stahl, *The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?*, 50 Pepp. L. Rev. 579 (2023). Professor Stahl discusses the trend of state legislatures preempting local land use regulations that restrict housing. He distinguishes between this preemption of governmental land use regulations and the concept of legislative overriding of HOAs' CCRs. He describes and evaluates arguments that might be raised to challenge the validity of CCR overrides. Professor Stahl focuses on recent aggressive California legislation.

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