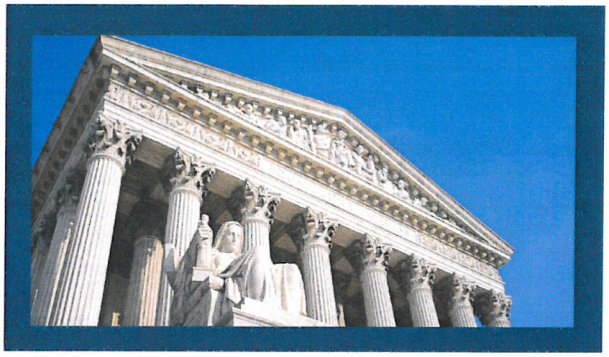
COMMUNITY MATTERS

News and Trends in Community Association Law

Summer 2015 Edition **Published by the law firm of Lueder, Larkin & Hunter, LLC**

Case Law Update: Supreme Court Hands Victory to Community Associations



By: Daniel E. Melchi, Esq.

It is often frustrating for community associations when a homeowner owes money for unpaid assessments and then files for bankruptcy. Depending on whether the owner filed a Chapter 7 or a Chapter 13 bankruptcy will determine whether or not the association is likely to recover the money it is owed. Usually, in a Chapter 13, the owner will repay what is owed over the life of the bankruptcy case Contrarily, in a Chapter 7, the owner will usually receive a discharge of his or her debt without paying back what is owed. On June 1st, the United States Supreme Court handed down a decision that is welcome news for community asociations in Georgia regarding associations' lien rights when it comes to Chapter 7 bankruptcies.

What many community associations do not realize is that, even if an owner is discharged in bankruptcy (meaning that he or she is no longer personally liable for their pre-bankruptcy debt), his or her property will usually remain encumbered by a community association lien which survives a bankruptcy discharge. This means that if an owner does not pay off the lien in his or her bankruptcy case, the lien for the pre-bankruptcy amounts owed to the association remains on the property. This can have advantages for a community association depending on the type of association it is. For community associations that are condominiums or are submitted to the Georgia Property Owners' Association Act, such associations may foreclose the surviving lien if the owner does not agree to pay it off, despite a personal bankruptcy discharge having been entered. For all associations no matter what type they are, if an owner ever wants to sell or refinance the property, then the full surviving lien amount may be included in any payoff request.

On June 1, 2015, the U.S. Supreme Court decided the case of *Bank of America v. Caulkett*. Prior to the decision, what had been occurring in Georgia as the result of a lower court decision was the "stripping off" of community association liens when the market value of the property was less than the balance owed to the first mortgage holder. For example, let us suppose that a property was worth $100,000. If the first mortgage on the property was $100,000 or greater and there were any junior liens on the property subordinate to the first mortgage (such as a community association lien or a second mortgage) the owner could file a Chapter 7 bankruptcy and simply have the Bankruptcy Court declare any such junior liens "void." As of June 1, 2015, such a scheme is no longer allowed in Chapter 7 cases thanks to the Supreme Court's ruling.

Consequently, community associations can now rest a little bit easier knowing that their lien rights will be preserved even if an owner filed a Chapter 7 bankruptcy case and keeps his or her property. Because of the Supreme Court's ruling, community associations may be able to obtain payment for discharged amounts if such associations are able to foreclose their liens or require the satisfaction of such liens at any subsequent sale or refinance by the formerly-bankrupt owner.

Featuring: Tim Guilmette!

Tim Guilmette is one of the firm's newest Community Association attorneys, joining the firm last March and passing the Georgia Bar exam in May of this year. Before his transition to the practice of law, Tim spent 12 years in the United States Army as a Blackhawk helicopter pilot and special operations soldier. Originally from a small town in Massachusetts, Tim is an avid outdoorsman, and when not in the office, he can often be found on the Chattahoochee River in full waders, snapping a fly rod back and forth or out in the woods trying to find that perfect spot for his tree stand.

In addition to the outdoors, Tim enjoys traveling with his family and spending quality time with its newest edition, born in early July. As an adopted Southerner, he has also become an avid college football fan (a must for the spouse of a UGA grad). Tim is also a certified commercial pilot and general aviation enthusiast. Tim and his wife attend Roswell Presbyterian Church and are active in their local community.

Tim is a welcome addition to the firm and is eager and ready to serve the needs of the firm's clients.

Lueder, Larkin & Hunter, LLC now has offices in:
Atlanta/Buckhead, Atlanta/Camp Creek, Buford, Jefferson, Loganville, Northlake/Tucker, Suwanee, Winder, and Charleston (South Carolina) as well as our main office in Alpharetta.

Have You Ever Wondered... What Makes an Amendment Valid as to All Members in an Association, Even Those Who do not Consent?

By: Cynthia C. Hodge, Esq.

Thanks to the Georgia appellate courts' decisions in recent years, we have received further guidance on this appealing topic. (Pun intended). The following discussion attempts to answer this question based upon whether you reside in a condominium, a homeowners association that has submitted to the Georgia Property Owners' Association Act (the "POA"), or a homeowners association that has not submitted to the POA.

Prior to answering this question, we must first identify one key statutory provision at the heart of this issue, namely O.C.G.A. § 44-5-60(d)(4). We will call this the "Anti-Restriction Law." As an owner of property, this law states that no change in covenants which imposes a greater restriction on the use of land will be enforced unless the owner of the affected property agrees to the change in writing.

What does a "greater restriction on the use of land" mean? A common example would be placing a leasing restriction, or cap, on the number of homes that can be rented in the community. Put simply, it refers to a limitation or prohibition against something that the owner previously could do. Therefore, the existence of the Anti-Restriction Law coupled with amendments that create a new restriction reveals an interesting response below.

The Georgia Condominium Act ("Condo Act") and Georgia Property Owners' Association Act ("POA") expressly provide that any limitations provided in the Anti-Restriction Law shall not apply to any covenants contained in any condominium or homeowners association submitted to the POA. What does this mean? It means that these two types of associations can amend their covenants and create a new use restriction, so long as the associations obtain at least, if not more than the required percentage of the votes needed to pass an amendment. Generally speaking, this required percentage would equal two-thirds (2/3) or such larger majority as the governing documents may specify. Once the required percentage has been met, the amendment has been approved and can be executed and recorded in the respective county land records. Even though there may be owners who rejected the amendment, the amendment that imposes new restrictions would still apply to all owners.

What about a common law homeowners association that is not submitted to the POA? Suppose such an association attempts to amend its covenants to add a new use restriction. Its amendment provision requires approval of owners to which 67% of the votes in the association pertain. Suppose further that the association receives 67% of the votes, even though it also received several rejections. Can the association move forward with recording the amendment? Certainly. Is the amendment enforceable against all members? No. It is only enforceable against those that consented to it. That is because the Anti-Restriction Law applies to homeowners associations that have not submitted to the POA.

This then begs the question: How can we fix this for a common law homeowners association, in order for an amendment to apply to all members, even if not all members consented to the amendment? The brief answer is that such an association would need to amend its covenants and submit to the benefits that the POA offers. Georgia case law tells us that an association can submit to the POA and add additional restrictions, provided that the amendment is approved by at least a two-thirds majority. Once submitted to the POA, the Anti-Restriction Law does not apply for future amendments to that community.

Giving Back to the Community

With the assistance of several amazing property management companies, our firm was able to collect more monetary donations and food donations than we ever have before. Our firm participated in the 4th annual Georgia Legal Food Frenzy, which occurred during the two-week span of April 20, 2015 to May 1, 2015. At the end of the competition, we raised a total of $2,305.00 in monetary donations, which is the equivalent of 9,220 pounds of food. In addition, we collected 751 pounds of food, which was able to be donated directly to the Pleasant Hill Missionary Baptist Church in Roswell, Georgia for immediate distribution to its patrons. We accumulated a total of 12,588.75 pounds in the competition and placed 7th among our local peers in the medium firm category. We tripled our donations from last year. We could not have had such a tremendous showing without the help of our incredible colleagues at (in alphabetical order): **Access, CMA, First Service Residential, Heritage, HMS, and Liberty. The colleagues assisting us were amazing, and we are excited to exceed our donation goal next year!**

Lueder, Larkin & Hunter, LLC
5900 Windward Parkway, Suite 390
Alpharetta, Georgia 30005

Telephone: 770-685-7000
Facsimile: 770-685-7002
Email: newsletter@luederlaw.com