COMMUNITY MATTERS

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Articles:

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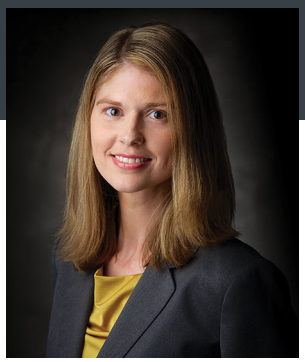


HUD's New Fair Housing Rule and Its Implications for Community Associations

by | **Cynthia C. Hodge, Esq.**

The U.S. Department of Housing and Urban Development's new rule regarding discriminatory acts by third parties could spell trouble for community associations.

The U.S. Department of Housing and Urban Development ("HUD") issued a new rule ("Rule"), which took effect on October 14, 2016. Its title, "Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act" is a formidable one, and the Rule creates liability under the Fair Housing Act ("FHA") for housing providers based upon occurrences of quid pro quo ("this for that") harassment and hostile environment harassment because of a resident's protected class. A great mnemonic device for FHA protected classes is Realtors Can Really Sell Houses Fast Now, which stands for race, color, religion, sex, handicap, familial status, and national origin.

The FHA protections extend beyond the initial transaction of purchasing or renting a home. In conjunction with the Civil Rights Act, it aims to protect against discrimination during which the resident in a protected class uses and enjoys his or her property, and when such protections have been established by the courts and HUD.

To summarize, the new Rule creates three categories of direct liability that would affect community associations, including: (1) liability for the housing provider's own conduct; (2) liability for failing to take prompt corrective action relating to the conduct of employees or agents; and (3) liability for failing to take prompt corrective action for the conduct of a third party (such as another resident).

From a community association perspective (including condominiums, cooperatives, townhomes, and single family homes), the Rule means that associations may be liable under the FHA for the discriminatory impact of residents (third parties) who harass or create a hostile environment for other residents that are in a protected class.

When the federal regulation was proposed, the Community Associations Institute ("CAI") submitted its comments with respect to the Rule's effect on community association liability. One of the chief concerns involved the illegal, discriminatory acts of non-agents (third parties) of the association and how an association could know, correct, and end a discriminatory act of a third party.

CAI acknowledged that a violation of the FHA includes an association board member, acting in his or her board capacity, who engages in discriminatory activity. If the other board members knew of or should have known about these discriminatory activities and failed to take corrective action, those board members and the association are exposed to liability under the FHA in accordance with this Rule. The Rule applies also to association employees or other agents engaging in discriminatory actions, and where the board knew of or should have known and failed to take action to correct the actions, the board members and the association would be liable.

But, what happens if the offending party is not a director, officer, or agent of the association? What if it is a resident in the association engaging in discriminatory activities against another neighbor and resident of the association? Those concerns were also addressed by CAI prior to the Rule being finalized.

In fact, HUD modified the final Rule to address several of these issues. HUD stated that not all resident disputes rise to the level of housing discrimination. HUD clarified that "community associations do not have a general duty to halt housing discrimination, but must take prompt action to halt housing discrimination when the association is required to by law or governing documents."

See, *https://www.caionline.org/Advocacy/GovernmentAffairsBlog/Pages/finalruleupdate.aspx*.

Further, the Rule provides that community associations are not required "to take actions outside the scope of authority under law or governing documents to halt housing discrimination," and, if the association is required under law or by governing documents to halt discrimination by third parties, the Rule adds a "reasonable person standard to determine if or when a community association should have been aware of or acted." (See previous weblink.)

Despite these modifications, the Rule itself still presents some ambiguities. Time and upcoming court decisions will assist in determining where that liability standard lies with respect the association's duty to halt discrimination by third parties. In these final words, there is no definitive answer on how associations should proceed going forward since the area of law is new and unsettled at this time.

From a best practices approach, we would recommend that if the board learns of a dispute between residents, the board should first contact its legal counsel for further direction and attention to these matters. The association, with legal counsel, should investigate the incident involving the dispute and review the governing documents to determine (1) whether the incident constitutes a violation of the governing documents and (2) whether the association is afforded any enforcement remedies to enforce compliance of the violation. Attention should be paid to the language of the governing documents to determine whether certain actions need to be taken to limit exposure to liability.

Additional Information Sources:

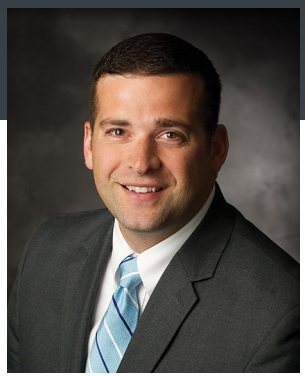
https://www.caionline.org/Advocacy/GovernmentAffairsBlog/Pages/finalruleupdate.aspx

http://www.jdsupra.com/legalnews/new-fair-housing-rule-extends-liability-33425/

http://nationalfairhousing.org/portals/33/PSAs/brochures/associations%20brochure.pdf

CLICK HERE **to view CAI's December 21, 2015 letter to HUD**

The Importance of the Mountainbrook Case



by | **Joseph C. Larkin, Esq.**

In July of 2016, the Georgia Court of Appeals issued an order affecting interest, late fees, and attorneys' fees for an association attempting to collect delinquent assessments.

In *Northside Bank v. Mountainbrook of Bartow County Homeowners Association, Inc.*, the community association, Mountainbrook, filed suit against Northside Bank for failure to pay assessments on a number of properties the bank owned through foreclosure. The association's covenants provided that interest could be levied on unpaid assessments at "the maximum legal rate per annum." For condominiums subject to the Georgia Condominium Act ("COA") and for communities that have been subjected to the Georgia Property Owners' Association Act (the "POA"), the question of the maximum legal rate of interest is expressly answered by statute: 10% per annum "to the extent the instrument provides." However, for common law homeowners associations with documents that allow interest at the maximum legal rate, the industry has debated whether the allowable interest rate is 7% or 18%. O.C.G.A. § 7-4-2 provides that the maximum rate of interest is 7% in contracts where the interest rate is not specified. Conversely, O.C.G.A. § 7-4-16 establishes the maximum of interest to be 1.5% per month (18% per annum) on commercial accounts. Mountainbrook argued that the 18% rate for commercial accounts applied.

The Court of Appeals in *Mountainbrook* disagreed. Specifically, the Court decided that this language was ambiguous and concluded that the standard contractual interest rate of 7% applied instead of the 18% the Association had levied. The Court held that the Declaration, which gave rise to the authority to collect interest, was not considered a commercial account.

In addition, the Court found that a provision setting late fees at the discretion of an association's Board of Directors without specifying a specific late fee amount may not be enforceable without evidence that the amount chosen was a reasonable pre-estimate of damages caused by non-payment of the assessments. The Court noted that the late fee provision provides no pre-estimate, reasonable or otherwise, of the probable loss associated with the late payment of assessments. The late fee was set at the total discretion of the Board, and there was no indication as to what criteria the Board must use to determine the late fees, when the late fees are to be set, or whether there is any ceiling on the amount of late fees that can be charged. In short, the late charge was considered an impermissible penalty, not liquidated damages.

To the extent the instrument provides under the COA or POA, the association may charge late or delinquency charges not in excess of the greater of $ 10.00 or 10 percent of the amount of each assessment or installment not paid when due. However, since *Mountainbrook* involved a community not subject to the POA or the COA, it is unclear how the Court would have ruled had the association been subject to either act. Although a provision that directs a late fee amount "to be determined by the board" seems like the kind of ambiguous language that could constitute an impermissible penalty as discussed in *Mountainbrook*, the COA and POA specifically provide for late fees up to a "ceiling amount," and defer to the association instruments to provide any amount under that ceiling. The Court of Appeals employed that same logic when it ruled that fines were not an impermissible penalty because the COA specifically provided for them. *See, Spratt v. Henderson Mill Condo. Ass'n, Inc.*, 224 Ga. App. 761, 764, 481 S.E.2d 879, 881 (1997)

Finally, the Court ruled that "reasonable attorneys' fees" should mean all reasonable attorneys' fees, not just statutory attorneys' fees under O.C.G.A. § 13-1-11. The Court held that O.C.G.A. § 13-1-11 does not apply because the Declaration is not "evidence of indebtedness" as contemplated by the statute because evidence of indebtedness, has reference to a "printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." Here, the Declaration only indicates an obligation that may arise to pay assessments should they be levied. Moreover, in holding that O.C.G.A. § 13-1-11 does not apply to an attorneys' fees

provision in a declaration of covenants, the Court dispelled some of the myths regarding the need to include the words "actually incurred" in a declaration to avoid application of O.C.G.A. § 13-1-11. It had been argued by non-paying owners that if the words "actually incurred" did not appear in the attorney's fee provision, that O.C.G.A. § 13-1-11 would provide the legal calculation. That argument simply has no merit given the Mountainbrook ruling.

In conclusion, here are the main points to take away from the *Mountainbrook* case:

1. If the community association is not subject to the COA or POA, and the Declaration allows for the imposition of interest but does not set the specific rate of interest, interest is 7%, not 18%.
2. If the community association is not subject to the COA or POA, and the Declaration either a) does not set the specific amount, or b) provide a reasonable calculation of damage due to nonpayment of assessments, then the late fee is an impermissible penalty.
3. A Declaration does not serve as "evidence of indebtedness" as contemplated by O.C.G.A. § 13-1-11, and therefore the percentage cap for attorneys' fees under this statute does not apply. This is so regardless of whether the declaration provides for an award of reasonable attorney's fees "actually incurred."

Settlement Agreements:
An Effective Tool for Collection Purposes

by | Mark J. Edwards, Esq.

One of the most utilized tools for collecting delinquent assessments are settlement agreements. An association and a delinquent homeowner can reach a settlement at any stage of the collection process. Understanding the effect of settlement agreements at different stages of the collection process can help a community association manage its litigation costs while protecting its claim.

Prior to the association filing a lawsuit, an association and delinquent homeowner can reach an agreement. Typically, the homeowner will be agreeable to making payments toward their delinquent balance in monthly installments over a period of time in addition to future assessments as they become due.

The advantage of settling a claim prior to filing a lawsuit is that legal costs are relatively low at this stage. However, since there is no lawsuit, the association will not be able to enforce the terms of the agreement without actually filing a lawsuit. In other words, the association cannot get the benefits of a lawsuit without actually filing one. Although a pre-litigation payment plan does not get the association closer to receiving a judicial determination of the claim, it is effective in resolving, or at least limiting, the expenses of litigation.

Once a lawsuit is filed, the association and owner can still settle the claims using either a "consent order" or a "consent judgment." The effect that consent orders and consent judgments have is the same as if the association prevailed at trial. Both effectively secure the unpaid amounts claimed by the association, because the owner essentially waives any dispute or defense he or she may have had and agrees to relief in the association's favor if payments are not timely made. The difference between a consent order and consent judgment is a subtle but important one. A consent order provides for a settlement amount and planned period of payments but gives the court the authority to issue a final judgment including additional amounts that have become due, in the event of default. A benefit to this for an owner is that there is not an official judgment that can appear on his or her credit report. Once all payments are made, the lawsuit is dismissed without a judgment having been entered. A consent judgment is similar to a consent order in its provision for a planned period of payments; however, unlike a consent order, it does not require or permit further action by the court. A consent judgment is final and allows the association to proceed automatically on the remaining balance if there is a default. The limitation of a consent judgment is that it will not include anything that became due after being signed by the parties and the judge.

While both of these options seem more beneficial to the association than to the owner, an owner benefits from entering into a consent agreement because doing so helps to mitigate the attorney's fees that might be expended in going to trial or collecting post-judgment through garnishment or other means. Moreover, an association may be more flexible in negotiating penalty charges such as interest or late fees and provide a longer payment term to an owner who is genuinely trying to settle his or her debt. Either type of settlement agreement is an effective tool in preserving the Association's claim

In cases where no agreement has been reached, the association may obtain a judgment by way of trial. A judgment is a finding by the court determining the liability of a particular party. A judgment is not actual money, therefore an association must engage in post-judgment collection efforts to collect upon its judgment. This normally entails garnishing certain assets or foreclosing on the subject property. These efforts will incur additional legal costs.

In a situation where there is an outstanding judgment and the parties want to settle the claim, the settlement agreement is commonly known as a forbearance agreement. In a forbearance agreement, the association will suspend post-judgment collection efforts in exchange for scheduled payments from the homeowner. The association benefits, because it receives payments without the expense of post-judgment collection efforts. As long as the homeowner remains current with the agreement, he or she will not be subject to a foreclosure or disruptive garnishments. Understanding the financial strength of the homeowner should guide these negotiations.

Another benefit of a forbearance agreement is that it may include amounts that have become due after the judgment was entered. Typically, the association would still need to obtain a second judgment to secure these amounts; however, that may not be necessary if the owner pays them as agreed. If the homeowner defaults, the forbearance agreement can be used as evidence of the owner's acknowledgement that these amounts were due and owed.

Settlement is the most effective means of collecting unpaid assessments; however, the choice of settlement options and use of certain provisions depends on the circumstances of each case. The association should consult with its counsel prior to finalizing any agreement because such agreements are usually final and are very difficult to change without the consent of both parties.

Attorney Spotlight:
Soha Stacy Sohrabian, Esq.

Soha Stacy Sohrabian is an associate at our Alpharetta office. She joined our firm in February 2015, and her primary areas of practice are community association law, litigation, and collections. Soha was born and raised in Roswell, Georgia. She graduated from the University of Georgia with her Bachelor's Degree in advertising and a minor in sociology. She then earned her Juris Doctorate Degree from Georgia State University College of Law. During law school, Soha served as a senator for the Student Bar Association. She also spent a semester as an extern to the Honorable Judge Wendy Shoob in the Fulton County Superior Court.

When she is not at the office, Soha enjoys traveling, hanging out with friends and family, and spending time outdoors.

We are proud to have Soha at our firm and excited to feature her in this edition's Attorney Spotlight.

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