



COMMUNITY MATTERS

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News and Trends in Community Association Law

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Assessment Collection, Bankruptcy Trends, and Predictions for 2022

by | Daniel E. Melchi, Esq.

Levying and successfully collecting neighborhood assessments is essential to the operation of all community associations. Without funds, communities cannot keep

the lights on, maintain common areas, plant flowers, and fill the pool. The world experienced, and continues to experience, one of the greatest economic “shocks” in history, beginning in 2020 with a worldwide health pandemic that continues through the present. But with these fluctuations and unpredictable economic fallout have come some surprising results which may or may not continue.

In the spring of 2020, at the height of pandemic-related closures, it was clear that the economic toll of business, school, government, and other service closures was being brought to bear. The stock market plunged, unemployment soared, and things looked bleak. Many community associations, law firms, and business insiders assumed that with a massive loss of employment and severe curtailing of services, homeowners would begin to default upon their obligations to pay neighborhood assessments. While some did, this expected trend of financial Armageddon has not yet come to pass, overall. This is possibly a result of many communities having already assessed and collected 2020 assessments at the beginning of 2020, or perhaps because of certain government benefits such as stimulus checks, increased child tax credits, extended unemployment benefits, a moratorium on foreclosures, and a pause on student loan interest and payments.

Overall throughout 2020 and 2021, the National Bankruptcy Institute reported a cratering of the number of personal bankruptcy cases filed. Bankruptcy cases filed by individuals were at an all-time low, and that number has continued through January 2022; however, many insiders expect this number to begin to tick up in the near future.

Why, if, during the worst of the pandemic in 2020 and 2021, the community association

industry did not see a worse-than-normal financial impact? Could things devolve in 2022, a year when, presumably, the economy will continue to grow and recover? There are a number of things at play that could reverse the “lull” that community associations have had with respect to delinquent accounts. Many government initiatives put in place to lessen the economic impact during the pandemic have expired or will expire soon, thereby possibly causing homeowners to begin to make difficult financial choices.

The moratorium on the foreclosure of federally-backed mortgages has now expired, and the President has stated that he will not be reimposing it. Mortgage lenders have once again begun to schedule foreclosure sales. In active bankruptcy cases, mortgage lenders have increased the filing of Motions for Relief from Stay in order to begin the foreclosure process. And, once again, “Foreclosure Tuesdays” (the first Tuesday of each calendar month in Georgia when foreclosures take place on the courthouse steps of every courthouse in the state) are having a steadily increasing number of foreclosure sales scheduled and called out.

A child tax credit which was put into place during the pandemic and had provided monthly income to many families with children has now expired. As of the writing of this article, Congress has not moved to reinstate it.

The repayment of federally-issued student loans and the pause of interest accruing thereupon is scheduled to expire in May 2022. The deadline for these deferments has been extended several times, but the President has indicated that the deferments cannot continue indefinitely. It appears likely that these payments will once again start to be coming due soon.

Inflation in the price of most goods is also a concern. The more homeowners spend on

everyday items, the less they may have to pay their neighborhood assessments. If homeowners prioritize their spending on other items over their assessment obligations, that could lead to increased delinquencies for community associations.

Some sound advice for community associations would be to plan and stay vigilant in collecting overdue assessments early rather than waiting. Keep in mind that smaller amounts are far easier to collect than large, unwieldy amounts that have grown over time. If communities can tackle the smaller amounts early as they first fall overdue, it could pay dividends in the long run over having to employ more drastic collection methods to try to collect larger amounts later.

Along those lines of collecting early, community associations should also ensure that they either have: (1) statutory liens in place or (2) notices of lien recorded against delinquent lots and units. The real estate market remains strong at the moment, meaning many homes now have substantial equity. As more and more homeowners choose to sell, refinance, or if their property forecloses, having a lien in place will ensure that an association collects what it is owed at closing or out of excess foreclosure sale proceeds. More and more properties are selling for in excess of what the foreclosing lender is owed. Most times, an association's lien will be in second priority, and the association will be in line to collect any additional sales proceeds from a foreclosure sale.

Of course, there is no way to predict what will or will not happen in 2022 and beyond. It does help that community associations be prepared, anticipate the possible economic ramifications of current events and policies, and try to ensure they are on the best financial footing for whatever 2022 decides to throw their way. ❖

Preparing for Covenant Enforcement Litigation

by | **Dwayne D. Kinney, Esq.**



Enforcing your association's restrictive covenants will help maintain the character of your neighborhood and protect property values by attracting future homebuyers.

Most homeowners want to comply with the restrictive covenants they agreed to when they purchased their homes, and they want their homes to look nice. In most instances, your neighbor may only need a gentle reminder of the covenants from the community association manager or a friendly visit from a board member urging them to bring their property into compliance.

However, you may occasionally encounter a homeowner who simply refuses to comply with the covenants, and your association's board of directors may resolve to seek self-help to cure some violations or impose fines or other sanctions against them depending on the nature of the violation. But what happens if your neighbor still refuses to abate a violation of the covenants despite having received friendly letters, fines, or other sanctions? If your community is experiencing this problem, you should discuss the matter with your association's counsel and prepare for covenant enforcement litigation.

If your association's board of directors has determined that a homeowner (or their tenant or occupant) is violating the covenants, the board of directors can request that the association's counsel file a lawsuit seeking equitable relief. When an association seeks equitable relief in Georgia, it asks a court to compel a homeowner to perform a certain act or refrain from doing a certain act. For the purposes of covenant enforcement, the association is asking the court to require a homeowner to comply with the community's restrictive covenants. Additionally, if fines or other sanctions have been imposed, including legal fees and court costs, the covenant enforcement lawsuit will have claims seeking monetary damages against the homeowner. To

summarize, covenant enforcement lawsuits can include multiple claims seeking monetary damages and equitable relief, when appropriate.

To succeed in court, an association must first prove its case, and that requires evidence. It is of paramount importance that your association collect evidence of the violations at issue and maintain that evidence as part of the association's business records. Copies of all letters sent to a homeowner (or tenant or occupant) regarding the violation are needed. Your association should also take photos of the violation (videos when possible) on a regular basis to document the continuation of the violation or if the condition is getting worse over time. However, make sure you also keep a record of who took the image or video as well as the date and time it was taken. Do not forget that you will need to continue collecting evidence even after you have filed a violation enforcement lawsuit.

Once your association has started collecting its evidence and the board has determined that a violation is occurring, check your declaration of covenants for a dispute resolution provision. Some communities' covenants contain a clause that requires the association's board and the non-compliant homeowner to mediate their dispute before litigation can be filed. If your association's covenants contain a dispute resolution provision and the board does not comply with terms of that clause, the association's lawsuit could get dismissed by the judge. If you are unsure whether your community's declaration of covenants contains a dispute resolution clause, your association's counsel can help you make that determination and guide you through the process.

Although your community will need to collect evidence of the violations at issue and check for a dispute resolution process, the association's board of directors will also need to keep its eye on the calendar. Some violations have a two-year statute of limitations. That means if the board wants to file a covenant enforcement lawsuit, then the association must file its lawsuit within two years of the violation first occurring. Some violations of your community's covenants will not be subject to this two-year statute of limitation and can be enforced even if the violation first occurred more than two years ago. However, determining which violations are subject to the two-year statute of limitations can be difficult. We recommend contacting your association's counsel to determine whether the violation your community wants to enforce is subject to the two-year limitation.

After you have collected evidence, complied with the dispute resolution process (if applicable), and determined that the statute of limitations does not bar the association from filing suit, your community will likely be ready to have its counsel draft a violation enforcement complaint to file with the court. It is crucial to remember that the board and the association's manager will likely know a lot more about the homeowner and the violation at issue than your counsel. Therefore, your association should give its counsel the information and evidence it has collected so far. Although a certain document, photo, or fact may not seem important, it could end up being an important piece of evidence that helps the association be successful in court. ❖



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