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ATTORNEYS AT LAW

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IN THIS ISSUE

L A W Q U A R T E R L Y

SAVE THE DATE!

Saturday, September 23, 2017, 8:00AM – 12:00PM
Perkins & Anctil is pleased to present our annual **Condominium Roundtable Seminar**. The Future is Here! Worried about computer hackers, network safety, electric cars, and flying drones? These and other timely issues are on the agenda.
Location: The Westford Regency, 219 Littleton Road, Westford, MA 01886
Visit our website or the link below for more information and to register.
https://www.caine.org/ProgramEventRegistration/EventFull.asp?EventID=468

Conversations are Flowing About Short Term Rentals

By: Rhonda L. Duddy, Esq.

With the rising popularity of Airbnb and similar online services that connect those who wish to rent out their homes with those looking for accommodations on a short-term basis, several municipalities as well as the courts and Legislature are examining how to handle the ramifications of these short term rentals.

There is a different set of issues in suburban towns than in large cities or tourist destinations such as Cape Cod. Municipalities are enacting zoning and land use regulations due to growing concerns of changes to the character of their neighborhoods. Such is the case in Lynnfield, when in 2016 a group of men rented a 5,000-square-foot home and threw a party where one of the partygoers was shot to death.

Some condominium associations are now reviewing their governing documents, which may prohibit short term rentals. Unit owners are concerned about guests having access to common areas, club houses, storage facilities, etc., preferring not to have short term renters coming and going in their communities. Recently, a Back Bay condominium association fined a unit owner over $9,000.00 for renting his unit out through Airbnb in violation of their condominium rules.

The Massachusetts Legislature is also weighing in and has proposed House Bill No. 3454, which would add an excise tax as well as impose new restrictions to the short-term rental of residential homes. Airbnb supports the Senate's plan to assess taxes, stating in an advertisement, which aired on June 5, 2017, that the company is "committed to working with Massachusetts on new, common-sense home sharing rules. We want to collect and pay taxes for our hosts. And we want to protect affordable housing. Together, we can make sure that all of Massachusetts benefits."

The proposed Bill states that the hosts of short-term residential rentals would be classified into the three following categories: residential hosts, professionally managed hosts, and commercial hosts. The categories would be taxed at 4%, 5.7%, and 8% respectively. Different municipalities would be able to raise these taxes should they choose, however, there would be a cap which would limit the increase to 5%, 6% and 10% respectively.

Residential hosts are defined as any person who is the owner of a residential unit who is offering said unit for rent no more than 60 days a year and the unit is the occupant's primary residence. Professionally managed hosts are defined as any person or entity who is offering a residential unit for rent for a minimum of 5 consecutive nights and the unit is managed by someone who is responsible for the upkeep and maintenance of the property and shall be available to respond to any

issues that might arise with the renter. A commercial host is defined as anyone who offers his or her residence for tourist or transient use for more than 60 days a year or is offering a unit for rent that is not his or her primary residence.

Municipalities may require both commercial hosts and professionally managed hosts to obtain a proper business license from the local authority and could restrict the number of days a host may rent out a short term residential unit.

Additionally, the Bill calls for the excise tax to be added to the rent charged by the host, paid by the renter, and is to be stated and charged separately. However, no excise would be charged if the total amount of rent is less than $15.00 per day or its equivalent. There would also be an exemption if the renter is an employee of the United States Military traveling on official military orders that encompass the date of said rental.

It is important for potential hosts to be aware of the existence of any regulation prohibiting renting out their homes, as well as to be aware of the most current taxing procedure for short-term rentals before they consider renting out their homes to guests.

Litigating Over Whether You Can Litigate

By: Scott J. Eriksen, Esq.

More often than not we counsel our association clients to avoid litigation when they can in favor of more expedient, inexpensive or creative solutions to their problems. If you have ever been a party to a lawsuit, chances are you know why: litigation can be a costly, uncertain, time-consuming and frustrating ordeal. Litigating to have one's proverbial "day in court" is often fruitless, as a vast majority of civil actions settle or are disposed before trial, and those individuals who do make it to trial may wait months or even years for the dubious privilege of doing so. However, there are times and circumstances when litigation is unavoidable (or at least advisable), and an association is compelled to engage legal counsel to pursue civil action.

So, imagine yourself a board member, faced with a challenging dispute and an obligation to protect the association's interest. You have thoroughly evaluated other alternatives to litigation and found them wanting. You may also be faced with statutory time bars or other pressures that force your hand, and you believe court action is the most effective avenue to seek the redress to which you are entitled. Armed with such facts, documents and testimony which you feel are more than adequate to carry the day, you consult with legal counsel only to learn that initiating litigation may not be as simple as you thought, and that it may in fact be necessary to litigate in order to determine whether you can litigate at all!

While the notion that you would have to engage in legal action to determine whether you have the right to pursue legal action may sound like something from a Dickens novel/nightmare, it can be an all too real predicament for some associations. Covenants in the governing documents which mandate arbitration (most often in the case of action against unit owners), or that require the board to present a litigation plan to the ownership for approval prior to commencing suit, can be significant hindrances to filing.

Consider the latter example, where you find a provision in your governing documents (usually the Trust or By-Laws) which states that the board may only proceed with legal action ***after*** having presented a litigation budget/plan to the owners and received a super-majority vote authorizing the board to go forward. These provisions are not uncommon in more recent documents, and are primarily designed to protect the developer/declarant from legal actions in the event of transition disputes; however, they may also bar or hinder legal action against non-developer parties.

This isn't right, you say – it offends notions of fairness and public interest. Well, those arguments have been made. Yet while these "anti-litigation" provisions have been challenged as void or voidable as against public policy, the Appeals Court of Commonwealth has upheld them. In Bettencourt v. Trs. of the Sassaquin Vill. Condo. Trust, 2016 Mass. App. Unpub. LEXIS 903, the Massachusetts Appeals court found that a provision in the Sassaquin Village Condominium documents which required the consent of owners entitled to 80% of the beneficial interests as a prerequisite to legal action was valid. The Court noted that the plaintiffs (unit owners in that case) conceded that "they knowingly and voluntarily agreed to the consent requirement when they purchased their units" and found "no basis for concluding that the provision is unconscionable."

The Court wrote that "[o]ther than asserting that it is mathematically impossible to obtain the consent of eighty percent of the unit owners, the plaintiffs have not identified any aspect of the consent requirement that is substantively or procedurally unfair. As we have noted, the plaintiffs were aware of the consent requirement when they bought their respective units. In addition, nothing in the consent requirement precludes

the plaintiffs from persuading other unit owners and one or more of the trustees to consent to a lawsuit … having concluded that the consent requirement is not unconscionable, it follows that it does not offend public policy."

The Court also rejected the plaintiffs' argument that "the consent requirement violates art. 11 of the Massachusetts Declaration of Rights because it effectively curtails the plaintiffs' right to seek redress from the courts … because constitutional rights may be waived by contract."

The lesson of Bettencourt is part caveat emptor, with a healthy dose of admonition that careful attention to governing documents is important in the preliminary stages of an association dispute. Knowing that you may have to deal with these types of provisions will allow you to plan accordingly in your legal strategy. While "anti-litigation" provisions may present an obstacle to legal action, they are not insurmountable, and knowing about their existence before filing a complaint is crucial to saving time and money.

When is a Debt Collector not a Debt Collector Under The Fair Debt Collection Practices Act?

Summary by: David R. Chenelle, Esq.

In a unanimous opinion written by newly appointed Justice Neil M. Gorsuch, the U.S. Supreme Court answered the question whether someone who purchases a defaulted debt is not a "debt collector" as defined by the Federal Fair Debt Collection Practices Act, or FDCPA. How the Court arrived at that conclusion is the rest of the story.

The case of Henson v. Santander Consumer USA Inc. began with an auto loan from CitiFinancial Auto to the Hensons. As is sometimes the case the Hensons defaulted on the auto loan and the car was repossessed. Unfortunately there remained a deficiency after the auction which was subsequently sold to Santander which then sought to collect the amount owed in ways and methods that the Hensons considered to be aggressive and in violation of the FDCPA. The Hensons then filed a complaint in the U.S. District Court of Maryland which determined that Santander was not a debt collector as defined by the FDCPA. Thereafter the Hensons appealed to the U.S. Court of Appeals for the Fourth Circuit which upheld the lower court's ruling. In order to resolve a split between the Appeals Courts, the U.S. Supreme Court accepted the case under Certiorari.

The FDCPA only applies to debt collectors, a term under the act specifically defined in 15 U.S.C. §1692 a(6) as anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another." (The "Act") Ostensibly, a company who collects on its own debt, whether it was the originator or purchased it from another would not fall under the controls of the Act.

The Court then set about to determine how to classify entities "who regularly purchase debts originated by someone else and then seek to collect those debts for their own account." Using an analogy, J. Gorsuch framed the question as whether the Act treats "the debt purchaser . . . more like the repo man or the loan originator?" He further stated that "all that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for 'another." That analysis, he said, "would seem" to mean that a debt purchaser does not fall under the statutory definition. The ultimate question for the Court to decide was boiled down to: "…if you purchase[d] a debt and then try to collect it for yourself – does that make you a "debt collector" resulting in the application of the Act? Ultimately, as the Court stated "under the definition at issue before us, you have to attempt to collect debts owed *another* before you can ever qualify as a debt collector".

In their pleadings, memorandums and oral arguments both parties agreed that, under the Act, third party debt collection agents generally qualify as debt collectors "while those who seek only to collect for themselves, loans they originated generally do not". It is the gray area of whether those who purchase debt from the originating creditor can be classified as a debt collector?

In an attempt to clarify their position, the Hensons argued that the term "owed to another" was misleading and did not reflect the Congressional intent when the Act was put into law. The Court then entered into a complex statutory and grammatical analysis, focusing largely on the word "owed." Citing from various grammar books and the Oxford English Dictionary, the Court put to rest the Hensons' counter interpretation of the term "owed" and further stated "it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced". J. Gorsuch stated the "proper role of the judiciary" is to "apply, not amend, the work of the People's representatives." Ultimately, "that [the] legislature says . . . what it means and means . . . what it says.".

The Court held that a "company may collect debts that it purchased for its own account without triggering the statutory definition in dispute. By defining debt collectors to include those who regularly seek to collect debts "owed . . . another," the statute's plain language seems to focus on third party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect debts for itself."

Condominiums At Lilac Lane Unit Owners' Association v. Monument Garden, LLC

By: Charles A. Perkins, Jr., Esq.

In a recent opinion issued by the Supreme Court of New Hampshire, it appears again that the Court has ignored the clear meaning of RSA 356-B in favor of adopting what it sees as an equitable result.

With full disclosure that our firm submitted an *amicus curiae* brief about this case on behalf of the Community Association's Institute, it is our opinion that the Court in this case just got it wrong.

The summary of the facts is somewhat simple. The developer declared property as part of the association and did not complete the project within the allowable time period. As such, the Association took the position that land and buildings, whether equitable or not, should have been part of the Association's property and the developer's mortgage was extinguished at the same time.

However, the Court specifically found that there are other ways to create condominiums in New Hampshire other than on convertible land with expandable condominiums. In other words, the condominium act implies that a condominium can be created prior to completion of construction on all units, without the need to classify portions of the condominium land as convertible (i.e., that not all units within the condominium must be located on subsequent or converted land.)

Consequently, the Court ruled against the Association in favor of the declarant and mortgage holder.

About Our Law Firm

Perkins & Anctil, P.C. is a leading firm in all facets of real estate law. Our diverse experience includes all aspects of condominium and community association law, real estate conveyancing (including the representation of numerous local and national lenders), developer representation (from the municipal approval process through the sale of property), landlord-tenant matters and real estate litigation. In addition we offer years of industry experience in general litigation and bankruptcy cases, as well as the full spectrum of employment related matters. Our attorneys have been acknowledged for their expertise in Massachusetts and New Hampshire. We encourage you to set up an initial complimentary meeting with us.
www.perkinslawpc.com

Perkins & Anctil, P.C.
6 Lyberty Way, Suite 201
Westford, Massachusetts 01886
(978) 496-2000
info@perkinslawpc.com

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