HILL WALLACK
ATTORNEYS AT LAW

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IN THIS ISSUE

*The **Hill Wallack Quarterly** provides information of general interest to our readers. It is not intended, and should not be used, as a substitute for consultation with legal counsel. If you have any questions regarding specific issues raised in this issue, you may contact the authors directly at (609) 924-0808 or by e-mail at info@hillwallack.com.*

Message From the Managing Partner

In this fall edition of our firm's *Quarterly,* we continue to keep our Community Association Law clients informed on the ever changing law and other developments which affect community association operations. In this issue, you will find informative articles on developments in Community Association law, notes on significant case decisions and helpful tips on the business aspect of association operations.

Hill Wallack's Community Association Law Practice Group covers the entire spectrum of legal counseling of condominium, cooperative and homeowners associations. From enforcement of the covenants and restrictions to negotiation of contracts for provision of services, our **Community Association Law Practice Group** Attorneys are an integral part of the community association's professional team. Our community association attorneys are recognized as individual leaders in the field through published works, legislative activities and industry group leadership positions.

In our lead article *"A Fence by any Other Name is Still a Fence",* my Partner, Ron Perl discusses the enforcement of regulations of fences within planned communities. *"Verdict in on FDCPA…",* written by Partner, Michael Karpoff concentrates on the Federal Fair Debt Collection Practices Act's application to common expense assessments. Another Partner, Terry Kessler discusses obligations of a unit owner with regard to common elements in her article *"Unit Owners Bear Responsibility for Removing Amenities from Limited Common Elements to Allow Repair".* Michael Karpoff gives insight into whether associations may publish the names of delinquent owners in association newsletters in his article *"Collecting Maintenance Fees: Does Publication of Delinquency Lists Cross the Line?"* Finally Andrew McDonald outlines the role that Architectural Control Committees play in enforcing a common scheme in his article *"Common Ground: The Role of Architectural Control Committees in Maintaining a Common Scheme".*

We are sure that you will enjoy both the substance and the variety of the articles in this issue. Again, please let us know the subjects you would like to see covered in the *Quarterly.* We hope that you will find this newsletter useful, and we would be pleased to have your comments or suggestions.

–Robert W. Bacso

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A Fence By Any Other Name Is Still a Fence

by Ronald L. Perl

"If it looks like a duck, walks like a duck, and sounds like a duck, it's a duck." Fences too are defined by their function, not by what they are called, the New Jersey Supreme Court has held.

Over the years, a number of cases have arisen concerning prohibition or regulation of fences within planned communities. Often, the dispute centers on whether plant material or another natural barrier is a "fence" for purposes of the use restriction. Recently, in the case entitled *Bubis v. Kassin,* the Supreme Court found that an eight foot high sand berm topped with bushes and trees constituted a fence for purposes of a restrictive covenant and local zoning ordinance. Although the case did not involve a community association, it did concern a restrictive covenant running with the land. Since community association declarations consist of covenants running with the land, the analysis of the Supreme Court in the *Bubis* case is instructive for community association practitioners.

Ocean View Blocked

Sophie Bubis is the owner of a home on Ocean Place in the Village of Loch Arbour, New Jersey. Her house is located directly across the street from the beach. Until 1995, the beach property was used as a recreational beach open to the public for a fee. During that time, Mrs. Bubis had a view of the beach and ocean through a chain link fence on the beach club property.

In 1995, the Kassins purchased the beach club and converted it to their exclusive private use. Shortly after the purchase, they constructed an eight feet high sand berm behind the chain link fence and planted bushes and trees at the top of the berm. The total height of the berm, trees and shrubbery was between 14 and 18 feet. Mrs. Bubis was deprived of her view of the beach and ocean.

Mrs. Bubis sued the Kassins, alleging their violation of a restrictive covenant dating from 1887 which prohibits the construction of fences higher than four feet on the beachfront property. In addition, a municipal zoning ordinance of the Village of Loch Arbour contains a restriction on fences. It provides that all fences must be made from chain link or a similar fencing material and prohibits the use of any webbing on the chain link fence. The ordinance prohibits any fences or hedges in excess of six feet in height.

Mrs. Bubis argued that the vegetated berm was the "functional equivalent" of a fence, and that it satisfied the dictionary definition of the word "fence." The Kassins responded that the berm was a "dune" and did not constitute a fence as that term is ordinarily used. The Kassins also argued that New Jersey's Coastal Area Facility Review Act (CAFRA), which regulates sand dunes, preempted the local zoning ordinance. The CAFRA issue is beyond the scope of this article and will therefore not be discussed. However, the Court's analysis of the definition of "fence" is important to community associations and deserves attention.

Analysis Focused on Purpose

The Court's analysis began with a review of several dictionary definitions of the term "fence" including the definitions found in *Black's Law Dictionary, Webster's Third New International Dictionary, The American Heritage Dictionary, Second College Edition,* and others. The Court concluded that while there is no single definition of the word "fence," there are two "guide posts" for analysis. First, no definition limits the type of material from which a fence can be constructed. Any definition which lists materials for building fences uses them as examples only. Second, the Court

observed that the various definitions agree "that the user's intent and the actual function of the structure are dispositive in ascertaining whether a structure is a fence." The Court concluded in this regard "that a fence is defined primarily by its function, not by its composition. As long as the structure marks a boundary or prevents intrusion or escape, then it is a fence, regardless of the material from which it is forged. This is the ordinary understanding of 'fence.' "

The Court then analyzed cases from other jurisdictions, beginning with a well known community association case from the State of Washington. In *Lakes at Mercer Island Homeowners Ass'n. v. Witrak,* a Washington appeals court case, the court found that a row of trees along the property line of the Witrak lot constituted a fence within the plain meaning of that term. Applying the particular facts before it, the New Jersey Supreme Court held that the Kassins' berm constituted a fence because: a) "it is a partition that separates the Kassins' property from the street;" and b) "it prevents intrusion from without."

The Kassins had argued that the berm was constructed to protect the beach and was therefore a dune. The Court observed that the berm could not protect the beach from erosion because there was no sand behind the berm. Because the berm and plantings constituted a sizable and imposing presence along Ocean Place and because the Kassins placed it along the boundary of their premises, the Court found that this berm functioned as a fence.

Berm Violated Restrictions

The next step for the Court was to determine whether the fence violated the 1887 restrictive covenant. While restrictive covenants are generally subject to strict construction, the Court reasoned that a covenant should not be read in such a way that defeats its plain and obvious meaning. Although the covenant itself did not express its underlying purpose, the Court found that the most likely intended purpose was to enable nearby residents and passers-by to have a view of the beach and the ocean. The Court therefore held that the Kassins' fence was violative of the restrictive covenant.

The Court also found the fence to violate Loch Arbour's zoning ordinance, utilizing an analysis similar to that employed with regard to the restrictive covenant.

Some community association governing documents are precise in defining the term "fence" in the context of prohibition or regulation. Others, which simply prohibit "fences" of a certain height or dimension, present more difficult issues of interpretation, especially when plant material is used as a screen or fence. This New Jersey Supreme Court case gives guidance as to how the courts are likely to interpret such a restriction.

Ronald L. Perl *is a partner of* ***Hill Wallack*** *where he is partner-in-charge of the* ***Community Association Law Practice Group.*** *He is an Adjunct Professor at Seton Hall Law School and a member of the College of Community Association Lawyers.*

"…community association declarations consist of covenants running with the land…"

Verdict In On FDCPA: Community Association Assessments are Debts Covered By Act

by Michael S. Karpoff

When we last reported on the Federal Fair Debt Collection Practices Act (FDCPA) eight years ago, the majority of trial courts who had considered the issue had ruled that community association assessments were not debts as defined by the Act and therefore were not subject to the Act. Thus, attorneys and others seeking collection of assessments may not have been obligated to comply with the Act. However, there was enough confusion on the issue to prompt a warning that property managers and attorneys who are involved in assessment collection comply with the requirements of the Act to protect themselves. That premonition has proved justified as the tide has turned. The majority of appellate and trial courts have since held that community association assessments are covered by the FDCPA.

Act Applies to "Debt Collectors"

Although association governing boards are not directly affected by the FDCPA, it is important for them to understand the procedures required, in order to avoid frustration over the timing of collection efforts. Congress adopted the FDCPA in 1977 to end abusive debt collection practices. It defines a "debt collector" as a person who conducts a business primarily for the collection of debts or who regularly collects debts owed to another. A "debt" for the purposes of the Act is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes." A "consumer" is "any natural person obligated or allegedly obligated to pay any debt."

The Act establishes certain restrictions and requirements for debt collectors. It limits what debt collectors may communicate to third parties while attempting to locate debtors, when and where a debt collector may contact a debtor, and where a debtor may be sued for collection. It also bars harassment or abuse, false or misleading representations, and unfair practices.

Notice Requirements Important

Of particular concern are the statute's notice requirements. It mandates that a debt collector provide a debtor with a written statement of the debt and the creditor's name within five days after the first communication. The debtor also must be advised that: (a) the debt will be deemed valid unless the debtor disputes the debt within 30 days after receipt of the notice; (b) the debt collector will provide verification of the debt if the debtor disputes the debt in writing within 30 days; and (c) the debt collector will provide the name and address of the original creditor, if different from the current creditor, upon written request made within 30 days. Each communication to the debtor must also disclose that it is from a debt collector, and the initial communication must state that the debt collector is attempting to collect a debt and any information obtained will be used for that purpose.

If within the 30-day period, the debtor notifies the debt collector in writing that he or she disputes the debt, requests verification, or requests the name and address of the original creditor, all collection efforts must cease until verification and the name and address of the original creditor are mailed to the debtor. The statute is liberally construed to protect the debtor, and alleged violations will be judged as viewed by the "least sophisticated consumer." Any statement by a debt collector which contradicts the required notices or which is likely to confuse the "least sophisticated consumer" constitutes a violation of the Act.

The actual creditor itself is not subject to these requirements. However, attorneys who regularly seek collection of debts are. Whether property managers are subject to the

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"…whether community association assessments are debts covered by the Act is important to attorneys and property managers engaged in collection and shapes the procedures they must use."

Unit Owners Bear Responsibility for Removing Amenities from Limited Common Elements to Allow Repair

by Terry A. Kessler

"…maintenance and repair of the unit is the responsibility of the unit owner while maintenance and repair of the general common elements falls upon the association."

Limited common elements can be a problem. The respective obligations of the unit owners and the association with respect to limited common elements are not always clear. Owners think of them as their exclusive property and often are responsible for maintenance, but associations need to be able to exercise control over them to assure proper maintenance and repair. As a result, tensions sometimes arise regarding the respective rights and obligations of unit owners and the association. However, a recent court decision has shed some light on this issue.

Limited Common Elements "Hybrids"

Under community association law, there are two primary types of ownership: (1) individual ownership of the unit, usually the interior components of the dwelling, and (2) common ownership by all unit owners collectively of the "common elements" in proportion to their respective interests as recited in the master deed or declaration. The term "common elements" can be comprised of both "general common elements" and "limited common elements." General common elements usually include the exteriors of the buildings, roofs, foundations, load bearing walls, stairs, and surrounding land, while limited common elements are those common elements which are designated by the master deed for the use of one or more specified units to the exclusion of other units, *e.g.*, terraces, balconies, decks, and patios.

It is well settled that maintenance and repair of the unit is the responsibility of the unit owner while maintenance and repair of the general common elements falls upon the association. Limited common elements are frequently treated as hybrids. Customarily, unit owners are responsible for maintaining, at their expense, areas designated as limited common elements appurtenant to their unit, and the association is responsible for structural repairs. However, it has been unclear whether the owner or the association is responsible to remove, store and replace unit owner personal property when necessary to effect repairs to the common elements. Recently, a trial court in Bergen County issued an opinion in *Greenhouse Condominium Association, Inc. v. Silverman* which provides associations and homeowners some guidance on this issue.

Responsibility for Removal of Owner's Property in Dispute

The Silvermans owned one of four penthouses located atop the high-rise Greenhouse Condominium in Cliffside Park. According to the master deed for the condominium, the Silvermans were permitted to use the adjacent terrace which is designated as a "limited common area." On the advice of a consultant, the association's board of directors contracted to replace the entire roof of the building due to leaks and attendant damage in apartments located on the floor just beneath the roof. In addition, based upon the advice of its engineer, the association adopted weight restrictions for items installed on the roof-top terraces. The manufacturer of the new roofing material recommended that all "personal belongings" of the penthouse-unit owners that were in place on the roof terraces be removed before construction.

Accordingly, the association notified all penthouse unit owners of the pending project and asked them to remove their possessions from the terraces which included a fountain, potted trees, drift wood and a platform. However, the Silvermans refused to remove their possessions unless the association assumed the cost and responsibility to remove, store, and return the items to their original locations.

Unit Owner to Bear Cost

Relying upon the New Jersey Condominium Act, the court found that the use of the terraces was limited and that the users—here, the Silvermans—were subject to the weight restrictions imposed by the association because the association controlled all common elements. The court held that the board acted on the considered recommendation of its expert and adopted reasonable weight regulations within its business judgment. The judge also concluded that the responsibility and cost for removal of the property lay with the Silvermans; reasoning that the Silvermans, in placing these items on the rooftop terraces with or without the acquiescence of the association, did so "with the implied understanding that if called upon to facilitate repairs to the area, they would remove the possessions." Thus, their placement was at the sufferance of, and subject to, the regulations of the association.

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SPOTLIGHT

NEW PARTNERS

Two senior associates of **Hill Wallack,** ***Marc H. Herman*** and ***Meridith F. M. Mason*** have been admitted to partnership. ***Marc H. Herman*** is now partner in the **Automotive Dealers Business & Liability Practice Group.** He has been with the firm since 1998. Mr. Herman's practice concentrates in every phase of automobile dealer representation from structuring the purchase or sale of dealerships to handling finance and real estate issues and every-day litigation. He represents numerous dealerships in class action litigation. A resident of Highland Park, NJ, Mr. Herman earned his law degree from Rutgers University, Newark and is admitted to practice in New Jersey. ***Meridith F. M. Mason,*** a senior civil litigation attorney is now a partner in the **Creditor's Rights/ Bankruptcy Practice Group.** She has been with the firm since 2000 and has a practice concentration in all matters of creditor's rights, including representation of secured and unsecured creditors in bankruptcy, workouts, foreclosure, replevin and collection matters. Ms. Mason earned her law degree from Brooklyn Law School and is admitted to practice in New Jersey and New York. Ms. Mason is a resident of Ewing, NJ.

Eric A. Abraham joins the firm as partner in the **Complex Litigation Practice Group.** Mr. Abraham will continue to practice business counseling and commercial litigation at the trial and appellate levels in both state and federal courts, representing corporations, partnerships and individuals. Mr. Abraham is a trial lawyer with significant experience with partnership and corporate conflicts, as well as complex contract disputes and construction litigation. He is also the Chairman of the Western Monmouth Utilities Authority. He earned his law degree from Seton Hall University School of Law, cum laude, and his B.A. from Franklin & Marshall College. A resident of Manalapan, NJ, he is admitted to practice in New Jersey, New York and Pennsylvania.

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NEW ASSOCIATES

Eric P. Kelner has joined **Hill Wallack** in its **Creditors' Rights/ Bankruptcy Practice Group.** Mr. Kelner concentrates his practice in all matters of creditors' rights and bankruptcy, including workouts, foreclosures, replevin actions and collections. A resident of Bridgewater, NJ, Mr. Kelner earned his law degree from Villanova School of Law and is admitted to practice in New Jersey and Pennsylvania.

Kenneth W. Thayer, III has joined the firm in its **Workers' Compensation Practice Group.** Mr. Thayer concentrates his practice in defense litigation and workers' compensation. A resident of Manalapan, NJ, he earned his law degree from Seton Hall University School of Law and is admitted to practice in New Jersey.

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APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner with **Hill Wallack** was appointed Municipal Court Judge in the Townships of Plainsboro and Cranbury in Middlesex County. Mr. Herman is a member of the firm's **Litigation Division** and partner-in-charge of the **Workers' Compensation Practice Group.** He is certified by the NJ Supreme Court as a workers' compensation expert. His principal area of practice is in the representation of major self-insured corporations, insurance companies and clients of third-party administrators in the defense of workers' compensation claims, as well as defense of tort liability, environmental litigation and automobile dealer litigation. He is also partner-in-charge of the firm's **Automotive Dealers Business & Liability Practice Group,** representing many of the state's largest automobile dealers. Mr. Herman has been practicing law for 35 years. He is a recognized authority throughout New Jersey on the law and the practice of workers' compensation matters. He has presided as Municipal Court Judge in Spotswood since 1987 and also serves as Municipal Court Judge in the Borough of Highland Park in Middlesex County.

Julie Colin, a partner with the firm and member of the **Litigation Division** and **Employment & Labor Law Practice Group** has been appointed to the New Jersey Defense Association Subcommittee on Employment Law. Ms. Colin concentrates her practice in employment law, personal injury including products liability, employment discrimination and premises liability with expertise in trial work including jury trials in defense litigation, personal injury commercial litigation and workers' compensation. A *cum laude* graduate of Seton Hall University Law School, she is a member of the New Jersey State and Mercer County Bar Associations. The New Jersey Defense Association establishes a communication link among New Jersey defense attorneys, full-time executives, managers or supervisory employees of insurance companies, self-insurers and other corporations who devote a substantial portion of their time to the defense of damage suits or to claims administration.

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SEMINARS

Gerard H. Hanson, a partner of **Hill Wallack,** where he is a member of the firm's **Litigation Division,** and partner-in-charge of the **Trial & Insurance Practice Group** was recently a featured speaker at the New Jersey Defense Association Seminar *"Insurance Coverage Issues Arising Out of Construction Defect Litigation"*. Mr. Hanson has a practice concentration representing insurance companies in defense of diverse claims. A graduate of Seton Hall University School of Law, Mr. Hanson is an active member of the Defense Research Institute and the New Jersey Defense Association. He is admitted to practice in New Jersey and before the U.S. District Court for the District of New Jersey, before the U.S. Court of Appeals for the Third Circuit, and before the U.S. Court of Military Appeals. He is an adjunct professor at Seton Hall University School of Law.

Rocky L. Peterson, a partner of the firm, where he is a member of the firm's **Litigation Division, Municipal** and **School Law Practice Groups** was recently a featured speaker at the National Business Institute Seminar *"School Law Issues in New Jersey"*. Mr. Peterson gave a presentation on Special Education, Ethics Issues and the continuing impact of the No Child Left Behind Act. A graduate of Cornell University, Mr. Peterson received a degree in law from Cornell University School of Law. Prior to joining **Hill Wallack** in 1984, Mr. Peterson was a Deputy Attorney General for the State of New Jersey. He is admitted to practice in New Jersey, before the U.S. Court of Appeals for the Third Circuit, and before the U.S. Supreme Court. A member of the New Jersey State Bar Association, he has served as chair of both the NJSBA Minorities in the Profession and Bar/Law School Liaison Committees.

Michael S. Karpoff, a partner of **Hill Wallack,** where he is a member of the firm's **Community Association Law Practice Group** was recently a featured speaker at the 26th Annual Community Association Law Seminar in New Orleans, sponsored by the Community Associations Institute (CAI). The Law Seminar focused on the topic *"Public and Media Relations for the Community Association Attorney"*. A resident of Highland Park, NJ, Mr. Karpoff discussed the applicable law and the ethical responsibilities of community association attorneys in presenting their clients' positions to third parties outside of the courtroom. Certified by the Supreme Court of New Jersey as a civil trial attorney, Karpoff is also a member of CAI's National College of Community Association Lawyers. He graduated from Rutgers College, holds a Master of Science degree in public relations from Boston University, and received his Juris Doctor degree from Rutgers Law School – Newark. He is admitted to practice law in New Jersey, New York and Pennsylvania as well as before the United States Supreme Court, the U.S. Court of Appeals for the Third Circuit, and the U.S. District Court for the District of New Jersey.

Stephen J. Hyland, a partner of the firm, where he is partner-in-charge of the firm's **Trusts & Estates Practice Group** was recently a featured speaker at the National Business Institute Seminar *"Find It Free and Fast on the Net: Advanced Internet Strategies for the New Jersey Legal Professional"*. Mr. Hyland gave a presentation on various ways to do legal research on the Internet. Mr. Hyland concentrates his practice on estate planning and administration, elder law and domestic partnership law. Besides authoring the new book, *"New Jersey Domestic Partnership: A Legal Guide,"* Mr. Hyland has published numerous articles on estate planning and domestic partnership law, privacy law, computer law and internet law, and is a frequent speaker on legal issues. He is an active member of various community and professional organizations, including the GLBT Rights Committee, the Real Property, Trusts and Probate Section, and the Elder Law Section of the New Jersey State Bar Association. Mr. Hyland graduated from Pennsylvania State University with a B.S. Degree in agriculture. Following a successful career as a software engineer and technology consultant, he embarked on a career in law, receiving his J.D. degree from South Texas College of Law in Houston, Texas. He is a resident of Titusville, NJ.

Wendy C. Cohen, a paralegal at **Hill Wallack,** where she is a member of the firm's **Litigation Division,** was recently a featured speaker at the Jewish Women International 2nd International Conference on Domestic Abuse *"Pursuing Truth, Justice and Righteousness: A Call to Action"*. Ms. Cohen, along with other members of the Project Sarah (Stop Abusive Relationships at Home) gave a presentation on Teen Dating Violence, teaching teens how to recognize non-healthy dating relationships. A graduate of University of Chapel Hill, North Carolina, Ms. Cohen is a resident of Lawrenceville, NJ. She is active in numerous professional and community organizations. She has recently been appointed to the Mercer County Commission for the status of women.

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Collecting Maintenance Fees: Does Publication of Delinquency Lists Cross the Line?

by Michael S. Karpoff

Monthly maintenance fees, common expense assessments, and proprietary rents are the lifeblood of common interest ownership communities. If a unit owner or cooperative tenant fails to pay monthly fees, the association suffers financial harm and the other owners bear the consequences. It therefore is no wonder that governing boards become frustrated with delinquent owners and look for ways to encourage them to pay the amounts owed. A frequent question is whether associations may publish the names of delinquent owners and the amounts they owe in association newsletters. However, such publication creates several risks to the association.

The motive behind publication is twofold – 1) to inform the community of the financial situation, that is, that income is deficient; and 2) to encourage delinquent owners to make their accounts current. With respect to the first reason, financial disclosure, at least one New Jersey court has held in an unpublished decision, that association members have the right to see account information of delinquent owners. However, because that case was rendered by a trial court and was not published, it does not constitute controlling authority. In addition, although association members clearly have the right to know how many unit owners are delinquent and how much is owed, disclosure of the specific names raises privacy issues.

Publication Requires Consideration of Applicable Law

Furthermore, unsolicited publication and distribution of the information by the association is different from a situation where an owner requests information. Such disclosure raises additional concerns related to the second reason for publication. Clearly, publishing the names of delinquent owners can embarrass and pressure them to pay their debts, which often is the real intent. That effect requires caution by the association.

Although the Fair Debt Collection Practices Act (FDCPA) does not prohibit such publication by the association, it may become an issue if the property manager is involved. The FDCPA does not restrict a creditor's attempts to collect its own debts and so would not prevent an association from publishing a list of its debtors. However, the Act may apply to property managers' attempts to collect debts for their clients. If the management company prints or distributes the newsletter, such a list may be deemed harassment or abuse, in violation of the FDCPA, and may subject the management company to action under the Act. (See the related article about the FDCPA in this issue.)

Even though the FDCPA does not restrict the association's actions, other laws may. For example, it is well-settled that community associations stand in a fiduciary relationship to their members. Such a relationship requires that the association act consistently within the structures of any enabling act and its own governing documents, and that its actions not be unconscionable. The association must act reasonably and in good faith in dealing with unit owners. Any publication that is either intended to or seems to result in the harassment of particular unit owners could call into question whether the association has breached its fiduciary duty.

"…Any publication that is either intended to or seems to result in the harassment of particular unit owners could call into question whether the association has breached its fiduciary duty."

Bankruptcy Must Be Considered

The association also must be aware of whether the unit owner has filed for bankruptcy. The Federal Bankruptcy Act requires that attempts to collect a debt cease if a debtor has filed a bankruptcy petition. A creditor may proceed against a debtor in bankruptcy only with permission of the bankruptcy court. If a unit owner has filed a petition for bankruptcy, publication of the owner's name on a delinquency list may be deemed a violation of the automatic stay provision, subjecting the association to penalties for contempt of court. On the other hand, publishing the names of some delinquent owners but not those who have filed for bankruptcy raises fairness issues and may be deemed unlawfully discriminatory.

Moreover, publication of delinquencies creates other risks to associations. For instance, if a unit owner's name is mistakenly included in the list although he or she paid the

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Common Ground: The Role of Architectural Control Committees in Maintaining a Common Scheme

by Andrew T. McDonald

One of the main reasons people decide to purchase and live in a property administered by an Association is the concept of "uniform appearance." The interests of the individual owners in Common Interest Communities in maintaining uniformity is apparent, as it pertains both to his or her home and to the surrounding homes.

Similarly, the Association representing the group of owners also has an interest parallel to the individual homeowners in the desire for long-term, widespread uniformity and quality. At the same time, the Association, as an enforcement agent, also has an interest in ensuring a procedurally appropriate and judicially understood system for design review. Over the years, the Association's design or architectural control committees have become significant parties in this process. This article discusses generally the role that Architectural Control Committees play in enforcing a common scheme and the interpretative questions that courts have grappled with regarding rules and procedures adopted by such committees.

Timeliness and Consistency Are Key

An important step in developing a procedure for dealing with architectural and environmental issues that often arise in Common Interest Communities is to adopt a policy that contains guidelines for the Association, its Board and its Committees. The developer partially administers this process during construction by creating a detailed and concise Public Offering Statement. Architectural guidelines of the Association should mirror the intentions of the developer, not only to contribute to organizing the process but also as a means of enhancing its validity and enforceability. As a general rule of thumb, the architectural guidelines should discuss the legal basis of the restriction, the objectives of the restriction, what must have approval of the Architectural Control Committee and what has been pre-approved by the Committee. Likewise, the guidelines should explain the procedures and the standards or criteria for approval. Applications made to the Architectural Control Committee should be processed fairly, consistently, in a timely manner, and in full compliance with the procedures set forth in the association manual.

One important consideration in testing the validity of a committee's action on an architectural control decision is whether the committee acted in a timely manner. In *Plaza Del Prado Condominium Association, Inc. v. Richman,* the association sued to require a unit owner to comply with certain architectural control provisions. The board sought the removal of porch railings that the defendant unit owners had constructed, which differed in color and material from the railings on other units. The defendants argued that they had the permission of the sales representative who had been on the site during the marketing period and her supervisor and, moreover, that one year had elapsed from the time that the defendants had erected the railing until the board had raised its objections. This delay, they argued, estopped the association from requiring removal.

The Florida Appeals Court determined that there was no uniformity in the exteriors of all units, and that other unit owners had made exterior changes. Moreover, based on authority originally granted by the developer, the sales representative's supervisor had the authority to approve architectural changes. Even were this not so, the court held that the board was under a duty to assert itself sooner, and that it was estopped from objecting to the railings after a year had passed.

However, in *Heritage Heights Home Owners Association v. Esser* and *Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Association,* the Arizona Appellate Court illustrated that subsequent actions to cure previously ignored violations are not prohibited, particularly when the enforcement body has changed, such as when control is transferred from the developer to the owners. The problem boils down to consistency, which can be affected by the developer's needs and market changes. Consistency can also be affected by lesser motives, such as inattention, unit owner control, the election of a different slate of directors, who seek consistently to enforce in the future all regulations that have been ignored in the past, or other such major alterations in the enforcement body.

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Common Ground... cont. *(continued from page 9)*

The difficulty arises when a board seeks to enforce previously-existing violations against a particular owner or to enforce for the first time covenants or restrictions that were previously ignored. Both instances have found judicial support, however, a board should not automatically assume that it is too late to require observance of the regulations. An architectural or environmental decision will be upheld unless the decision is unreasonable, arbitrary, or capricious. This rule applies to after-the-fact enforcement as well as to initial denials or enforcement. All of the facts and circumstances, including consistency and time delays, contribute to whether a decision is reasonable, arbitrary, or capricious.

Judicial Review of Architectural Committee Actions

What is the scope of judicial review? If the property owner is aggrieved by a decision of the design review body, the matter could wind up in court. Which rules should the court apply in testing the design committee's decision? May the court substitute its own judgment for the committee's? Does the court have sufficient information or are there intangible factors to support traditional deference to the committee? Should the court afford to the committee the degree of deference that is given to an administrative agency? If so, what process must the committee follow to justify such treatment?

In *Ironwood Owners Association IX v. Solomon,* owners of a unit appealed a judgment in favor of their Community Association, which granted an injunction to compel the removal of eight date palms from the owners' property. The trial court found that the owners had violated the governing documents of the association because they planted date palms without previously filing a plan with and receiving the approval of the association's design committee. Documents that set forth a detailed procedure for application and approval required the owners to obtain approval before making changes on their individually owned property.

The governing documents also contained specific standards for the appropriate committee to disapprove submitted plans. The court held that the governing documents required submission of landscape plans, and it interpreted the language broadly to include any substantial change in the structure or appearance of the buildings and the landscapes. Because there was no factual evidence bearing on the interpretation of the provisions of the governing documents, the appellate court held that interpreting the provisions was a question of law and upheld the trial court's decision on that point. However, the request for an injunction was "in effect, a request to enforce an administrative decision on its part," which presented matters of fact for the court to review.

The *Ironwood Owners* case is interesting because it reviews in some detail the administrative review procedure and the process that an association must afford an owner when reviewing submitted plans and specifications. The appellate court pointed out that "despite the Association's being correct in its contention that [the defendants] violated the governing documents while failing to submit a plan, more was required to establish its right to enforce the governing documents by mandatory injunction." The court held that the association must satisfy three steps: (1) the association must show that it had followed its own standards and procedures before pursuing the injunction; (2) the procedures must be shown to be fair and reasonable; and; (3) the association's substantive decision must have been made in good faith and reasonable, not arbitrary or capricious. The court pointed out that the governing documents "carefully and thoroughly provided for the establishment" of the committee and imposed on it "specifically defined duties, procedures and standards" to be followed in discharging its duties. The court was persuaded by the fact that the record disclosed that the committee had exhibited a "manifest disregard" for these procedures.

In a more recent case, *Bolandz v. 1230-1250 Twenty-Third Street Condominium Unit Owners Association, Inc.,* the District of Columbia Court of Appeals made it clear that court review of architectural approvals would be based on a "reasonableness" standard, not the more deferential "business judgment rule." Of particular interest in the *Bolandz* case is the court's observation that a decision of an association board is not unreasonable simply because a judge disagrees with it. Based on all the substantive and procedural facts, a court must decide the reasonableness of a decision. Architectural standards that are enforced "reasonably, uniformly, consistently, and in good faith," are most likely to survive judicial scrutiny.

Conclusion

It is clear from recent case law that in order for architectural regulations to be valid, they must (1) have been adopted in a good faith effort to further a community purpose, as evidenced by the documents and applicable statutes; (2) represent a reasonable means of advancing that purpose; (3) not run counter to superior documents; and (4) be enforced reasonably and consistent with public policy. Courts have repeatedly upheld the validity of architectural controls that have followed these guidelines. Precise standards and a uniform application of architectural controls can further assist a reviewing court. Associations seeking to enforce a common scheme must seek proper counsel to educate themselves in order to ensure that the architectural guidelines adopted have a legal basis, that they properly explain the objectives of the restrictions, and to provide an efficient review procedure. As always, the attorneys at **Hill Wallack** stand ready to assist condominium and homeowners associations facing these issues.

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Verdict In On FDCPA... cont. *(continued from page 4)*

Act is still in dispute. The Act exposes violators to payment of actual damages suffered by the debtor, additional damages of up to $1,000.00, and the debtor's costs and reasonable attorneys' fees. Mere negligence is not a defense. Rather, to escape liability, a debt collector must prove that the violation was not intentional, and that it resulted from a good faith error notwithstanding the maintenance of reasonable procedures to avoid such error. Therefore, whether community association assessments are debts covered by the Act is important to attorneys and property managers engaged in collection and shapes the procedures they must use.

Case Law Regarding Assessments Evolved

In 1987, the United States Court of Appeals for the Third Circuit, which encompasses New Jersey, Pennsylvania, Delaware and the Virgin Islands, held in *Zimmerman v. HBO Affiliate Group* that a debt within the meaning of the FDCPA is one involving the offer or extension of credit. Under that reasoning, where there has been no offer or extension of credit, the strictures of the Act do not apply. Relying upon that holding, several District Courts held that community association assessments were not debts subject to the FDCPA because the associations did not offer or extend credit to the homeowners. Other courts held that assessments were not debts because they did not involve a transaction for personal, family or household goods.

However, in 1997, in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.,* the Seventh Circuit Court of Appeals disagreed with the Third Circuit's holding in *Zimmerman,* concluding that no offer or extension of credit is necessary for a debt to be covered by the Act. Later that year, the Seventh Circuit held in *Newman v. Boehm, Pearlstein & Bright, Limited* that homeowner association assessments are debts within the meaning of the Act because they arise out of the purchase of the homes which are transactions for personal, family or household purposes. Since that time, the Eighth and Ninth Circuits also have rejected the Third Circuit's analysis, in *Duffy v. Landberg* and *Charles v. Lundgren & Associates, P.C.,* respectively. Furthermore, the Tenth and Eleventh Circuits, in *Ladick v. Van Gemert* and *Shimek v. Weissman Nowack, Curry & Wilco, P.C.,* respectively, have held that community association assessments are debts covered by the Act. So, too, have numerous District Courts throughout the country.

New Jersey Exception Unlikely

Because New Jersey is part of the Third Circuit, that court's holding in *Zimmerman* provides a potential argument for New Jersey practitioners that in the absence of an offer or extension of credit, there is no debt under the FDCPA. However, in light of the overwhelming contrary decisions throughout the country, that argument is less persuasive. Moreover, in 1999, in *Loigman v. King's Landing Condominium Association,* a New Jersey Superior Court judge held that condominium assessments are subject to the FDCPA. Therefore, the safest practice is to assume that assessment collection is covered by the Act and to comply with its requirements.

Property management companies may have an additional argument they are not bound by the FDCPA. Three published U.S. District Court cases—*Franceschi v Mautner-Glick Corp.; Alexander v. Omega Management Co.;* and *Berndt v. Fairfield Resorts, Inc.*—and an unpublished California appeals court case, *Bouzan v. Diedel,* have held that property managers are not debt collectors because they qualify for exceptions to the definition of debt collector. That is, debt collection is not the primary purpose of their business; they serve in a fiduciary capacity as the creditor's agent; or they acquired the right to collect the debts pursuant to contracts entered into before the debts were in default.

However, no New Jersey court has exempted property managers from the Act. Therefore, a property management firm who does not comply with the FDCPA in its collection efforts runs the risk that another court will disagree with these holdings. The better practice therefore is to avoid that risk by complying with the requirements of the Act.

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Unit Owners Bear Responsibility... cont. *(continued from page 5)*

Most notably, the court stressed that the terraces, and other similar limited common elements, were not the property of the individual penthouse owners, despite the owners' exclusive use of them. In this case, the Silvermans did not have an individual property right in the terrace except as owners in common with all other unit owners. They therefore could not assert dominion over the limited common element; except as granted them by the provisions of the master deed and in accordance with the rules and regulations adopted by the association. Ultimately, the Silvermans, were ordered to remove their possessions from the terrace at their own cost and by their own effort.

Thus, although unit owners have the exclusive right to use their respective limited common elements, that right is not absolute. If the association needs to repair a common element and that repair requires removal, storage and return of a unit owner's personal property located on a limited common element, the unit owner is solely responsible to arrange for, and pay for, the removal, storage and return of that property.

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Collecting Maintenance Fees... cont. *(continued from page 8)*

amount owed, that unit owner may have a cause of action against the association for defamation. Truth is a defense to a defamation action; negligence is not. On the other hand, even if the information published is true, an identified unit owner also may sue for invasion of privacy for public disclosure of embarrassing private facts. Although it is not clear whether a unit owner has a right to keep a delinquency private, the association's motive in publishing the information is likely to be scrutinized. If the association is found to have intended to shame or humiliate the owner, that action may be held to be an invasion of privacy.

Are All Delinquencies Equal?

Another potential issue is differentiation among delinquent owners. If a unit owner gets behind in payments because of severe medical bills or loss of a job, does that owner rate exposure, and hence, embarrassment, in the same manner as an owner who has no excuse or holds back payments because of a dispute with the association? Is a unit owner who is paying arrears in installments pursuant to an agreement with the association also subject to publication as being delinquent?

Governing boards may be willing to omit from the list owners who have good cause for getting behind or who are making efforts to pay the debt. However, judging what reasons justify delinquencies or what payment efforts are sufficient may create other difficulties, disputes, and even litigation. In addition, basing publication on the reasons for the delinquency or the owner's efforts to pay may constitute unlawful discrimination.

Delinquent assessments are a serious problem. Several remedies are available to associations, including private meetings with debtors, written reminders from management or the association, collection letters from attorneys, lawsuits to collect monies owed, and foreclosure. Publication of lists of delinquents may be an inexpensive substitute. However, before deciding to publish lists of delinquent owners, associations must weigh whether the benefit of publication outweighs the risks. Certainly, associations considering disclosure of individual unit owners' financial information should seek legal counsel to avoid potential liability.

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