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Cooperative, Condominium, and Homeowners' Association Litigation

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I. [10.1] INTRODUCTION

It is estimated that in the near future, the majority of privately owned residences in this country will be subject to recorded covenants administered by an association. There are three main types of residential associations: the cooperative (co-op), the homeowners' or townhome association, and the condominium association.

A. [10.2] Cooperative, Homeowners', and Condominium Associations

A cooperative can be a corporation or a trust set up to manage real property. Typically, it is one or more apartment buildings. Each purchaser becomes a shareholder, certificate holder in a corporation, or beneficiary of a trust, that holds the title to the real property. A proprietary lease that grants rights of occupancy to an apartment is executed, and each member is subject to the bylaws and house rules. The cooperative is administered by a board of directors or trustees. Cooperatives usually maintain control over who may purchase through the right of first refusal. Though tested time and again, this preemptive right is still permissible provided that it is not used for discriminatory purposes.

Homeowners' or townhome associations are planned developments of attached or detached housing in which individual owners of residential dwelling units or lots are subject to recorded covenants that run with the land, including a right to use certain portions of the property designated as common areas. While these associations are frequently referred to as Planned Unit Developments (PUDs), it is really a misnomer since a PUD is actually a zoning term. These associations are also known as "common interest communities." 765 ILCS 605/18.5. See also 735 ILCS 5/9-101, *et seq.*

A condominium creates an interest in real estate that consists of an undivided interest in a portion of the property held in common with other owners (common elements) plus a separate ownership interest in a space defined as a "unit," the boundaries of which are legally described on a recorded plat and in a recorded declaration. 765 ILCS 605/1, *et seq.* Most condominiums are residential, however, they can be commercial space, offices, warehouses, even docks.

Since the adoption of the Condominium Property Act in Illinois, 765 ILCS 605/1, *et seq.*, on January 20, 1963, there has been a virtual explosion of the condominium lifestyle. The condominium's older ancestors, the cooperative (co-ops) and homeowners' associations, have also become the subject of new statutory and court-ordered mandates.

For a small group of attorneys, their professional role now falls between that of "corporate counsel" and "city attorney." These lawyers are writing virtual "constitutions of lifestyle" for communities that range from sprawling retirement centers to young singles' townhouses in the suburbs. Fred Strasser, *Condo Groups: A Fertile Field For All*, Nat'l L.J. 7, (Jan. 14, 1985).

B. [10.3] Master Association

A master association acts as an umbrella to one or more residential associations. The Master Association also has a recorded declaration or other recorded covenants that creates the association with designated powers over one or more separate associations for the benefit of the unit owners. It is usually set up to control jointly shared facilities, including swimming pools, clubhouses, tennis courts, etc., or to maintain open space. 765 ILCS 605/18.5.

II. LEGAL AUTHORITY

A. [10.4] Statutes

In Illinois, in addition to covenants and bylaws, the legal authority for association operations also emanates from various statutes such as the General Not For Profit Corporation Act of 1986, 805 ILCS 105/101.01, *et seq.*, Article IX of the Code of Civil Procedure, 735 ILCS 5/9-101, *et seq.*, and the Condominium Property Act. 735 ILCS 605/18(n)(ii).

Since this entire body of law really began in the 1960s, each new case potentially refines and modifies existing concepts and constructive interpretations of statutes.

In Illinois, almost every year the legislature deals with a batch of proposed amendments to the Condominium Property Act. A great number of bills are proposed, new issues are addressed, some holes are plugged, and some sections are reevaluated and rewritten.

There have been efforts over the years to establish a Uniform Condominium Act (UCA) or even a Uniform Common Interest in Ownership Property Act (UCIOPA), but they have only been adopted in a limited number of states.

B. [10.5] Caselaw

One of the earliest Community Association cases in Illinois was *Gale v. York Center Community Cooperative, Inc.*, 21 Ill.2d 86, 171 N.E.2d 30 (1960) (abst.), which addressed the validity of unit resale restrictions. The right of first refusal, is contained in most cooperative charters, and ultimately became a standard provision of early condominium declarations. As the FHA and VA prohibit the right of first refusal as a condition of approval for government-backed mortgages, most contemporary draftsmen have phased it out of their documents. There are many who believe the right of first refusal to be practically unenforceable for a condominium association (Jordan I. Shifrin, *First Right of Refusal — Protection or Illusion?*, 74 Ill.B.J. 398 (1986)) or legally unenforceable if used for the wrong purposes. *See Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982) (association's exercise of right of first refusal racially motivated and constituted violation of both Civil Rights Act of 1966, 42 USC §1982, and Fair Housing Act, 42 USC §3601, *et seq.*).

The evolution of most of the caselaw in this area stems from an association's attempts to enforce its covenants.

There are currently a large number of appellate court decisions governing the board's power to maintain architectural and aesthetic control. There are also numerous cases citing issues of developer liability, board authority, association finances, etc.

Currently, the trend is toward reducing association litigation by encouraging alternative dispute resolution. Section 32 of the Condominium Property Act (765 ILCS 605/32) provides for mediation or arbitration of disputes not exceeding \$10,000 although it is not a mandatory procedure.

The number of cases filed is minimal in comparison to the relative numbers of people living in associations.

C. [10.6] Operating Documents

In order to create a cooperative, condominium, or homeowners' association, there must be a unanimous subscription to an underlying document by the owner of the property — a charter, bylaws, a trust agreement and/or proprietary lease (co-op), or a recorded set of covenants and bylaws that run with the land. Anything less creates a “voluntary” association in which membership is not mandatory and rules are not enforceable against nonmembers.

In order to create a condominium association, the association must follow statutorily prescribed requirements. By recording a declaration, plat, and building floor plan, a declarant submits the property to the provisions of the Condominium Property Act, 765 ILCS 605/4.1. Consequently, all owners of record are subject to these covenants, as well as all applicable statutes.

The procedure for creating a homeowners' or property owners' association is similar though not identical. The legal documents define: (1) which property is owned and by whom; (2) responsibilities of ownership; (3) rights of membership; (4) a system of protective standards; (5) management and maintenance; (6) election procedures; (7) means for financing association operations; (8) transition of control from developer to the members; and (9) amendment procedures. In addition to the more common types of developments with residential dwelling units situated on lots that are owned in fee simple and that are subject to recorded covenants, there are associations for “zero-lot line” communities, boat slips, recreational lots, etc., and leasehold communities where the dwelling unit or home is situated on a lot owned by a third party and leased for “99 years.”

The legal documents are the primary source for judicial enforcement of association rights, whether recorded covenants or association-adopted rules. One type of covenant that was prevalent in the 1970s and early 1980s is the right of first refusal. A key element in cooperative bylaws to limit rights of stock purchasers, the right of first refusal has consistently been upheld by the courts since *Gale v. York Center Community Cooperative, Inc.*, 21 Ill.2d 86, 171 N.E.2d 30 (1960). In practicality, the right of first refusal is difficult to administer on a day-to-day basis, and in the late 1980s it became increasingly less popular. Further, courts have begun to scrutinize the reasons behind a board's denying ownership rights. An additional area of board liability has now been created as a result of *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982), in which the court held that an association exercise of the right of first refusal was racially motivated and constituted a violation of the Civil Rights Act of 1966 and the Fair Housing Act. The association and the board were the subject of a sizeable judgment that was not covered by directors and officers insurance.

The proper exercise of the preemptive right was further elaborated on in *Wolinsky v. Kadison*, 114 Ill.App.3d 527, 449 N.E.2d 151, 70 Ill.Dec. 277 (1st Dist. 1983). Courts have held boards of directors accountable for arbitrary and capricious application of the right of first refusal, and now such boards must demonstrate good cause for any exercise of that right. For further detail, see Jordan I. Shifrin, *First Right of Refusal — Protection or Illusion?*, 74 Ill.B.J. 398 (1986).

To make the governing documents such as the Declaration and Bylaws, living and breathing documents, they need to be reviewed, revised, and amended from time to time.

The practitioner must determine whether it is a material change that requires a “super-majority of owners” to obtain approval, or whether it is a new policy modification which can be accomplished with a rule change. The test for condominiums is that whether it is a “material” change (see Section 27(b) Illinois Condominium Property Act, 765 ILCS 605/27(b)).

An amendment that grants an association practically unlimited power to assess lot owners which was contrary to the original intent of the contracting parties is invalid and unenforceable. *Armstrong v. The Hedges Homeowners Ass'n., et al.*, 633 S.E.2d 78, 360 N.C. 547 (2006).

D. [10.7] Rules and Regulations

At this point in time, any exercise of a right of first refusal would be subject to a “strict scrutiny” test; race, sex, age, family status, etc. It then would appear that the primary reason that this “preemptive” right can be legally used is financial. It is important for the board (and when warranted, the members) to develop effective rules for enforcement of community standards. The rules are the plan of day-to-day living in the association.

Certain fundamental steps are generally spelled out to create rules, which, in turn, assure effective compliance and enforcement procedures that are often limited by constitutional and statutory restraints (nondiscriminatory policies affecting disabled and handicapped persons, permitting satellite dishes within FCC guidelines, etc.). Associations must also specifically tailor their rules and the subsequent enforcement of those rules to meet the particular needs of the community.

The typical declaration and bylaws are generally deficient in providing specific information about the requirements of day-to-day living at the property or are written in undecipherable legalese. Further, since the declaration and bylaws usually require a two-thirds or three-fourths majority of all owners to approve any amendments, it is not practical to incorporate laundry room hours, garbage pickups, swimming pool rules, etc., into the recorded covenants when modifications are so difficult and cumbersome to obtain.

Therefore, most governing documents and, in the particular instance of condominiums, the Condominium Property Act authorize the board of directors

[t]o adopt and amend rules and regulations covering the details of the operation and use of the property, after a meeting of the unit owners called for the specific purpose of discussing the proposed rules and regulations. Notice of the meeting shall contain the full text of the proposed rules and regulations, and the meeting shall conform to the requirements of Section 18(b) of this Act, except that no quorum is required at the meeting of the unit owners unless the declaration, bylaws or other condominium instrument expressly provides to the contrary. However, no rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution . . . nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments. 765 ILCS 605/18.4(h).

The rules and regulations are a significant source of authority for the board because they govern the daily operation of the association. The rules and regulations should interpret the declaration and bylaws and have the same force and effect as an ordinance for a municipality, which is also governed by the federal and state constitutions, as well as statutes of the federal, state, and county authorities.

Rules and regulations must (1) conform to the governing documents and statutes and (2) contain no illegal provisions.

The rules and regulations of an association are only as good as the efforts of the board to enforce them. Effective enforcement requires the education of all present and future residents as to the content of the rules, as well as the procedures for enforcement, such as fines and legal action. An association should make copies readily available at a nominal charge, and all new residents, whether tenants or owners, must receive a current copy and should acknowledge receipt in writing, which the association should keep on file.

Pertinent sections should be reproduced and posted at the appropriate places on the property (swimming pool rules at the pool, laundry rules in the laundry rooms, etc.).

The association must have a specific, detailed procedure for enforcing rule infractions, whether it is by warnings, arbitration proceedings, denial of privileges, fines, etc. The procedure must be set forth in precise detail. Paramount to imposition of any punishment are notice and an opportunity to be heard:

The powers and duties of the board of managers shall include, but shall not be limited to, the following:

* * *

(l) To impose charges for late payment of a unit owner's proportionate share of the common expenses, or any other expenses lawfully agreed upon, and after notice and an opportunity to be heard, to levy reasonable fines for violation of the declaration, by-laws, and rules and regulations of the association. 765 ILCS 605/18.4(l) (condominium associations); 765 ILCS 605/18.5(c)(7) outlines the authority of master associations and common interest communities with respect to rule enforcement.

Associations and their legal counsel, are solely entitled to collect any fees and costs from collection actions. Section 9.2(c) of the Illinois Condominium Property Act, 765 ILCS 605/9.2(c), provides that no fees by the property manager can be charged back to a delinquent owner unless it is expressly agreed to by contract and is expressly stated in the Declaration.

Once an association assumes police powers, it must afford the accused due process. By affording all accused rule violators an opportunity for a fair and impartial hearing, an association can avoid accusations of being "arbitrary and capricious." The courts are reluctant to side with associations that do not provide for notice and due process. An association should adopt basic administrative procedures for all hearings on rule infractions and the imposition of fines.

After an association sends notice and holds a hearing, the board should vote on the matter at the next open meeting. Thereafter, the board should send a written finding to the accused.

The enforcement procedures should specify a schedule of fines, suspension of privileges, legal remedies, and other details, including an admonishment that the guilty party will be responsible for the association's costs and legal fees in the event legal proceedings are warranted.

The rules and regulations are in many instances given weight and authority equal to the recorded covenants. In *Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa*, 287 Ill.App.3d 886, 679 N.E.2d 407, 223 Ill.Dec. 222 (1st Dist. 1997), the Illinois appellate court held that the board of directors of a condominium association had the power to issue reasonable rules prohibiting the keeping of dogs on the premises. While it was once thought that a vested property right could be modified

only by an amendment to the declaration, the court considered adopted rules and regulations to the same level of “condominium instruments” as a recorded declaration or bylaw, so long as they meet certain tests of fundamental fairness, property values, best interests of the association, etc.

An area of frequent contention is the right of an association to ban leasing. Since the 1970s, courts across the country have upheld the right of an association to amend its covenants to bar investor owners. However, it always came down to a question of amending the covenants because courts considered the issue one of a “vested property right.” Again, in *Apple II Condominium Ass’n v. Worth Bank & Trust Co.*, 277 Ill.App.3d 345, 659 N.E.2d 93, 213 Ill.Dec. 463 (1st Dist. 1995), the Illinois appellate court permitted an association to adopt a rule change to override a covenant. In this case, the association banned the leasing of units without amending the declaration. Although rule changes will come under strict scrutiny and courts will hold such changes to a higher standard, courts have permitted amendments under certain tests. The cases discussed in §10.7 above are examples of how an association must carefully draft and then adopt its rules and regulations in accordance with proper procedure in order for a court to uphold their enforceability. For further details, see Jordan I. Shifrin’s No-Leasing Restrictions on Condominium Owners: The Legal Landscape, *Illinois State Bar Journal*, February 2006.

III. [10.8] COVENANT ENFORCEMENT

The underlying documents, usually characterized as a declaration, are the covenants running with the land. Each owner purchases an interest in a unit or lot subject to these covenants. Sometimes these covenants become outdated due to changes in the law. For example, although historically associations have been able to ban satellite dishes through the restrictive covenants or their rule-making authority, such authority has changed since the FCC’s adoption of §207 of the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56. Essentially, a restriction on direct broadcast receiving equipment (dishes) one meter or less in size is void when the owner has exclusive use and ownership of the property. In summary, property owner associations, townhome associations, etc., cannot impose a restriction on the installation of an 18-inch dish on an owner’s lot or in areas where the owner has exclusive use and control. An association must show that any restriction does not impair installation, maintenance, or use of an over-the-air reception antenna or that safety or historic preservation justifies the restriction. *See In re Holliday*, 14 F.C.C.R. 17,167 (1999), in which it was held that an association could not enforce its rules to prohibit a homeowner who maintains his own balcony, and thus has exclusive use of it, from maintaining a satellite dish. Such a rule is unenforceable, and the owner is entitled to exclusive use of the balcony. *See In re Frankfurt*, 12 F.C.C.R. 17,631 (1997). An association board can prohibit installation on the association’s maintained amenities only when a condominium or association has exterior maintenance responsibility on dwelling units.

When reviewing much older covenants, one must be cognizant of restrictions that prohibit certain activities, races, nationalities, etc. from owning property. These types of restrictions would be considered unconstitutional and void against public policy.

In a decision by the Illinois appellate court, *Greenwood Park Condominium Ass’n v. Shah*, No. 01-01-2993 (1st Dist. June 23, 2003) (Rule 23), which affirmed the Circuit Court of Cook County decision, No. 98CH13042, the court determined that the use of articles of agreement (contract sale) to get around the restrictions of a validly adopted amendment to eliminate leasing was a “sham” transaction and in violation of association policy.

Many Declarations of Covenants, for example, prohibit owners from running a business of renting out rooms. In *Colony Hill v. Ghamaty*, 143 Cal.App. 4th 1156, 50 Cal.Rptr.3d 247 (2006), the California Appellate Court found that this activity did violate the covenants.

IV. [10.9] DISCLOSURE OF DOCUMENTS AND RECORDS

Section 107.75 of the General Not For Profit Corporation Act states:

Each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors; and shall keep at its registered office or principal office a record giving the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any member entitled to vote, or that member's agent or attorney, for any proper purpose at any reasonable time. 805 ILCS 105/107.75.

Correspondingly, the Condominium Property Act compels the board of managers to maintain the following records: declaration, bylaws, amendments, articles of incorporation, annual reports, rules and regulations, receipts and expenditures of the association, copies of contracts, leases, minutes, and such other records as are required by the General Not For Profit Corporation Act. 765 ILCS 605/19. 765 ILCS 605/18.5(d) details the responsibility of master associations and common interest communities to maintain records.

Therefore, it is a duty imposed by law upon an association to provide broad accessibility to association records. This is, in effect, a two-fold obligation, as the board of directors ultimately is responsible for reasonable access to the books and records, as well as being vicariously liable for its manager or agent hired for the purpose of maintaining them.

Under the Condominium Property Act, when a proper request is made for documents following the "availability for examination" provisions under §19 or for the disclosure upon resale provisions of §22.1, the board has a duty to make the necessary disclosure as required by statute. In *Miller v. St. Charles Condominium Ass'n*, 141 Ill.App.3d 834, 491 N.E.2d 125, 96 Ill.Dec. 311 (2d Dist. 1986), when an association was advised by counsel to deny a request for an "assessment" letter upon the resident's sale of her condominium, the association attorney was viewed to have taken a malicious posture with intent to "annoy or injure" the other party, and both the association attorney and the association were held liable for sanctions and attorneys' fees.

However, in spite of the appearance of unlimited accessibility, the association can still impose certain reasonable restrictions to maintain control of the situation such as the stating of a "proper purpose". Initially, the law imposes a similar if not far greater duty on public bodies for citizen access to public records. Federal and state statute, as well as the Constitution of the State of Illinois, guarantee this right.

Under §19 of the Condominium Property Act (and §107.75 of the General Not For Profit Corporation Act), the association has the burden of producing records that are not specifically enumerated when the owner can demonstrate a proper purpose even when the board is still controlled by the developer. Concern over association actions in collecting assessments from delinquent owners was found to be a proper purpose for which another owner was entitled to inspect the association's delinquent

reports. *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 221 Ill.App.3d 742, 583 N.E.2d 14, 164 Ill.Dec. 460 (1st Dist. 1991).

Consistent with an individual's right to privacy and applicable law, the following records may not be made available without the express written consent of the board of directors:

- a. minutes of executive sessions;
- b. minutes of administrative hearings pertaining to the imposition of fines, late fees, or other punitive disposition;
- c. personnel records;
- d. interoffice memoranda;
- e. litigation files; and
- f. preliminary data and information of investigations that have not been formally approved by the board of directors, such as contractor bid prospects.

In addition, records may not be made available without written consent of the board when

- a. disclosure would violate a constitutional or statutory provision or applicable public policy;
- b. disclosure could result in a discernable harm to the association or any of its members;
- c. disclosure might result in an invasion of personal privacy or a breach of confidence or privileged information;
- d. disclosure would unreasonably interfere with or disrupt the operation of the association; and
- e. access might result in a private harm or damage that would outweigh the right to access.

The association is under no obligation for any additional information other than that which is required by law. Caselaw will further define what is disclosable and what is confidential.

V. [10.10] COLLECTION OF DELINQUENT ASSESSMENTS

The payment of assessments required by the governing documents is essential for the operation of an association in order to fund all services. A number of different remedies are available as are outlined elsewhere in this chapter. Often, clients will question whether essential services such as heat or water can be denied a delinquent owner for nonpayment. Many declarations and bylaws allow a board to deny privileges such as use of the facilities, voting in elections, or running for the board. However, whether essential services can be withheld has not been tested in Illinois, although it has been upheld in other jurisdictions.

First, denying essential services could open the door to the issue of “offset” as a defense for nonpayment if an owner is unhappy with the services. Second, several cases do address this issue. See *Western v. Chardonnay Village Condominium Ass’n*, 519 So.2d 243 (La.App.1988), in which a condominium association was denied the right to shut off water to a delinquent owner. However, in *San Antonio Villa Del Sol Homeowners Ass’n v. Miller*, 761 S.W.2d 460 (Tex.App. 1988), the Texas appellate court held that the association did have the power to shut off water because the right was expressly set forth in the governing documents. Covenants running with the land that spell out specific remedies, even though harsh, are given greater weight by reviewing courts than implied or inherent powers.

Severe restrictions have been imposed on debt collectors in the industry-wide practice of collecting delinquent assessments as a violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692, *et seq.*

In *Vosatka v. Wolin-Levin, Inc.*, No. 94 C 4129, U.S. Dist. LEXIS 10415 (N.D.Ill. July 21, 1995), the federal district court held that condominium fees were not “debt” within the definition of the FDCPA and, as a result, it did not apply to collection procedures. Other jurisdictions have concurred with this opinion since the condominium fees were not deemed to be the extension of credit. *Azar v. Hayter*, 874 F.Supp. 1314 (N.D.Fla. 1995), *aff’d*, 66 F.3d 342 (11th Cir. 1995); *Archer v. Beasley*, No. 90-2576 (CSF), 1991 U.S. Dist. LEXIS 2994 (D.N.J.Mar. 5, 1991). However, two additional cases in the Seventh Circuit Court of Appeals (*Riter v. Moss & Bloomberg, Ltd.*, No. 96 C 2001, 2000 U.S. Dist LEXIS 14470 (N.D.Ill. Sept. 26, 2000), and *Newman v. Boehm Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997)) challenging this interpretation reversed the holding in *Vosatka* and found that condominium assessments were considered “debt” under the FDCPA.

In *Cohen v. Beachside Two -1 Homeowners Ass’n*, No. 05-706 ADM/JSM, 2006 U.S. Dist. LEXIS 44978 (D.Minn. June 29, 2006), the U.S. District Court held that if all the statements made by the defendants were true then the Association was entitled to a “common interest qualified privilege” regarding its communication even to the extent of reporting the delinquents’ debt in the minutes. Thus, there was no basis for a Fair Debt Collection Practices claim.

In *Knolls Condominium Ass’n v. Czerwinski*, 321 Ill.App.3d 916, 748 N.E.2d 1259, 255 Ill.Dec. 189 (2d Dist. 2001), the Illinois appellate court upheld an association’s right to use a stamp, an electronic signature, or anything reasonably understood to manifest the signer’s intent to execute a 30-day notice or other legal documents in a case to collect delinquent assessments.

In an FDCPA case, the Seventh Circuit held that even though a debt collector technically violated the FDCPA by sending a debt collection letter after the debtor filed bankruptcy, it was a “bona fide” error due to inadvertence, which is an affirmative defense. *Hyman v. Tate*, 362 F.3d 965 (7th Cir. 2004).

A. [10.11] Lien Rights

When a unit owner fails to pay either the outstanding assessments in a timely manner or otherwise make arrangements for payment within a specific time frame with the board, the association can record a notice of lien against the delinquent’s unit. Liens are permissible for condominiums pursuant to §9(g)(1) of the Condominium Property Act as well as by most declarations of both condominium and homeowners’ associations.

If any unit owner shall fail or refuse to make any payment of the common expenses or the amount of any unpaid fine when due, the amount thereof together with any interest, late

charges, reasonable attorney fees incurred enforcing the covenants of the condominium instruments, rules and regulations of the board of managers, or any applicable statute or ordinance, and costs of collection shall constitute a lien on the interest of the unit owner in the property prior to all other liens and encumbrances, recorded or unrecorded, except only (a) taxes, special assessments and special taxes theretofore or thereafter levied by any political subdivision or municipal corporation of this State and other State or federal taxes which by law are a lien on the interest of the unit owner prior to preexisting recorded encumbrances thereon and (b) encumbrances on the interest of the unit owner recorded prior to the date of such failure or refusal which by law would be a lien thereon prior to subsequently recorded encumbrances. Any action brought to extinguish the lien of the association shall include the association as a party. 765 ILCS 605/9(g)(1).

A lien for common expenses shall be in favor of the members of the board of managers and their successors in office and shall be for the benefit of all other unit owners. Notice of the lien may be recorded by the board of managers, or if the developer is the manager or has a majority of seats on the board of managers and the manager or board of managers fails to do so, any unit owner may record notice of the lien. Upon the recording of such notice the lien may be foreclosed by an action brought in the name of the board of managers in the same manner as a mortgage of real property. 765 ILCS 605/9(h).

The recording of a notice of lien is recommended for three reasons: (1) in the event of a mortgage foreclosure, the association's interest will be of record, and, since the association must be named as a party defendant, the association can be included in the final order of foreclosure; (2) subsequent lienholders will also be required to take subject to the association's previously recorded assessment lien and may have a lesser priority and (3) in the event of a bankruptcy, although the personal obligation may be dischargeable, the association's lien against the real estate is fully enforceable whether in a Chapter 7 liquidation or in a Chapter 13 reorganization.

Prior to recording a lien, a tract book search or title search should be performed to verify ownership, prior encumbrances, recent conveyances, lienholders of record, etc. Upon verification of the foregoing, a properly prepared lien form and notice of filing should be recorded with the county recorder, and copies should be sent to the delinquent as well as his or her first mortgagee.

There is a debate as to the distinction between a lien for unpaid assessments and the "duty to pay" a debt. In *Highland Lakes Country Club & Community Ass'n v. Farnzino*, 186 N.J. 99, 892 A.2d 646 (N.J. 2006), the court held that a purchaser at a foreclosure sale, other than the lender, still had to pay the delinquent amounts owed even though the lien filed by the association was extinguished by the foreclosure, because the account was still "in arrears" and the unpaid or overdue debt itself remained unpaid. The extinguishment of the lien is not fused to the right to collect the underlying debt.

However, in the event the first mortgage is foreclosed and there are buyers at the sheriff's sale, the lien on the mortgage holder being superior to the assessment line, allows for the foreclosure to extinguish the association's lien, and subsequent purchasers obligation to pay assessments on the first day of the month following the sheriff's sale. 765 ILCS 605/9(g)(3).

However, in 2006, the Illinois Condominium Property Act was amended (765 ILCS 605/19(g)(4), (g)(5)) to provide that a purchaser of a unit other than the mortgagee shall pay the assessments and legal fees owed.

B. [10.12] Assessment Lien Foreclosures

The only method of enforcing a lien to actually collect the money is by the filing of an action in foreclosure. A complaint is prepared and filed in the county in which the property is located, a summons is placed with the sheriff, and all lienholders and parties with any ownership interest and creditors of record are notified by personal service or constructively by publication. The end result is the sale of the delinquent unit at a sheriff's sale, when the association or other qualified purchasers must pay off the association's lien, as well as all prior encumbrances, *e.g.*, the first mortgage. Lien foreclosures may be filed subject to the first mortgage, as is the case of a mechanics lien. There is currently no Illinois caselaw or statutory authority that establishes procedures to govern association assessment lien foreclosures. The necessary analogies must then be made to the Illinois mortgage foreclosure law and Illinois mechanics lien foreclosures.

By initiating an action to foreclose an assessment lien, the association must order "Minutes of Foreclosure" from a title company in order to identify all necessary parties to the litigation. A complaint similar to a mechanics lien foreclosure is filed, a summons is placed with the sheriff, and a notice of foreclosure must be published for all owners and lienholders of record or those who may claim an interest. As in the case of a mechanics lien foreclosure, an assessment lien foreclosure can proceed subject to mortgages and encumbrances of record.

Upon obtaining an order of foreclosure, the local sheriff then will be directed to sell the property at public sale. At the expiration of the period of redemption (30 days after date sale is confirmed), the purchaser at the sale then obtains title subject to all prior liens, *e.g.*, first mortgage, IRS liens, real estate taxes, etc. Though permitted to bid by §9 of the Condominium Property Act (765 ILCS 605/9), both condominium and homeowners' associations are often restricted from bidding at sheriffs' sales without the express approval of a large percentage of homeowners. If the association is the highest bidder at the sale, it becomes the owner of the unit.

C. [10.13] Suit for Monetary Judgment

The obligation to pay assessments is also a personal obligation set forth in the covenants running with the land, which can be pursued through a breach of contract action. The amounts in controversy are generally within the small claims framework of most counties. A complaint and summons are filed alleging that the debtor owes the association unpaid common expenses plus all costs and attorneys' fees. Upon obtaining service of process on all named defendants, a personal judgment then can be obtained against the delinquent homeowner upon proper proof, which then would be enforceable just as any other monetary judgment. Wage garnishments, citations to discover assets, etc. then can be filed in order to liquidate the judgment. Some of the practical problems that may arise follow:

1. Judgments may be entered for a specific sum, but each month the actual amount owed continues to increase. From the date of filing the lawsuit itself until a judgment is obtained, several months may pass. One should always be prepared to serve notice and amend the ad damnum on the complaint prior to proceeding to trial or prove-up or, in the alternative, be prepared to accept a judgment amount for less than the actual sum owed. The court shall award attorneys' fees, late fees, interest, and costs incurred by the association. 765 ILCS 605/9(g)(1). A memorandum of judgment should be recorded in the County where the property is located so that the "judgment lien" is of record.

2. Once a judgment is obtained, as in the case of any other ordinary collection matter, the delinquent may prove to be "judgment-proof," and, thus, the amount becomes uncollectible.

3. Once a judgment is obtained and the delinquent pays the judgment amount in full, the delinquent can obtain a release.

Since many courts are reluctant to award an order of possession in an action for forcible entry and detainer for late fees, fines, or other charges that do not include delinquent assessments, seeking a monetary award through a small claims proceeding may be the preferable way to proceed on these items.

D. [10.14] Actions in Forcible Entry and Detainer

While some consider the foreclosure procedure in Illinois cumbersome, the preferred remedy in Illinois is an action in Forcible Entry and Detainer:

In the event of any default by any unit owner in the performance of his obligations under this Act or under the declaration, bylaws, or the rules and regulations of the board of managers, the board of managers or its agents shall have such rights and remedies . . . including the right to maintain an action for possession against such defaulting unit owner . . . for the benefit of all the other unit owners in the manner prescribed by Article IX of the Code of Civil Procedure. 765 ILCS 605/9.2(a).

Any attorneys' fees incurred by the association arising out of a default by any unit owner or the owner's tenant, invitee, or guest in the performance of any of the provisions of the condominium instruments, rules and regulations, or any applicable statute or ordinance shall be added to and deemed a part of that owner's respective share of the common expense.

By virtue of filing a "forcible," the association is seeking possession only of the delinquent unit although the delinquent still retains title and is obligated to continue paying his or her mortgage. Most associations use eviction as a remedy in order to secure possession of the property. 735 ILCS 5/9-102(a)(7) provides:

The person entitled to the possession of lands or tenements may be restored thereto under any of the following circumstances:

* * *

(7) When any property is subject to the provisions of the Condominium Property Act, the owner of a unit fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or of any other expenses lawfully agreed upon or any unpaid fine, the Board of Managers or its agents have served the demand set forth in Section 9-104.1 of this Article in the manner provided for in that Section and the unit owner has failed to pay the amount claimed within the time prescribed in the demand. 735 ILCS 5/9-102.

Thus, not only are unpaid assessments fully collectible, but also late charges, fines, damages, and other fees due are collectible as well.

Pursuant to §9-104.1 of the Forcible Entry and Detainer statute (735 ILCS 5/9-101, *et seq.*), a 30-day notice and demand for possession must be served before an action is filed. The demand shall be served either personally or by certified mail with return receipt requested to the last known address of the

unit owner or, if no one is in actual possession, then by posting the notice on the premises. The statute does not require “delivery” of the notice, the mere act of “sending” is legally sufficient. After the 30 days has expired, a complaint in Forcible Entry and Detainer is filed (See §10.26 below) in the county where the property is located, and a forcible entry and detainer summons is placed with the sheriff (See Cook County Form CCM N081, available online at www.cookcountyclerkofcourt.org). After filing the action, waiting for service, and arrival of the return date, if there is a return of “no service,” the association has the option of either reattempting service with an “alias summons” either through the sheriff or a special process server, or using constructive service, also known as a notice by posting. See Cook County Form CCG 0013 available at www.cookcountyclerkofcourt.org, 735 ILCS 5/9-107.

The association can then obtain an Order of Judgment for Possession pursuant to §9-110. “[T]he court shall stay the enforcement of the judgment” for a period of 180 days nor less than 60 days from the date the judgment was entered. 735 ILCS 5/9-110, subject to the discretion of the court.

Upon obtaining a judgment for possession and once the stay of the Order of Possession expires, the order can be placed with the Sheriff to evict any occupants from the premises, just as in the case of rental evictions. The tendering by the delinquent of less than payment in full at any time does not prohibit the association from continuing with all proceedings.

An action brought under paragraph (7) of subsection (a) of Section 9-102 of this Act is neither barred nor waived by the action of a Board of Managers in accepting payments from a unit owner for his or her proportionate share of the common expenses or of any other expenses lawfully agreed upon for any time period other than that covered by the demand. 735 ILCS 5/9-106.1.

If the association has commenced the action in a timely fashion and obtains physical possession, it can then secure a tenant and rent out the unit. Section 9-104.2(c) provides that if the owner is a landlord, the association can notify his tenant to begin paying rent to the association under the existing lease arrangement. If the tenant fails to comply, that tenant, too, can be evicted. Actions in forcible entry and detainer can also be used to elicit delinquent assessments from master and homeowner association residents by nature of §9 102(a) of the Illinois Code of Civil Procedure, 735 ILCS 5/9-102(a)(8).

E. [10.15] Collection of Attorneys’ Fees

The collection of attorneys’ fees is mandated by statute and by most declarations that provide for collection of fees upon the breach of any of the covenants that ultimately requires legal action. Since a declaration is a covenant running with the land, the courts often attempt to award the association only what the judge believes to be “reasonable” fees. 765 ILCS 605/9(g)(1) provides for the collection of reasonable attorneys’ fees incurred in enforcing the covenants. If proper documentation is presented to the court through an itemized attorney’s fee affidavit, the judge should enter an order for the entire amount.

The courts often view fees as a cost of doing business for the association, and one cannot overemphasize the need to convince the judge that the majority of innocent, rule-abiding homeowners are subsidizing the delinquent and that all fees expended should be collectible through the pending action. Further, many owners are on limited or fixed incomes and they should not be required to fund any deficiencies caused by a delinquent who is not required to pay the full amount. Recently, courts have enforced the collection of attorneys’ fees for homeowners’ associations, even when not expressly stated in the declaration, as long as that right is spelled out in the rules and regulations and the rules have been

adopted in accordance with the declaration. It is good practice for counsel to prepare an affidavit of actual time spent in order to support any request for an award of fees.

One should also be aware of a number of relevant cases, including *Board of Managers, Colony West Townhome Owners Ass'n v. Bucalo*, 69 Ill.App.3d 287, 387 N.E.2d 53, 25 Ill.Dec. 596 (3d Dist. 1979), and *Board of Managers of Dunbar Lakes Condominium Ass'n II v. Beringer*, 94 Ill.App.3d 442, 418 N.E.2d 1099, 50 Ill.Dec. 105 (1st Dist. 1981), in which Illinois appellate courts have authorized the collection of fees equal to or even in excess of the amount in controversy if the complexity of the case so warrants. It is important to (1) document one's time and (2) try to set one's fees for collection in conjunction with amounts that are customarily awarded in like cases in the same jurisdiction. *Forest Glen Community Homeowners Ass'n v. Bishop*, 321 Ill.App.3d 298, 746 N.E.2d 1285, 254 Ill.Dec. 237 (2d Dist. 2001), confirms the principle that even if the attorneys' fees exceed the amount sought to be recovered, once a board properly establishes assessments, the owners are obligated to pay them and the owners owe the association reimbursement of attorneys' fees and costs.

Sometimes as a defense to a collection action, a delinquent owner will attempt to argue that he or she has withheld assessments because of deficient or a lack of services. Defective conditions in a unit and disagreements with board decisions do not allow unit owners to withhold payment of assessments. *In re Abbady*, 629 N.Y.S.2d 6 (1995). See also *Park Place Estates Homeowners Ass'n, v. Naber*, 35 Cal.Rptr.2d 51 (1994).

F. [10.16] Mortgage Foreclosures

The rights of the mortgage holders of record are spelled out in the declaration. Also, the Condominium Property Act provides:

(1) If any unit owner shall fail or refuse to make any payment of the common expenses or the amount of any unpaid fine when due, the amount thereof together with any interest, late charges, reasonable attorney fees incurred enforcing the covenants of the condominium instruments, rules and regulations of the board of managers, or any applicable statute or ordinance, and costs of collections shall constitute a lien on the interest of the unit owner in the property prior to all other liens and encumbrances, recorded or unrecorded, except only (a) taxes, special assessments and special taxes theretofore or thereafter levied by any political subdivision or municipal corporation of this State and other State or federal taxes which by law are a lien on the interest of the unit owner prior to preexisting recorded encumbrances thereon and (b) encumbrances on the interest of the unit owner recorded prior to the date of such failure or refusal which by law would be a lien thereon prior to subsequently recorded encumbrances. Any action brought to extinguish the lien of the association shall include the association as a party.

(2) With respect to encumbrances executed prior to August 30, 1984 or encumbrances executed subsequent to August 30, 1984 which are neither bonafide first mortgages nor trust deeds and which encumbrances contain a statement of a mailing address in the State of Illinois where notice may be mailed to the encumbrancer thereunder, if and whenever and as often as the manager or board of managers shall send, by United States certified or registered mail, return receipt requested, to any such encumbrancer at the mailing address set forth in the recorded encumbrance a statement of the amounts and due dates of the unpaid common expenses with respect to the encumbered unit, then, unless otherwise provided in the declaration or bylaws, the prior recorded encumbrance shall be subject to

the lien of all unpaid common expenses with respect to the unit which become due and payable within a period of 90 days after the date of mailing of each such notice. 765 ILCS 605/9(g)(1), 605/9(g)(2).

In *Citicorp Savings of Illinois v. Bhatti*, 173 Ill.App.3d 170, 527 N.E.2d 424, 122 Ill.Dec. 926 (1st Dist. 1988), the court held that the lien of the first mortgage is superior to the assessment lien of a condominium association. The lender is not liable for pre-foreclosure assessments.

When an association is named as a party defendant in a suit to foreclose a mortgage, trust deed, or other financing instrument, the association should respond in order to protect its interests. A proper response would include an “Answer to the Complaint,” an “Affidavit of the Attorney for Fees,” and a “Lienholder’s Certificate.”

Unless there is a basis to challenge the proceedings, the rights of the parties will be adjudicated expeditiously. Because of priorities of lien structure, an association carrying a delinquent balance on a unit that is in foreclosure is entitled to collect assessments from a first mortgagee only from the first day of the month following a sheriff’s sale. 765 ILCS 605/9(g)(3). However, in the event of a defect in service of process, omission of the association as a necessary party, a surplus, an intervening bankruptcy, etc., an association that has protected its rights may have a chance to recoup delinquent assessments from the foreclosure purchaser at the sheriff’s sale.

The purchaser of a condominium unit at a judicial foreclosure sale, or a mortgagee who receives title to a unit by deed in lieu of foreclosure or judgment by common law strict foreclosure or otherwise takes possession pursuant to court order under the Illinois Mortgage Foreclosure Law, shall have the duty to pay the unit’s proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale, delivery of the deed in lieu of foreclosure, entry of a judgment in common law strict foreclosure, or taking of possession pursuant to such court order. Such payment confirms the extinguishment of any lien created pursuant to paragraph (1) or (2) of this subsection (g) by virtue of the failure or refusal of a prior unit owner to make payment of common expenses, where the judicial foreclosure sale has been confirmed by order of the court, a deed in lieu thereof has been accepted by the lender, or a consent judgment has been entered by the court. 765 ILCS 605/9(g)(3).

Lien priorities can be established by the court based on statutory interpretation, timeliness and propriety of notice, and express language in the governing documents. While the condominium association declaration constitutes a covenant running with the land subject to the mortgagee’s interests, the association’s lien for common expenses does not relate back to the date the declaration is recorded. The lien of the first mortgagee has a priority over the assessment lien. The “statutory lien” under the Act is for unpaid common expenses “when due,” and prior recorded mortgages take priority. Section 9(k), amended in 1984, states, “Nothing in Public Act 83-1271 is intended to change the lien priorities of any encumbrance created prior to August 30, 1984.” 765 ILCS 605/9(k); *St. Paul Federal Bank for Savings v. Wesby*, 149 Ill.App.3d 1059, 501 N.E.2d 707, 103 Ill.Dec. 390 (1st Dist. 1986).

In the event the foreclosure is not contested, the association should arrange to have its lien included in the judgment of foreclosure, which may necessitate a court appearance although sometimes it can be provided by agreement with counsel for the plaintiff. In the event the property has a sizeable amount of equity, the association should consider either buying the unit outright at the sheriff’s sale or appearing in order to bid the amount of its lien, so that a third-party purchaser would have to pay enough

money to purchase the property in order to pay off superior liens, such as the first mortgage and the association's unpaid assessments. Many declarations require an association to obtain the approval of its owner-members prior to purchasing a unit at a sheriff's sale.

If the association is unwilling or unable to bid, the first mortgagee generally will purchase the property for the amount of its lien and will only become obligated to pay future assessments commencing with the first day of the month following the sheriff's sale. 765 ILCS 605/9(g). All unpaid assessments owed prior to the sale are either the personal obligation of the original owner or must be written off if deemed to be uncollectible from the owner.

G. [10.17] Bankruptcies

When an association is notified of the filing of a personal bankruptcy (Chapter 7 or Chapter 13), an automatic stay is in place until a discharge is entered, a plan is approved, or the case is dismissed. Many practitioners erroneously believe that the association can take no further action until one of these two events occurs.

In *In re Rosteck*, 899 F.2d 694 (7th Cir. 1990), the court held that any attempts to collect delinquent or post-petition assessments from the bankrupt would result in the association's being held in violation of the automatic stay and in contempt of court. Under the statutory definition of "debt," even future assessments are dischargeable debts. However, by distinguishing between the personal obligation that is dischargeable based on *In re Rosteck* versus the in rem action as set forth in 735 ILCS 5/9-107, which is not dischargeable, the association can preserve its rights and has a higher likelihood of collecting the delinquent balance.

Initially, upon receipt of a bankruptcy notice, all collection action must cease based on the entry of an automatic stay until the bankruptcy case is adjudicated. Thereafter, a proof of claim should be filed with the court and sent to the attorney for the bankrupt. This form is available online at www.uscourts.gov/bankform/formb10new.pdf.

After communicating with the attorney for the bankrupt in order to arrange for an agreement to prioritize the lien in a Chapter 13 proceeding or reaffirm through a payment plan under a Chapter 7 bankruptcy, a motion to modify the stay should be filed. Once the motion is granted and an order is entered, the association can proceed to enforce its lien rights by proceeding with an action in forcible entry and detainer against the property.

The association can take action against the property itself (in rem), and a judgment can be obtained that, in effect, allows the association to obtain possession. Considering that the primary objective of most bankrupt people is to save their homes, once a motion to modify the stay has been filed, an amicable resolution often can be worked out before a hearing. The discharge of a Chapter 7 does not discharge a lien for past due assessments. *Westbrooke Patio Homes Ass'n. v. Goodrich*, 607 N.W.2d 455 (Minn.App. 2000).

VI. SUITS AGAINST THE ASSOCIATION

A. [10.18] Personal Injury

Some of the most common actions filed against an association are personal injury actions, primarily slip-and-fall cases. These types of matters come within the scope of ordinary liability coverage, and the case should be tendered to the carrier for defense. A condominium association, like any other property owner, owes a duty of ordinary care to all persons and is liable for personal injuries when it breaches that duty. *Altszyler v. Horizon House Condominium Ass'n*, 175 Ill.App.3d 93, 529 N.E.2d 704, 124 Ill.Dec. 723 (1st Dist. 1988). However, a condominium board of managers, as a fiduciary of unit owners, is not liable in tort for breach of the fiduciary duty to the owners, even when there is a duty to maintain the property and exercise due care. *Robinson v. La Casa Grande Condominium Ass'n*, 204 Ill.App.3d 853, 562 N.E.2d 678, 150 Ill.Dec. 148 (4th Dist. 1990). In *Tressler v. Winfield Village Cooperative, Inc.*, 134 Ill.App.3d 578, 481 N.E.2d 75, 89 Ill.Dec. 723 (4th Dist. 1985), the appellate court found that a property owner is liable for negligence for a breach of a covenant to remove snow only when it is shown that the owner failed to use due care in performing his duty under the covenant. In this case, the cooperative was found to have acted reasonably.

In another decision, an association's location of a playground slide on an asphalt surface did not create a "dangerous situation," and defendants owed no duty as a matter of law to a child who was permitted to play unsupervised on a slide that posed an obvious risk. *Alop v. Edgewood Valley Community Ass'n*, 154 Ill.App.3d 482, 507 N.E.2d 19, 107 Ill.Dec. 355 (1st Dist. 1987).

In the area of mold remediation, there has been extensive litigation. It is a condominium association's duty to maintain and repair the common elements, and interior damage or repairs are the responsibility of the unit owner.

In *Caracci v. Cobblestone Village Condominium Ass'n*, 927 So. 2d 542 (La.App. 2006), the owner, claiming water and mold damage, sued the board for not acting quickly enough to remediate the problem. The court found that the board and the manager could only be liable if their management or non-feasance of the mold problem was bad faith and willful and wonton misconduct and the evidence did not support such a claim.

At association board/owner meetings tempers sometimes flare, and people say things that are regrettable or even actionable. In *Barner v. Kroehle*, 2006 Ohio 5569 (App., 2006), the president was alleged to have defamed an owner by calling him a "deadbeat". The court held that the statement did not constitute defamation because they were either true or a constitutionally protected opinion.

B. [10.19] Breach of Fiduciary Responsibility

Codifying decades of caselaw in 1984, §18.4(q) of the Condominium Property Act (765 ILCS 605/18.4(q)) was amended to provide that members of the board of directors are fiduciaries on behalf of the members of the association. This necessitated the addition of §18(g), which requires associations to obtain fidelity insurance for any directors, employees, or agents who are directly responsible for the handling of association funds. The term "fiduciary" has been expanded, however, by both recent cases and common usage, to monitor most board activities. For example, a condominium board of managers' proper exercise of its fiduciary duties requires strict compliance with the bylaws. *Wolinsky v. Kadison*, 114 Ill.App.3d 527, 449 N.E.2d 151, 70 Ill.Dec. 277 (1st Dist. 1983).

As a matter of common law, officers and board members of nonprofit associations also owe a fiduciary or quasi-fiduciary duty to association members; they must act in a manner reasonably related to exercise of that duty, and failure to do so will result in liability for both the association and individual

officers and directors. *Schweickart v. Powers*, 245 Ill.App.3d 281, 613 N.E.2d 403, 184 Ill.Dec. 376 (2d Dist. 1993).

In every matter, from board election results to examination of association records, board members must act prudently and judiciously in carrying out their duties as directors. A director of an association is held to the “sound business judgment” standard of any corporation. As this field of law continues to grow, a skilled litigator can draft pleadings that take directors outside the scope of their insurance coverage and declaration indemnification provisions. These provisions have been held to absolve individual board members from liability for breach of fiduciary duty unless it is proven that they are guilty of willful misconduct. *Kelley v. Astor Investors, Inc.*, 123 Ill.App.3d 593, 462 N.E.2d 996, 78 Ill.Dec. 877 (2d Dist. 1984). See Louis S. Harrison and Eric L. Marhoun, *Protection for Unpaid Directors and Officers of Illinois Not For Profits: Fact or Fictio?*, 79 Ill.B.J. 172 (1991). The court will look at the specific facts of each case beyond the obvious instances of fraud, financial mismanagement, intentional torts, etc.

An area ripe for accusation of breach of fiduciary duty is the area of association elections. Particulars such as propriety of electioneering by directors, proxy formats, and timeliness of notice are addressed in *Adams v. Meyers*, 250 Ill.App.3d 477, 620 N.E.2d 1298, 190 Ill.Dec. 37 (1st Dist. 1993). For example, a board of directors can adopt rules limiting the use of a proxy to the prescribed form adopted by the board. *Wymbs v. Conashaugh Lakes Community Ass’n*, 151 Pa.Cmwlth. 216, 616 A.2d 749 (1992).

Although the question remains open as to the extent of a developer’s liability for serving on the board prior to homeowner control, in *Raven’s Cove Townhomes, Inc. v. Knuppe Development Co.*, 114 Cal.App.3d 783, 171 Cal.Rptr. 334 (1981), it was determined that a much broader standard than that in *Kelley* should be applied.

Although the scope of the fiduciary duty can be limited by the express language of the declaration, such as an exculpatory clause, the failure of a board to act in a reasonable manner related to its overall fiduciary duty to the members can result in liability for the board of directors as a whole, as well as for the individual directors. *Carney v. Donley*, 261 Ill.App.3d 1002, 633 N.E.2d 1015, 199 Ill.Dec. 219 (2d Dist. 1994). However, exculpatory clauses generally are not favored and are strictly construed and must have clear, explicit, and unequivocal language. *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill.App.3d 154, 510 N.E.2d 409, 109 Ill.Dec. 541 (1st Dist. 1986).

The area of board members’ liability for breach of fiduciary responsibility constituting constructive fraud was propounded in *LaSalle National Trust, N.A. v. Board of Directors of 1100 Lake Shore Drive Condominium*, 287 Ill.App.3d 449, 677 N.E.2d 1378, 222 Ill.Dec. 579 (1st Dist. 1997).

The precise definition of “constructive fraud” springs from the knowing and willful breach of the board’s fiduciary duty. When a court finds that the board has been guilty of acts or omissions constituting gross negligence or fraud, a court may be inclined to find the board guilty of “constructive fraud” as well.

Members of a board of directors must act judiciously when conducting a “closed” or executive session. The contents of those discussions that are contained in the minutes of an executive session are discoverable except for the portions protected by attorney-client privilege. *Wilstein v. San Tropai Condominium Master Ass’n*, 189 F.R.D. 371 (N.D.Ill. 1999).

Another common area of dispute between owners and directors leading to allegations of breach of fiduciary duty is access to association records. Section 19 of the Illinois Condominium Property Act provides for a list of records owners can review. In order to curtail fishing expeditions that waste the

board's time and to limit the ability of dissident owners to harass a board, parties seeking to inspect the records must first demonstrate a "proper purpose." *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 221 Ill.App.3d 742, 583 N.E.2d 14, 17, 164 Ill.Dec. 460 (1st Dist. 1991). However, failure to provide for a requested inspection of association financial documents can result in sanctions being entered against the board and an award of attorneys' fees. *Tagher v. Wesley*, 343 Ill.App.2d 1140, 799 N.E.2d 377, 278 Ill.Dec. 659 (1st Dist. 2003).

C. [10.20] Civil Rights/Fair Housing Violations

Defending causes of action for alleged civil rights violations is often specifically excluded from directors and officers insurance coverage, and the most common instances occur in actions of alleged discrimination involving either (1) the Fair Housing Amendments of 1988 or (2) state human rights statutes. In addition, the adoption of the Americans with Disabilities Act of 1990 (ADA), Pub.L. No. 101-336, has raised questions of applicability to all multifamily and community associations. As of this writing, the ADA has not been applied to associations since the "public areas" of an association are still deemed private property limited to association members and their guests.

However, the Fair Housing Amendments Act of 1988 (Amendments), Pub.L. No. 100-430, prohibits discrimination against people based on family status or handicapped status and has resulted in restrictive qualifications on what constitutes a bona fide "senior citizen" community. Although the Amendments were designed to prevent discrimination, there must be reasonable cause. For example, it was held that the enforcement of a "two person per bedroom" rule did not violate the Fair Housing Amendments. *Far Ooqui v. Sibley Real Estate, U.S. Dept. of HUD #02-92-0160-1*, Attorneys Title Guaranty Fund Newsletter (May 1994).

Associations must be cautious in dealing with its residents who have special needs, so as to not be guilty of discriminatory practices. The following discussion outlines several decisions regarding allegations of discrimination by an association.

Marthon v. Maple Grove Condominium Ass'n, 101 F.Supp.2d 1041 (N.D.Ill. 2000), involved a resident who suffered from Tourette's Syndrome, allegedly causing a noise disturbance, and who was sent notices by the association regarding excessive noise. The resident sued the association for harassment, discrimination, and violation of the Fair Housing Amendments Act of 1988 after the association tried to evict him. Although the case ultimately settled, the federal district court refused to dismiss the case as a matter of law and held it over for trial.

In *Fairfield House Condominium Ass'n, Inc. v. Chang*, No. CV 99-0172200, 2000 WL 1022854 (Conn.Super. July 13, 2000), it was held that the association would not be granted injunctive relief to restrain an owner suffering from autism from making disturbing noises.

On the issue of parking for disabled individuals, the Cook County Commission on Human Rights (Commission) ruled that an association was guilty of failing to provide "reasonable accommodation" for a disabled owner by refusing to convert an open parking space behind the complainant's town house for disabled use, even though to do so would require the consent of the unit owners. The Commission felt the most reasonable accommodation was to grant the owner's request to convert one of the open spaces to a disabled space for the use of any owner who needed handicapped parking. *Pace v. Board of Managers of Courts of Randview Townhome Ass'n*, Cook County Commission on Human Rights No. 1996H009 (1999).

D. [10.21] Covenant Disputes

There is a better than likely chance that an association initiating legal action to enforce its covenants and/or rules with a lawsuit will be met with stiff resistance or possibly a counterclaim. The association should be prepared to document the history and paper flow in each instance. The board must make sure its policy is objective, evenhanded, nondiscriminatory, and applied uniformly to all residents. Restrictive covenants will always be strictly construed to give the benefit of the doubt to the aggrieved owner. A case often hinges on the specificity of the covenant or rule being enforced and the issue of notice and fair application.

Once a case is properly documented, the association should prevail. Numerous matters covered by the covenants such as those that follow often have to be enforced by court order.

Commercial Use of a Residential Unit. An association can bar the operation of a day care center/baby-sitting service as a violation of the declaration, and the owner will also be liable for the payment of the association's costs and attorneys' fees. *Board of Managers of Village Square I Condominium Association v. Amalgamated Trust & Savings Bank*, 144 Ill.App.3d 522, 494 N.E.2d 1199, 98 Ill.Dec. 872 (2d Dist. 1986).

In *Gerber v. Hamilton*, 276 Ill.App.3d 1091, 659 N.E.2d 443, 213 Ill.Dec. 527 (5th Dist. 1995), the Illinois appellate court found that a beauty salon is a commercial business and that the court will not ignore the explicit language of restrictive covenants prohibiting the operation of a business out of one's home.

Parking Regulations. The court held that the association was entitled to a mandatory injunction to uphold a restrictive covenant barring the parking of a boat on the property in *Forest Glen Community Homeowners Ass'n v. Nolan*, 104 Ill.App.3d 108, 432 N.E.2d 636, 59 Ill.Dec. 850 (2d Dist. 1982). See also *Fairwood Greens Homeowners Ass'n, Inc. v. Young*, 26 Wash.App. 758, 614 P.2d 219 (1980).

In *Stuewe v. Lauletta*, 93 Ill.App.3d 1029, 418 N.E.2d 138, 49 Ill.Dec. 494 (1st Dist. 1981), the developer of a condominium building granted an owner a lease with a covenant for a parking space that was part of the common elements. After the owners took control of the association, it challenged the parking space lease, and the court upheld its position, contending that the specific language of the declaration required approval of all owners before the common elements could be diminished. See also *Sawko v. Dominion Plaza Condominium Ass'n No. 1-A*, 218 Ill.App.3d 521, 578 N.E.2d 621, 161 Ill.Dec. 263 (2d Dist. 1991).

Also, a board can exceed its authority by adopting parking rules and regulations that discriminate against nonresident owners. *Thanasoulis v. Winston Towers 200 Ass'n*, 110 N.J. 650, 542 A.2d 900 (1988).

Architectural Control. When a dispute arose over whether a flower box installed on an owner's patio constituted a structure, the court ruled that the condominium association had the authority to interpret its own declaration and restrictions reasonably by employing the test of either reasonableness or business judgment and had the authority to seek the removal of the flower box. *Yorkshire Village Community Ass'n v. Sweasy*, 170 Ill.App.3d 155, 524 N.E.2d 237, 120 Ill.Dec. 472 (3d Dist. 1988).

Frequently, an association may be required to contend with a defense of laches for waiting too long to enforce its covenants. An association did not waive its right to enforce architectural control

provisions by allowing shutters to remain on the exterior of a unit and by allowing two prior conveyances of the unit. *Bogardus v. Zinkevicz*, 134 N.H. 527, 596 A.2d 722 (1991).

Antennas. A declaration prohibiting condominium unit owners' construction of certain structures was sufficient notice to owners to prohibit installation of a ham radio antenna. *Monday Villas Property Owners Ass'n v. Barbe*, 75 Ohio App.3d 167, 598 N.E.2d 1291 (1991). *See also Perry v. Spavale*, 828 S.W.2d 709 (Mo.App. 1992).

Structures. Construction of a storage structure violated a residential covenant prohibiting erection of buildings other than detached single-family dwellings and private attached two-car garages. *Simcox v. Obertz*, 791 S.W.2d 440 (Mo.App. 1990).

E. [10.22] Mechanics Liens

A common problem faced by an association member is the situation involving a dispute between an association and a contractor and the contractor's attempt to record a mechanics lien against the association to recover money due. A third-party purchaser who purchases a condominium unit prior to the recording of a lien is not protected under §9.1 of the Condominium Property Act. 765 ILCS 605/9.1. However, a third-party purchaser is protected under §1 or §7 of the Mechanics Lien Act. 770 ILCS 60/0.01, *et seq.* A contractor must record a lien within four months of completing work (a subcontractor, within three (3) months), on the individual condominium units in order to give third parties proper notice of the claim for lien. *Edward Electric Co. v. Automation, Inc.*, 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987).

Section 9.1 of the Condominium Property Act sets out the obligations of both the association and the individual owners in protecting themselves from contractors' liens in the event a unit is being sold or refinanced. See 765 ILCS 605/9.1.

As a practical matter, when a unit owner is selling his or her home with a mechanics lien recorded against it, a title company administering a closing can either (1) request the purchaser or seller to post a bond in the amount of one and one-half times the percentage of ownership divided into the amount of the total lien or, the better approach to take when the association has a bona fide dispute with the contractor, (2) have the association execute a hold-harmless agreement by which the association agrees to assume all responsibility for the claim so the transaction can close without the unit owner posting any cash and it does not prejudice the association's right to adjudicate a bona fide dispute.

F. [10.23] Condemnation

Frequently, units of local government, state agencies, or even federal departments commence condemnation proceedings to expand roadways, install utilities, or expand/build modern facilities for sewer or water, etc. Procedures for condemnation are set forth in the Condominium Property Act as follows:

The unit owners' association shall be named as defendant on behalf of all unit owners in any eminent domain proceeding to take or damage property which is a common element and which includes no portions of any units or limited common elements. The association shall act therein on behalf of all unit owners. Nothing contained herein shall bar a unit owner or mortgagee or lienholder from intervening in the eminent domain proceeding on his own behalf. 765 ILCS 605/9.3.

Additionally, as stated in section 9.4:

After receipt of summons in an action to take or damage a common element, the unit owners' association shall provide to the plaintiff a list of the unit owners, mortgagees and lienholders, and the plaintiff shall provide notice by certified mail to the unit owners, mortgagees and lienholders.

The notice shall include the following:

- (1) case name and number and jurisdiction in which the case is filed;**
- (2) date of filing;**
- (3) brief description of the nature of the case;**
- (4) description of the property being damaged or taken;**
- (5) statement that the unit owner may petition the court to intervene; and**
- (6) statement that the mortgagee or lienholder may petition the court to intervene.**

An immaterial error in providing notice shall not invalidate the legal effect of the proceeding. 765 ILCS 605/9.4.

Often, the governing documents provide for extensive easements for utility companies or units of local government. However, when the easement does not exist, the result is condemnation proceedings. As always, when there is a conflict between the operating documents and the statute, the statutory provisions govern.

G. [10.24] Towing

If an association has any likelihood of ever being sued, it will arise from this type of activity. People's "wheels" are more precious to some than their children.

In *King v. Chism*, 632 S.E.2d 463 (Ga. App. 2006), an owner sued his association alleging unlawful towing of his vehicle. The alleged illegal act constituted the unlawful deprivation of and unlawful interference with his property as well as trespass, theft and bad faith.

The court held that the association had the authority under state law and the declaration to create a rule that allowed it to remove vehicles from the common areas.

VII. [10.25] ACTIONS BY THE ASSOCIATION VS. THE DEVELOPER

It has long been established that the implied warranty of habitability extends to residential construction (*Petersen v. Hubschman Construction Co.*, 76 Ill.2d 31, 389 N.E.2d 1154, 27 Ill.Dec. 746 (1979); *Herlihy v. Dunbar Builders Corp.*, 92 Ill.App.3d 310, 415 N.E.2d 1224, 47 Ill.Dec. 911 (1st Dist.

1980)), as well as to condominiums. *Tassan v. United Development Co.*, 88 Ill.App.3d 581, 410 N.E.2d 902, 43 Ill.Dec. 769 (1st Dist. 1980).

The courts have upheld the proposition that defective construction is actionable when the defect “may be found to interfere with a purchaser’s legitimate expectation that the structure be reasonably suited for its use as a residence.” *Supra, Herlihy*, 415 N.E.2d at 1228.

However, in *Board of Directors of Bloomfield Club Recreation Ass’n v. The Hoffman Group, Inc.*, 186 Ill.2d 419, 712 N.E.2d 330, 238 Ill.Dec. 608 (1999), the Illinois Supreme Court affirmed an appellate court decision not to expand the liability for construction defects under the theory of implied warranty of habitability to “free-standing recreational building(s),” notwithstanding the fact that in *Briarcliffe West Townhome Owners Ass’n v. Wiseman Construction Co.*, 134 Ill.App.3d 402, 480 N.E.2d 833, 89 Ill.Dec. 351 (2d Dist. 1985), the same circuit applied the implied warranty of habitability to vacant common land when serious storm drainage problems affected association property.

In conversion properties, the court has held that a developer of a condominium conversion project is not liable under the doctrine of implied warranty of habitability if the conversion of the existing property does not involve substantial renovation and the defects would not be latent. *Kelley v. Astor Investors, Inc.*, 106 Ill.2d 505, 478 N.E.2d 1346, 88 Ill.Dec. 620 (1985).

The purchaser of a new condominium also can waive the right to pursue recovery for latent defects under the theory of implied warranty of habitability. The waiver arises out of an agreement that contains a disclaimer that must be conspicuous and fully disclose the consequences of its inclusion. *Country Squire Homeowners Ass’n v. Crest Hill Development Corp.*, 150 Ill.App.3d 30, 501 N.E.2d 794, 103 Ill.Dec. 477 (3d Dist. 1986); *Carl Sandburg Village Condominium Ass’n No. 1 v. First Condominium Development Co.*, 197 Ill.App.3d 948, 557 N.E.2d 246, 145 Ill.Dec. 476 (1st Dist. 1990).

Developers can also be held liable under the theory of consumer fraud when it is proven that the developer had knowledge of the defects and, when threatened with litigation, the developer made short-term repairs that were unsuccessful and continued to sell units to consumer purchasers even though the developer knew the problem still existed. *Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 267 Ill.App.3d 790, 643 N.E.2d 199, 205 Ill.Dec. 248 (1st Dist. 1994).

A landmark case in the area of developer liability as a fiduciary while controlling the association prior to turnover is *Maercker Point Villas Condominium Ass’n v. Szymiski*, 275 Ill.App.3d 481, 655 N.E.2d 1192, 211 Ill.Dec. 809 (2d Dist. 1995). In *Maercker Point Villas*, the association sued the developer for failing to fund reserves properly and pay expenses while controlling the board. The court held for the association and established the precedent that the developer’s fiduciary duty begins when the declaration is recorded. In order to determine when a declaration has been officially recorded, the court will accept as proof the testimony and evidence of a reserve study.

The extent of a developer’s fiduciary duty was further expanded in *Seven Bridges Courts Ass’n v. Seven Bridges Development, Inc.*, 306 Ill.App.3d 697, 714 N.E.2d 601, 239 Ill.Dec. 682 (2d Dist. 1999), and *Board of Managers of Weathersfield Condominium Ass’n v. Schaumburg Ltd. Partnership*, 307 Ill.App.3d 614, 717 N.E.2d 429, 240 Ill.Dec. 336 (1st Dist. 1999). Once and for all, the court has said that a developer, while controlling the association, is prohibited from enhancing his or her own personal interests at the expense of the association. Developers have a fiduciary duty to calculate, abridge, collect, and set aside reserves for future capital expenditures.

Declaration of [Condominium] [Covenants] for the _____ Association (Declaration), recorded with the Office of the Recorder of _____ County, Illinois.

2. Defendants are the legal owners of the property commonly known as [property address], which is subject to the terms and conditions of the Declaration.

3. Article _____, Section _____, of the Declaration provides that each unit owner must pay to the Association monthly and special assessments and other common expenses and further provides that if an owner fails to pay these assessments, the Board shall have the power to maintain an action in forcible entry and detainer against the unit owner. A copy of Article _____, Section _____, of the Declaration is attached hereto and made a part hereof as plaintiff's Exhibit A.

4. Pursuant to Article _____, Section _____, of the Declaration and Sections 9-102 and 9-104.1 of the Illinois Code of Civil Procedure, 735 ILCS 5/9-102 and 5/9-104.1, plaintiff has the legal right to utilize the remedy of Forcible Entry and Detainer in order to collect the foregoing unpaid assessments, and plaintiff sent or caused to be sent to defendants a Demand for Possession dated _____, 20__, by certified mail with return receipt requested to the last known address of defendants. A copy of the Demand is attached hereto and made a part hereof as plaintiff's Exhibit B.

5. Article _____, Section _____, of the Declaration and Section 9-111 of the Illinois Code of Civil Procedure, 735 ILCS 5/9-111, further provides that defendants shall be responsible for payment of plaintiff's costs, late charges, interest, and reasonable attorneys' fees incurred in the bringing of this action.

6. Defendants have failed to pay common expenses as required in the Declaration in the amount of \$_____. This amount is inclusive up to the date of filing this action.

7. Despite plaintiff's demand on defendants, defendants have failed and refused and continue to fail and refuse to pay to plaintiff the aforementioned amounts. Pursuant to Section 9-111 of the Illinois Code of Civil Procedure, 735 ILCS 5/9-111, plaintiff is entitled to possession of the unit.

8. Defendants unlawfully withhold possession from plaintiff.

9. Plaintiff has credited any and all payments received from defendants to the unpaid balance of defendants' account in accordance with Section 9-106.1 of the Illinois Code of Civil Procedure, 735 ILCS 5/9-106.1.

10. There is due to plaintiff from defendants, after deducting all payments made to date by defendants, the sum of \$_____, plus costs, interest, and attorneys' fees.

11. Additional assessments, late fees, costs, and attorneys' fees have accrued up to and through the court date.

WHEREFORE, Plaintiff Association requests the Court to enter judgment in its favor and against defendants [unit owner] and All Unknown Occupants as follows:

A. For possession of Unit _____, commonly known as [property address], as against defendants [unit owner] and All Unknown Occupants.

B. For a judgment for unpaid common expenses, including late charges, interest, and fines in the sum of \$_____, plus any and all assessments, late charges, interest, and fines that accrue subsequent to the filing of this action and remain unpaid to date on the account of Unit _____, commonly known as [property address].

C. For an award of court costs and attorneys' fees in the amount of \$_____, plus any additional amounts sought and proven at the trial of this cause and awarded by the court as an additional judgment.

D. For an order directing defendants' tenant (if any) to pay rent directly to plaintiff to satisfy this judgment order.

E. For such further relief as the Court deems appropriate.

_____ ASSOCIATION

By: _____
One of its Attorneys

[name, address, and telephone
number of law firm]

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

VERIFICATION

The undersigned, being first duly sworn on oath, deposes and says that he is the agent of the plaintiff in the above Complaint, and that the facts pled in the Complaint are true to the best of his knowledge.

By: _____
Attorney for Plaintiff

Subscribed and sworn to before me
this _____ day of _____, 20__.

Notary Public