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LEGISLATIVE UPDATE

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In the past few months, the Legislative Action Committee of CAI has been part of amicus curiae efforts which advanced the rights of community associations both in New Jersey and nationally.

For those who may not be familiar with the expression, "amicus curiae" means "friend of the court" in Latin. An amicus curiae is someone who is not a party to a case and offers information that bears on the case, but who has not been solicited by any of the parties to the case to assist a court. In both cases in which CAI participated as amicus curiae, legal briefs were filed on behalf of CAI to ensure that the broad legal effects of the court decisions would not depend solely on the parties directly involved in the case.

At the outset, the expertise and commitment to the community association industry of the law firm of Stark & Stark, in the preparation of briefs and the legal argument of both matters must be acknowledged. Christopher Florio, Esq., a shareholder of the firm, is a member of LAC-NJ. CAI was represented by Gene Markin, Esq., and John Randy Sawyer, Esq., on the *Palisades* matter discussed below. Timothy P. Duggan, Esq., represented CAI in the *Rones* decision, also discussed below.

The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC

On February 1, 2016, the Appellate Division of the Superior Court of New Jersey determined that the "discovery rule" tolls the six year statute of limitations within which a condominium association must file suit relating to construction defect claims. The appellate court had reversed and remanded the trial court's grant of summary judgment in favor of various subcontractor defendants based on the statute of limitations. The appellate panel ruled that the condominium association's construction defects claims did not begin to accrue until the individual unit owners had full control of the association's board and the governing board had sufficient facts upon which to assert actionable claims, regardless of when the project had been substantially completed.

> ***"This decision is important to community associations since it affirms the application of the discovery rule to construction defects claimed by the association."***

In *Palisades,* no defects were disclosed in the Public Offering Statement or engineering report that was registered by the New Jersey Department of Community Affairs. Initially, the unit owners could not have known about the defects because the association did not yet exist or it was under control of the sponsor. When the unit owners took

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control of the association, they engaged an engineer to perform an investigation to prepare an engineering report to evaluate the condition of the premises after a series of leaks were detected. The association then asserted claims based upon the contractor defendant's defective work.

Prior to trial, the contractor defendants moved for summary judgment based upon the statute of limitations. By court order, the motion was granted, dismissing the plaintiff's claims. The plaintiff moved for reconsideration but was denied. The Appellate Division of the Superior Court of New Jersey determined that the "discovery rule" deferred the limitations period until the engineering report was supplied because that is when the board determined that a claim existed.

This decision is important to community associations because it affirms the application of the discovery rule to construction defects claimed by the association. Despite the relevance of the date of substantial completion of construction, an association's claims will not accrue until unit owners have control of the board and sufficient facts upon which to timely assert any claims for damages.

In re: Rones

On February 16, 2016, the U.S. District Court for the District of New Jersey held that liens filed by condominium associations are protected from modification because of the Bankruptcy Code provision known as the Anti-Modification Clause.

The U.S. Bankruptcy Court had determined that condominium assessment liens were eligible to be stripped off as wholly unsecured liens, despite being classified as security interests in Chapter 13 cases. On appeal, the U.S. District Court of New Jersey held that the New Jersey Condominium Act provides a limited priority for an association lien for delinquent assessments, which elevates that portion of the lien above more senior claims. The Court concluded that "[t]he Bankruptcy Court erred in treating the Association's lien as a 'wholly unsecured' claim which could be stripped off (either in whole or in part); instead this Court finds that the lien was partially secured by a security interest in the debtor's principal residence." The case was remanded to the Bankruptcy Court.

Condominium associations, which had secured unpaid assessments by recording a lien against the unit owner prior to the bankruptcy filing, now have the *Rones* decision to counter efforts of condominium owners who file Chapter 13 bankruptcy petitions to avoid the payment of delinquent common expense assessments. It should be noted that, because of the limited priority that is granted by the Condominium Act, the decision only applies to condominium associations and not to other forms of community associations in New Jersey.

Challenges To Super-Lien Priority

In New Jersey and in many other States, community associations have a limited super lien priority for unpaid common expense assessments. Under the New Jersey Condominium Act at N.J.S.A. 46:8B-21, a condominium association is entitled to limited "priority" over previously recorded liens, including mortgages, for a sum equal to the aggregate customary condominium assessment against the unit owner for the six-month period prior to the recording of the lien. This priority is commonly referred to as the "super lien" of the association. The law in New Jersey became effective twenty years ago in 1996.

The Federal Housing Finance Agency (FHFA) has taken the position that the limited lien priority of community associations violates the right of Fannie Mae and Freddie Mac to have a first lien position. Essentially, the FHFA's position is that these mortgages must remain in a first lien position and have first priority in receiving the proceeds from selling a house in foreclosure. As a result, any lien securing payment of unpaid common expense assessments should not be able to gain priority so that the association would receive payment of delinquent assessments.

By filing suit to attack the priority status of associations in states where there is a priority lien law, FHFA is attempting to ensure that Fannie Mae and Freddie Mac get paid by the lending institutions that failed to complete foreclosures in a timely manner, or pay association dues while foreclosure was in process. The FHFA is acting at the obvious detriment of community associations and the owners which form their membership.

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The membership of CAI is painfully aware that reasons for delays in the foreclosure process are many and protracted. While foreclosures are underway, delinquent assessments continue to accumulate rapidly. Associations operate under the burden of budget deficits in their day-to-day operation due to the homeowner delinquencies. And many associations feel they have no alternative but to somehow fund and perform maintenance on abandoned homes to preserve the aesthetic quality and value of their communities.

In the coming weeks, CAI-NJ will be dispatching information to its members about the actions being taken by lenders and FHFA. CAI will be educating its membership of its efforts to preserve super lien rights and to stem the consequences of the FHFA's challenges to the vital benefits of the lien priority law in New Jersey. Please look out for emails and other communications from CAI on this important issue and get involved. ■