



Latest CA Laws & Trends: Your Dilemmas, Our Solutions

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The Evolving Foreclosure Crisis and Bankruptcy Backfire

We've all heard the gloomy news about the residential real estate market and the slowdown in home sales, rising foreclosure rates and the implosion of the subprime mortgage market. As you would expect, it's not good news for homeowners or their community associations. If owners can't pay their mortgage, they can't pay their associations. Also, with the impact of changes in the bankruptcy laws from late 2005, bankruptcy is providing little or no relief against increasing foreclosures. As a result, we expect to see a continued rise in delinquencies to associations.

The Foreclosure Crisis

Anyone driving down the streets of their own neighborhood can see that there are many houses on the market and, in many cases, those houses are taking longer and longer to sell. According to the National Association of Realtors, as of November 2007, there were nearly 4.3 million homes listed for sale across the United States, an increase of more than 12% from 2006. Nationally there is more than a ten month supply of housing inventory available, an increase of more than 40% over 2006 levels.

Contributing to the rising level of housing inventory is the increasing number of foreclosures across the country. In November 2007, nearly 202,000 filings occurred nationwide, almost 70% more than the number recorded in November 2006. Georgia had nearly 9,000 foreclosure filings in November 2007, a rate of 1 for every 421 homeowners. This level of activity placed Georgia in the top ten for the nation and represents an increase of more than 25% over 2006 numbers.

In addition to the slowdown in housing sales, 2007 saw an unprecedented tidal wave of mortgage companies closing their doors. Since late 2006, more than 200 different lenders and mortgage bankers went out of business with many others downsizing or closing their wholesale and correspondent divisions that offered loans to independent mortgage brokers. Many of these now-shuttered companies did business in Georgia. In April of 2007, Atlanta-based mortgage company Southstar Funding, LLC, which at its peak originated more than \$6 billion in loans in 30 states and employed more than 700, closed its doors. Likewise in August 2007, Atlanta-based HomeBanc Mortgage Corporation, which originated approximately \$5 billion in loans in 2006 primarily in Georgia and Florida, filed for bankruptcy and laid off most of its more than 1,000 employees. With each company's exit from the marketplace, the number of options for mortgage brokers and homebuyers looking for financing to make a home purchase or refinance grows smaller.

Among the surviving lenders and mortgage companies, underwriting guidelines and the loan approval process have tightened. Many of the loan programs available during the boom years to borrowers with less than perfect credit, little or no downpayment, or irregular financial status have disappeared. Loans with adjustable rate ("ARM"), interest only or option payments, and 100% financing arrangements allowed many first-time and move-up buyers to enter the housing market with little planning and sometimes little understanding of the financial risks those loans could involve. With rates at all time lows, many homeowners took out home equity loans up to 125% of the value of their homes to consolidate debts and make major purchases. As

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interest rates have slowly crept higher and low introductory rates expire, those same borrowers now face annual or more frequent increases to their ARM and equity loan payments at the same time that refinancing has become more difficult.

The Bankruptcy Backfire

In addition to the spike in foreclosures, personal bankruptcies rose 48% in the first half of 2007 from the same period in 2006. As you may recall, in October 2005, the federal bankruptcy laws were overhauled for the first time in more than 25 years. Credit card companies pushed hard for the changes which were intended to help stop consumers from walking away from credit card bills. The law changed to make it much more difficult to file under Chapter 7 of the bankruptcy code, which allows a total discharge of non-mortgage debt. Consumers filing bankruptcy were pushed into Chapter 13, which is for wage earners who can enter repayment plans with their non-mortgage creditors.

However, in the context of today's real estate market, the change to protect credit card profits backfired against the banks. Consumers are now choosing to pay their credit card bills first over their mortgages, and, consequently, they are losing their homes more often to foreclosure. The impact of the surge in foreclosures has rippled through the entire financial services industry.

Those owners who have subprime loans with adjustable rates are at the greatest risk of losing their homes to foreclosure. Even bankruptcy can't protect them. Once the mortgage rates reset, the home becomes unaffordable and bankruptcy protection can't help.

Congress is now evaluating whether to intervene and make more changes to the bankruptcy laws. One proposal, which the banks don't like, is to give bankruptcy judges the authority to lower interest rates and reduce mortgage balances to reflect the current market value for a debtor's home. It's likely with the current rate of foreclosures that we will see some changes or relief.

The current residential real estate market presents many challenges for owners and their associations. It is important to remember, however, that despite the gloomy news, plenty of opportunity still remains. Interest rates have remained relatively low and Georgia continues its growth with new jobs and new residents. By understanding the significant changes that have occurred over the last year and with adequate planning to deal with those conditions, it is possible to weather the difficult times and avoid the problems faced by those who are unprepared.

FCC Renders Exclusive Cable Contracts Unenforceable

On November 12, 2007, the Federal Communications Commission (“FCC”) issued a *Report and Order* banning exclusivity clauses in contracts for the provision of video services between multiple dwelling units (MDUs) and multichannel video programming distributors (MVPD). In rendering this opinion, the FCC found that exclusivity clauses violate Section 628 of the Communications Act of 1934, as amended (Act). Section 628 of the Act was created to boost “competition and diversity in the multichannel video marketplace, increase the availability of satellite cable and satellite broadcast programming to persons in areas not currently able to receive such programming” and to “spur the development of communication technologies.” The *Rule and Order* prohibits the execution of new exclusivity clauses in video service contracts and renders exclusivity clauses currently contained in video service contracts unenforceable. However, the *Rule and Order* does not affect other provisions in video service contracts that contain exclusivity clauses.

What’s a MDU?

According to the *Report and Order*, nearly thirty percent (30%) of all Americans live in MDUs. The term MDU is used to describe centrally managed residential developments such as apartments, cooperatives, condominium buildings, gated communities, and mobile home parks. However, the term MDU is not used to describe timeshare units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing homes or assisted living facilities or other group quarters.

What’s an Exclusivity Clause?

An exclusivity clause is a provision in a contract granting one MVPD the exclusive right to provide video services for a MDU. According to the *Report and Order*, exclusivity clauses are widespread in agreements between MVPDs and MDU owners. For example, based on a survey conducted by AT&T, at least ninety percent (90%) of MDU residents in Raleigh and Charlotte, North Carolina are subject to exclusivity clauses. Some exclusivity clauses last between five (5) and fifteen (15) years, often renew automatically or are continual.

Is My Service Provider Affected by This Rule?

The prohibition of exclusivity clauses applies to cable operators, telephone common carriers, and open video system operators. Private cable operators (PCOs) (also known as Satellite Master Antenna Television (SMATV) providers) and Direct Broadcast Satellite (DBS) providers are not affected by the prohibition. However, the FCC issued a *Further Notice of Proposed Rulemaking* to address whether the exclusivity clause restriction should be expanded to include DBS providers and PCOs.

What are the Benefits and Drawbacks of the *Rule and Order*?

• **The Pro's**

(1) Lower Costs and Improved Service to Consumers

Proponents of the *Rule and Order* believe that an increase in multichannel providers will result in lower prices for video services to consumers. In comments presented to the FCC, Verizon contends that when the company began to enter two Florida counties, Comcast announced that it would not raise its cable rates for the first time in a decade. Verizon also stated that six months after the company entered into competition with the incumbent cable operator in three Texas markets, on average, consumers saved almost \$27 a month on their cable television bill. In addition to potential financial benefits to consumers, proponents of the *Rule and Order* feel that with increased competition, MVPD's will be forced to improve service offerings to consumers.

(2) Increased Technology and Programming Options

Proponents of the *Rule and Order* are also of the opinion that exclusivity clauses deter entry into the cable marketplace by new local exchange carriers and other wire-based MVPDs who provide satellite cable and satellite broadcast programming. The entry of local exchange carriers in additional markets may result in the increased deployment of wireline broadband to American homes. As such, consumers may be offered additional cable services. The new MVPDs and local exchange carriers entering the cable marketplace are also likely to offer consumers additional television programming. The availability of additional programming will foster a greater dissemination of diverse entertainment options for consumers.

• **The Con's**

(1) Community Investment

Entering into exclusive contracts helps MVPDs to obtain financing to wire MDUs for cable and other services. In turn, a MVPD is able to recover their financial investment over the term of the exclusivity period. Some opponents of the *Rule and Order* feel that the inclusion of exclusivity clauses in cable contracts is the only way to entice MVPDs to invest in marginally attractive MDUs.

(2) Greater discounts to individual households

Opponents of the *Rule and Order* argue that exclusivity clauses substitute competition for individual residents for competition for MDUs. More specifically, in exchange for granting exclusive rights to the MVPD, a MDU can collectively bargain for bulk rates and other concessions that are traditionally not offered to consumers on an individual basis. The benefit of the bulk rate is subsequently passed on to the MDU resident.

Will the exclusivity clause ban last?

It is expected that members of the cable and MDU industries will seek to challenge the FCC's *Rule and Order* on the grounds that it equates to an unconstitutional regulatory taking. Stay tuned for further details.

Smoking in the Home... Snuff or Puff?

In a 2006 Colorado lawsuit, smokers sued non-smokers. The non-smokers won the lawsuit – no surprise, based on the trend sweeping the nation prohibiting smoking in many public places.

The Heritage Hills condominium development had a total of four units, one of which was occupied by heavy smokers. Two of the other unit owners repeatedly complained about smoke seeping into their units, but the Association's efforts to prevent smoke from entering their homes were unsuccessful. The non-smoking unit owners subsequently approved an amendment to the Declaration of the Condominium. The amendment barred smoking within the property boundaries of the Association (including inside the units).

The smokers sued the condominium association and argued three things:

- (1) The smokers argued that the Association acted arbitrarily in amending the legal documents.
- (2) The smokers complained that the Association did not have the authority to ban smoking in the Condominium.
- (3) The smokers stated that the smoking ban violated their right to smoke within the privacy of their own homes.

The Colorado court disagreed with all three of the arguments and in response to the smokers' claims the court ruled that:

- (1) The Association made reasonable attempts to stop the smoke from entering the non-smokers' units. These efforts took place over an extended period of time before the Association amended the legal documents to prohibit smoking. Since the Association put in so much effort to fix the problem first, the Association was not acting arbitrarily by amending the documents.
- (2) The Association did have authority to make and pass the amendment to ban smoking since the documents already included a nuisance provision. The nuisance section prohibited residents from engaging in activities that interfered with the peaceful possession and proper use of other residents' properties. Since the smokers' actions were interfering with possession, use and enjoyment of the units owned by non-smokers', the smokers were causing a nuisance in the Condominium and the Association had the authority to make the nuisance stop.
- (3) People do not have a "right" to smoke because the act of smoking is not protected by the Constitution. The Association's restriction regarding smoking inside the units was proper, particularly since the smokers' private activities were creating such a negative impact on the remainder of the Community.

This Colorado court decision represents a major stride for anti-smoking activists, but its effect will be somewhat limited for a couple of reasons. First, the case was not decided by a court of appeals, but by a trial court. Trial court cases do not affect the rights or actions of anyone other than the parties to that particular court case. Second, the Colorado decision rested

on very unique facts. For instance, the condominium in question was very small (4 units) and the building was very old so smoke seepage was much more difficult to control, despite extensive efforts to do so.

Notwithstanding its limitations, this decision highlights the possibility that smoking disputes in a community or condominium association may escalate to litigation. To make the association's case as strong as possible, the board should implement some procedures in the community. Below are some ideas for the board of directors.

- **Require Caulking, Door Sweeps, Weather Stripping.** The board could require the smoking unit owner to caulk all openings and install door sweeps or weather stripping around all doors and windows that open into or adjoin indoor common areas.
- **Require Duct Work, Air Purification/Ventilation or Filtering Mechanism.** If weather stripping efforts fail to reasonably contain the smoke, the board could require the smoking unit owner to reroute ductwork and/or install an air purification/ventilation system or other filtering mechanism that would prevent smoke from entering into the hallways and other non-smoking units.
- **Hire a Professional Consultant.** A board could retain a professional consultant to perform on-site testing and/or survey the residents to evaluate whether secondhand smoke is infiltrating non-smoking units. The consultant can provide appropriate solutions for the problem. Depending on the language in the association's legal documents and the circumstances involved, the cost for the testing, advice and solutions could be paid for by the association, shared by all owners or charged back only to the smoking owners.
- **Amend the Documents.** An association may propose an amendment to the recorded legal documents that would ban smoking in all areas of the community, including the common areas and, in certain circumstances, the interior of individual homes/units. The association can take this action to preserve the health and well-being of the owners in the community. It protects them from the fire hazards associated with smoking and the well-documented health hazards associated with exposure to second-hand smoke.
- **Be Extremely Sensitive to the Smoking Owners.** In order to avoid challenges to the amendment from the smoking owners, an association should use extreme sensitivity when amending the documents.
 - ▶ The association could conduct a survey of all the owners to determine whether the community is generally for or against a smoking ban.
 - ▶ The association could consider "grandfathering" some or all of the smoking owners, so the amendment would not affect them. Instead, the amendment would be enforceable only against people who purchase in the community after the amendment is recorded in the county land records.

► The association could require grandfathered smoking owners to caulk, install door sweeps and/or weather stripping, reroute ductwork and/or install air purification and ventilation systems to insure that second-hand smoke does not infiltrate other homes or the indoor/outdoor common areas so as to present a nuisance to others.

Ultimately, an association's board of directors must balance the desires of smokers and the health concerns of non-smokers in addressing smoke disputes within a community. Admittedly, this is not a simple task. However, if an association can provide well-documented evidence of the remediation efforts taken to prevent the smoking nuisance to others, the association can bolster its defense against any claims relating to smoke-related disputes within the community.

Funding Reasonable Accommodations Specifically Related to Handicap Parking Under the FHA

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I. Fair Housing Act

As it relates to handicapped persons, the purpose of the Fair Housing Act (“Act”) is to extend the principals of equal housing opportunities to handicapped persons who have been victims of unfair and discriminatory housing practices. The definition of “handicap” under the Act is broad and includes persons with a “physical or mental” impairment which substantially limits one or more of such persons major life activities, where such persons have either a “record of having such an impairment “or have been” regarded as having such an impairment.” The protection does not extend to persons with current, illegal use or addiction to controlled substances. Once it is determined who afforded protection, it is necessary to determine whether discrimination occurred.

The Act prohibits discrimination against handicapped persons in the terms, conditions or privileges of rental of a dwelling or in the provision of services or facilities in connection with such a dwelling, such as handicap parking. To avoid discrimination in the case of community living, the Act requires a community association to “make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person equal opportunity to use and enjoy a dwelling.” The Act only holds a community association liable when it discriminates against an owner.

Under the Act, discrimination includes “a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied ... by such person if such modifications may be necessary to afford such person’s full enjoyment of the premises.” To establish a prima facie claim of discrimination under this section of the Act, a complaining unit owner must show that she sought the association’s permission to modify the premises to accommodate her disability, and that the unit owner is a person with a “handicap” as the term is defined under the Act, that the association knew or should have known that the unit owner had a handicap, that reasonable modifications may be necessary to afford the unit owner full enjoyment of the premises, and that the association, thereafter, refused to permit such reasonable modifications. The court will, in essence, balance the association’s interest against the need for an accommodation in a particular case. This includes handicapped ramps and handicapped parking spaces.

For many years, the legal position for approving modifications for the handicapped owners was that the modifications were to be made at no expense to the Association. In 2007, in a totally surprising decision that is a first in the Unites States, the Georgia Commission on Equal Opportunity issued a finding in direct contradiction to this theory. In that holding, the Georgia Commission on Equal Opportunity held that an association that requested that the handicap owner pay the cost for painting a handicap logo on a parking spot and pay for the costs of the requisite handicap parking sign discriminated against that owner.

Knowing that an association may have to bear modification costs, many associations are concerned with establishing whether an owner is truly handicapped under the Act. This determination is something that should be given liberal consideration. For example, in one

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Wisconsin case, an apartment complex was asked by a tenant with multiple sclerosis to increase the number of handicapped parking spaces at the community. The complex denied the request even though the tenant explained that he was handicapped and required a parking space close to his building. The complex did not ask the tenant for more information about his condition. The community defended the fair housing lawsuit brought against it because it claimed that the tenant making the request did not “appear” to be limited by his multiple sclerosis. The complex did not know that the tenant could not park in narrow spaces, could not walk long distances without resting and was required to carry a portable urinal for the times he could not find a parking space close enough to his apartment to use his bathroom.

In ruling for the tenant, the court quoted the following remarks of a judge in a different case:

[D]iscrimination against the handicapped often begins with the thought that she looks just like me - that she's normal - when in fact the handicapped person is in some significant respect different. Prejudice, it bears recalling, includes not just mistreating another person because of the difference of her outward appearance but also assuming others are the same because of their appearance, when they are not. [The community] denied [the tenant's] request without asking for more information regarding the extent to which [the tenant's] MS limited his activities. Had they asked, we presume that [the tenant] would have provided them with the substantial documentation that he provided to HUD and the Administrative Law Judge. If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.

The recent Georgia holding and the Wisconsin Court's opinion above have hit hard in the community association world as Boards struggle to make the right decisions for those afforded protection under the Act. To assist with this process, it is recommended that all associations should immediately revisit their policies to ensure that the association fully investigates whether an individual is disabled under the Act and to revisit allocation of costs specifically related to handicap parking space designations.

Sex Offenders in Community Associations

We all were shocked by the recent story of Jessica Lunsford, the nine year old Florida girl who was kidnapped and murdered by a convicted sex offender who lived nearby. Unfortunately, Jessica's story was all too reminiscent of Megan Nicole Kanka, whose death spurred her parents to change the way our nation tracks sexual predators.

On Friday, July 29, 1994, Megan Nicole Kanka disappeared. Megan was killed by a two-time convicted pedophile that lived across the street and shared his house with two other convicted sex offenders. Megan's parents gathered more than 430,000 signatures and 89 days after Megan's disappearance the first state law mandating active community notification was signed into law. On May 17, 1996 Megan's parents' efforts to nationalize the law were victorious and a federal law requiring all 50 states to notify the community of the presence of sex offenders posing a risk to public safety was enacted. Since that time, the subject of convicted sex offenders residing in the community has become an even more important issue for many community associations.

Today, just about everyone has heard of Megan's Law and with increasing frequency, residents of condominium and homeowners associations are bringing information from the state's registry of local sex offenders to the attention of the board or are seeking such information directly from the board. In Georgia, persons convicted of a sex crime are required to register with the Georgia Bureau of Investigations ("GBI") and to notify the GBI of any change in residency. OCGA 42-9-44.1 requires a person convicted of a sex crime to register with the Georgia Bureau of Investigations ("GBI"). The law requires the Georgia Crime Information Center, a division of the GBI, to maintain a list of persons convicted of a sex crime who reside in the State of Georgia. The information is accessible at the GBI's web site as well as a number of other local government and watch dog websites. These public access websites typically provide the ability to discover persons convicted of crimes that are by nature a sexual offense, thereby allowing the public to take necessary steps to protect the resident's family.

The increased awareness of sex offenders raises two issues for community associations. First, does an association have an obligation to inform its members of the presence of a sex offender in the community? Next, recognizing that most association boards favor notifying the community residents about sex offenders in the community, what liability does a community association face if it publishes the information on a sex offender residing in the community?

- **Does the Association have a Duty to Tell?**

With sex offender registration being relatively new across the county, there is very little statutory or case law which addresses the obligation of the community association's board of directors to inform its members if the board learns of a convicted sex offender living in the community. However, an association generally will not be liable for an illegal act or injury to a person committed by a third party, unless the association's board of directors has reasonable grounds for believing that such criminal act may be committed. If a board of directors has knowledge of facts which indicate that a criminal act may be committed, the board has a duty to exercise ordinary care and diligence to protect the members of the association from the potential danger.

If a board of directors becomes aware of the presence of a registered sex offender in the community, the board has knowledge of a person who may pose a threat or danger to its members. An association could be subject to legal liability if it fails to inform its members of the existence of a sex offender who has been convicted of a sexual offense, and a person in the community is then harmed by this sex offender. When faced with the knowledge of a convicted sex offender residing in the community, an association should take appropriate steps to protect members and residents from potential harm from the sex offender.

In considering reasonable means by which an association can exercise ordinary care and diligence to protect members from potential harm from a sexual offender, one of the most logical steps is to inform the community of the risk, meaning informing the community of the presence of a sex offender. This can be accomplished by publishing a notice to the members and residents of the Georgia's registry profile. This notice should state only the facts presented on the governmental sex offender registry or as provided by the local sheriff's office, and the board should clearly indicate in the notice that the information presented was obtained from the governmental website or from the sheriff's office, and the date on which the information was obtained.

- **Is there any liability for publishing information on sex offenders in the community?**

The release and publication of the offender's name and other information must be handled with special care to avoid a potential claim against the association for libel. Libel is a false and malicious defamation of another, expressed in print, writing, pictures or signs. Truth is an absolute defense in a civil action for libel. Therefore, if an association restricts the publication of information regarding a sex offender strictly to truthful, accurate information provided by the appropriate law enforcement agency, the association should be protected from legal liability for libel.

In ensuring that the information published to the membership is accurate and truthful, the association should always refrain from publishing any information based on unsubstantiated hearsay or rumors. Instead, the board of directors should carefully inspect the records of the local sheriff's office or the law enforcement website and report to the community only that information contained within such records. If possible, a photocopy of the record should be distributed as part of the community notice.

To review whether registered sex offenders live in your neighborhood, visit www.ganet.org/gbi (select "Sex Offenders" on the Home Page).

- **Is there any pending legislation to help associations deal with sex offenders?**

Since 1996, Georgia law has prohibited sex offenders from living within 1,000 feet of any place where children gather. However, the Georgia Supreme Court tossed this legislation out in November 2007 stating that it is unconstitutional to force a registered sex offender to relocate his/her residence because a child care facility, school or church later opens in the vicinity. The court's rationale was that in the case of an individual who owns property, the restriction was an illegal taking of the property because the offenders are faced with 10 years in prison or selling and relocating. Further, once the sex offender relocated, there would be no

guarantee that the new location would not soon have a child care, school or church constructed within 1,000 feet requiring a subsequent relocation. The confusion in this ruling led to a request that the Supreme Court clarify its holding. In December 2007, Georgia Attorney General Thurbert Baker issued a clarification statement that the 1,000 feet rule applied to all sex offenders in the State of Georgia, with the exception of those that own their own property.

New legislation has now been proposed that would allow this same exclusion to apply to those that rent their property, arguing that a forced move based on a church, school or childcare facility moving within 1,000 feet after one has established residency would similarly be a taking. One argument that the legislators are using in support is that if one lives within 1,000 feet of a church, school or childcare facility and is then convicted as a sex offender, there is no requirement that the offender move. House Bill 908 is now being sent to the full House for consideration.

To learn more about House Bill 908, visit www.legis.state.ga.us/legis/2007_08/sum/hb908.htm.