Litigating Over Whether You Can Litigate

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

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

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

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

This isn't right, you say – it offends notions of fairness and public interest. Well, those arguments have been made. Yet while these "anti-litigation" provisions have been challenged as void or voidable as against public policy, the Appeals Court of Commonwealth has upheld them. In

Bettencourt v. Trs. of the Sassaquin Vill. Condo. Trust, 2016 Mass. App. Unpub. LEXIS 903, the Massachusetts Appeals court found that a provision in the Sassaquin Village Condominium documents which required the consent of owners entitled to 80% of the beneficial interests as a prerequisite to legal action was valid. The Court noted that the plaintiffs (unit owners in that case) conceded that "they knowingly and voluntarily agreed to the consent requirement when they purchased their units" and found "no basis for concluding that the provision is unconscionable."

The Court wrote that "[o]ther than asserting that it is mathematically impossible to obtain the consent of eighty percent of the unit owners, the plaintiffs have not identified any aspect of the consent requirement that is substantively or procedurally unfair. As we have noted, the plaintiffs were aware of the consent requirement when they bought their respective units. In addition, nothing in the consent requirement precludes the plaintiffs from persuading other unit owners and one or more of the trustees to consent to a lawsuit … having concluded that the consent requirement is not unconscionable, it follows that it does not offend public policy."

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

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