Winter 2018

From the Law Offices of
PERKINS & ANCTIL P.C.
ATTORNEYS AT LAW

LAW QUARTERLY

IN THIS ISSUE

ANNOUNCEMENTS *We are pleased to welcome our latest edition to the Perkins & Anctil family! Paralegal Amanda Kelly's daughter arrived on February 6, 2018. Congratulations Amanda & Ryan!*

NEW AMENDMENTS TO TRID

By: Rhonda L. Duddy, Esq.

After listening to over 1600 comments from various parties involved in the real estate and mortgage industries, the Consumer Financial Protection Bureau's (CFPB) changes to the Truth in Lending Act-Real Estate Settlement Procedures Act integrated disclosures (TRID) released an amended rule on July 17, 2017. The rule was effective October 17, 2017 and has a mandatory compliance date of October 1, 2018. Lenders may start using the new rule any time between October 10, 2017 and October 1, 2018.

The 2017 TILA-RESPA Rule amends and clarifies the application of the good faith standard. The CFPB expanded what is the definition of good faith as it pertains to providing the best information available. How much research must a lender do to have the best information available for preparing a Loan Estimate (a three page form that the lender provides after applying for a mortgage which provides estimated interest rate, monthly payment, and estimated closing costs for the loan known as a "LE") or a Closing Disclosure (a five page form which provides the final details and terms of the mortgage loan and final closing costs known as a "CD")? Originally, good faith was defined as providing the consumer with the best information reasonably available at the time of the preparation of the document. The amended rule now extends the requirement to include the definition of good faith as it pertains to providing the best information available. How much research must a lender do to have the best compliance date. Here are some key changes.

Every charge must be lawful and every service must be actually performed. This would require a lender to accurately reflect every fee it discloses on the CD.

Nothing has changed with respect to privacy. A settlement agent still cannot share the CD with various parties involved in the mortgage process without buyer's consent. Also, with respect to settlement agents and their liability for the CD, lenders are responsible for the accuracy of the CD, but if the lender wants to contractually obligate others, they can do so.

The 2017 TILA-RESPA Rule now establishes requirements for cooperative units. Currently, creditors need to provide LE's and CD's for a loan secured by a cooperative unit if the coop is classified as real property under applicable state law. It does not require a creditor to provide these disclosures for such loans if the coop is classified as personal property under applicable state law. The amended rule creates a uniform rule regarding loans for coops and requires creditors to provide LE's and CD's for a loan secured by a coop regardless of whether state law classifies a coop as real property. In other words, coops are now covered by TRID regardless of state consideration.

The CFPB has decided that trusts are now deemed natural persons. A trustee or a trust is considered as the same person and a LE given to a trust is adequate notice for the trustee and all beneficiaries as well as any co-borrower. As such, credit extended to certain trusts established for tax or estate planning purposes is credit extended to a natural person.

The 2017 TILA-RESPA Rule includes tolerances for the total of payments disclosure, including tolerances that apply for purposes of rescission. For example, the 2017 Rule generally provides that the total of payments listed on a disclosure is considered accurate if it is overstated, or if it is understated by no more than $100.

The amended rule also allows a principal curtailment. When a lender needs to give a credit to a borrower, but for whatever reason cannot at the time of closing, the credit can be applied to the principal amount of the loan. Therefore, if it doesn't work as a credit on the CD, the amount can then be applied as a principal curtailment.

With respect to refinances, all borrowers must be named and their address listed on the CD, but for a non-borrower title holder they don't need to be named on the CD, however they must receive a CD.

Among other items not discussed herein, the 2017 TILA-RESPA Rule also clarifies various elements of construction loans, provides options for separating borrower and seller information on the LE and CD as well as guidance on sharing the CD with various parties involved in the mortgage origination process, and it also amends and clarifies when revised LE's or CD's are permitted or required.

For more information, please see:

https://www.federalregister.gov/documents/2017/08/11/2017-15764/amendments-to-federal-mortgage-disclosure-requirements-under-the-truth-in-lending-act-regulation-z

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_Executive-summary-of-2017-TILA-RESPA-rule.pdf

INSURANCE LAW AND ORDINANCE DANGER WILL ROBINSON – DANGER!

By: Charles A. Perkins, Jr., Esq.

A catastrophic loss has occurred at your condominium complex, but you are not worried because the association has insurance coverage! But is it enough?

Despite a guaranteed replacement cost policy (or any of the replacement cost policies) and the promise that the units will be rebuilt, the promise is really only to repair or replace with like kind and quality. Many condominiums built in the 1980's or 1990's do not carry sufficient insurance coverage for total replacement.

In addition to repairing and replacing the damaged property, the additional cost to meet current building codes to the damaged property is not covered under the replacement cost coverage resulting in a deficiency which is passed onto the unit owners.

While some insurance companies provide a small extension of coverage of $100,000.00 or $250,000.00 for ordinance coverage, it is more often not nearly enough coverage to cover the actual total cost of the claim.

To protect yourself, contact your insurance agent and inquire about "Law and Ordinance" coverage which provides additional protection sufficient to cover the cost for a loss which requires the construction or repair of damaged buildings, specifically older structures that are damaged and may need upgraded electrical; heating, ventilating, and air-conditioning (HVAC); sprinklers, elevators, and plumbing units based on city codes.

Failure to do so may leave the association with a deficiency in its insurance claim, making a bad situation much worse.

CAN A CONDOMINIUM ASSOCIATION FILE A CHAPTER 7 BANKRUPTCY PETITION?

By: David R. Chenelle, Esq.

Over the years that I have been practicing in the U.S. Bankruptcy Courts as well as representing Condominium Associations, the question has periodically come up of whether a Condominium Association could file for bankruptcy protection. This question, at least in part, was recently answered by the United States Bankruptcy Appellate Panel for the First Circuit.

The subject case arose in the Bankruptcy Court of Puerto Rico involving the "Asociacion De Titulares De Condominio Castillo", (hereinafter "Castillo"). Castillo is a 22-unit association located in San Juan, Puerto Rico which had a recent involvement and challenge from the U.S. Department of Housing and Urban Development ("HUD"). It was alleged that Castillo had forced a unit owner ("DiMarcos") to sell his unit because he was keeping a dog in violation of the "no pets" provisions of the bylaws. Thereafter HUD filed an action of discrimination against Castillo under the Fair Housing Act claiming that its refusal to allow a unit owner to keep an emotional support dog in his unit was a violation of the Act. Following a 4-day evidentiary hearing the administrative law judge ("ALJ") found in favor of Castillo!

But unfortunately for the association it didn't stop there. HUD appealed the ALJ's decision to the Secretary of HUD who heard the case on an administrative appeal and thereafter overturned the decision of the ALJ, finding instead for the unit owner. The case was remanded back the ALJ for determination of damages. The ALJ issued her decision for damages which HUD appealed once again to the Secretary. Through the several back and forth levels, Castillo was eventually found liable for violating the Fair Housing Act, and ordered to pay $20,000.00 in damages to DiMarcos and $16,000.00 in civil penalties. See Castillo Condo. Ass'n v. United States HUD, 821 F.3d 92, 2016 U.S. App. LEXIS 7951. It is because of this decision that Castillo attempted to file for bankruptcy protection.

Castillo thereafter filed a voluntary Chapter 7 bankruptcy petition in June of 2016. In its original bankruptcy schedules, Castillo listed a minimal amount of assets of $14,048.12 and liabilities of $104,515.00 with the majority of the debt being owed to 3 creditors, including DiMarcos. At the §341 Meeting of Creditors, the president of the Board indicated that the association had ceased doing business with the filing of the bankruptcy case, and that the homeowners created a new association moving forward. She further stated that the purpose of the bankruptcy filing was to avoid collection of the judgement debts.

DiMarcos thereafter filed a motion to dismiss Castillo's bankruptcy petition under Title 11 U.S.C. §707(a) claiming, among other assertions, that Castillo was not a person as defined by §109(41) and could not sustain a bankruptcy case. Under §109(41) of the Code, it provides that "the term 'person' includes individual, partnership, and corporation, but does not include governmental unit…" for purposes of filing a bankruptcy petition under Chapter 7 of the bankruptcy code. Following several non-evidentiary hearings, the court concluded that Castillo did not fall under the definition of a person, and therefore was not eligible for bankruptcy relief. Several weeks later the court further found that the bankruptcy filing demonstrated a "lack of a legitimate bankruptcy purpose". It was these determinations which generated Castillo's appeal to the Bankruptcy Appellate Panel of the First Circuit. ("BAP")

In its review of the case the BAP first concluded that the First Circuit "has not expressly address(ed) (sic) whether a condominium association constitutes a 'person' under §101(41) or whether it may be a debtor under §109(a)". Either way, the issue was a case of first impression for the BAP. It then settled down to analyze the rulings of the bankruptcy court and its holdings that Castillo was not eligible to qualify as a debtor, and that the case was filed, in essence, in bad faith.

First tackling the definition of 'person' the BAP confirmed and summarized that:

"§101(41) provides that '[t]he term 'person' includes individual, partnership, and corporation[.]' 11 U.S.C. §101(41) (emphasis added). The bankruptcy court interpreted §101(41) to mean that only those entities specifically identified in §101(41)- individuals, partnerships, and corporations- are 'persons' under the Bankruptcy Code that are eligible for bankruptcy relief. And, the court concluded, because the Association was not an individual, partnership, or corporation, it was ineligible to be a debtor."

The BAP went further in stating that although Castillo did not fall into any of the delineated definitions of a 'person' under §101(41) the court should have considered whether the legal characteristics of Castillo were sufficiently analogous to other entities such as a partnership or corporation. Having determined that the bankruptcy court's review and application of the definition of a 'person' to be a narrow and exclusive reading of §101(41), "without any supporting legal authority", the BAP thereafter opined that: "we conclude the bankruptcy court committed legal error when it applied a narrow, exclusive interpretation of the term 'person' set forth in §101(41) in determining that the Asociacion [de Titulares de Condominio Castillo] was not eligible to be a debtor under §109."

However, the BAP did sustain the bankruptcy court's dismissal of Castillo's bankruptcy case concluding "that there was no legitimate bankruptcy purpose to be served" and that the dismissal of the bankruptcy case was supported by the facts.

Going forward, at least through the BAP level of the First Circuit, a condominium association could file for bankruptcy protection under Chapter 7 and get by the first of many hurdles bankruptcy debtors face throughout their case. Whether a bankruptcy case could be sustained

through a successful conclusion, well, that is still to be determined.

REAL ESTATE CONDOMINIUM LAW SEMNAR!

Wednesday, April 4, 2018

9:00 a.m. – 9:30 a.m.:

Continental Breakfast including Coffee, Muffins & Fruit

9:30 a.m. – 12:00 p.m.:

Seminar:

12:00 p.m:

Complimentary Lunch

Perkins & Anctil, P.C. invites you to an exciting seminar on condominium law. The firm has put together an exclusive seminar which we believe will be informative, a great networking opportunity and a way to earn 2 CE credits. We have 60 seats available.

The Speakers from Perkins & Anctil, P.C. include Scott Eriksen, Esq., Rhonda Duddy, Esq., & Robert Anctil, Esq.

Our last seminar was filled to capacity so register early!

Seminar Highlights:

- How a condominium is created
- Property Interest in a Condominium
- The Annual Budget and Insurance Policies
- Unit Taxes Right of First Refusal
- Condo Super Lien and;
- Top Facts your clients should know ***before*** they purchase.

To register visit here:

https://events.r20.constantcontact.com/register/eventReg?oeidk=a07ef4jhtoabdc3f658&oseq=&c=&ch

Location:

Northeast Realtors Association of Realtors
6 Lyberty Way, Suite 204
Westford, MA 01886

Our Condominium Practice Team is one of the leading firms in Massachusetts representing over 850 condominiums, community associations, homeowner associations and cooperatives throughout both Massachusetts and New Hampshire.

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Please let us know if you would like the option of receiving your bills electronically.

Interested parties should contact Pia Anctil at panctil@perkinslawpc.com. Please provide her with your desired email address and billing contact name.

Thank you!

ABOUT OUR LAW FIRM

Perkins & Anctil, P.C. is a leading firm in all facets of real estate law. Our diverse and robust experiences includes all aspects of condominium and community association law, real estate conveyancing (including the representation of numerous local and national lenders), developer representation (from municipal approval process through the sale of property), landlord-tenant matters and real estate litigation. In addition we offer years of industry knowledge in general litigation and bankruptcy cases, as well as a full spectrum of employment related matters. Our attorneys have been acknowledge for their expertise in Massachusetts, New Hampshire and throughout the country. We encourage you to set up an initial complimentary meeting with us. www.perkinslawpc.com

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