From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

Spring 2013

LAW QUARTERLY

IN THIS ISSUE

Announcements

Perkins & Anctil, P.C., wishes to remind its clients and business contacts that **The New England Condo & Apartment Management Expo** will be held at the Seaport World Trade Center – Exhibit Hall at 200 Seaport Boulevard, Boston, MA on Tuesday May 21, 2013 from 10:00 am – 4:30 pm.

If you have attended in the past, then you are aware that this is a unique opportunity to meet with over one hundred vendors of all types that specialize in serving the condominium industry. Further, seminars and other opportunities to obtain information make the day a premier educational opportunity for all attendees. We hope to see you there!

Also, The New England Chapter of the Community Associations Institute's upcoming seminars are provided to our clients on a complimentary basis. In order to take advantage of this valuable resource, visit the CAI on the web at **http://www.caine.org/ProgramEventRegistration/Default.asp. Or call Perkins & Anctil, P.C. at 978-496-2000 to register for free.**

"Roadshow" Reminder: Refine your organization's operational skills by scheduling a complementary presentation with one of our partners to learn more about any legal changes that may impact community associations. Also, understand tips and procedures for complying with changing law and for limiting potential liability; or discuss any developing situations a condominium association or property management entity may encounter at any of its properties. This individually tailored program will be delivered to you and your team with complimentary breakfast or lunch. We have limited availability so call today to schedule your presentation.

Chapter 13 Bankruptcy and Purported Homestead Protection

By: Fredrick J. Dunn, Esq.

***(Nicole Gordon, Appellant v. Denise Pappalardo, Chapter 13 Trustee, Appellee* BAP No. MW12-060, Bankruptcy Case No. 11-44524-HJB)**

The Bankruptcy Appellate Panel for the First Circuit recently ruled on an appeal from a decision of the Bankruptcy Court in connection with a debtor's claimed exemption in a remainder interest with respect to real estate. Specifically, when filing for Chapter 13 relief, the debtor indicated ownership of a one quarter remainder interest in certain real estate, subject to a life estate held by the debtor's parent. Within the filing, the debtor claimed the remainder as an exemption pursuant to section one of the Massachusetts "Homestead Statute" (see Mass. Gen. Laws ch. 188, hereinafter the "Statute"). The Trustee objected to the claimed exemption under the theory that the debtor was not an owner of the property, as defined within the Statute. The Bankruptcy Court agreed, stating that a remainder interest is not sufficient to allow the holder of said interest to qualify as an owner under the Statute and take advantage of its protection. The debtor then filed an appeal.

On appeal, the debtor argued that the amendment of the Statute in 2011 afforded protection to those holding a life estate or beneficial interest in real property, and therefore applied to a holder of a remainder interest. The Bankruptcy Appellate Panel disagreed. According to the Panel, the Statute defines an owner as a "natural person who is a sole owner, joint tenant, tenant by the entirety, tenant in common, life estate holder, or holder of a beneficial interest in a trust." The only issue, according to the Panel, was whether the holder of a remainder interest falls within the definition of an owner as it is defined within the Statute. The Panel went on to indicate that this issue had not been determined by the state's highest court. However, in determining how the highest court might rule, the Panel attempted to liberally construe the provisions of the Statute while being careful not to overlook the actual language, or its plain and ordinary meaning. In doing so, the Panel did not see where the definition of an owner could be construed to include the holder of a remainder interest. Having failed to meet the ownership requirement as outlined with the Statute, the Panel affirmed the Bankruptcy Court's order indicating that the remainder interest could not be considered exempt.

When a Condo Can't Say No to Fido: Service and Emotional Support Animals

By: Scott Eriksen, Esq.

A dog may be one man's best friend, but to many condominium associations a dog can be a hassle, a nuisance or even a liability. This is true not just for canines, of course, but for all sorts of furry friends. For this reason, many condominium documents incorporate provisions that restrict, or even prohibit, pets from common areas or units. Properly drafted and incorporated in the governing documents, pet provisions have been held enforceable by the courts of this Commonwealth. However, there are certain situations where condominiums may be forced to allow pets regardless of what the governing documents state.

Many people are familiar with the Fair Housing Amendments Act of 1988 ("FHA"). The FHA makes it unlawful for an association to refuse to make *"reasonable accommodations in rules,*

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policies, practices, or services, when such accommodations may be necessary" to afford a *"handicapped"* individual equal opportunity to use and enjoy his or her dwelling. 42 U.S.C. § 3604(f)(3)(B). At first glance, the FHA's application in a pet situation may seem clear. Individuals who, as a result of a disability, require animal assistance should be permitted reasonable exception to condominium rules. It would be hard to imagine any association that would challenge the right of a blind individual to keep a seeing-eye dog on condominium property. But what about an individual suffering from anxiety, hypertension, depression or alcoholism? Are these individuals afforded the same rights to "reasonable accommodations" to a condominium's pet policy? The short answer is: it's certainly possible, and associations would be remiss to flatly deny these requests without at least considering the potential implications under the FHA and state law.

All associations must be aware that the term *"handicap"* is not limited to physical disabilities. *"Handicap"* is defined under both federal and Massachusetts law to include *"a physical or mental impairment which substantially limits one or more of [a] person's major life activities."* 42 U.S.C. § 3602(h); M.G.L. c. 151B, §1(17). This broad definition has been held to include the conditions referenced above, as well as numerous other mental and psychological disorders. What this means in many cases is that a *"handicap"* may not be physically determinable or readily apparent. This can create challenges for condominium boards tasked with evaluating requests for exceptions to an association's pet policy.

Consider the following example: Tom Katz sends a letter to the Board to inform them that he needs a "reasonable accommodation" from the association's pet prohibition to adopt and keep Hairball, a 15lb Persian cat who has no training as a "service animal." In support of his request, Tom indicates that he suffers from anxiety and that Hairball's company is necessary to treat his condition. Tom also includes a letter from an out-of-state medical care provider stating that Hairball is one means, but not the sole means, of treating Tom's anxiety. The Board, fresh off an enforcement action against another unit owner for pet violations, is seriously opposed to Tom's request. They do not believe Tom has met his burden to show Hairball is **reasonable** or **necessary** for him to use and enjoy his Unit. Should they write a polite denial letter to Tom and refer him to the provision of the documents prohibiting cats?

The first thing the Board should do when it receives any correspondence which could be construed as a request for a reasonable accommodation is refer it to counsel. The fact of the matter is that each of these requests and the attendant circumstances will likely be unique and different. One thing that is clear from the case law regarding FHA and state law discrimination claims is that a "reasonable accommodation" analysis is a malleable analysis – there is no one size that fits all. This means it will be important for an association facing a request to gather as many facts as possible and present them to counsel for proper consideration in light of the law.

While the FHA and state discrimination laws can be unyielding in many respects, both federal and state courts have noted that the duty to make a "reasonable accommodation" does not simply spring from the fact that a unit owner wants the accommodation made. The courts have given some meaning to the "reasonable" component of "reasonable accommodations," stating in many instances that there must be a nexus between the animal and the disability in order to establish a valid claim under federal law. In addition, reviewing authorities may also conduct a cost-benefit balancing test taking both the association's and the requesting individual's needs into account. As noted above, however, there is no "bright line" rule for what is "unreasonable." In that respect, it is a bit like pornography – the courts just know it when they see it.

With this in mind, we turn back to Mr. Katz: In advising the board on an appropriate course of action we might consider the Massachusetts Superior Court case of *Nason v. Stone Hill Realty Ass'n*, 5 Mass. L. Rep. 305 (Mass. Super. Ct. 1996). In *Nason*, the court held that where an affidavit from a doctor did not indicate that a support animal was the **sole** means of addressing an owner's disability, then the unit owner had not demonstrated that an accommodation was "reasonable and necessary." This ruling was made in connection with a preliminary injunction request, however, and the court went on to note that there could be a basis on a "fully developed record for a finder of fact to determine that keeping the cat is necessary given Nason's handicap." "[T]he record before the court fails to clearly demonstrate the nexus between keeping the cat and [the Plaintiff's] handicap sufficient to warrant the court to intervene at this juncture of the litigation."

In light of the above, Mr. Katz's board may have some basis for denying his request. However, the board should be aware that doing so may not be the end of the story. It is possible that Mr. Katz could claw back with a discrimination claim against the association. Any given reviewing authority (a court or the Massachusetts Commission Against Discrimination, for example) may have a different perspective on what is "reasonable" and "necessary." If such a reviewing authority finds that a requested accommodation is in fact "reasonable," the association may find itself in a hairy situation.

Bank's Refusal to Foreclose on an Abandoned Home Following Bankruptcy Discharge is Not a Violation of the Discharge Injunction

By: David R. Chenelle, Esq.

Ralph and Megan Canning's financial troubles took a turn for the worse in early 2009. Falling behind in their monthly mortgage payments, and denied in their attempts to refinance their mortgage, the Cannings were placed in foreclosure by their lender, Beneficial Mortgage Services ("Beneficial"). The Cannings thereafter filed a Chapter 7 Bankruptcy Petition on March 5, 2009. According to their bankruptcy schedules, the mortgage loan balance was $186,521.00 with a value on the home of $130,000.00. It was also their stated intention to surrender their home through the bankruptcy process. The bankruptcy case was uneventful and the Canning's Discharge was issued on June 3, 2009. It was 2 months after the discharge of their debt where the problems began.

Beneficial began the volley by sending the Cannings a letter informing them that it had no intention of initiating or completing a foreclosure of their property, and that the Cannings were to remain owners of the property. Beneficial's letter also indicated that the Cannings would be responsible for the premises including the payment of real estate taxes, liability insurance and maintenance of the property. Prior to the bankruptcy case, these costs were born by Beneficial.

Interpreting this communication as a violation of the Automatic Stay and Discharge Order, the Debtors responded by demanding that Beneficial either foreclose on the property or release its lien, and that failure to abide by the demand would result in the filing of an adversary proceeding in the bankruptcy court. They further informed Beneficial that the property had been vacated, and the utilities shut off. Beneficial declined the invitation and restated that it would not foreclose on the property "until the lien balance is satisfied in the amount of $186,324.15". It also suggested the option of a settlement or a short sale was available.

The Cannings filed an adversary proceeding against Beneficial several months following the initial letter, seeking actual and punitive damages for Beneficial's "failure or refusal to commence foreclosure or otherwise recover possession of the residence". Beneficial denied all allegations, and stated that the estimated value of the property was then $75,000.00. The parties agreed to submit the issue of liability on the basis of a jointly filed Stipulation and Exhibits.

The Cannings relied on the case of *Pratt vs. General Motors Acceptance Corp.*, 462 F.3d (1st Cir. 2006). That court found that General

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Motors' refusal to either reclaim its collateral or release its lien on an "inoperable, worthless car was intended to objectively coerce the debtor into paying a discharged debt". It was the Cannings' argument that the Pratt case was analogous to Beneficial's refusal to foreclose or release its lien on the Debtors' property. The bankruptcy court was not persuaded and found in favor of Beneficial stating that the Canning case involved a piece of real estate that could appreciate over time as opposed to a worthless car. It further stated that Beneficial had provided alternatives to its refusal to foreclosure. As a postlude, the court offered:

> Of course, [Beneficial's] chosen course of action, or inaction, did not make things easy for the Cannings. Forces remained at work that could make their continued ownership of the real estate uncomfortable--forces like accruing real estate taxes and the desirability of maintaining liability insurance for the premises. But those forces are incidents of ownership. Though the Code provides debtors with a surrender option, it does not force creditors to assume ownership or take possession of collateral. And although the Code provides a discharge of personal liability for debt, it does not discharge the ongoing burdens of owning property.

The Cannings' filed a timely appeal with the Bankruptcy Appellant Panel ("BAP"), which found that the Cannings failed to introduce any evidence showing that they had actual expenses arising from the continued ownership of the residence but instead "rested their case on the mere possibility that liabilities could arise in the future". The BAP further found that there were dispositive distinctions between the Canning and Pratt cases and that it was unable to conclude "that there was a particular confluence of circumstances that renders Beneficial's refusal to discharge its mortgage tantamount to coercing the payment of a discharged, prepetition debt". The Cannings then appealed to the 1st Circuit Court of Appeals. (the "Appeals Court")

Foremost within Canning's argument was the Fresh Start Doctrine premised under 11 U.S.C. §524(a) which sets forth the automatic stay against collections of debt already discharged. The Court found that although this doctrine is broadly interpreted, it does not prohibit a secured creditor from recovering its collateral on valid prepetition liens, which unless modified, "ride through" bankruptcy unaffected and enforceable under applicable state law. Conversely, the secured creditor has the "prerogative to decide whether to accept or reject the surrendered collateral". Alternatively stated, although the Cannings had the right to surrender their residence through the bankruptcy process, there is nothing in the bankruptcy code that requires a secured creditor to accept it. However the secured creditor's decision must not guise to coerce payment of a discharged debt. In the Canning case, the Appeals Court found no such activity.

Similar to the statements of the BAP, the Appeals Court further found that "there is nothing in the record…to evidence any expenses related to the [Cannings' continued] equitable ownership other than the … reference in their brief to being exposed to liability". Ultimately the Appeals Court found no similarities between the worthless automobile in the Pratt case and the Canning's residence.

In affirming the bankruptcy court's judgment, the Appeals Court warned that its decision should not be relied upon to leverage a way out from negotiating in good faith, and stated that: "while this case may provide some guidance on the dos and don'ts applicable to the bargaining dynamics between secured creditors and bankruptcy debtors, our remarks in *Pratt* still control: the line between forceful negotiations and improper coercion is not always easy to delineate, and each case must therefore be assessed in the context of its particular facts".

A Hot Debate: Adopting Smoking Bans in Community Associations

By: Gary M. Daddario

As the title suggests, this seminar from The CAI National Law Conference 2013, discussed the issue of smoking bans in condominiums. The session began with a review of some astonishing facts. By the year 2000, the U.S. Surgeon General's report cited 4,000 chemicals and 50 carcinogens in second hand smoke. In 2005, the California Environmental Protection Agency concluded that second hand smoke ("SHS") causes health problems. In 2006, the U.S. Surgeon General also reported that SHS causes health problems. Based on the findings of the Surgeon General and the EPA of California, SHS is a problem. Further, it is a problem faced by many Americans. The number of households in America located within an association setting is approaching 25% of total households in the country. Also troubling, SHS can occur even with proper ventilation and there is no acceptable level of SHS for purposes of eliminating health risks.

Regardless of the above, there are presently no states that impose a state-wide ban on smoking in units. About a dozen states have such bans relative to common areas. Associations may, however, implement such bans through their own restrictions. In fact, in 1993, 43% of associations had rules banning smoking. By 2003, that number increased to 72%.

Associations have multiple options for addressing the issue. A complete ban may be placed in the original documents. Such bans may be applied to common areas and/or to the units. Or, the documents may provide that the Board has the authority to restrict smoking by regulation. Such regulations would likely be enforceable only with respect to common areas. In order to ensure enforceability of a smoking ban in units if the same is not included in the original documents, an association should seek to amend the documents to include such a ban. Due to the community-wide vote required to approve such a ban, most associations will need to "grandfather" existing smokers.

Note that additional dilemmas are presented when states pass regulations such as those legalizing medical marijuana. It is unclear what the ultimate interplay might be between such laws and condominium covenants. At this time, federal law does not recognize exceptions for use of substances like marijuana.

Bottom Line: SHS does pose a threat to health and that threat is experienced in association settings by many Americans. Associations may deal with the issue of smoking, at the outset, through provisions of the documents. Or, associations can take subsequent action either through regulations or formal amendments to the documents.

The Gentle Shove Towards More Transparency

By: Gary M. Daddario

This seminar from The CAI National Law Conference 2013 explored the law and trends regarding the amount of information that association boards must share with their communities. Discussion began with the reasons why boards seek to hold information as confidential. These reasons include, but are not limited to: controversial topics; abusive unit owners; ego; ignorance; sensitive topics; and a perceived need to protect privacy. Regardless of the reason for withholding association-related information, this course of action produces predictable results including: breakdowns in communication; an "us versus them" mentality; conditions ripe for misconduct such as embezzlement; conspiracy theories among owners; and governmental intervention by way of legislation.

A review of common law relative to transparency issues revealed that in case after case, courts across the country are trending towards decisions favoring the release of information and association records to unit owners. Indeed, one seminar attendee was a unit owner. He announced to the room that he had successfully sued his association for production of records and, in addition to the records, was awarded some $25,000 in legal fees for his own efforts.

A review of statutory law revealed that while some states require unit owners to assert a proper purpose for obtaining association records, the trend is away from such require-

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ments. Additional legislative trends include limiting the purposes for which boards can meet in executive session and the passage of "open meeting" type laws.

Attendees learned of various techniques for increasing transparency of association boards. Such techniques include: use of parliamentary procedure at meetings; frequent communication; use of experts to perform and explain applicable tasks; varied methods of communication for reaching the community; adoption and communication of policies for consistent handling of association issues; and the education of board members for a greater understanding of the fiduciary role and obligations.

The discussion also included reference to the benefits associated with transparency beyond the mere avoidance of negative consequences that result from secrecy. For example, information sharing between associations or members of an association can lead to bargaining benefits such as economies of scale or reliable referrals for trusted vendors. Transparency can also produce collaboration between board members and owners, such as with the development of committees within an association. Transparency can also increase the accountability of both board members and unit owners relative to the responsibilities all parties have for the association and its affairs. In the unfortunate event of a claim or allegation lodged against the association, transparency can contribute to the information and records available for the association to use in its own defense.

Bottom Line: There are societal, legislative and courtroom trends all moving towards the increased accessibility of association information and records to unit owners. Associations would be wise to utilize techniques for increasing transparency and may even reap some rewards from doing so.

Big Fish Small Pond or Small Fish Big Pond

By: Gary M. Daddario

Consistent with its title, this seminar from The CAI National Law Conference 2013, explored the similarities and differences between large and small law firms. Points of discussion included different models for the decision-making process, relationships between departments and the differing tasks of partners and non-partners. The discussion explored what could be considered the advantages and disadvantages of both large and small firms.

Trends in the business of representing associations were also discussed. Emphasis was placed on trends developing from the collections "boom" of recent years. While the volume has made this area of practice a strong source of revenue, it has also spurred increased competition both between law firms and from non-attorney businesses that are now offering collection services. In the recent past, collection services began driving the decision as to associations' choice of legal counsel. In addition, both the cases and the development of the law have resulted in situations of increasing complexity. As a result, the input of attorneys has become increasingly necessary in what used to be a document-driven process.

Another business trend discussed was the increasing presence and use of technology. As both associations and property managers utilize more technology, it becomes necessary for legal counsel to do so as well. Beyond managing e-mails and calendars, legal counsel of the future will need to utilize technology to provide more effective customer service.

Bottom Line: Large and small firms both represent opportunities for attorneys and each offer a set of rewards and responsibilities. The satisfied practitioner is one who finds the best fit for his/her personality, character and lifestyle. Trends reveal that collections services and technology are the "hot button" topics of today and the near future.

Notes from CAI Legislative Action Committee

By: Charles A. Perkins, Jr.

This is the time of year that the Legislative Action Committee ("LAC") from the Community Associations Institute starts ramping it up and becomes busy. This year, the Committee has requested three (3) Bills be filed on behalf of LAC which includes: (i) a Bill to clarify the grants of limited common areas and votes required by mortgage holders; (ii) a Bill that would clarify that the tolling of the Statute of Limitations and Statute of Repose for construction defects claims against the developer by the condominium unit owners would not begin until the developer has turned over control of the condominium association to the unit owners; and (iii) a Bill to establish that the six (6) month lien periods may be multiple periods and not limited to one (1) six (6) month time period.

Although all of the Bills are important, the second and third Bills which deal with the Statute of Repose and Statute of Limitations and the lien periods are very important to condominium associations as a whole. Undoubtedly, there we will need the help and support of all leaders in the industry as well as members of associations as these bills begin to move through the legislative process.

We at Perkins & Anctil will continue to keep you informed in these matters and if you desire copies of any of the above Bills, please do not hesitate to contact our office.

About Our Law Firm

Perkins & Anctil, P.C. is one of Massachusetts' and New Hampshire's leading firms practicing; condominium law; condominium conversions; real estate law; developer and lender representation; representation before town and municipal boards; landlord/tenant matters; real estate litigation; and bankruptcy. www.perkinslawpc.com

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