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YOUR TENANT HAS FILED BANKRUPTCY – NOW WHAT?

By Randy P. Orlik and Susan S. Davis

A growing number of retail tenants are filing bankruptcy due to lingering problems in the economy. This article provides an overview of some rights and remedies available to both a landlord and a tenant when the tenant files bankruptcy. As an illustrative example, assume that the tenant and landlord enter into a lease with rent due on the 1st day of each month. The tenant misses two months of rent. The landlord serves the tenant with a 3-day notice to pay rent or quit (or such other notice for non-payment of rent as may be set forth in the lease). The tenant then files bankruptcy on the 15th day of the third month.

1. Automatic Stay.

When the tenant files bankruptcy, an automatic stay immediately goes into effect. The automatic stay is a statutory injunction that prohibits actions by creditors, landlords and others to obtain possession or control of the tenant's property or to assert claims against the tenant. In the above example, when the tenant files bankruptcy, the landlord is automatically stayed from bringing an unlawful detainer action against the tenant after the 3-day notice to pay rent or quit (or other default notice) has run.

2. Post-Petition Rent.

If the tenant stays in possession of the leased premises after filing bankruptcy, the tenant is required to pay post-petition rent to the landlord and to keep those rent payments current as long as the tenant occupies the leased premises. Unpaid pre-petition rent is classified as an unsecured claim which is paid with other unsecured claims after secured and priority claims. Unpaid post-petition rent while the tenant occupies the leased premises is entitled to be paid as an administrative claim before general unsecured claims.

In the above example, whether the tenant's obligation to pay post-petition rent begins on the fifteenth day of the month in which the bankruptcy is filed or on the first day of the following month depends on where the tenant files bankruptcy. Some bankruptcy courts hold that rent due on the first day of the month is for the entire month. If the tenant files bankruptcy on the fifteenth day of the month, the rent for the entire month, including the remainder of the month after the tenant files, is considered pre-petition rent. In these courts, in the above example, the tenant would owe three months of unpaid pre-petition rent and would be required to pay post-petition rent commencing the first day of the month following the month in which tenant files bankruptcy.

Other courts prorate the rent based on the bankruptcy filing date with the tenant paying post-petition rent from the date the tenant files bankruptcy. In those courts, in the above example, the tenant would owe two and one-half months of unpaid pre-petition rent and would be required to pay post-petition rent commencing the fifteenth day of the month in which tenant files bankruptcy.

If the tenant fails to pay post-petition rent or perform other lease obligations on a timely basis, the landlord can file a motion with the bankruptcy court seeking either relief from the automatic stay in order to evict the tenant or an order compelling the tenant to pay such rent or reject the lease.

3. Assumption/Rejection.

The tenant has two options in bankruptcy with respect to its lease: assumption or rejection. Rejection is simply a breach of the lease. Assumption means that the lease continues in full force and effect in accordance with its terms.

When the tenant rejects the lease, the tenant must vacate the premises and turn over possession to the landlord. The landlord then has an unsecured claim in the bankruptcy for the landlord's damages caused by the tenant's breach of the lease. This claim is determined according to state law, subject to certain limits imposed by the bankruptcy code. The bankruptcy code caps the landlord's claim for breach of the lease at an amount equal to the rent required to be paid under the lease for the greater of one year ***or*** 15% of the remaining term of the lease, not to exceed three years.

So when a tenant files bankruptcy and rejects its lease, the landlord must first determine its damages for breach of lease under state law. Once state law damages are determined, the bankruptcy cap is applied. If the state law damages are less than the bankruptcy cap, the landlord has a claim in the bankruptcy equal to its state law damages. If the state law damages are greater than the bankruptcy cap, then the landlord has an unsecured claim in the bankruptcy equal to the bankruptcy cap. The landlord is entitled to add unpaid pre-petition rent and damages to its claim. The landlord also may have an administrative claim for unpaid post-petition rent if the tenant remained in possession of the lease premises post-petition without paying rent. In addition, the landlord's claim may be reduced by any security deposit held by the landlord.

A tenant assumes a lease if the tenant wants to remain in possession of the leased premises or it wants to assign the lease to a new tenant. In order to assume the lease, the tenant must cure all defaults under the lease (with certain non-monetary exceptions). In addition to complying with the other terms of the lease, the tenant must pay all pre-petition and post-petition rent owing under the lease to the landlord. In the example above, the tenant would have to pay the unpaid pre-petition rent, as well as any rent due post-petition, to the landlord in order to assume the lease.

4. Assignment.

Even if the lease expressly provides that it cannot be assigned, the bankruptcy code permits the tenant to assume the lease and assign it, provided that the assignee provides adequate assurance that it can perform the terms of the lease after the assignment. This situation usually arises when the rent is below market and the tenant does not intend to continue to occupy the premises. In that situation, an assignee may pay the tenant in order to take over the lease. A landlord can object to assignment on the ground that the assignee is not creditworthy; however, such objections are typically difficult to win.

5. Use.

Shopping centers are given special treatment under the bankruptcy code with respect to use restrictions. Use restrictions in a lease are honored, for the most part, if the lease is in a shopping center. If the lease is not in a shopping center, generally speaking, a use restriction will not be enforced by the bankruptcy court, absent extraordinary circumstances.

6. Time in Which to Assume or Reject.

Prior to the 2005 amendments to the bankruptcy code, a tenant in bankruptcy had ninety days to decide whether to assume or reject a lease. This initial 90-day period could be and routinely was extended by the bankruptcy court. There was no limit on how many times an extension could be granted or how long the extensions could last.

The 2005 amendments to the Bankruptcy Code imposed overall limits on the time for a tenant to decide to assume or reject a lease. The tenant has an initial 120-day period in which to decide to assume or reject the lease. This initial 120-day period can be extended for up to another 90 days; however, no further extensions can be granted without the express consent of the landlord. Unless the landlord consents, the tenant now has a maximum of 210 days to assume or reject a lease. At the end of this 210 days, the lease is deemed automatically rejected if it has not been assumed.

7. Designation Rights.

Below market leases may be a valuable bankruptcy asset of the tenant. A practice has evolved of tenants selling sell “designation rights” early in the bankruptcy case. This practice allows a tenant to receive an early cash payment for its leases, rather than waiting to receive payments as it assumes and assigns each lease.

Sales of designation rights generally occur with leases that the tenant no longer intends to use in its operations or a part of a sale of all of the tenant’s assets. A third party pays the tenant for the right to tell the tenant whether to assume or reject the lease, and if a lease is assumed, to whom the lease is to be assigned. The purchaser of the designation rights then receives whatever compensation the tenant would have received upon the assumption and assignment of the lease. If an assignee is willing to pay money in order to take over a below market rate lease, the purchaser of the designation rights receives that payment instead of the tenant. The landlord retains its rights under the bankruptcy code to object to any proposed assignee.

8. Conclusion.

This articles discussed some of the basic bankruptcy principles applicable to landlords and tenants when the tenant files bankruptcy. The rights and obligations of landlords and tenants in bankruptcy are complex and are continuing to evolve after the 2005 amendments to the bankruptcy code.

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Title Insurer Not Liable for Acts of Agent at Closing in Absence of Closing Protection Letter

By John C. Murray

Introduction

Title agents are customarily authorized, through agency agreements, to sell policies for one or more title insurance underwriters. These agency agreements normally provide that the agent is an agent solely for the purpose of issuing title insurance commitments and policies, and explicitly state that the agent is not the title company's agent for the purpose of conducting settlements or performing escrow services. Authorized title agents also often act separately as the agent for the lender, buyer and/or seller, pursuant to instructions from such "principals" (that only such principals can enforce), in connection with the escrow closing of the transaction that is the subject of the title insurance. A lender who also wants the title insurer to be responsible for the agent's acts in connection with escrow closing activities and services must separately contract with the title insurer for such additional protection by entering into an "insured closing letter" or "closing protection letter" ("CPL"). CPLs have been available since the 1960s. They originally were not title-industry approved forms but, rather, were forms requested by mortgage lenders that were concerned they had no protection against unauthorized or fraudulent actions, or failure to comply with the lender's closing instructions, by the title company's approved closing agent or attorney. Lenders require CPLs because the agency-principal relationship between a title underwriter and a policy-issuing agent or approved attorney is limited to the issuance of a title-insurance policy, and such relationship does not extend to escrow or closing functions. CPLs specifically apply to escrow closing activities and services performed for title underwriters by approved attorneys or agents who are not employees of the title companies; as a general rule they are not issued on behalf of independent closers over whom the title company has no control. (An "Approved Attorney" is defined in the standard forms of CPLs as "an attorney upon whose certification of title the title insurance company issues title insurance"; an "Issuing Agent" is defined as "an agent authorized to issue title insurance for the title insurance company"). These letters are standardized indemnity agreements given to individually named lenders and recite the specific conditions under, and the extent to which, title insurers will accept liability for the acts or omissions of such parties.

The *Pal Properties* Case

The lack of a contractual relationship (absent a CPL) between the attorney-agent and the title underwriter regarding escrow-closing functions, and thus the lack of responsibility of the insurer with respect to such activities when conducted by the

Approved Attorney or Issuing Agent, is demonstrated in a recent Michigan case. In *PAL Properties LLC v. Ticor Title Ins. Co.*, Case No. 06-073149-CK, (Oakland County, Mich. Circuit Court, June 4, 2007) (unreported), there was no closing protection letter ("CPL") issued to any party (it was a cash deal), and the issuing agent (acting in its separate capacity as an escrow closer) absconded with or diverted funds from the closing intended for a mortgage payoff. The Circuit Court, based on the language in the title commitment and the agency contract, and the lack of a CPL, ruled in favor of the defendant title company ("Ticor"). The plaintiff-purchaser argued that it should have the benefit of a CPL, even though it was a cash transaction and no CPL was issued to any party. Reasoning that because it was not Ticor's fault that the funds weren't used to pay off the mortgage, and the escrow agent subsequently was cut off as an issuing agent by Ticor (and subsequently went out of business), the court rejected the buyer's claims of breach of contract, fraud, agency liability, negligence, conversion, loss of profits, and fiduciary duty. The plaintiffs appealed the Circuit Court's decision to the Michigan Court of Appeals. The appellant-purchaser's brief (filed October 31, 2007) made the following highly unusual (at least to the court and to title insurers) statement, at page 14:

> Ticor wants this court to believe that it had *no duty* to insure that its agent properly disbursed the funds. However, it is of paramount importance that the Court understands that the vast majority of mortgage transactions are funded by commercial lenders. This is the realm in which CPLs have developed. Lenders have vast amounts of bargaining power and have therefore demanded these letters to *remove any ambiguities* as to whose responsibility it is in the event of an underwriter's agent failure to disburse. The real purpose of these letters is to make it *clear that underwriters, and not lenders are responsible, and thus to avoid costly litigation on these disputes*. Ticor wants this court to believe that since [the appellant-buyer] did not have a CPL, it is clear that Ticor is not responsible for this loss. This is simply not true. This issue presents a contingency that neither party contracted for, and is therefore, *subject to interpretation* as to who should bear the responsibility. The trial court committed reversible error by not addressing these issues. (Emphasis in text.)

On December 9, 2008, the Michigan Court of Appeals affirmed the trial court's decision. *See PAL Properties LLC v. Ticor Title Ins. Co.*, 2008 WL 5158894 (Mich. App., Dec. 9, 2008). The appellate court noted that a title policy was never issued in this matter and, and held that because only a title commitment was produced by Ticor and only an actual title insurance policy provides insurance, the commitment did not serve to impose a duty upon Ticor to protect the plaintiff from Consolidated's actions. The court noted that the contract entered into by the parties designated Ticor as principal and Consolidated as its "issuing agent," which limited the scope of Consolidated's agency to the purpose of issuing title insurance only. The court stated that "Plaintiff has provided no authority suggesting that conducting a closing is an inextricable or necessary part of transacting or promoting title insurance business." *Id.* at *2. Also, according to the court:

> Notably absent from the contract is any reference to Consolidated attending closings or performing any duties at closings for the benefit of Ticor. Nowhere in the document does it indicate that Ticor dictated how Consolidated was to proceed with any change.

Id. at *3. The court further noted that:

> Ticor's only recourse under the contract would be to terminate the same. Ticor has no contractual right to take over Consolidated's business, to take control of the escrow account, or to force Consolidated to take any action.

Id. The appellate court also rejected the plaintiff's argument that Consolidated acted as Ticor's apparent agent for purposes of the closing, noting that Consolidated was the only entity, other than the buyer and seller, to sign the closing statement and it alone prepared the necessary closing documents (collecting a fee from the plaintiff) and conducted the closing. The appellate court also noted that the plaintiff had no contact with Ticor until several months after the closing. The court also dismissed the plaintiff's claim of negligent supervision, noting in particular that Ticor had the right, but not the responsibility, to examine Consolidated's records and that "Nothing in the title insurance contract serves to impose a duty upon Ticor to protect plaintiff from Consolidated's actions." *Id*. at *5. The court also rejected the plaintiff's claim of fraud, because the plaintiff "had not alleged that Ticor made any misrepresentation to it whatsoever, at any time, with respect to the escrow monies or whether or not the mortgages would be paid out of the escrow funds." *Id*. at *6. Finally, the appellate court dismissed the plaintiff's claim that a material dispute existed with respect to whether Ticor breached the title insurance policy, because even though one of the mortgages mentioned in the title commitment was not discharged (albeit through no fault of the plaintiff), "no title insurance policy, under which plaintiff could make a claim of loss, was issued." *Id.* at *7.

The vast majority of existing case law supports the holding in the *PAL Properties* case, but a few cases have held for the purchaser, even where no CPL had been issued. *See, e.g.*, *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 350-52 (1993). In this case, the court held that the buyer's attorney, who acted as the closing agent and was an "approved attorney" of the title company, was controlled to at least some extent by the title company. The court found that because the attorney failed to remit funds deposited to pay off a mortgage the title insurer would be responsible to the purchaser for the loss, even though the buyer had retained the closing attorney and no CPL had been issued to either the buyer or the lender. According to the court, "the title insurer had a duty either to give [the borrower] . . . an opportunity to insure himself against the risk or, at the very least, to inform him that he was not covered against such a risk." *Id.* at 347.

See generally Joyce D. Palomar, TITLE INS. LAW 2-12 (1994) ("Underwriting and agency agreements generally . . . limit the underwriter's responsibility for agents' activities as escrowees in real estate closings"); Richard J. Landau and Kristin M. Tsangaris, *The Mortgage Fraud Epidemic*, S & P's THE REVIEW OF BANKING AND FINANCIAL SERVICES, Vol. 22 No.4, April 1, 2006 ("In the absence of an insured closing letter . . . a majority of cases hold that . . . the title insurer has no liability for fraud or other misconduct in connection with a closing").

Conclusion

The CPL serves to extend the liability of the (presumably) large and creditworthy title insurance company - which would otherwise be limited to the title insurance policy - to cover certain "bad acts" of the company's Issuing Agent or Approved Attorney. But this additional protection, as specifically noted by the Michigan Appellate Court in the *PAL Properties* case, must be separately and specifically requested from the title insurer, and the scope of the coverage is defined solely by the contractual terms and provisions of the CPL. Coverage under the CPL is also strictly limited to the parties designated therein, and generally applies only with respect to the particular transaction for which the letter is furnished. The ALTA has attempted to meet the needs of title insurance customers by expanding the types of CPLs (the latest being the 2008 ALTA CPLs) to cover varying factual situations and comply with state statutory and regulatory restrictions. It is important for both the insured and the insurer to understand the legal (both case law and statutory) and regulatory restrictions and limitations on the use of CPLs in certain jurisdictions, and the nature and scope of the agency relationships that exist between title insurance companies and their Issuing Agents and Approved Attorneys.

How To Create A Green Community

Amy Bray

Take eco-friendly building a step further.

for LEED Guideline certified buildings and developments.

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THESE DAYS, everything's going green—and as the saying goes, it's not easy being green. However, with a little planning, both new developments and ones with existing sets of covenants, conditions, and restrictions ("CCRs") can be governed in a manner that allows eco-friendly products and practices.

Although builders see value in constructing homes using sustainable building practices and LEED Guidelines (and alternative green standards), and as such trends are gaining in vogue, there seems to be a lag in making sure that the documents that set the ground rules in those developments match, enhance, and preserve green ideals. As well, in established developments, some owners struggle with antiquated use restrictions that prohibit environmentally friendly practices. Even in the commercial context, developers and building owners desire the efficiency and marketing benefits that green building practices provide. As these trends continue to develop, many attorneys are caught at a loss, failing to consider the need to revisit their usual CCR forms.

HOW TO GO GREEN • Of course, when starting with a brand new development the ability to change existing forms is much easier. The greatest challenge is making sure there is continuity among the actual improvements and programs put in place, the marketing plans, and the final CCRs. When drafting a new development's CCRs, spend some time considering current trends and draft in the flexibility to change restrictions (or require re-evaluation with sunset provisions) to ensure that the final product tracks current market trends and can change as necessary.

In existing CCRs, the issue is complicated by determining how an amendment can be adopted and if the adoption of such an amendment is possible as a practical matter. In representing an association (or groups of owners) seeking to change a set of existing CCRs, take into consideration that the task is as much a public relations matter as a legal one. A "green audit" may be necessary to determine the changes that can be made to accommodate current trends in eco-friendly and energy efficient living, as well as ways to build in flexibility to allow the development to more easily adjust to the evolution of such trends. This concept of a "green audit" can be used to give an owners' committee or advisory group information that would allow them to share potential changes with other owners and give owners a say in the extent of any proposed changes. Having an open process of researching and crafting a final amendment will give owners a feeling of "buying in" to the final product and improve the chances of the successful adoption of a proposed amendment.

Evaluate And Revise "Stock" Use Restrictions

Most CCRs prohibit clotheslines, solar panels, compost piles, and vegetable gardens; however, in some cases these items may be permitted in limited circumstances. All of these items are essential (and in some cases easy to accomplish) components of a green lifestyle and need to be accommodated in the CCRs. When a particular use or practice would potentially be objectionable, put controls into place to neutralize the potential objection. Restrictions can be revised to permit clotheslines with reasonable limits on when lines may be used. For example, require that clotheslines must be taken down when not in use or may not be in continual use for more than 10 to 12 hours at a time.

Permit owners to install solar panels, but retain the right to review and designate locations through the established architectural control process (if any) and permit other "off-grid" power sources. Keep in mind that in some areas local utilities offer rebates to customers that generate their own electricity or sell electricity generated at their homes back to the utility. As energy costs skyrocket, these options will look more appealing to owners, in both commercial and residential contexts. Keeping around blanket prohibitions on such options for generating power will become more likely to cause owner dissatisfaction and friction with association boards.

Allow, and even encourage, compost piles and vegetable gardens in designated locations. Restrictions or guidelines allowing compost piles may include controls on locations, screening requirements, or minimum standards for appearance or type of compost system. For example, there are "mini-composters" on the market that are entirely self-contained and take up little space. These composters would work well, if allowed, in developments with homes where residents are in close proximity to their neighbors. Another consideration is whether a self-contained composter is preferable to an exposed compost pile in a development. A truly forward-thinking association might provide a community composting program as an additional amenity, if space allows and if composters on individual units are not a good idea. This type of program will be discussed further below.

As water becomes more of a commodity in some areas, restrictions that require owners with sprinklers on their property to use a sprinkler timer should be considered. Owners can also be required to set an early morning time period for watering, in order to minimize loss of water to evaporation.

Other potential restrictions, which may be too extreme for some developments, include adding a prohibition on gas-powered leaf-blowers and lawn mowers. Gas-powered leaf-blowers and mowers produce air polluting emissions just like cars do and they generate extensive noise pollution. If such a restriction is adopted, a program such as having community-shared electric mowers, as described below, can make compliance easier.

Another potential use restriction change is the modification of window covering restrictions that permit only white or off-white window coverings. Natural, neutral colors at windows would allow for a wider array of eco-friendly window coverings, while preserving a development-wide standard. Traditional blinds are poor insulators and many are made of polyvinyl chloride ("PVC") or petroleum-based synthetics. Shades and blinds made of fast-growing bamboos and responsibly-harvested bass-wood are becoming popular but are generally not white or off-white. These types of window coverings come in natural, brown, and honey shades. Other types of window coverings can be used that are eco-friendly and comply with the standard white or off-white requirement, such as roman shades, hon-eycomb shades, and lined drapes. These products also provide extra insulation that traditional blinds do not.

Check The Various LEED Guidelines

The United States Green Building Council first adopted the Leadership in Energy and Environmental Design ("LEED") Standard Version 1.0 in 1999 and has followed it with several new versions. The LEED program provides standards for developing high-performance green building designs. There are LEED Standards for a variety of projects, including" new construction, major renovations, homes, and retail. Some states and local builder associations have also adopted their own alternative standards, some modifying the LEED standards for local conditions.

The Congress for New Urbanism, Natural Resources Defense Council, and the U.S. Green Building Council have now developed a pilot version of a "LEED for Neighborhood Development Rating System" (June 2007). This program, much like the LEED rating system for buildings, sets an industry standard with an objective set of criteria for determining just how extensively Smart Growth, new urbanism, and green building standards are applied in a development. A development earns credits in various categories of the LEED rating system and requires incorporating environment-friendly restrictions in the set of covenants, conditions, and restrictions that govern the development. These restrictions serve a variety of purposes, such as the protection of steep slopes, limiting site disturbance in perpetuity, preserving trees in perpetuity, incurporating on-site energy generation requirements, and requiring adherence to light pollution standards. While an existing community may not be able to achieve the standards this program sets out, reviewing the LEED guidelines can provide invaluable assistance as a starting place for "green ideas."

If a client has a development and intends to obtain a LEED certification it is important to ensure that the CCRs track, and carry forward, the program requirements. For example, in the case of a recent mixed-use condominium, we had to deal with requiring recycling programs, assuring adequate changing facilities were available for persons desiring to bike to work at the condominium, and other issues, in order to assure that the initial programs and uses were addressed in the condominium's governing documents.

Make Design Guidelines And Community-Specific Use Restrictions Track Changing Technology

Architectural requirements need to be flexible to accommodate changing technology, as well. Remember that what is considered great today may change or be replaced tomorrow. When dealing with specific items be sure to create a procedure that allows changes to policies and guidelines without the need to obtain owner consents to amend a recorded document. Creating a built-in sunset provision for guidelines or a mandatory review of the guidelines after a specific period of time will also enhance the CCRs and assist in tracking the evolution of products available to owners.

Such guidelines should specifically state that new technologies and products that were not available when the guidelines were initially adopted must be given special consideration in connection with review of requests for approval. Variances should be granted when new products are in harmony with the intent of the guidelines and the then-current appearance of the development. Considerations for architectural guideline changes may include such simple ideas as allowing awnings on homes, as awnings can reduce demand for air conditioning. Keep in mind that the market's evolution may include a return to items that merely fell out of fashion and not just the creation of new products.

For example, in some developments, decks must be painted to match a home's trim colors. However, long-lasting engineered wood has come onto the market after those guidelines initially came into vogue. Painting this type of material may not be recommended and may even void the manufacturer's warranty. If decks must be painted to match trim, and there is no variance permitted or consideration given to the benefits of the new product, there is a direct disincentive for owners to use the preferable "green" material.

In developments where an association is responsible for maintenance of units or utilities are master-metered, consider requiring programmable thermostats in all units and advise associations to teach unit owners how to use them. Require owners to plug air leaks around windows, doors, and wall penetrations or make sure the association has the authority to do so on behalf of owners.

With respect to landscaping, require use of native plants in landscaping, including wildflowers. Use guidelines to minimize lawn areas and encourage tree planting. Of course, professional landscapers and arborists can provide valuable input when drawing up reasonable landscape guidelines for a development. The guidelines should encourage or can even require xeriscaping (water conserving landscape design). Some areas of the country, including my home state, are experiencing a significant, long-term drought and the popularity of xeriscaping in such areas is increasing. Owners in a development that embraces xeriscaping will benefit from reduced watering and other landscape maintenance costs from the adoption of xeriscaping principles. A less stringent change to guidelines would be a restriction on planting non-native plants.

Along similar lines, prohibit or limit the use of industrial fertilizers and other synthetic lawn care products, as these products can adversely affect the ecosystem around the property where it is used. Fertilizer contained in runoff has long caused problems in ponds, lakes, and other waterways. Prohibiting its use may actually save costs related to association expenses in the management of a pond or lake that would otherwise be spent countering the fertilizer's effect on the water (and its inhabitants).

Another idea is to make sure the guidelines allow driveways and other concrete slabs to be replaced by geoblock or other aesthetically pleasing permeable surface. In many standard CCRs, such materials are either not addressed or are implicitly prohibited through the description of the materials driveways, sidewalks, and patios can be made of.

Create Community-Wide Programs And Services That Carry Through Environmental Ideals

This is an area where leadership in an association makes "going green" a positive experience. However, the framework for programs the association may want to establish, the creation of committees, and authority for their operation should be set up in advance in the CCRs and related governing documents. The association can adopt programs to accomplish green goals without needing to create restrictions and require punitive actions for the failure to comply with those restrictions. Programs should be simple and easy to accomplish, as the people involved will be volunteers.

For example, a community composting program or Christmas tree recycling program will require some community involvement but has limited expense and effort. The composting program would only require some space, a few stand alone trash composters, and a few overseers who make sure things go smoothly. Set up electronics recycling programs or computer donation programs to prevent those toxic items from being improperly discarded. A committee can be tasked with soliciting used computer equipment and other electronics from owners and donate them to charitable groups. The net benefit is two-fold: helping the community and preventing electronics from ending up in a landfill.

Set up a committee to place and maintain recycling containers in common areas to serve the entire development. This is especially effective if local garbage collection companies do not provide recycling with their garbage collection services. In the alternative, have a committee partner with local schools to have containers placed in the community in support of school recycling drives.

The association can adopt an internal policy to use environmentally responsible cleaning materials in clubhouse and pool areas and use compact fluorescent light bulbs. Power development lights through solar panels where possible.

The association can buy an electric mower (or two) for use in the development. Giving owners a cleaner, quieter, easy alternative to gas mowers will help minimize the use of gas mowers and will likely be better received than an outright prohibition on gas mowers.

A committee can also be formed to get in touch with local farmers and farmers' markets to set up a market day in the development. This promotes the concept of buying local and can have a positive effect on the sense of "community" within the development. If open to the public, such a market can also enhance the public image of the development and assist in marketing property or bring in additional traffic.

COUNSELING CLIENTS REGARDING GREEN CHOICES • The key to representing community associations has always been advocating for reasonableness. The problem is that one person's idea of reasonable is not always the same as everyone else's. This is especially true when it comes to viewing a neighbor's yard, whether it contains a lush green lawn, a meadow of native wildflowers, or laundry drying on a clothesline.

Currently, a backlash against traditional association controls is growing against restrictions that interfere with green living. Stories circulate about fines for hanging out clothes on temporary clotheslines, growing lawns taller in drought conditions, or replacing lawns with wildflowers. Compost piles and vegetables gardens, too, are often the target of enforcement actions.

One can go to the opposite extreme by prohibiting the use of chemical fertilizers, limiting lawn size, or requiring the use of sustainable materials on buildings. While, of course, it is a laudable goal to want to require owners and occupants to adhere to a high standard of environmental responsibility, it will be difficult to police and enforce. When counseling clients as to what restrictions to loosen, re-write, or adopt, keep in mind there are limits to how much restrictiveness will be tolerated on either side of the issue.

In many cases the choice may be easy, especially when developing a community from the start. Practitioners and associations alike should keep the restrictions easy and reasonable, with a focus on easy-to-staff programs and easy-to-enforce restricttions (for example, instituting community recycling, allowing clotheslines), while permitting (but not requiring) the more expensive or intensive aspects of green living. If one of the greatest complaints about traditional covenants is the rigidness that requires owners to stick to conventional restrictions that prohibit eco-friendly practices, the response should be to create flexibility that gives owners a choice to adopt green practices and to guide them toward reasonable and responsible practices for the benefit of the community. Counsel your clients to put effort into making sure any current owners or potential owners know about unusual provisions through marketing materials, sale contract provisions, and legally required disclosure documents. This can help to ensure that people buying into the development know the ground rules and are not caught by surprise.

Another consideration is the benefit that owners receive from adopting eco-friendly practices. These days the benefits can exceed mere personal satisfaction: there are real dollars to be saved. Utility bills can be cut and tax incentives gained, at both federal and state levels. In addition, energy-saving homes can gain added value. (See *Solarizing Can Pay Off in More Ways Than One,* by Ginny Figlar and Mary Jo Cameron, http://life.gaiam.com/gaiam/p/SolarizingCanPayOffinMoreWaysthanOne.html)

It is true that many people see clotheslines in use outside a home as a detractor from the home's appearance. Others feel that a yard is only pretty and well kept if the grass is green and kept short. And few have considered solar cells aesthetically pleasing. Unfortunately, the reality is that prohibiting clotheslines or solar panels and requiring vast expansive lawns are practices that are not appropriate in a community that seeks to be environmentally responsible and ignores the growing trend favoring environmental responsibility in everyday choices. Sustainable, eco-friendly practices and technology are ever-evolving. Even if the entire community does not seek to adopt these ideals, the flexibility to consider and permit uses and conditions that are becoming more prevalent is key to satisfaction of the community's residents.

If changes to existing CCRs are adopted, be sure the intent behind the change is clear in your amendment or other documents. It will give guidance to people who have to enforce the changes. After the people who adopted the changes are no longer managing the association, such a statement of intent will let future purchasers in the development know about the ideals behind die requirements.

CONCLUSION • Sometimes, these choices will be made for your developments. Some states are considering passing laws that give homeowners the right to install solar panels (such as Hawaii) and take other actions that are environmentally friendly (for example, Arizona and Florida). Counsel architectural modifications reviewers to consider the benefits the owners seek when making a change. Will denying the change prevent those owners from reducing their monthly utility bills? Will it prevent them from getting tax incentives? There may be die savings of real dollars motivating the proposed change. In addition, homes with solar power sources are better equipped to deal with natural disasters, such as Hurricane Katrina. Developments in areas that face power outages due to storms should see the value in encouraging, or at least allowing, on-site power sources. People are making green choices for any number of good reasons, and the CCRs should have the flexibility to put those choices into practice, as long as the changes are right for the owner, the development, and the association.

OHIO FORECLOSURE CASES:
LENDERS BEWARE – THE RIPPLE CONTINUES

By Gretchen D. Jeffries and Michael J. Ball

In previous articles appearing in the *eReport*, we discussed the two foreclosure cases from the United States District Court for the Northern District of Ohio: *In re Foreclosure Cases,* 2007 WL 3232430 (N.D.Ohio, Oct. 31, 2007) and *In re Foreclosure Actions*, 2007 WL 4034554 (N.D.Ohio, Nov. 14, 2007) (collectively, the "Northern District Foreclosure Cases") and the influence of these decisions, including subsequent cases in the United States District Court for the Southern District of Ohio, which followed the lead of the Northern District Foreclosure Cases. The courts in these cases dismissed complaints to foreclose on mortgages because the plaintiff lender failed to submit to the court a copy of the assignment of the note and mortgage evidencing the plaintiff's status as holder of the note and mortgagee under the mortgage at the time the foreclosure complaint was filed. The previous articles also addressed the open issue of whether the Ohio state courts would take the same position as the federal courts and require proof of ownership of the note and mortgage at the time of the filing of the foreclosure complaint. The Ohio cases decided prior to the Northern District Foreclosure Cases appeared to offer more latitude to foreclosing lenders that did not attach assignment documents to the complaint, allowing, in some instances, for the lender to submit a post-filing assignment to establish the plaintiff lender's standing.

Despite these earlier cases, one recent case in the First Appellate District of Ohio indicates that the tide is ebbing toward the federal cases, *Wells Fargo Bank, N.A. v. Byrd*, 2008-Ohio-4603 (Ohio App. 1 Dist., 2008). On January 23, 2007, Wells Fargo filed a foreclosure action claiming that it was the holder of a promissory note and mortgage deed from Gloria and Ellsworth Byrd; however, both the note and mortgage identified WMC Mortgage Corp. as the lender. *Id* at ¶2. Attached to Wells Fargo's motion for summary judgment was an assignment of the note and mortgage dated March 2, 2007, acknowledging that WMC Mortgage Corp. had assigned the note and mortgage to Wells Fargo. *Id* at ¶3. The trial court dismissed the case with prejudice and ordered the law firm representing Wells Fargo to submit proof that its client is a real party in interest at the time of the filing of any future foreclosure complaints. *Id* at ¶4. The appellate court addressed the issue of whether a plaintiff lender, which is not a real party in interest when the suit is filed, can later cure the defect by producing an after-acquired interest in the litigation. *Id* at ¶7. Wells Fargo argued that in dismissing the case, the trial court misapplied Civ.R.17, which provides:

> Every action shall be prosecuted in the name of the real party in interest….No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Citing cases from the Eleventh and Twelfth Appellate District in Ohio, the appellate court reasoned that Civ.R.17 is not applicable unless the plaintiff has standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the subject matter. *Id* at ¶9. In other words, if the plaintiff lender does not have standing to be in the courtroom, the plaintiff lender cannot avail itself of the right to Civ.R.17's provision allowing for "a reasonable time…after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." The appellate court held that "in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage." *Id* at ¶16. However, the appellate court did find that the trial court was in error to dismiss the foreclosure action with prejudice. *Id* at ¶23. The appellate court further found that the trial court lacked authority to order the plaintiff lender's law firm, upon filing of future foreclosure complaints, to present additional documentation demonstrating that its clients are the real party in interest. *Id* at ¶24.

In addition to dismissing cases in which plaintiff lenders have been sloppy in their record keeping, courts and politicians inside and outside of Ohio have been profferring and promulgating manners in which to deal with the "foreclosure crisis" clogging the court systems. In a previous article, we discussed the order issued in Summit County, Ohio incorporating new procedures for foreclosure cases, including the requirement of a "Certificate of Readiness," which serves to demonstrate that the plaintiff lender is the real party in interest and that the matter is ready to proceed against all necessary parties.

Along this same line, Chief Judge Robert J. Morris, Jr. of the Sixth Judicial Circuit in and for Pasco and Pinellas Counties, Florida recently issued Administrative Order No. 2008-081 regarding mortgage foreclosure actions. In the order, Chief Judge Morris admonishes attorneys for their role in predicating the inefficiency associated with the ever-increasing volume of mortgage foreclosure cases:

> Frequently, attorneys who handle a large volume of mortgage foreclosure cases do not have their pleadings in order or fail to appear at scheduled hearings, causing the court to reschedule or delay hearings in mortgage foreclosure cases. The volume of the cases and the resetting of these hearings results in difficulties scheduling these summary proceedings. In light of the court's finite resources, it is necessary to establish procedures for more efficient handling of mortgage foreclosure cases.

Citing these problems as its basis, the order provides for additional procedural steps to be taken in connection with a complaint to foreclose a mortgage by an institutional lender in Pasco and Pinellas Counties, Florida. The additional steps include: (1) that a notice to homeowner and a plaintiff/lender contact information sheet be submitted to the Clerk of Circuit Court with the initial foreclosure filing; [1] (2) that prior to requesting a mortgage foreclosure summary judgment hearing date, plaintiff's attorney file with the Clerk a uniform certificate titled "Certification of Compliance with Foreclosure Procedures", which provides the attorney's certification of the completion of requisite actions and the dates upon which those actions were completed; and (3) delivery of a foreclosure judgment packet[2] by plaintiff's attorney to the presiding judge's office at least 5 business days prior to the scheduled hearing date for the motion for summary judgment. Among the items required to be submitted in the foreclosure judgment package is the **original** promissory note.

Outside of the court system, politicians too are taking measures in reaction to the "foreclosure crisis." For example, the mayor of Providence, Rhode Island proposed a new ordinance in December, 2008 affecting the statutory non-judicial residential mortgage foreclosure process in the City of Providence. The new ordinance requires, among other things, the following: (1) written notice from the lender to the City of lender's intent to foreclose at the same time the

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[1] This requirement applies only to foreclosure on a homestead property.

[2] The packet consists of the following items: (a) Proposed Uniform Final Judgment; (b) Original Promissory Note; (c) Notice of Sale; (d) copy of Certification of Compliance with Foreclosure Procedures; and (e) copy of the Notice of Hearing.

lender issues notice to the homeowner of the foreclosure action; (2) filing of the notice of intent by the lender with the City Clerk/Recorder of Deeds; (3) a ***mandatory mediation conference*** between the homeowner and lender; and (4) prior to the mediation, a loan counselor to be assigned to the homeowner by a HUD-approved independent counseling agency. The ordinance provides for a penalty of not less than $1,000 per offense.

Whether it is an unwillingness on the part of the courts to allow a plaintiff lender to skirt the formal procedural requirements regarding assignment of notes and mortgages or additional procedural requirements instigated by bureaucrats and judges alike, it is clear that foreclosing on mortgages can no longer be a perfunctory function for lenders, at least for now and the foreseeable future.

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