KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT



August 2016

Community Association, Club & Resort
Annual Update

Joshua D. Krut
Chair, Community Association, Club & Resort
krut@kolawyers.com
(561) 910-0688

Scott Hyman
Attorney, Community Association, Club & Resort
hyman@kolawyers.com
(561) 910-0715

Greetings!

In the next few pages you will find important information relevant to legal developments in the community association industry over the last twelve months.

Please pay special attention to the fire sprinkler retrofit advisory (page 2). In case you are not aware, December 31, 2016 is a very important deadline for certain condominium buildings to opt out of the requirement for the installation of an approved and supervised automatic fire sprinkler system. Failure to comply with this deadline will require certain condominium associations to initiate an application for a building permit demonstrating that the association will become compliant by December 31, 2019. We strongly recommend reviewing this important advisory and immediately retaining a qualified engineer to ensure that the necessary steps are being taken in advance of this New Year's Eve deadline.

We have also included information on the statutory amendments that did and did not pass (page3). Importantly, all community associations are now required to complete the processing of a service member's rental application within seven (7) days after submission of the application. Accordingly, all associations will want to review their application and leasing procedures to ensure that they are ready and able to comply with such a quick turnaround time. There were also several interesting amendments that were not passed, involving estoppel certificates and fees, liens for fines, official records, and the Marketable Record Title Act. We have included summaries of these amendments even though they were not passed because the issues contained therein may arise in subsequent legislative sessions, and associations should be aware of the trending issues affecting the industry.

Equally as informative and educational are the case law rulings (page 5) that have been published which affect association operations. You will find that these decisions are generally favorable to community associations, as long as associations take advantage of the guidance set forth in the cases and avoid certain pitfalls by learning from the mistakes suffered by other associations. The cases include valuable lessons for associations as it pertains to foreclosures and confidential communications with property managers.

Finally, we have included information summarizing two important issues affecting associations today. First, we discuss new guidance published by the Department of Housing and Urban Development involving the Fair Housing Act and criminal background checks (page 8). Second, we address the increased scrutiny that many associations have been facing with respect to their high transfer fees (also known as screening fees or application fees), which are used to conduct background checks on applicants (page 10).

We hope you find this information useful in ensuring that your community is up to speed on the ever-changing dynamics of community association living, and we hope that it helps to ensure that your community continues to be a desirable place to reside.

As always, please do not hesitate to contact us with any questions or concerns. Our goal is to help you achieve your goals.

Best Regards,

Josh

OFFICES

Boca Raton
200 East Palmetto Park Road
Suite 103
Boca Raton, FL 33432

Fort Lauderdale
1 West Las Olas Boulevard
5th Floor
Ft. Lauderdale, FL 33301

Miami
2800 Ponce de Leon Boulevard
Suite 1100
Coral Gables, FL 33134

Fire Sprinkler Retrofit

The Florida Fire Prevention Code provides that by December 31, 2019, all high-rise buildings (defined as being greater than 75 feet in height from the lowest level of fire department access to the floor of the highest occupiable level) must be protected by having installed an approved and supervised automatic fire sprinkler system, unless every unit in the building has exterior exit access. However, the Condominium Act permits a residential condominium association (an "Association") to opt out of the requirement to install an automatic fire sprinkler system if a majority of all of the voting interests in the Association vote (either by proxy, ballot, or written consent) to do so at a duly called membership meeting. In order to ensure that the opt out vote is effective, the Association must hold the membership meeting and vote, as well as record a certificate attesting to such vote in the public records, by no later than December 31, 2016.

If the Association decides to hold a meeting and vote to opt out of the required fire sprinkler system, it must mail or hand-deliver to each Unit Owner written notice of the meeting at least 14 in advance of such meeting. Within 30 days after the vote, notice of the results of the vote must be mailed or hand-delivered to all Unit Owners. Evidence of compliance with this notice requirement must be made by affidavit executed by the person providing the notice and filed among the official records of the Association. After notice is provided to each owner, a copy must be provided by the current owner to a new owner before closing, and by an owner to a renter before signing a lease. The Association must also report to the Division of Condominiums the results of the membership vote and the recording of a certificate in the public records.

Importantly, even if the Association votes to opt out, it would likely still be required to install an Engineered Life Safety System, which is developed by a registered professional engineer that is experienced in fire and life safety design. If the Association is not in compliance with these requirements and has not voted to opt out, then by December 31, 2016, it must initiate an application for a building permit for the required installation demonstrating that the Association will become compliant by December 31, 2019.

Fire safety is a serious issue, and its importance cannot be overstated. In determining whether to opt out of the fire sprinkler requirement, the Association should consider various factors, including, but not limited to, life safety issues, insurance issues, the general condition of the building, and the costs of the various options. A qualified and licensed fire and life safety engineer can help the Association weigh these factors. Accordingly, if the Association has not yet taken steps to comply with the fire safety requirements, we believe that it is imperative for the Association to immediately retain such an engineer in order to inspect the building and determine what may be required of the Association in light of the upcoming deadline.

2016 Community Association Legislative Update

Unlike the past few years, the 2016 Legislative Session did not result in significant changes to the operations of community associations. Nonetheless, there were many potentially impactful bills that were not ultimately passed. The following is a summary of the new law that is of most importance and relevance, as well as a summary of the important bills that were not passed. We have included the bills that did not pass because the issues contained therein may arise in subsequent legislative sessions, and associations should be aware of the trending debates affecting the industry; one such bill affects both condominium associations and homeowners' associations, while the other two bills only affect homeowners' associations. Please be advised that the summaries below are for informational purposes only, and they are not intended, nor should they be considered, the providing of legal advice. Please let us know if you have any questions about the information herein, or if you would like us to review your governing documents to ensure that your Association is adequately protected with regard to the 2016 legislation.

New Statutory Amendment

Lease Applications for Service Members

The statutory amendment from this year's legislative session with the largest impact on associations involves lease applications for services members. Section 83.683, Florida Statutes, was amended to provide that if an association requires a prospective tenant to complete a rental application before residing in the community, then the association must: 1) complete the processing of the rental application of a service member within seven (7) days after submission of the application; and 2) within such 7-day period, notify the service member in writing of an application approval or denial and, if denied, the reason for denial. Absent a timely denial of the rental application, an association must allow the owner to lease the parcel or unit to the service member, and the landlord must lease the parcel or unit to the service member if all other terms of the application and lease are complied with. For purposes of this amendment, "service member" is defined as any person serving as a member of the United States Armed Forces on active duty or state active duty and all members of the Florida National Guard and United States Reserve Forces. See Section 250.01, Florida Statutes. This amendment places a significant

burden on associations to not only cause a quick turnaround on the application process, but also to be aware of which applicants are service members. Therefore, in order to best protect itself, an association should amend its rental application to include a question asking whether the prospective tenant is a service member, as defined by Section 250.01, Florida Statutes. Please do not hesitate to contact our office to discuss any questions or concerns on this issue.

Bills that were not Passed

Estoppel Certificates and Fees

This bill would have changed the amounts that may be collected for preparing estoppel certificates, as well as the required procedures for such preparation. While the current law allows an association to charge a "reasonable fee" for the preparation of an estoppel certificate, the bill provided a cap of $250 if no delinquent amounts are owed to the association for the applicable parcel or unit, an additional capped fee of $100 if the estoppel certificate is requested on an expedited basis and delivered within three (3) business days, and an additional capped fee of $200 if delinquent amounts are owed to the association for the applicable parcel or unit.

Additionally, the bill prohibited an association from charging a fee for an estoppel certificate that is issued more than ten (10) business days after the association receives the request for the certificate, and limited increases to such fees only every three (3) years and in accordance with the Consumer Price Index.

Finally, the bill waived an association's right to collect any amounts in excess of the amounts reflected on the estoppel certificate from anyone who relies on the certificate, including the owner (whereas the current law appears to allow an association to collect such excess amounts from an owner if there is an unintentional error in the estoppel certificate), provided that an estoppel certificate is only effective between 30 and 35 days after issuance, and required an unreasonable amount of information to be included on an estoppel certificate.

All of these changes would have negatively affected an association's ability to charge a reasonable estoppel fee, provide a thorough and accurate estoppel certificate, and protect itself against mistakes or delays in the estoppel process. Such negative effects

Continued on page 4

Continued from page 3

would unfairly fall on the owners who have no connection with the transaction rather than the parties requesting the estoppels. Therefore, the bill contained significant consequences for community associations as a whole, and the community association industry may have taken a collective sigh of relief upon hearing that this bill did not become law.

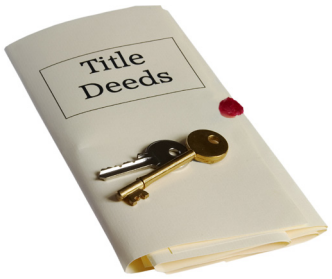
Liens for Fines, Official Records, and Binding Arbitration

This bill also would have crated negative consequences, although it only affected homeowners' associations. One of the important differences in enforcement procedures between homeowners' associations and condominium associations is that homeowners' associations may place a lien on an owner's parcel for fines exceeding $1,000, whereas condominium associations cannot place a lien on an owner's unit for any amount of fines. This makes the collection of fines difficult for condominium associations because it removes the greatest point of leverage, i.e., encumbering an owner's unit with a lien. Instead, if a condominium association wishes to collect fines from owners who refuse to pay them, the condominium association is often forced to initiate a lawsuit, which can be a time-consuming and expensive process. This bill eliminated the right of a homeowners' associations to place a lien on an owner's parcel for any amount of fines, which would have diminished the ability of homeowners' associations to enforce the collection of fines similar to condominium associations.

Additionally, this bill increased the minimum damages for the failure of a homeowners' association to provide access to official records from $50 per calendar day up to $500 per calendar day, as well as increased the number of days for which a homeowners' association may be liable for such damages from 10 days to 30 days. By way of example, this means that if a homeowners' association does not provide access to the official records to a member, then the member could be entitled to $15,000 in minimum damages, whereas the current law only permits $500 in minimum damages. The bill also created financial liability for property managers if they are the ones responsible for failing to provide access to the official records, as well as prohibited a homeowners' association from reimbursing the manager for such financial liability.

Marketable Record Title Act

This is one of the only bills that was not passed which would have provided benefits to an association, although this bill only applied to homeowners' associations. The Marketable Record Title Act ("MRTA"), established and set forth under Chapter 712, Florida Statutes, aims to prevent a person examining property title from having to search the property back to the early ages of time, and it empowers a person



owning land to be deemed to have record title to such land which is free and clear of all claims, including the covenants, conditions, and restrictions (the "CC&Rs") established in the governing documents of a homeowners' association. Of course, this presents a potential problem for a homeowners' association if it does not act to preserve the CC&Rs as a claim and covenant against an owner's parcel. Barring special provisions in the governing documents which extend the life of the CC&Rs, the CC&Rs in an association's governing documents expire 30 years from the date on which the CC&Rs are filed, unless the CC&Rs are preserved through a very specific statutory process. The purpose of this bill was to exempt the CC&Rs of a homeowners' association from expiring under MRTA, and therefore would have saved unnecessary time, expense, and legal complications for homeowners associations.

However, in light of the unsuccessful attempt to alleviate homeowners' associations from this burden, MRTA is still effective and remains one of the most important laws for homeowners' associations. Accordingly, we strongly suggest reviewing your association's governing documents in order to examine the "root of title." If it is determined that the CC&Rs are set to expire or have already expired, it is imperative to have our office analyze the circumstances to ensure that all necessary and preventative steps are taken to preserve the very important CC&Rs. Without the CC&Rs, the preservation of your community's symmetry, beauty, and allure could be severely compromised. In addition, the very essence of your association's function may become impaired, and it may find itself without the most basic and integral of powers, such as the authority to enforce rules, hire managers, provide lawn maintenance and security, or collect assessments to maintain, operate, repair, replace, and insure the common areas. The preservation process can be complicated and time-consuming, so if you feel that there may be an issue, please contact our office so that we can undertake a thorough review of the governing documents and applicable law to ensure that the association is adequately protected.

Case Law Update

The following summarizes some of the more important case law decisions that were published over the past year. The ramifications of these cases are far-reaching for associations. We suggest that your Association takes full advantage of the guidance set forth in the cases, and avoid the pitfalls suffered by other associations, by amending your Declaration and contracts as necessary.

Bona Vista Condominium Association, Inc. v. FNS6, LLC

In Bona Vista, the chronology of the facts were as follows: 1) Guido Brito was the original owner of a unit; 2) the association foreclosed its lien for delinquent assessments and purchased the unit at its foreclosure sale; and 3) the bank foreclosed its lien three years later, and FNS6 purchased the unit at the bank's foreclosure sale. After FNS6 took title to the unit, the association informed FNS6 that FNS6 was solely responsible for the nearly $21,000 in unpaid assessments that came due during the three years that the association held title to the unit. FNS6 disagreed and filed a lawsuit.

Importantly, the 2013 version of the Condominium Act applied to this case. The 2013 version of Section 718.116(1)(a), Florida Statutes, provided that while the current owner (here, it was FNS6) and the immediate-prior owner (here, it was the association) are jointly and severally liable for unpaid assessments which came due while the immediate-prior owner (the association) owned or held title to the unit at issue, the obligation to pay such assessments does not affect the right of the current owner (FNS6) to recover the amounts it paid from the immediate-prior owner (the association).

As applied to the facts of this case, this meant that: 1) the association is jointly and severally liable with Brito (the original owner) for those unpaid assessments that came due while Brito held title; 2) the association (as the immediate-prior owner to FNS6) is jointly and severally liable with FNS6 for those assessments that came due during the association's ownership of the unit at issue; 3) FNS6 (the current owner) is not liable for any unpaid assessments which came due while Brito (the original owner) held title; 4) FNS6 is jointly and severally liable with the association (the immediate-prior owner to FNS6) for assessments which came due while the association held title; and 5) FNS6 is solely responsible for all assessments which have come due since it took title.

Therefore, because the association and FNS6 are jointly and severally liable for the assessments that came due during the association's ownership (roughly $21,000), the association may recover that amount from FNS6, and FNS6 has the right to recover that amount from the association. As a result, the court ruled that FNS6 did not owe any assessments incurred through the date of its purchase of the unit because both parties had the right to seek the $21,000 from the other party, making it "basically a wash."

We used the word "importantly" above when describing the annual version of the Condominium Act that applied to this case because this statute was amended in 2014. In particular, Section 718.116(1)(a) now provides that the term "previous owner" does not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. This means that for the purposes of determining who is liable for unpaid assessments, the time during which the association owned the unit is essentially excluded and forgotten. Therefore, an association is not jointly and severally liable with the new owner (in this case, FNS6) for all unpaid assessments that came due during the association's ownership of the unit, and the new owner is jointly and severally liable for the unpaid assessments that accrued during the time that the original owner (in this case, Brito) owned the unit.

However, in order for a condominium association to avail itself of the new statute, its declaration must either be amended to include the new statute or contain what is known as Kaufman Language (Kaufman Language can be either part of the original declaration or added as an amendment). Kaufman Language is a provision in a declaration that automatically incorporates all future statutory amendments into the declaration,

Continued on page 6

Continued from page 5

and without Kaufman Language, an association might be forced to using the version of the Condominium Act that was in place when the declaration was recorded. Therefore, without Kaufman Language, an association, such as Bona Vista, may be detrimentally affected when it cannot take advantage of new favorable amendments to the Condominium Act. Condominium associations that amend their declarations to include the favorable 2014 amendment language (or to include Kaufman Language) would avoid the pitfalls in which Bona Vista found itself, i.e., a $21,000 error. Furthermore, in light of the similar language contained in the Homeowners' Association Act, it appears likely that similar decisions will be forthcoming for the homeowners' associations and/or that the Bona Vista case would be used as persuasive authority in the homeowners' association context. We suggest that your Association takes full advantage of the recent favorable amendments by amending your Declaration accordingly.

Jallali v. Knightsbridge Village Homeowners Association, Inc.

In what may be one of the most important association cases in recent years, the court overruled U.S. Bank National Ass'n v. Quadomain Condominium Ass'n, Inc., a case that has become a thorn in the side of many associations since 2012. The holding in Quadomain had been widely interpreted to mean that an association's lien is barred if there is an ongoing lender foreclosure action and if the association does not intervene in the lender foreclosure action within 30 days after the lender's lis pendens has been recorded (simply stated, a lis pendens is a formal notice to the world that there is a pending legal action affecting a particular piece of property). The Quadomain ruling was based on Section 48.23, Florida Statutes, which provides that the recording of a lis pendens constitutes a bar to the enforcement of liens that are unrecorded at the time that the lis pendens is recorded, unless the holder of any such unrecorded lien intervenes in the proceedings within 30 days after the recording of the lis pendens. Quadomain caused significant issues for associations because lender foreclosure actions frequently take extended periods of time to resolve, which left associations without a viable recourse if a particular owner became delinquent 30 days after the commencement of a lender's foreclosure.

In Jallali, the court acknowledged that an association's lien is a recorded interest that is effective from, and relates back to, the date on which the original declaration of the association was recorded. Therefore, an association's lien is deemed to be recorded within the 30-day period after the lender records a lis pendens, meaning that Knightsbridge Village's lien was not barred by the lender's pending foreclosure action; in essence, the ruling in Jallali exempted an association's declaration and lien from the harsh ruling set forth in Quadomain. The court reasoned that Section 48.23 was intended to protect the lender rather than the delinquent owner, leaving it unclear as to whether an association's lawsuit contesting the superiority of a lender's lien over an association's lien would also benefit from this decision. Nonetheless, the most harmful effects of Quadomain appear to be overruled, i.e., a pending lender foreclosure action no longer bars an association's ability to proceed with its own lien foreclosure action.

The similarity in claims between a condominium association and a homeowners' association would likely result in this case equally applying to condominium association lien foreclosures. However, in order to be completely protected by the benefits that this case offers, all associations should confirm that their respective declarations include language providing that the association's lien for unpaid assessments relates back to the recording of the declaration; if not, then the board should discuss the benefits of amending the declaration to include these safeguards.

Las Olas River House Condominium Association v. Lorh

The attorney-client privilege generally permits attorneys and clients to refuse from disclosing the contents of confidential communications to third parties, including during legal proceedings. On many occasions, a property manager serves as the primary point of contact between an association's attorney and its board of directors. As a result, the attorney-client privilege plays a pivotal role in association operations. In Lorh, the court discussed whether the attorney-client privilege applies to a property

Continued on page 7

Continued from page 6

manager. Importantly, if the attorney-client privilege does not apply to a property manager, then any email or telephone communications in which the manager is included would not be protected by the attorney-client privilege, and adverse parties would potentially have the right to view or be privy to such communications.

In Lorh, a unit owner sued the condominium association, and during the course of discovery proceedings, the unit owner requested copies of all communications between the association and its attorney in which the unit owner was mentioned. The trial court ruled that the unit owner was entitled to such copies because the property manager was copied on the communications, thereby waiving the attorney-client privilege attached to them. The association appealed on the basis that the property manager acted as the association's agent and kept the board and attorney informed on association matters and communications, meaning that such communications should be protected by the attorney-client privilege.

In coming to its ruling, the Lorh court referenced the Florida Supreme Court case of Southern Bell Telephone & Telegraph Co. v. Deason. In Deason, the Florida Supreme Court considered what constitutes a confidential communication in the corporate context, and noted that a corporation can only act through its agents whereas a person can individually seek legal advice for himself. The Deason court set forth a five-part test to determine whether a corporation's communications are protected by the attorney-client privileged:

(1) the communication would not have been made but for the contemplation of legal services;
(2) the employee making the communication did so at the direction of his or her corporate superior;
(3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
(4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

The Lorh court ruled that the Deason test should be applied to associations and their property managers in light of their corporate structure. This ruling certainly will provide some comfort to associations who use property managers as a point of contact with the attorney. However, associations should nonetheless consider the following procedures to ensure the preservation of the attorney-client privilege to the greatest extent possible:

- Ensure that contracts with a property manager contain clear language regarding the role of a property manage in the legal affairs of the association. For example, the contracts should include language that expressly extends the attorney-client privilege from the association to the manager, include language that the association's attorney may have to speak with the property manager in the rendering of legal advice to the association, and include language that the property manager is to be considered an agent for the purpose of assisting the attorney in rendering legal advice to the association;
- Refrain from including anyone other than the board, attorney, and property manager on confidential emails or phone calls (and only including the property manager if it is necessary to include him and if the property manager is established as an agent of the association for legal matters);
- Only including the property manager's employees on confidential emails or phone calls on an as-needed basis.

While including this language in property management contracts will not guarantee that any such communication will be protected by the attorney-client privilege, it will strengthen an association's legal argument that the attorney-client privilege has not been waived if a property manager is included on confidential communications. We suggest reviewing your property management contracts to ensure that the association is adequately protected.

Community Associations and Criminal Background Checks

The Department of Housing and Urban Development ("HUD") is responsible for enforcing the Fair Housing Act (the "FHA"), which plays a pivotal role in the operations of community associations around the country and in Florida. In particular, the FHA prohibits practices that result in discrimination in the sale or rental of homes on the basis of race, color, religion, sex, disability, familial status or national origin. As many people in the community association industry well know, the FHA is the authority which requires associations to provide reasonable accommodations to disabled persons, such as providing assigned parking spaces close to a building's entrance or permitting pet exceptions for emotional support animals.

Recently, HUD published additional guidance (the "Guidance"), which will affect the operations of condominium associations and homeowners' associations. Specifically, HUD is concerned that because certain races are arrested at rates that are disproportionate to the rest of the American population, their criminal background checks may have a disproportionately negative impact on their applications to purchase or rent a home. Accordingly, the Guidance addresses an association's potential liability under the FHA in using criminal background checks and screenings as part of its approval process. The overarching summary is that a policy or practice that denies housing to a person based on criminal history violates the FHA if such policy or practice has an unjustified discriminatory effect on one of the above-referenced protected classes, such as race or national origin.

Of course, the question is what constitutes an unjustified discriminatory effect on one of the protected classes. In answering that question, the Guidance provides what could be described as a three-step burden-shifting test.

Step One

A challenge based on the improper use of criminal background checks will always start with the plaintiff (such as a prospective purchaser or tenant or HUD) claiming that the association has violated the FHA. In determining whether the plaintiff's claim has merit, a court will analyze whether the association's policy results in a disparate impact on a particular group of people because of their inclusion in a protected class. The Guidance contemplates that a court would use national and/or local statistical evidence on racial and ethnic disparities in the criminal justice system, as well as applicant data and tenant files, to evaluate the claim and to determine if the policy burdens one race or national origin over others.

Inevitably, determining whether a policy or practice results in a disparate impact will be fact-specific and case-specific. If the plaintiff shows a disparate impact, then the plaintiff will be deemed to have satisfied its initial burden, and the burden would then shift to the association to defend its policies. This is the first step of the burden-shifting test.

Step Two

The second step requires the association to prove that the policy or practice is justified, which the Guidance defines as being "necessary to achieve a substantial, legitimate, nondiscriminatory interest" of the association. In order to satisfy this burden, the association must show that: 1) the association has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy or practice; and 2) the challenged policy or practice actually achieves that interest. The purpose of such two-step burden is to ensure that the association's claimed "interest" is not hypothetical or speculative.

For example, an association's "substantial, legitimate, nondiscriminatory interest" in employing a particular policy could be the protection and safety of residents and property. However, the association must be able to prove through "reliable evidence" that such policy actually assists in protecting resident safety and/or property. According to the Guidance, blanket assertions based on generalizations or stereotypes that a person with an arrest or conviction record poses a greater risk than a person without such a record are insufficient to satisfy this burden.

Continued on page 9

Continued from page 8

This places associations in a seemingly impossible position. Therefore, an association's policy should place careful consideration on the nature and severity of criminal conduct, as well as the amount of time that has passed since the criminal conduct occurred. Only then will an association be best positioned to show that its policy or practice serves a "substantial, legitimate, nondiscriminatory interest." Similar to step one, a court's determination on this will be made on a case-by-case basis.

Step Three

If the association has demonstrated that its policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest, then the burden would shift one more time to the plaintiff to prove that such interest could be served by another practice that has a less discriminatory effect. The Guidance suggests that an association can help itself in having a less discriminatory effect by considering "relevant mitigating information beyond that contained in an individual's criminal record," such as the facts or circumstances surrounding the criminal conduct, the age of the individual at the time of the conduct, evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct, and evidence of rehabilitation efforts. The Guidance further suggests delaying consideration of criminal history until after an individual's financial and other qualifications have been verified.

Exception

Importantly, the FHA provides an exception for certain drug-related crimes, such as the denial of an applicant who has been convicted of the illegal manufacture or distribution of a controlled substance, meaning that an association will not be liable under the FHA for denying an applicant on such grounds, even if the denial results in a discriminatory effect. However, this exception only applies to a person's conviction for such crimes, and it does not apply if a person has simply been arrested for same. Additionally, the exception is limited to drug manufacturing or distribution convictions, and it does not apply to other drug-related convictions, such as a conviction for drug possession.

Additional Considerations

An association may be found to have engaged in intentional discrimination if an applicant shows that a criminal background check was not the true reason for a rejection, but rather that it was used as a pretext for unlawful discrimination. For example, intentional discrimination may be proven based on any of the following circumstances: 1) an association rejects a Hispanic applicant based on his criminal record, but admits a White applicant with a comparable criminal record; 2) an association has a policy against renting to persons with a particular conviction, and makes exceptions for certain White applicants but not Black applicants; 3) an association's leasing agent assists a White applicant who is seeking to secure approval despite his potentially disqualifying criminal record, but does not provide such assistance to a Black applicant; 4) a property manager tells a Black applicant that her criminal record would disqualify her from renting, but does not similarly discourage a White applicant with a comparable criminal record from applying; or 5) an association offers shifting or inconsistent explanations for the denial of an application. Additionally, the above-referenced exception regarding drug-related convictions does not apply to claims of intentional discrimination, meaning that an association cannot admit White applicants with such convictions, while rejecting Black applicants with such convictions.

Continued on page 10

Continued from page 9

Conclusions and Suggestions

Unfortunately, it appears that the Guidance may put some of the burden and risk of rehabilitating criminals on community associations, a position that will likely make many associations uncomfortable. And while criminal background checks may still be used by associations in deciding whether to approve a prospective applicant, there is now a heightened risk of a possible discrimination claim. However, the obstacles presented by the Guidance should not influence an association to stop reviewing criminal background checks, as this could also present liability to the association.

Accordingly, associations must be careful and specific in reviewing applications and in establishing their policies. In order to facilitate a legally compliant review of criminal background checks, an association should consider the nature of the committed crimes (theft, violence, privacy violation, etc.), the degree or category of the crimes (misdemeanor, felony, etc.), the amount of time that has passed since the crimes were committed and/or since the conviction, and the judicial result of the crimes (arrest, plea deal, conviction, etc.), keeping in mind that each application should be reviewed on a case-by-case basis.

Simply stated, an association will want to focus on crimes for which the applicant has been convicted and which are of a nature and severity that might threaten the safety of the community's residents, while placing reasonable considerations on the amount of time that has passed since the crimes were committed and/or since the conviction. For example, an arrest for a white-collar crime ten years ago would not present as great of a concern as an arrest for burglary within the last few years.

In establishing policies for applications, an association should ensure that they are in written form, included as part of the association's records, and provided to all owners. However, most importantly, a competent community association attorney should be consulted in drafting the policies, as well as each time that an association intends to reject a prospective applicant. These procedures will help an association minimize its potential liability to the greatest extent possible.

Transfer and Application Fees

Many community associations are facing increased scrutiny from prospective owners, prospective tenants, and government agencies as a result of their high transfer fees (also known as screening fees or application fees), which are used to conduct background checks on applicants. In fact, we are aware that some attorneys are gathering information in preparation to initiate class action lawsuits against certain associations for their fees. In light of this negative attention on associations, it is important to be aware of the permitted fees and procedures for transfer applicants.

Pursuant to Section 718.112(2)(i), Florida Statutes, a condominium association may not charge a fee in connection with the sale or lease of a unit, unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. If an association satisfies these prerequisites to impose a fee, such fee may not exceed $100 per applicant, with the exception of a husband/wife or parent/dependent child, whom are to be considered as one applicant. Additionally, if a lease or sublease is a renewal of a lease or sublease with the same lessee or sublessee, no charge may be made.

Similarly, if the authority to charge a security deposit is contained in the declaration or the bylaws, then a condominium association may require a prospective tenant to place such deposit into an escrow account that is maintained by the association. The security deposit may not exceed the equivalent of one (1) month's rent, and the association may use the security deposit to protect against damages to the common elements or association property resulting from the acts or omissions of tenants. Importantly, security deposits do not apply to unit owners.

There is no statutory limitation on the amount of transfer fees for homeowners' associations in Chapter 720 like there is for condominium associations in Chapter 718. However, generally speaking, an association may not exercise a power that it has not been granted either through the statutes or the governing documents. Thus, a transfer fee that is charged by a homeowners' associations might not be valid unless it is properly adopted in the governing documents.

Unfortunately, the limit on transfer fees for condominium associations means that they may be forced to bear any expense of conducting background checks that exceeds $100, which is an unfair burden placed on condominium associations. Nonetheless, this is what the current law mandates. Please let us know if you have any questions about the information contained herein, or if you would like us to review your governing documents to ensure that your Association is adequately protected in light of the trend of prospective purchasers and tenants to challenge transfer fees.