

Freyermuth, R. Wilson

From: Direktor, Kenneth <KDirektor@becker-poliakoff.com>
Sent: Friday, August 23, 2013 3:21 PM
To: Freyermuth, R. Wilson
Subject: Request for Comments on Potential Change to 3-116 of the ULC

Mr. Freyermuth,

My practice has focused on community association (CA) law since 1984. I currently chair the CA practice group at the law firm of Becker & Poliakoff. Our group includes over 30 lawyers practicing full time in CA and represents nearly 4,000 communities around Florida. I also teach condominium law as an adjunct professor of law at Nova Southeastern University College of Law and lecture for various civic association comprised of Board members and community association manager trade organization throughout South Florida.

The materials sent with your e-mail accurately describe the current plight of community association as a result of the lack of equity in most foreclosed properties and the length of the foreclosure process. I have been considering for a few years the prospect of changing the dynamic to incentivize the lender to foreclose. The old adage "time is money" is quite pertinent in this discussion. Frankly, with the lack of equity in properties, the crowded court dockets and the banks' reluctance to foreclose, the timing of the foreclosure process may be the only variable we can hope to influence to better protect the Associations. The materials attached to the e-mail addressed the banks' desire to avoid assessment liability by delaying foreclosure. However, there are other carrying costs the lenders seek to avoid, such as the cost of maintaining the unit, especially units which have been allowed to fall into disrepair. A lender foreclosing and taking title faces the same obligations as any other owner with regard to the maintenance of the unit, a covenant enforceable by the Association. As such, the lender may face a significant exposure to restore a deteriorated unit. Similarly, a lender foreclosing and taking title must consider the cost of liability and property damage insurance and, of course, the risks of avoiding that expense. I have even seen Associations forced to advance the cost of restoring utility service so a unit can be air conditioned during summer months, a significant concern in the heat and humidity of South Florida.

With all of this in mind, I respectfully ask that the committee consider changing the bank's limited liability under the current format to a limited exculpability. If the bank's risk is capped, whether at 6 months or whatever the amount in a given jurisdiction, there is no consequence to the bank from the business decision to delay a foreclosure. Although court dockets are crowded, in my experience, most delays are the result of the banks making a business decision to delay or a failing to properly handle the mortgage documents. The financial impact of these delays should not be visited upon the Association membership. We have even seen banks foreclose and conduct a sale, then vacate the sale and the judgment and delay renewing the process for years. If a bank's exculpability is capped at 6 months of assessments (not a number I'm convinced is right, but included just to illustrate the point), there would be a financial consequence arising from the decision to delay and the community would not be left to hold the proverbial bag by paying to preserve the collateral for the benefit of the bank without hope of appropriate contribution toward those costs from the bank. Simply put, we would change from a cap on the banks' liability to a cap on the Association's potential losses. A bank which forecloses promptly could do so within the limited exculpability and pay nothing for past due assessments. Accordingly, for banks that move quickly when mortgages become delinquent, this change does not involve an adverse financial impact. As a matter of fact, those that pay 6 months under the current version of 3-116 would receive a benefit. Again, in my experience, Associations would welcome a loss of 6 months, as most are seeing losses of several years of assessments, as well as special assessments and costs advanced to preserve deteriorating units.

My contact information is below and I am happy to discuss this further if so desired. Thank you for your consideration and for your efforts on behalf of the CA industry.

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