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U.S. Foreclosure Filings Jump 30 Percent in February

Foreclosure filings in the U.S. climbed 30 percent in February from a year earlier as the worsening economy thwarted efforts by the government and lenders to prevent homeowners from losing property.

A total of 290,631 homes received a default or auction notice, or were seized by the lender. Properties that got a foreclosure filing for the first time totaled 161,976, the highest in RealtyTrac records dating to January 2005. Rising unemployment also is making it harder for homeowners to keep up with payments. The U.S. jobless rate rose to 8.1 percent in February, the highest in more than 25 years.

Idaho, Illinois, and Oregon joined the list of the top 10 states with the highest rates, a sign that rising unemployment is now pushing defaults. Florida, chigan, Georgia, and Ohio were also in the top 10. California had the highest total with 80,775 foreclosure filings, a 51 percent increase from a year earlier.

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FEATURE

Protect Community from Fair Housing Violations by Outside Contractors

Communities often rely on a variety of outside contractors or vendors to perform services on their behalf ranging from landscaping to plumbing. If one of your members complains about harassment or discrimination by one of these contractors, it's not enough for you to apologize and explain that he doesn't work for the association.

Depending upon the circumstances, your association could be held liable for fair housing violations committed by outside contractors—particularly if you knew about the discrimination or harassment but failed to take action to stop it, explains fair housing expert Nadeen W. Green.

Although an association may have much less authority over the conduct of outside contractors than it does for its own employees, the

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TELECOMMUNICATIONS

Avoid Pitfalls When Leasing Condo Roof Space to Wireless Providers

In these challenging economic times, some condo associations are stretched to think of new ways to offset dwindling assessments. One potentially lucrative option is to lease rooftop space for antenna installation. The proliferation of cell phones, broadband, paging, wireless Web, and related technologies has driven the demand for wireless companies to increase their coverage areas and data transmission capacities.

Wireless providers require towers and other elevated spaces to install the equipment needed to serve their subscribers. Although independent structures have been built to house the necessary transmission equipment, many high-traffic areas simply do not have sufficient unoccupied land to build on. Therefore, installing mini-towers and inconspicuous transmission equipment on top of existing buildings has become an increasingly popular alternative.

Of course, the viability and value to wireless companies largely depends on the location of your buildings. Condominium buildings located near a high-traffic area will usually generate the most

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Fair Housing Violations (continued from p. 1)

Fair Housing Act (FHA) holds an association responsible for the discriminatory actions of outside contractors if they were acting as the community's "agent"—that is, the contractor was authorized to act on behalf of and for the benefit of the community and was subject to the community's control.

Whether an independent contractor is considered the association's agent can be a complicated legal determination, which depends on the facts of each case. Generally, courts look at a variety of factors, such as the relationship between the owner and the contractor, the nature of their business, and the general practices in the industry. The most important factor is the association's right to control the contractor's actions, according to fair housing attorney Avery Friedman.

Given the complexity of the issue, it may be difficult for you to determine who—and who is not—considered your agent among the outside contractors who perform services for your community. Instead, your best bet is to consider that any of your contractors could trigger a fair housing complaint, and to take steps to protect your community from liability for their actions.

Here are four tips to help you protect your community from fair housing trouble caused by outside vendors and contractors.

Put Fair Housing Compliance Provisions in Contracts

Two important documents that should be part of any arrangement with all your contractors are an acknowledgement that the contractor understands your community's fair housing policies and the consequences of its failure to abide by those policies; and an indemnification agreement that requires the contractor to repay you for any legal expenses or damages you must pay because of its violation of fair housing laws. The indemnification reinforces the seriousness of a fair housing violation and provides a powerful financial incentive for the contractor to ensure that its employees comply with the law.

By signing the acknowledgement form, the contractor confirms that it understands your community's fair housing policies. Your attorney should be able to help you with the specifics, but the form generally spells out your community's commitment to treat all residents in a fair manner, regardless of race, color, national origin, religion, familial status, disability, or sex—and any other characteristics protected under state or local law. It's also a good idea to make a specific reference to sexual harassment, since it is a common source of liability from outside contractors, Green adds.

If you have a written agreement with the contractor, you can attach the signed acknowledgement form. If you don't have a written arrangement, have the contractor sign the form and file it in your records. And, most important, you should think twice before hiring a contractor that refuses to sign the acknowledgement form. Green says that it could be a red flag that the contractor does not take fair housing seriously.

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Supervise Contractors' Conduct

You should train your staff to supervise outside contractors while they are working at your community, advises Green. Since your staff has been trained in fair housing issues, they will be able to detect—and immediately address—any comments or conduct by a contractor that could lead to a fair housing complaint.

For example, you may be able to head off a potential fair housing complaint if your staff member drops by the worksite and overhears a contractor's work crew exchanging racially charged jokes or using ethnic slurs while on the job. The staff member will be in a position to do something to stop such conduct—such as speaking to their supervisor—before it leads to a formal complaint from a member.

The level of supervision will depend upon the nature of the work and where it is performed, says Green. For jobs that do not involve a great deal of interaction with members, it may be enough for a staff member to go to the worksite before the contractor starts the job, and then drop by intermittently until the job is done.

On the other hand, Green advises communities to ensure that a staff member accompanies contractors for any work to be performed in close proximity to members. The likelihood of inappropriate comments or conduct—particularly sexual harassment—increases when a contractor has direct, unsupervised contact with members.

Take Special Precautions to Prevent Sexual Harassment Claims

Green notes that outside contractors hired to provide services such as carpet cleaning, painting, landscaping, and pool maintenance for your community are a frequent source of sexual harassment complaints.

HUD recently released guidance on sexual harassment claims under the FHA, which makes it clear that you may be liable if any of your employees, agents, or contractors sexually harass a member or potential applicant. The guidance says that you may be liable for sexual harassment committed by your employees or agents within the scope of their duties—regardless of whether the owner knew of or intended the wrongful conduct, or was negligent in failing to prevent it from occurring. Sexual harassment is considered a form of sex discrimination under fair housing law and the type of conduct that is prohibited.

When supervising contractors, an association's employees should watch for any conduct that could be considered sexual harassment. For example, you may be able to head off a potential sexual harassment complaint if your staff member notices employees of the landscaping company regularly taking lunch breaks near the pool and trying to interact with female residents who may be swimming or sunbathing there. Train your staff members to immediately report any suspected sexual harassment so your community may take prompt action to stop it.

Promptly Respond to Complaints About Contractors

A community's failure to address the discriminatory actions is considered a direct violation of the FHA, and exposes the community to potential liability to pay a large damage award, including punitive damages.

To prevent such claims, fair housing expert Avery Friedman recommends that communities establish policies and procedures to ensure a prompt response to any complaints about discriminatory or harassing comments or conduct by contractors working at your community. Associations should treat complaints about outside contractors seriously and to assure the member that your community will investigate and deal with every complaint they receive about outside contractors. Make sure your staff doesn't ignore complaints or give the impression that the problem is beyond their control because it involves the employees of an outside contractor, warns Green.

If your investigation indicates that the complaint is valid, then you have an obligation to do something to stop it—and to prevent similar misconduct in the future. Your response should be proportionate to the offending conduct, according to fair housing experts. In some cases, it may be enough for you and the contractor to apologize to the resident and to reprimand the contractor, says Green. But she warns that such a response would be inadequate if the complaint involves serious misconduct. In such cases, you should take steps to remove the contractor from your community by either firing him or, if he has a contract, exercising your rights under the fair housing acknowledgement to cancel the contract.

Be sure to communicate the results of your investigation—and your response—in writing to the member who registered the complaint. Even if the resident is dissatisfied with your response and files a formal complaint, your letter will provide documentary proof to counter any accusation

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Fair Housing Violations

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that you knew about a contractor's violation of fair housing law, but failed to do anything about it. Be sure to file these communications along with documentation on how the association investigated the complaint and actions taken as they may be important when defending your community against a fair housing complaint.

- Fair Housing Act: 42 USC §3601 *et seq.*
- Memorandum from Kim Kendrick: Questions and Answers on Sexual Harassment under the Fair Housing Act, issued Nov. 17, 2008; *www.hud.gov/content/releases/q-and-a-111708.pdf.*

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Q & A

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Assessing Liability for Water Damage Caused by Leaky Roof

Q Due to a leaking roof, rainwater entered the building and caused damage to a condo member's unit. As is typical, the master deed of our condo association requires the association to maintain the roof and other common elements, and requires condo members to maintain the interior of the units. The matter has not been fully investigated, but assuming that the roof leaked for some reason other than negligence on the part of the association, is the association or the unit owner typically held responsible for repairing the damaged unit's interior? And will an association's insurance policy cover this damage?

A If the leak was not due to negligence, the association will most likely not be responsible for repairing damage to the interior of the member's unit. However, showing that a leaking roof did not occur from negligence is a difficult obstacle to overcome for an association.

California attorney James Lingl points out that roofs do not ordinarily leak if they are adequately maintained. In his experience, if an association does not step up to repair the interior damage, the affected member will sue the association in small claims court, or California's superior court if the claim is more than $7,500, and the member will win. And the judgment is invariably based on a negligence theory.

From an insurance perspective, "water" has many meanings, especially when it comes to exclusions for damage caused by water, says community association consultant Clifford Treese. "Leakage and seepage" is one form of water damage that insurers exclude. Rainwater is not specifically excluded; however, damage caused by wind-driven rain without prior damage to the structure is usually excluded.

Water damage caused by faulty maintenance is another possible exclusion. In these situations, typically, an insurer might investigate whether the association had a maintenance program for the roof, and, if it did, then faulty maintenance would not be a valid reason for declining coverage.

Water damage from a leaky roof is insured for damage to the association's property, such as the common elements that are damaged. However, this does not mean that damage to the unit itself is insured in the master policy as a first party loss. If the unit owner could show that the association was negligent in maintaining the roof, the property part of the master policy would pay for damage to the association's property, and the property damage section of the commercial general liability (CGL) policy would pay for the member's property damage.

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RECENT COURT RULINGS

➤ Developer Didn't Have Actual Notice of Condo's Structural Defects

Facts: A Virginia condo association sued the condominium's developer for construction defects related to the exterior of the condominium buildings. The developer used a corporation and two limited liability companies to hold title to and manage development of the condominium project. The association alleged that the developer had made improper monetary transfers from the companies to him and used the companies to fraudulently avoid obligations owed to the association.

In October 2000, the project architect provided the developer with a field report that listed 21 specific comments and itemized various problems with individual units. Two of the comments referenced caulking the exterior and one suggested that the developer hire a water-proofing engineer to verify the exterior's seal.

Under Virginia state law, a developer of a condominium warrants or guarantees against structural defects in the units for two years from the date each is conveyed. The trial court ruled for the association based on notice of the association's potential warranty claim in the engineer reports. The developer appealed.

Ruling: The Supreme Court of Virginia reversed the trial court's decision.

Reasoning: The evidence did not show that the developer had actual notice of the units' structural defects. The architect's letter and engineering field reports did not notify the developer of any defect that reduced the stability or safety of the development as required under the state's warranty law. The documents merely contained a series of "punch list" problems, only some of which addressed the building's exterior, and made a series of recommendations to address the problems listed.

■ Luria v. Bd. of Dirs., February 2009

➤ Association May Be Liable for Slip-and-Fall

Facts: A member sued an association after she fractured her ankle when she slipped and fell while walking on the stairways and landing outside her condominium. The stairways and landing are within the common elements of the condominium property maintained by the association.

The association asked the trial court to dismiss the case. The association argued that it had no duty to maintain the common areas until the developer turned the association over to the control of the members through a duly elected board. The trial court granted the association's request to dismiss the case, and the member appealed.

Ruling: An Illinois appeals court reversed the lower court's decision.

Reasoning: The appeals court found that, under Illinois state law, the association had a duty to maintain the common elements of the property prior to the election of the initial board, and the developer acted as the interim board of managers to carry out that duty on behalf of the association. The court could find no language under state law that limits or removes the liability of the association itself once it exists as a legal entity.

■ Glickman v. Teglia, February 2009

➤ Association Didn't Violate Meeting Notice Requirements

Facts: In a four-unit condominium, a member sued the other three members of the association for allegedly violating the association's notice provisions for a meeting and breaching their fiduciary duties by voting for a proposed amendment.

The suing member alleged that the other members illegally cut substantial holes in common area walls and engaged in illegal construction and demolition activities. Also, the suing member received an emergency notice for a meeting to discuss an amendment to the governing documents, which granted the right to penetrate ceilings to install lighting fixtures and insulation to two units in the building but not to the suing member's unit. The proposed amendment passed, and the member sued.

The trial court granted a judgment without a trial in the other members' favor. The suing member appealed.

Ruling: A California appeals court upheld the lower court's decision.

Reasoning: The association's governing documents require 10 days' notice of any regular meeting. However, the governing documents also allow for a special meeting that may be called by "written notice signed by the president of the association or by any two members of the governing body other than the president."

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Recent Court Rulings (continued from p. 5)

The documents also state that the notice must be sent to all members and posted in a manner prescribed for notice of regular meetings not less than 72 hours prior to the scheduled time of the meeting. The court stated that the suing member introduced no evidence that the association did not follow the notice provisions.

The court also ruled that the suing member's complaint did not say that the other members acted as directors of the association. The court said that in voting to approve the proposed amendment, the other members acted as members of the association and not as the association's directors. Therefore, there was no authority for imposing a fiduciary duty.

■ Brownstein v. Smith, March 2009

Telecommunications

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revenue. And usually, wireless companies will approach your association about leasing rooftop space after they have conducted surveys to determine where a need exists for additional transmission sites and the most advantageous locations for equipment placement are determined.

Many associations are at a disadvantage against the wireless companies because they may not be familiar with rooftop leases and the typical contractual sticking points involved. Although a cell phone service provider's offer to lease a portion of your building's rooftop may seem like easy money, if an association agrees to the provisions in a standard rooftop lease without carefully analyzing each clause in the agreement, an association will probably regret the decision, says real estate attorney Mark Morfopoulous.

We will review the main clauses in a standard rooftop lease agreement and make suggestions for negotiating lease language that is more association-friendly than the industry's boilerplate.

Location and Installation of Antennas and Equipment

Standard rooftop lease agreements begin by broadly describing the location of the cell phone service provider's equipment, often referred to as Equipment Space, Antenna Space, and Cabling Space. This general language does not go far enough to protect owners. Therefore, when negotiating the Location and Installation clause, you should:

Make all installations subject to your prior approval. First, you should make sure that the location, type, weight, and size of all antennas, equipment, and shelters comprising the wireless company's facilities installed at any time during the lease term must be approved by the association prior to their installation.

Guard against damage. The installation of antennas, no matter where they're located on the roof, could damage the roof or other structural elements of the building. To protect your building, at a minimum, make sure that the cell phone service provider has adequate insurance to cover the risk in the event damage occurs.

Get detailed list of equipment. Today, the size and weight of the antenna(s) may be satisfactory. Tomorrow, however, the wireless company could install new antennas that are twice the size and weight of those originally installed. This may not be what you intended when you signed the lease. A larger antenna could be unsightly and block site line views. If new or additional antennas weigh more, they may cause damage to your building.

Maintaining and Repairing Company's Facilities

Although a wireless company should have the right to maintain and repair its facilities at a site, an association should have the right to approve the replacement or upgrading of any of the company's equipment in the event the equipment is not "substantially equivalent to" the equipment being replaced or upgraded.

Make company maintain roof, building integrity. With respect to the installation area, the company should agree to maintain the waterproof integrity of the building and the roof. In addition, a wireless company should not make any improvements or alterations to the site except as specifically authorized and approved by you.

Wireless Company's Entry onto Site

Standard rooftop leases give the company "24/7" access to their equipment. Although the cell phone service provider may have a legitimate interest in having round-the-clock access to its facilities, there are valid security reasons why an association would want to control such access.

Require notice. It is appropriate to require the company to give you 24 hours' advance notice of its need to access the roof, except in the case of emergencies in which instance, the company should call

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the association manager to give notice of its intent to enter the site.

Permits, Approvals, Authorizations

Standard rooftop leases state that before doing any work relating to the attachment of the antenna or the installation of any equipment, the company will obtain any and all governmental permits or approvals that may be required and provide you with copies of them.

Get expert's safety report, too. While obtaining governmental permits and approvals is a basic requirement for any radio antenna deal, a wireless company should also be able to deliver, at its sole expense, a report from a licensed engineering firm stating that the their plans do not pose any safety concerns to the building and the members. This report should attest that the site can safely accommodate the company's equipment.

A safety and engineering report can be used not only to satisfy you that the equipment is safe, but also to show the members in your building that you have performed the proper due diligence to ensure that the building is safe for all.

Make wireless company comply with report recommendations. In the event such reports call for modifications to the site to safely accommodate the company's equipment, the wireless company should be responsible for making such modifications at its sole expense before equipment is installed.

Get right to hire independent reviewer. In addition, an association should have the right to hire an independent engineering consulting firm specializing in the construction and maintenance of radio antenna equipment and/or radio frequency electromagnetic fields emissions to review: (1) the engineering report and safety report; and (2) the wireless company's work plan, as it may be revised from time to time, all at the wireless company's sole cost and expense.

Relocation of Facility

This provision is one of the most highly negotiated sections in a rooftop agreement. An association should at any time be able to require the company to remove or modify its equipment or relocate it to another area designated by you, if the equipment:

- Causes physical damage to the structural integrity of the building;
- Causes any interference; or
- Creates or results in any noise, odor, or nuisance tending to disturb any member of the building or adjacent areas.

Spell out shut-off/restart terms. You should request that the company agree that it must immediately shut off the equipment upon notification of any damage or interference, and may restart modified or relocated equipment to test for any damage or interference only with your permission, which should not be unreasonably withheld.

Agree to compromise. On the other hand, the company will argue that it intends to invest a substantial amount of money to install its equipment. Relocation of its antennas not only can be a huge expense, but may also render the site far less effective or even useless for its intended purpose. Further, if the wireless company is forced to shut off its equipment or render it inoperative for any period of time, that would affect its ability to provide cell phone service to its customers.

Therefore, a compromise may be to:

- Allow the wireless company to terminate the lease if it has reasonable grounds to do so;
- Provide alternate space for the equipment in the building; or
- Consider sharing the cost of removal and/or relocation of the equipment.

Assignment and Sublet

Standard rooftop agreements usually state that the wireless company "shall not assign this Lease or sublet, mortgage, or hypothecate this Lease or the Premises without the Association's written consent, which may not be unreasonably withheld, delayed, or conditioned."

Be aware that many cell phone service providers will attempt to co-locate with other cell providers at one site and reap huge profits that the association will not participate in—unless the lease requires the wireless company to pay the association a portion of those profits.

Inserting a profit-sharing formula into this provision could be an answer to this problem, but there are other issues to think of as well: Will the new subleasor install equipment that will interfere with the facilities of others at the building? Are the additional frequencies safe? Will the new equipment damage the building, be an eyesore, or block site lines? These are some of the matters you should consider when negotiating a standard assignment and sublet clause.

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