Community Association Management Insider®

FEBRUARY 2011

INSIDE THIS ISSUE

Police Arrest Squatters of Foreclosed Home

Police detectives in Newport Beach, Calif., recently arrested a couple for illegally squatting in a $2.6 million, ocean-view home. The couple had previously admitted they had entered the house, changed the locks, and put the utilities in their names, even though they did not own the property or have the owner's consent.

The couple had confidently told a reporter that they were immune to both civil and criminal liability because the house, which was heading to foreclosure, had been unoccupied. The couple had also used a lawyer to threaten a lawsuit against homeowners association officials because they declined to grant the couple gate entrance and exit privileges. Without being able to use the main gate, which is manned 24 hours a day, the couple said that they were "prisoners in our own home."

If convicted, the couple faces a maximum punishment of three years in a California prison, according to a spokeswoman for the DA's office.

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FEATURE

How the Foreclosure Fraud Scandal May Affect Associations

Ally Financial, one of the nation's largest lenders, recently announced that it's withdrawing all of its foreclosures in Maryland that were approved by employee Jeffrey Stephan, the "robo-signer" who admitted he signed off on thousands of files every month with little or no review.

The foreclosure fraud scandal became news last fall as several low-level employees at various national lending institutions admitted that they rubber-stamped mortgage documents without checking their accuracy. At the time, threatened with legal action, many of the banks, with the notable exception of Wells Fargo, halted foreclosures on delinquent borrowers to review their procedures. In this article, we'll take a closer look at how this scandal came about and what impact it may have on associations as it runs its course.

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HUMAN RESOURCES

Put Seven Safeguards in Reference Policy to Prevent Defamation Lawsuits

Whenever one of your employees leaves, you will have to decide what to say to other employers who call for a reference. The decision is simple if the employee left on good terms. You and your former employee can come up with a mutually agreeable statement to explain the departure, or you can simply tell the whole glowing truth to any prospective employer who calls for a reference. However, if the employee was fired, you face a more difficult task.

If you are not careful in your statements about former employees, you might find yourself facing a defamation lawsuit. Some job applicants sue their former bosses when they think an unfavorable reference costs them a new job. To prove defamation, a former employee typically must show that you intentionally damaged his or her reputation by making harmful statements about the employee that you knew to be false.

It would seem as though only spiteful employers would get caught in a defamation trap. But this is not the case. If you make an unflat-

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Community Association Management Insider (ISSN 1537-1093) is published by Vendome Group, LLC, 149 Fifth Avenue, New York, NY 10010-6823.

Volume 10, Issue 8

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Foreclosure Fraud (continued from p. 1)

Background

Due to the massive increase in foreclosures over the past few years, national lenders have struggled to process them in a timely manner. The increase was a direct result of the economic downturn. As unemployment rose, more homeowners were unable to pay their mortgage, and the collapse of the housing bubble left a large number of homeowners owing more on their homes than their homes were worth.

As the lenders tried to process foreclosures as quickly and as cheaply as possible, they made numerous missteps. The missteps stemmed from the affidavits the lenders file as they seek a quick judgment in thousands of foreclosure cases. The affidavits state certain facts about the case, including the amount owed, which the signer indicates he has personal knowledge of. Without the affidavit, the lender would have to prove the facts at a trial.

In depositions, banks have stated that they or their teams signed 10,000 or more affidavits and related documents a month. That didn't give them time to review the cases. Lawyers for foreclosed homeowners say the disclosures are symptomatic of the carelessness, if not outright fraud, that lenders have been exhibiting for years in their rush to file cases. Many necessary documents have disappeared, and lawyers claim the lenders often do not even have standing to foreclose.

Increased Uncertainty, Longer Delays

Ally Financial, formerly known as GMAC, stated that the 250 active cases signed by Stephan will be dismissed and resubmitted in Maryland, a potentially lengthy process that's likely to delay foreclosures and create uncertainty for the state's shaky real estate market. Consumer advocates are saying, however, that the move puts pressure on the company to withdraw similar cases across the country, and may force other lenders who also used robo-signers to follow suit.

Ally Financial's dismissals come as homeowners who missed their monthly payments are achieving some success as they challenge their foreclosures in court. In January, the Massachusetts Supreme Court voided two foreclosures because the banks failed to show the proper paperwork proving they owned the loans [U.S. Bank N.A. v. Ibanez; Wells Fargo Bank NA v. LaRace, January 2011].

And in the same month, a Maryland Circuit Court judge dismissed the foreclosure of a Baltimore homeowner who acknowledged he missed his monthly payments, but alleged that Ally committed widespread fraud when it filed the paperwork in his case [GMAC v. Matthews, January 2011]. Both parties consented to the dismissal.

Ally's dismissals give some borrowers a chance to hang on to their homes, but the relief is unlikely to last, since Ally is committed to resubmitting the foreclosures. The extra time could allow the borrowers to negotiate for better mortgage terms or find alternatives to foreclosure. But the delay could also be a drag on the housing market. Buyers tend to shy away from homes that are facing an uncertain foreclosure process.

Negative Impact on Associations

Before the scandal, banks were already slow in commencing foreclosures and often waited up to one year after the initially scheduled foreclosure sale date to actually go to sale. Any additional delay resulting from the scandal will mean more abandoned homes in communities and more "lame duck" members simply waiting for the bank to foreclose upon them. These owners have little incentive to take care of a property they know they are going to lose, and even less incentive to pay association dues.

Another effect of the scandal relates to prospective homebuyers being able to buy title insurance. Some title companies have either postponed or stopped issuing title insurance for homes that were foreclosed upon by the worst robo-signer offenders. One of the nation's largest title insurers, Old Republic International Corp., stated that it will no longer provide insurance for any Chase-foreclosed properties until the documentation issues get resolved.

Generally, without title insurance a home cannot be sold. In many instances, mortgage lenders require homebuyers to get title insurance in case someone else turns up claiming to be the rightful owner of the property. Therefore, any suspension by title companies to postpone the issuance of title insurance directly affects the market of post-foreclosure homes and further delays the process of getting new, paying members into communities.

Associations on the Offensive

Associations are free to foreclose on their assessment lien in a way that's similar to how the banks foreclose on their mortgage lien. According to Florida attorney Joseph Adams, with greater frequency, associations are making the decision to foreclose on units that have no equity. This is because associations realize they cannot idly sit back and let members of the community not pay their fair share. Members of the board have a fiduciary duty to protect the interests of the association, and that means enforcing the financial obligations of the members, he states.

The second reason more associations are foreclosing on delinquent members is that it has become too financially painful for them to wait for the banks to foreclose on delinquent homeowners. Foreclosures have become a means for associations to take control over abandoned units and speed up the process of finding a new paying member.

Once an association takes title, a number of options are available. If governing documents permit, the association can rent the unit. For communities with a viable rental market, particularly a short-term rental market, a substantial recovery can be made, Adams says.

Another option includes the marketing of the unit for a short sale and presenting an offer to the mortgagee. In a short sale, the bank or mortgage lender agrees to discount a loan balance. In some instances, associations have been able to make a greater assessment recovery when they have been able to short sell the unit than they would have if the mortgage holder had taken title through its own foreclosure. That can happen either because the association recovered more in the short-sale transaction than the statutory liability amount the mortgage holder would have had to pay after taking title through its own foreclosure, or simply because the association was able to move the unit into a new owner's hands sooner rather than later, thereby getting a nondelinquent, paying member into the unit, says Adams.

If you find that your community is experiencing an increased number of delinquent members and either nonexistent or stalled foreclosures, you should speak to your attorney about strategies to employ to speed up the foreclosure process. According to Adams, in Florida, there are procedural strategies for advancing the mortgage holder's case by filing certain notices, scheduling case management conferences, and filing motions for a judgment without a trial on the mortgage holder's behalf.

Usually though, once an association forecloses, a bank will start its own foreclosure relatively soon afterwards. In other words, an association's proactive step to foreclose may force a bank to act when it may not otherwise. This ultimately will get your association on sounder financial footing as more members, who are able to pay their assessments on time, enter the community.

Insider Source

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www.communityassociationinsider.com

Search Our Web Site by Key Words: risk management; foreclosure; delinquency

Human Resources

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tering statement that you don't absolutely know to be true, it could happen to you. Most reasons for firing make the employee look bad. And an employer often cannot prove what he or she believes to be true, such as incompetency, or initial lies about job qualifications. A management company executive who makes such statements about a former employee could get into trouble.

To avoid lawsuits, management companies should set policies for giving outsiders information about ex-employees and make sure everyone who works for them follows those policies.

Importance of Company-Wide Reference Policy

Even managers who think they're safe because their policy is to say little about ex-employees could become the target of a defamation lawsuit. For example, suppose an untrained employee gets a call asking for a reference about a former coworker. The employee tells the caller all the negative things that come to mind, not realizing she's supposed to direct all such calls to the personnel department, which will release only limited information. The manager doesn't learn of the incident until the former employee sues for defamation.

A written reference policy is the best way to avoid lawsuits like this. You should distribute your policy to all employees. Include it in the manuals you give to employees and supervisors.

Reference Policy Safeguards

Here are the safeguards the experts recommend you include in your reference policy. They may be used by management companies that give out little or no information and those that supply a full reference. (For an example of a policy, see our Model Policy: Distribute Policy for Revealing Information about Former Employees.)

Centralize reference responsibility. Make one person or office responsible for giving references and tell all of your employees to direct inquiries to that person or office. Directing all inquiries to a central office is important,

MODEL POLICY

Distribute Policy for Revealing Information About Former Employees

The following policy was written with the help of attorney Robert Nobile. The policy requires former employees to sign a release authorizing the disclosure of information on employment dates, job titles, and salary. Some managers get a release only when their references go beyond that limited information. Review the policy with your attorney and decide which approach works best for you.

EMPLOYEE REFERENCES

1. **PURPOSE:** To ensure that information regarding former and current employees remains confidential and that dispensing of information that could place the Company in a legally vulnerable position does not occur.
2. **SCOPE:** This policy applies to all divisions and facilities of the Company and to all supervisory/management employees.
3. **RESPONSIBILITY:** The interpretation and administration of this policy shall be the responsibility of the Vice President, Human Resources.
4. **POLICY:** Due to potential legal issues covering information dissemination, and in an effort to establish positive employee relations, information relating to employees and former employees may not be communicated outside the Company except in accordance with the procedures described herein. No member of management or employee may release information, verbally or otherwise, regarding any employee or former employee. All requests for information from sources outside the Company must be referred to the Human Resources Department. Employees releasing information without authorization may be subject to disciplinary action up to and including termination.
5. **PROCEDURE:**
   - (a) **Former employees:** Any inquiry regarding a former employee must be referred to the Human Resources Department.
   - (b) **Release:** The Human Resources Department may release information concerning former employees as follows:
     - (i) In response to written reference checks from bona fide sources (e.g., on the requesting party's letterhead; no oral requests regarding a former employee will be responded to), the Human Resources Department may provide the following information in writing only if the former employee has submitted a signed authorization to release information: dates of employment, job titles, and pertinent salary data. But the Human Resources Department may release certain information at its discretion, where it deems the release of such information appropriate (e.g., in response to inquiries from local law enforcement officials).
     - (ii) In response to a telephone reference check concerning a former employee, the Human Resources Department will instruct the caller to submit the request in writing to the Company.

says management expert Anne Sadovsky, because outsiders often contact untrained employees. One problem, Sadovsky says, is that "prospective employers usually call the person the applicant lists on the application as a reference. And most applicants list the name of their best friend at the company."

Get reference requests in writing. Instruct the person in charge of handling references to get all requests in writing. Never answer oral requests, warns New York City labor laywer Paul Nobile. Getting a written request on the questioner's letterhead will help you verify the identity of the reference checker. You want some proof that you are responding to inquiries from an employer who is thinking about hiring the former employee. Creditors and others might pose as prospective employers to "dig up dirt." Ex-employees have a strong chance of winning a lawsuit against owners who respond to requests without any attempt at verification.

Respond in writing. Give written references only, especially when dealing with prospective employers you don't know. Avoid oral responses, or you may end up in a dispute over who said and didn't say what. Oral references also leave owners vulnerable to "tone of voice" arguments, since tone can alter meanings. Finally, Nobile adds, "You never know when the caller might be taping the telephone conversation, which is not unlawful in most states."

Decide what information to disclose. One critical area for reference policies to address is the type of information you're willing to disclose about former employees and under what conditions. To lower the risks of a defamation lawsuit, many employers opt for what they consider a "safe" approach—that is, to say as little as possible.

For some owners that means giving no references at all. But the more common policy is to limit references to verification of employment dates, positions held, and, in some cases, salary history.

There are those, however, who do think it's important to give informative and extensive references. They believe that management companies have an interest in warning each other against bad employees. These bad employees go from payroll to payroll generating ill will and expensive lawsuits.

Consider requiring release. If you want to give more information to prospective employees than employment dates and job titles, think about requiring former employees to sign a release agreement. For an example, see our Model Agreement: Get Employee to Sign Release Before Disclosing Information. It is much harder for an ex-employee to win a defamation lawsuit after signing such an agreement. Here's how to get the most protection from a release.

➤ *Apply release rules consistently.* Some managers get a release only when they have something negative to say. They don't think they need it before giving a good reference. That's a mistake, because you may say something negative without even realizing it.

➤ *Get release signed immediately before giving the reference.* Some management companies have applicants sign releases when applying for a job or when they start work. But a release signed this early might not be enforceable. Also, rely on a prospective employer's release if you must. Using your own form is much more effective than relying on somebody else's, says Nobile. As a practical matter, though, you might not be able to get employees to sign your form once they leave. As a last resort, find out if the prospective employer has gotten a release from the job applicant. If so, and if the release covers third parties who provide information, you can disclose the information.

Have proof of information you disclose. Don't disclose information unless you can prove it's true. Each of the specific items you

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MODEL AGREEMENT

Get Employee to Sign Release Before Disclosing Information

It's much harder for employees to win defamation suits against their previous employers when they consent to the disclosure of information.

RELEASE

I, [*insert employee name*] ("Employee"), hereby authorize [*insert employer name*] ("Employer") to release information relating to my employment with Employer and to verify the accuracy of such information. I hereby authorize and release Employer and third parties requesting such information ("Potential Employers") from any and all claims and liabilities of any nature arising from the release of such information and such investigation or the supplying of information for such investigation.

Employee Signature _____ Date _____

Human Resources

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mention about the former employee should come from and be supported by written materials in your files. This "hard" information includes performance evaluations, memoranda, shoppers' reports, reprimands, member questionnaires or complaints, and any other writings.

Conversely, don't be guided by office gossip, rumors, subjective assessments, and other "soft" information. Avoid characterizing employees with "loaded" terms such as "thief," "troublemaker," "dishonest," and "incompetent." In fact, avoid drawing conclusions altogether. You should let prospective employers draw their own conclusions from the data.

Insider Sources

Robert J. Nobile, Esq.: Partner, Seyfarth Shaw LLP, 620 8th Ave., New York, NY 10018; *www.seyfarth.com.*

Anne Sadovsky: President, Anne Sadovsky and Co.; *www.annesadovsky.com.*

www.communityassociationinsider.com

Search Our Web Site by Key Words: references; former employees; defamation

RECENT COURT RULINGS

➤ Association Must Provide Access to Insurance Adjuster

Facts: A Florida condominium community was damaged by a hurricane. However, its insurer's estimate of damages didn't exceed the deductible for the property, so the insurer made no payment to the association.

After the insurer's decision, the association retained a public adjuster who prepared detailed construction cost estimates broken out by building, line item, quantities, and unit costs. The total estimate for repairs under the public adjuster's methods was approximately $1.9 million. The cost estimates were provided to the insurer with an initial demand for appraisal.

In a response letter, the insurer acknowledged receipt of the repair estimates, reserved various rights, and requested a final, signed, and sworn proof of loss as well as copies of 13 categories of documents. The association provided the signed and sworn proof of loss, but the insurer claimed there were inconsistencies with the earlier estimates prepared by the association's public adjuster. The insurer also renewed its request for the 13 categories of documents and complained that its loss consultant had not been given an opportunity to inspect the community since the initial inspection.

Shortly after, the association sued the insurer, alleging breach of the insurance policy. The association then filed a motion to compel appraisal, and one of the affidavits filed by the association acknowledged that the association had denied the insurer's request to allow its loss consultant to reinspect the damaged buildings. The association, at the time, wanted the property reinspected with an adjuster and not a loss consultant to determine coverage. The trial court granted the association's request to compel appraisal, and the insurer appealed.

Ruling: A Florida appeals court reversed the lower court's ruling, and ordered the association to provide the requested records and allow reasonable access to the property damaged as detailed in the claim.

Reasoning: The court cited the association's acknowledgment that it had denied the insurer's request to reinspect the damage with its loss consultant and that it had not provided certain categories of association documents to the insurer. The documents requested were required to be kept by the insured under Florida state law and could have provided the insurer with the identity of relevant individuals. Also, the association was not entitled to refuse access to the loss consultant. The court found that the obligations requested of the association were not unduly burdensome or arbitrary. An appraisal was not warranted until the conditions were met and the insurer had a reasonable opportunity to investigate and adjust the claim.

- Citizens Property Insurance Corp. v. Galeria Villas Condominium Assoc., Inc., November 2010

➤ Association May Be Liable for Aggravation to Member's Respiratory Condition

Facts: A member sued the condo association, the management company, and the association's landscape contractor for negligence. The member alleges that the landscaper negligently and carelessly spread and blew mulch near the member's condominium. As a result, dust from the mulch accumulated in the condominium, aggravating the member's preexisting chronic obstructive pulmonary disease condition.

The association asked the court to dismiss the negligence claims. The association argued that the member could not establish that it owed her a legal duty recognized by state law. More specifically, the

association maintains that no duty exists because the alleged harm is too remote and because the member has made no allegations that the aggravation of her preexisting respiratory condition was a foreseeable result of the association having instructed the landscaper to spread the mulch.

Ruling: A Connecticut trial court denied the association's request.

Reasoning: In Connecticut, condominium members are considered invitees of the condominium and their relationship with respect to premises liability is analogous to that of landlords and tenants. And landlords have a duty to use reasonable care to maintain in a reasonably safe condition those areas of their premises over which they exercise control.

Here, the court inferred that the landscaper was performing work in the common area, and the association owed the member the same duty to use reasonable care to maintain the areas of the premises under its control in a reasonably safe condition. Therefore, the association's duty to the member was established, and a trial was needed to determine whether that duty was breached.

- Casadontes v. Hayes Services, LLC, November 2010

➤ Association Not Required to Arbitrate Construction Defect Claims

Facts: A developer purchased 418 apartments, common areas, and common facilities in 2004 and converted the apartments to condominiums in 2005. In the course of making the property a condominium project, the developer recorded governing documents that required that the homeowners association arbitrate any construction defect claim the association might have against the developer. The governing documents provided that the association came into existence upon the sale of the first condominium.

Members sued the developer after noticing construction defects in common areas and common facilities and they believed the developer hadn't provided a reserve fund sufficient to repair the defects.

The developer asked the trial court to compel the members to participate in arbitration as required by the governing documents. The trial court refused the developer's request, and the developer appealed.

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

Reasoning: The court stated that both federal and state laws are in favor of the enforcement of arbitration agreements. However, in this case, the court concluded that there was no agreement to arbitrate disputes between the developer and the association. The governing documents did not provide any continuing contractual rights to the developer other than as the owner of unsold condominiums. The governing documents stated an intent to benefit only the owners of separate condominiums and provided a right of enforcement only to members and the association.

- Villa Vicenza Homeowners Assoc. v. Nobel Court Development LLC, January 2011

➤ Association Not Liable for Racial Discrimination

Facts: Under an association's governing documents, a purchaser had to pay at least 10 percent of the purchase price on the property with financing not to exceed 90 percent of the purchase price. A prospective buyer agreed to purchase a condominium for $55,000. She intended to pay $35,000 with funds from State Housing Initiatives Program (SHIP). Unlike bank loans, the recipient of SHIP money need not pay it back. However, if the recipient fails to remain in the home for 15 years, the city may exercise its lien rights, convert the SHIP money to a loan, and require the recipient to pay the money back.

The association denied the prospective buyer's application because she would "not be paying at least 10 percent of the purchase price." The prospective buyer, who was African-American, sued the association and the association manager for racial discrimination under the Fair Housing Act. The association asked the court to grant a judgment without a trial in its favor.

Ruling: A Florida district court ruled in favor of the association.

Reasoning: To prove intentional discrimination, the prospective buyer had to show that the association approved the sale of condominiums to others outside of the buyer's protected class who had qualifications similar to the buyer's. Here, the buyer claimed that the association treated her application differently because it looked into the source of her deposit, but does not look into the source of other applicants' deposits. However, the buyer's application revealed that her deposit would come from SHIP. Therefore, her application was unique, and the fact that the association looked into the program to determine whether the funds violated the governing documents is not evidence that the association applied a different standard to the buyer.

- Henderson v. Imperial Point Colonnades Condominium, December 2010

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