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COMMUNITY UPDATE

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U.S. Supreme Court Ruling on Fair Housing Law

Could Have Wide Ranging Impact on Community Associations

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Significant U.S. Supreme Court rulings in 2015 which garnered a lot of media attention addressed diverse topics which included: lethal injection; same-sex marriage; healthcare subsidies and pollution limits. In addition, there was one ruling involving housing discrimination that could profoundly impact the community association industry. The 5-4 Supreme Court holding in ***Texas Department of Housing and Community Affairs v. Inclusive Communities Project***, could have wide-ranging impact on community association boards. The case was brought by a Texas group which helps mostly lower-income black families find housing in the mostly white Dallas suburbs through the use of housing vouchers. Landlords receiving federal low-income tax credits must accept the vouchers. As a result, a disproportionate share of federal low-income tax credits went to landlords in minority communities.

The four dissenting justices (Roberts, Scalia, Alito and Thomas) voiced their concerns that the majority decision was based on the ***Griggs v. Duke Power Co.*** case rather than focusing on the actual intent and text of the 1968 Fair Housing Act. In ***Grigg***s, 401 U.S. 424 (1971), the Court held that black employees could recover from their employer under Section 703(a)(2) of Title VII of the Civil Rights Act of 18-964 without proving that the employer's conduct (the employer required a high school diploma or a qualifying grade on a standardized test as a condition for certain jobs) was motivated by a discriminatory intent.

So how could the outcome of this case impact your private residential community?

Previously, a volunteer board of directors was diving into dangerous waters when it passed rules and restrictions with the intent to treat people differently. If a Board was not thrilled with having children in the community, a proposed rule may set the pool hours at 9-3 which coincidentally are also the hours that most children attend school. Often, it was not difficult to determine when disparate intent was involved in a Board's decision-making protocol.

Under the new Supreme Court ruling, however, a board can

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How would the following association restrictions fare if evaluated under the new SCOTUS standard?

- Screening applications which inquire about previous criminal background?
- Screening applications which inquire about credit score, employment status and other indicators of financial stability and resources.
- Requirements that a new purchaser have a certain equity interest in the property being purchased.
- Rules requiring minors to be accompanied by an adult at all times when attempting to access a community pool, exercise room and other common areas.

now be held liable for housing discrimination whether or not anyone on the board intended to discriminate so long as the rule or restriction has a disparate impact on a legally protected group of people. Housing discrimination lawsuits can be very costly, time-consuming and can have a long-term negative impact on a community's real property values.

Many boards and association members wish to contribute to the continued success of their communities by regularly amending their governing documents. Often those amendments allow elected boards to thoroughly screen prospective tenants and purchasers in order to ensure that newcomers will not present a financial burden on the association by lacking the resources to pay assessments and other monetary obligations to the association in a timely fashion. This rationale would seem to make sense since a delinquent owner who cannot pay his or her assessments timely and in full, passes his or her financial obligations on to the remaining members who must make up the budgetary deficit. Screening and approval restrictions are also routinely drafted to weed out applicants who present a threat to the health, safety or welfare of the community.

The Supreme Court's dramatic shift in housing discrimination indicia forces us to more closely scrutinize restrictions which are fairly standard in community associations to eliminate any potential disparate impact concerns.

While the ***Texas Department of Housing*** ruling is a cautionary tale, volunteer boards still have a fiduciary duty to adopt and enforce reasonable rules and regulations so taking a "hands-off" approach is not a long-term solution. Today's board members will have to show that (a) they had a good reason for the rule or restriction and (b) there was no way in which to accomplish their reasonable goal in a manner which had a less disparate impact.

Disparate impact is a much different (and higher) threshold than disparate intent. Boards should undertake a document and rules audit with experienced association counsel to uncover any existing restrictions which might create a disparate impact and therefore may need to be modified. It is also more important than ever that association boards seek input from an association attorney when crafting and implementing restrictions in order to determine whether a disparate impact could result as well as to identify other avenues to accomplish reasonable goals without creating such an impact.

Becker & Poliakoff Helping Hands and the Holidays!

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The Christmas and Hanukkah season evokes smiles along with the anticipation of family reunions, traditional homemade dishes, music and joy. This is particularly true for children who make their lists of the toys they dream of getting and who also make an extra effort to "be good" so they will get everything on their list…

But the holiday season is very different for the parents and family of children who are hospitalized with cancer and other life threatening diseases. Most of us have never faced a situation of this magnitude, yet for hundreds of families in our community this is a sad reality. Such diseases do not discriminate by race, nationality or economic status. Our firm, Becker & Poliakoff, lived this scenario up close and personal a few years back when one of our partnering attorneys lived such a tragedy with his own daughter. Miraculously, the daughter of our attorney won her battle, but her parents lived through the devastation such an experience leaves in its wake. Yet, as happens quite often, from cases of desperation are born great hopes and solutions. Thus the creation of "Becker & Poliakoff Helping Hands".

Every year this non-profit organization receives donations of toys and money and gives to children who suffer from cancer and other life-threatening diseases. Yet beyond the simple handing out of toys, we see that life for these children is reduced to hospital visits, radiation and chemotherapy treatments leaving them weak and with little strength to do nothing more than look from afar… or sadder still, to look from close up. Hospitals offer few distractions… and with the handing out of toys, we are also handing out smiles and hope. Seeing a child who is too weak to speak lift his/her hand to touch the cheek of her favorite character or hero that inspires him is something miraculous and spiritually uplifting. Someone is thinking of them, someone is making them laugh! That "someone" is you, and me… and all of us who participate in this effort.

Your Association may have discretion in its budget to donate to worthy causes such as this but whether it does or not, individual community members as well as managers and even employees can make direct donations to benefit such a worthy cause, so please spread the word. Also, let everyone know that additional support can be provided by simply making any purchases from Amazon using their charitable organization Smile.Amazon.com. The link will let them choose to have Amazon automatically donate 0.5% of qualified purchases to Becker & Poliakoff Helping Hands without any additional cost.

Because "Becker & Poliakoff Helping Hands, Inc" is a 501-C charitable institution, all donations are tax deductible. Less than 1% of funds raised are used for promotional expenses. The rest is used directly to purchase toys and provide events for the children. Additionally, our staff donates their time voluntarily to eliminate administrative costs. We invite you to participate in this miracle by calling **954-985-4147** to make your donation or by visiting **bp-helpinghands.com** – no amount is too small. We thank you in advance for your support.

New NLRB Decision Could Be BIG Trouble

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On Thursday, the National Labor Relations Board (NLRB) issued a decision in the Browning-Ferris Industries case that could have a widespread impact on employers everywhere, including condominium and homeowner associations that contract with businesses such as professional employer organizations (PEOs) or management companies for the hiring of personnel.

For over 30 years, the rule was before joint employer liability would be imposed, two businesses must share or co-determine matters governing the essential terms and conditions of employment. Decisions such as hiring, firing, discipline, supervision, and direction were considered to meaningfully affect the employment relationship and were therefore considered in analyzing the relationship. If those duties were shared and two businesses exercised direct and immediate control over the employees, a joint employment relationship would likely be found.

In what the NLRB characterizes as an attempt to preclude employers from insulating "themselves from their legal responsibilities to workers," it has now ruled that a business need only exercise indirect control over the workers to be considered a joint employer. Meaning, if there is a potential for a business to exercise control over workers' wages and conditions, regardless of whether that control is exercised, joint employment liability could be imposed.

While it is no secret that the target of the NLRB has been big franchisers like McDonald's that have been able to escape liability for unfair labor practices imposed on their franchisees, the reality is that this ruling doesn't affect just big corporate companies, like McDonald's. It could likely have wider implications. If an association has the right to have an employee replaced that it does not like, but has never exercised that right, it could now be argued that the association is a joint employer. Likewise, if an association has the right to choose which individuals are hired by the PEO or management company, there is now a stronger argument that there is joint employment liability.

Now more than ever, associations need to be critical of these issues when negotiating such an agreement with a PEO or management company. While joint employer liability has always been an issue with these types of agreements, this new ruling is creating quite a stir and will undoubtedly have more businesses thinking twice before signing on the dotted line of these types of agreements.

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