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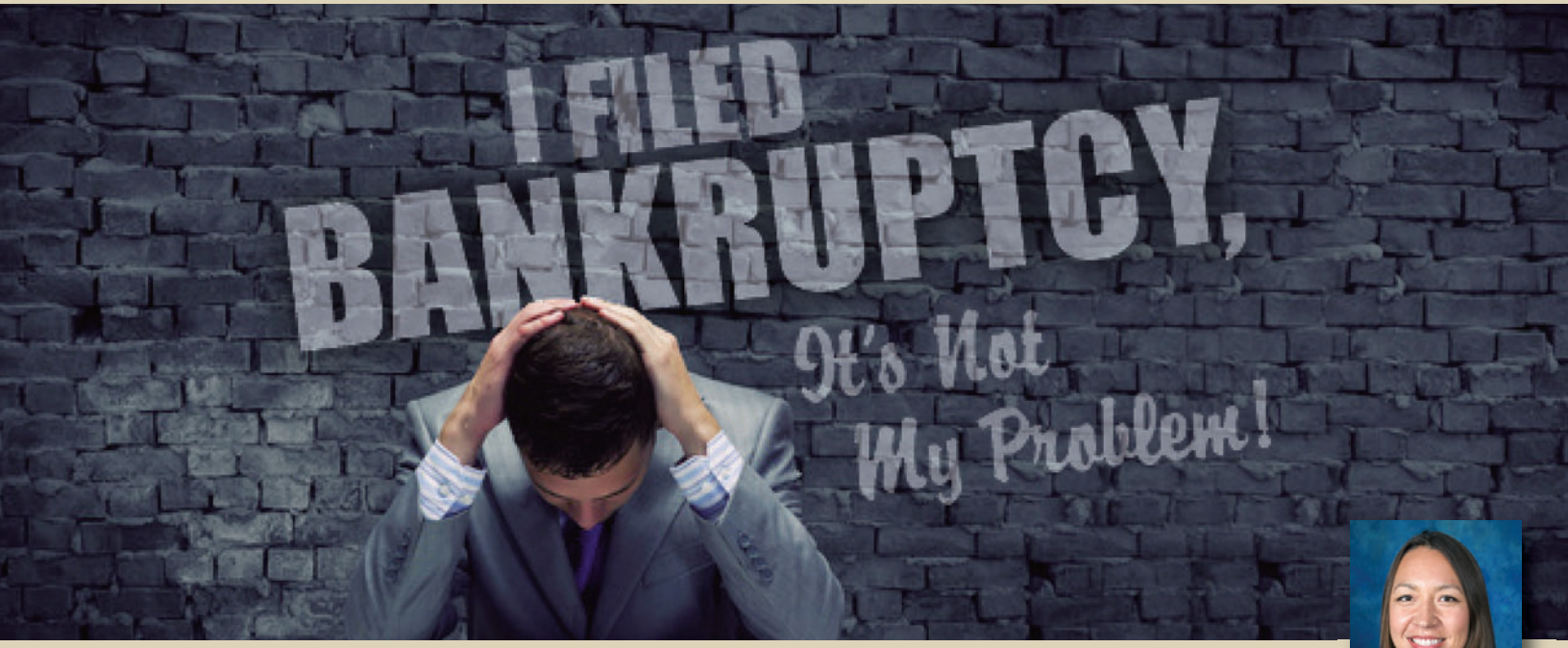
# COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

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*"I don't owe anything else." "It's the bank's problem now."* More often than not, these are the words we hear from an owner after they file for bankruptcy and the association tries to get on-going assessments from them – even when the owners are still living at the property and using the association pool!

Typically an association has two ways to pursue an owner who is delinquent for assessments. First, the association can file a lien and foreclose the property just like a mortgage foreclosure. The second option is a personal money judgment against the owner. Many times an owner will file bankruptcy after being delinquent to the association as they are no longer financially stable or for a variety of other reasons. The amounts that are included in a bankruptcy start from the date the owner files for the bankruptcy and go backwards. Any assessments due after the date of filing are not included in a bankruptcy automatically. In the past, after an owner files for bankruptcy the association would have likely been limited by an order for relief from stay to filing a lien foreclosure only against the property for the assessments due after the date the bankruptcy was filed, but the tides are changing. A recent Bankruptcy Court case has expanded the association's toolbox for handling an owner who does not pay assessments.

The case is *In re Montalvo,* 2016 WL 769997 (Bankr. M.D. Fla. Feb. 25, 2016) (Jennemann, J.), the Middle District of Florida made its first order on the issue of personal liability of an owner for assessments that come due after filing for bankruptcy. Up until this point, many Bankruptcy Court Judges only allowed associations to proceed against the property itself and not the individual owners for assessments that come due after the bankruptcy filing date. Under that type of order, an owner would get a free ride from the bankruptcy and then a second free ride after the bankruptcy until either the mortgage holder or the association finally foreclosed on the property. In the case that a mortgage holder foreclosed in a reasonable amount of time, the Association would be left with no recourse for those assessments.

However, that free ride is over - the Court clarified that the relief from personal liability will only come from a change in title, not just surrendering the property on paper in the bankruptcy. That owner remains personally responsible for every assessment that comes due while he or she is owner, even after they file for bankruptcy. Adding this case to *In Re: Metzler,* Case No. 8:12-bk-16792-MGW Chapter 13 and *In Re: Patel,* Case No. 8:13-bk-09736-MGW Chapter 7 (Bankr. M.D. Fla. May 15, 2015), once the owner surrenders their property in a bankruptcy, they are not entitled to fight the foreclosure action and until there is a transfer of title, the owner is still personally responsible for the on-going assessments. Together these cases give the association tools to use that will help in the recovery of a larger portion of past due assessments, even when the bank is moving forward. Next time your association has an owner that files for bankruptcy, remember that you may have a few more options than you think.

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# Words Have Meaning And, Possibly, Meaning Lots Of $$$


Author, poet and journalist May Sarton once said "The more articulate one is, the more dangerous one becomes." Given the volumes of legal briefs, memoranda and appellate court opinions attempting to interpret what legislators meant when drafting legislation, one would not normally ascribe to them the characteristic of being articulate.

Every now and then, however, the courts find legislative wording to be clear and easy to understand – articulate? Such was the case when Collier County, Florida Circuit Court Judge Lauren Brodie recently granted a summary final judgment in favor of a Florida panhandle condominium association – ruling that when the legislature used the word "shall" it was clear and unambiguous[1]. That ruling, while certainly significant to the association and to the management company involved, could have a much broader impact on contract drafting.

At issue was a three year term condominium management agreement which had been entered into by a Bulk Buyer-controlled Board of Directors for the Association with a community association management company headquartered in southwest Florida.

After several years of battle by a group of individual unit owners trying to wrest control of the Association's Board from individuals affiliated with the Bulk Buyer[2], majority control of the Board was obtained by the individual unit owners in December 2014. In addition to a number of house-cleaning actions[3], the Association's new Board took prompt action to terminate the management contract the Bulk Buyer-controlled Board had entered into. In addition to identifying areas in which the Association's new Board alleged the management company had breached its duties under the contract, the Board claimed that the contract was not valid or enforceable because it violated a very specific requirement contained in Section 718.3025, Florida Statutes. That statute, in addition to other requirements, provides that "[n]o written contract between a party contracting to provide maintenance or management services and an association which contract provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium shall be valid or enforceable unless the contract: … (d) Specifies a minimum number of personnel to be employed by the party contracting to provide maintenance or management services for the purpose of providing service to the association."

The contract in this case simply did not specify "… a minimum number of personnel to be employed by" the management company. After receiving notice from the Association that its contract (with more than two years of the term remaining) had been terminated both for cause and because the contract was not valid or enforceable for being in violation of the statutory requirement that a minimum number of personnel to be employed be specified in the contract, the management company sued the Association for breach of contract, claiming damages in excess of $200,000.

On a motion for summary judgment filed by the Association, the trial judge found that the management agreement did not comply with Section 718.3025(d), Florida Statutes, in that it did not specify "a minimum number of personnel to be employed by the party contracting to provide maintenance or management services for the purpose of providing service to the association." The judge also found that the language of Section 718.3025 is clear and unambiguous and that the legislative intent is to require management agreements to meet the minimum requirements contained in the statute. For that reason, the judge found the management agreement to be void and unenforceable, and entered judgment in favor of the Association.[4]

What is the take-away from the ruling in this case? First, when the legislature uses the word "shall" in a statute, Florida courts will routinely assign the word its usual mandatory meaning. In this case, the statute clearly said that if a management agreement with a condominium association failed to contain the specifics set forth in the statute, it "shall" not be valid or enforceable. Second, when drafting and reviewing contracts, it is important that the parties (whether the association, a management company, or any other contractor or vendor) read the contract and any applicable statute and understand that when words such as "shall," or "must," or other words of such import are used, they are more likely than not going to be given their customary mandatory meaning by the courts.

It may be cliché to say that "words have usage, not meaning." When reading statutes and drafting contracts, words have "meaning"! Not paying attention to those words can be dangerous.

*[1] Summary Final Judgment entered May 3, 2016 in Coral Hospitality, LLC, vs. Shores of Panama Resort Community Association, Inc., Twentieth Judicial Circuit in and for Collier County, Florida, Case Number 14-CA-002691.*

*[2] The original developer of the condominium became financially distressed, the project was taken over by the developer's lending bank, the bank then went into insolvency and was taken over by the FDIC. Approximately half of the residential units, a large number of commercial units, and the resort's major amenities were then sold by the FDIC to a group of Bulk Buyer entities who, using their block voting power, elected their representatives to all seven seats on the Association's Board of Directors.*

*[3] One such action was to file a breach of fiduciary duty and civil conspiracy lawsuit in federal court against four of the former Bulk Buyer affiliated Board members, which resulted in a jury verdict in the Association's favor for $1.9 million in compensatory damages and $10 million in punitive damages in February 2016.*

*[4] The Summary Final Judgment has been appealed by the management company to Florida's Second District Court of Appeal - Case Number 2D16-2517, and the case is pending in that court at the time of this article.*

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# New HUD Guidance Limits the Use of Background Checks for Associations to Prohibit Discrimination

On April 4, 2016, HUD published guidance limiting housing providers', including Associations', use of criminal records in qualifying potential purchasers, tenants and occupants under the Fair Housing Act. What does this mean for Associations? It should be noted at the outset that HUD Guidance is not binding law, but it interprets how the law may apply to certain situations. As with any new guideline, the legal ramifications will develop on a case-by-case basis as matters are heard in court and the guidance is considered.

## Background

The federal and Florida Fair Housing Acts ("FHA"), in part, prohibit discrimination in the sale or rental of dwellings based upon race, color, religion, sex, disability (handicap), familial status or national origin. Discrimination claims are evaluated under a disparate treatment or disparate impact analysis. Disparate treatment occurs where an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion. These claims generally involve intent. Disparate impact claims do not require a showing of intent or malice, but rather acknowledge fault based upon the effects of certain conduct or policies. Disparate impact claims usually rely on statistical data and analysis to establish that a policy that appears facially neutral actually has a disproportionate effect on a protected class.

HUD's new fair housing policy regarding background checks is one of the first regulations using the disparate impact standard since the Supreme Court's landmark case last summer in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc*. The Supreme Court unequivocally ruled that HUD and other agencies may use disparate impact as a cognizable cause of action to redress alleged discrimination.

## HUD's Guidance Regarding Background Checks

HUD states that this guidance was issued "concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions." At first blush, it is unclear how the FHA applies to this issue since having a criminal record is not a protected class. HUD explains that while having a criminal history is not a protected characteristic, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another. Using statistical data, HUD explains that nearly one-third of the United States population has a criminal record of some kind. "As of 2012, the United States accounted for only about five percent of the world's population, yet almost one quarter of the world's prisoners were held in American prisons."

Importantly, in the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. Accordingly, criminal records-based barriers to housing are likely to have a disproportionate impact on minority members searching for housing. While HUD recognizes that there are certain situations in which a criminal history could warrant a denial of housing, the policy must be supported by a legally sufficient justification. In other words, where a policy or practice that restricts housing based upon criminal history has a disparate impact on members of a protected class, such as race or national origin, the policy or practice will violate the FHA if it is not necessary to serve a "substantial, legitimate, nondiscriminatory interest of the housing provider".

It is important to note that this guidance does not entirely prohibit Association's from disqualifying those with previous criminal records. Those **convicted** of violent crimes or felonies may still be disqualified from some kinds of housing under certain conditions. HUD's guidance provides a three part test to evaluate whether or not the policy or practice is discriminatory.

In the first step of the analysis, a person or agency must file a complaint and prove that the criminal history policy has a disparate impact in a group of people because of their race or national origin. The complaining party or agency must present evidence, such as local, state, and national statistics, to prove that the policy disproportionately affects minorities and other "protected classes" under the Fair Housing Act.

Once a plaintiff or agency establishes through statistical data that a policy or practice disparately impacts people based upon race or national origin, the burden then shifts to the Association to demonstrate that the policy is justified – meaning - it is necessary to "achieve a substantial, legitimate, nondiscriminatory interest of the provider." The Association must use statistics and evidence to prove that the goal of the policy may not be achieved by other means. HUD notes that the interests that underlie a criminal history or practice often involve the protection of other residents and their property. "Ensuring resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate…." The Association must be able to demonstrate, through reliable evidence, that its criminal history policy or practice actually assists in protecting residents' safety or property.

Bald generalizations and stereotypes that people with arrest or conviction records pose a greater threat than those without such a record are insufficient to satisfy this burden. It should also be noted that HUD explicitly states that a policy or practice of refusing housing based upon one or more prior **arrests**, without convictions, cannot satisfy the burden of showing the necessity of the policy. Since an arrest, in and of itself, does not establish that a crime was committed, it cannot be used to exclude potential owners, tenants or occupants.

Similarly, "a housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden." A criminal history policy or practice must be narrowly tailored and must consider the nature, severity and recency of the crime in order to satisfy step two of the test.

The third step shifts the burden back to the plaintiff or agency to prove that the housing provider's interest could be served by another practice that has a

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# Did you know?

## The Community Update is getting an update!

**B&P** has proudly offered important news and issue updates in its Community Update newsletter for more than 10 years. In an effort to improve communication with you, we are taking steps to provide you this newsletter in a bold, newly redesigned format that is **just a few clicks** of the mouse or taps away on your mobile device as **we phase out paper copies.**

You will enjoy simple, searchable real-time and historical content. Check out our **Publications Page** on our website (http://www.bplegal.com/publications) for a library of content on many subjects of interest.

*If you simply want to read the most recent edition of our Community Update, and cannot find it in your email, that is easy too. Just select Community Update from the dropdown for Publication Type and the most recent issues will pop up.*

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less discriminatory effect. HUD suggests that the housing provider should conduct an "individualized assessment" of relevant mitigating factors instead of categorical exclusions. These factors might include the facts or circumstances surrounding the conduct; evidence that the applicant has maintained a good tenant history before or after the conviction; and evidence of rehabilitation efforts. This requires a subjective analysis of the facts surrounding each individual crime and the applicant him/herself. However, those convicted of the illegal manufacture or distribution of a controlled substance can be refused housing without any liability under the FHA. This does not include convictions for possession of drugs.

It goes without saying that an Association may discriminate against any person based upon any of the protected classes. Criminal history cannot be used as a pretext to exclude certain protected class members. For example, a policy of refusing housing to African American's who have drug distribution convictions, while allowing whites with the same conviction to reside in a community is considered intentional discrimination.

***To avoid the inherent pitfalls, to the extent possible, the best practices are:***

- Do not impose blanket bans on renting to those with criminal history or arrest records.
- In analyzing a conviction, the Board must consider the nature and severity of the crime and how long ago the criminal conduct took place.
- Educate and train all those who will come in contact with applicants concerning these issues.
- Keep screening policies pertaining to arrest records and criminal history specifically related to the safety of persons and property. The policy must distinguish between criminal conduct that indicates a demonstrable risk to resident safety and property (such as violent crimes) and criminal conduct that does not.
- Use a standard screening policy in compliance with Fair Housing and HUD regulations, and apply it equally to anyone who applies.

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