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# *Community Association LawLetter*

## CONDO MAY BE LIABLE FOR NEGLIGENT FAILURE TO PURSUE CONSTRUCTION DEFECTS

A recent decision from the Maryland Court of Special Appeals – the state's intermediate appellate court – significantly increases the potential liability of condominium associations. The court ruled that a condominium board of directors may be negligent for failure to "properly pursue" a construction defect against the condo developer.

In *Greenstein V. Avalon Courts Six Condominium, Inc*., a Baltimore County condo board first obtained information about water infiltration in June 2002. Upon further investigation as to the cause of the water damage, the board obtained a report from an engineering consultant in December 2005 which indicated that the problem was due to defects in the original construction of the building. After the condominium filed suit against the developer in August 2006, the trial court ruled that the suit was barred by the statute of limitations which required that suit be filed within 3 years from the time the condominium board first learned of the water infiltration problem.

To fund repairs to fix the construction defects, each owner was assessed over $35,000. Unhappy with a large special assessment, 35 of 36 unit owners filed suit against the condominium alleging the special assessment was due to the negligent failure to timely file suit against the developer to recover the repair costs.

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***On appeal, the Court of Special Appeals' decision concluded that the condominium does have a duty to "properly pursue any claims" against the developer related to defects in the "design and/or construction of the common elements" and a breach of that duty could constitute negligence***

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The trial court ruled in favor of the condominium on the basis that a condominium has no legal duty to file suit against the developer. On appeal, the Court of Special Appeals' decision concluded that the condominium does have a duty to "properly pursue any claims" against the developer related to defects in the "design and/or construction of the common elements" and a breach of that duty could constitute negligence. The appeals court asked the trial court to further review the owners' negligence claim.

## MARYLAND APPEALS COURT WITHDRAWS RULING ON CONDO RESALE CERTIFICATES

The Maryland Court of Appeals has withdrawn its October 25, 2011 decision regarding condominium resale certificates.

The highest state appellate court ruled in *MRA Property Management, Inc. v. Armstrong* that false and misleading statements in a condominium resale certificate may violate both the Maryland Condominium Act and Maryland Consumer Protection Act. The court concluded that the condominium and management company were engaged "in the sale of consumer realty" by issuing resale certificates and, therefore, subject to the Consumer Protection Act.

Twenty-three individual unit owners filed suit against a Cecil County condominium and its management company which issued resale certificates between 2000 and 2004. After the owners purchased their condominium units, the condominium board approved a special assessment in excess of $40,000 per owner in order to fund repairs.

The owners sought damages for failure to include information in resale certificates regarding water infiltration and expenditures to remedy the water damage to the condominium building. At trial, the parties stipulated that the owners' damages totaled $1 million.

With regard to the scope of required disclosures, the appeals court ruled in its October 2011 decision that a condominium must disclose only board-approved capital expenditures and not items under consideration but not yet approved. Therefore, the omission of information regarding repair of expenditures under consideration by the board -- but not yet approved – did not violate the Maryland Condominium Act or Consumer Protection Act.


However, the court also concluded that "known" health or building code violations must be disclosed whether or not a government notice of violation has been issued.

The court's decision was criticized by other appeals court judges in a dissenting opinion which concluded that the condominium and management company were not engaged "in the sale of consumer realty" merely by issuing a resale certificate and, therefore, there could not be a violation of the Consumer Protection Act. Additionally, the dissenting judges concluded that the court ruling created too much uncertainty as to what property condition must be disclosed when no health or building code violation has been issued by the government.

In response to a request by the management company and condominium to reconsider its decision, the Court of Appeals on December 15 nullified its October ruling and scheduled a new court hearing for March 2012.

## LENDER FORECLOURE DELAYS STRAIN ASSOCIATION BUDGETS

There is still no end in sight to the continuing rise in delinquent assessments which most condominiums and homeowner associations will face in 2012. Owners who are not paying the mortgage typically are also not paying the association assessments.

Foreclosures continue to be delayed by lenders who are re-examining the accuracy of loan and foreclosure documents in response to legal challenges and government criticism of lender foreclosure procedures. Foreclosure delays are also due to the high number of foreclosed properties already owned by banks and not yet re-sold.

In some instances, lenders favor "short sales" over foreclosures to allow the owner to sell the property directly with the lender accepting less than the amount owed on the mortgage. In a short sale, the owner may also ask the association to accept less than the full amount owed for assessments and related charges. If a short sale is unsuccessful, the lender then proceeds with a foreclosure sale.

Until a lender foreclosure sale occurs, the homeowner remains responsible for payment of condominium and homeowner association assessments. However, faced with more delays in lender foreclosures and owner requests to "short" the amount paid to the association, condo and HOA boards of directors should plan for continued assessment delinquencies in 2012.

## MARYLAND FORECLOSURE PURCHASER MUST PAY CONDO FEES

The successful bidder at a foreclosure sale of a condominium unit is not exempt from paying condo fee assessments until the property is conveyed after a court ratifies the sale, the Maryland Court of Special Appeals ruled on December 1, 2011.

In *Campbell V. Bayside Condominium*, a Maryland foreclosure sale purchaser challenged the authority of a Queen Anne's County condominium to impose a lien for assessments during the interval between the foreclosure sale date and conveyance to the purchaser several months later. She contended that the Maryland Condominium Act definition of "unit owner" should be applied to mean only those with "legal title" are obligated to pay the condo fees.

Under long-established Maryland law, the purchaser at a foreclosure sale acquires "equitable title" as of the sale date. After court ratification of the sale and upon conveyance by deed, the purchaser acquires "legal title" retroactive to the foreclosure sale date.

Applying this principle in the context of the purchase of a condominium unit at a foreclosure sale, the Court of Special Appeals concluded that the term "unit owner" in the Condominium Act embraces the holder of equitable title. Therefore, a foreclosure sale purchaser is liable for payment of assessments from the date of the foreclosure sale.

## FHA RESTORES HIGHER LOAN LIMITS THROUGH 2012

The maximum amount for loans insured by the Federal Housing Administration (FHA) has been restored to the levels in effect prior to October 1, 2011. The loan limit for single family homes and condominiums is again $729,750 in the Washington, DC metro area and $560,000 in the Baltimore metro area.

Seeking to reduce the role of FHA for higher-priced home, the loan limit had dropped on October 1 to $625,000 for Washington and surrounding counties and $494,000 for the Baltimore region. After Congress acted in late-November to restore the higher loan limits, the FHA announced that the higher limits would apply until December 31, 2012.

A primary mission of the FHA is to encourage private home lending by insuring mortgages. FHA insurance guarantees that lenders will be paid if the homeowner defaults on the mortgage debt.

More than 35 percent of all homebuyers now use FHA-insured loans which offer lower down payments, lower closing costs and easier credit qualifications than conventional loans.



**THOMAS SCHILD LAW GROUP, LLC** represents condominiums, cooperatives, and homeowner associations in Maryland and Washington, D.C. The firm advises community associations on all aspects of association operations including covenant enforcement, assessment collection, developer warranties, maintenance and management contracts, and association document interpretation. Thomas Schild Law Group also represents community associations in court litigation and administrative hearings.

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