ROBERTS MARKEL WEINBERG BUTLER HAILEY

Community Association Newsletter

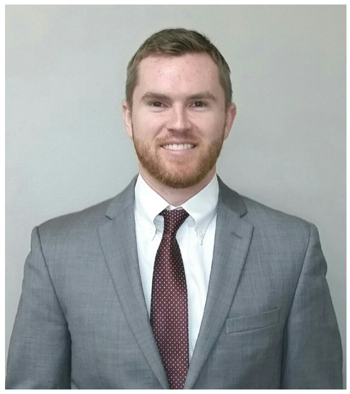
January 2017

In This Issue

Helpful Resources

www.RMWBHLAW.com
www.TexAppBlog.com

Attorney Highlights: RMWBH Welcomes Paul Gaines to the Firm



We are pleased to announce that Mr. Paul Gaines has joined the firm as an associate attorney. Mr. Gaines joins the firm's HOA practice group and will work in the San Antonio and Austin offices.

Mr. Gaines graduated from the University of North Texas in 2012. After completing his undergraduate studies in Philosophy and Political Science, he attended St. Mary's University School of Law where he received his Juris Doctor in 2015. During law school, he served as President of the Oil, Gas and Energy Resources Law Society, as well as Treasurer of the Federal Bar Association. Additionally, he worked as a research assistant for Professor L. Wayne Scott.

Congratulations to our attorneys who are now certified by the Texas Board of Legal Specialization:

Rick V. Anderson – Consumer and Commercial Law
Justin Markel – Labor and Employment Law
Brady Ortego – Residential Real Estate Law
Rahila N. Sultanali – Commercial and Residential Real Estate Law

5 Things Managers Should Know About Debt Collection
By Rick Anderson

1. Is Your Management Company Considered a "Debt Collector" Under Federal Law?

In general, the Fair Debt Collections Practices Act (FDCPA) applies to anyone collecting consumer debt arising from a personal, family or household purpose. A management company collecting assessments will almost always fall under the general definition of a "debt collector." However, a management company may fall within one of the exemptions to the FDCPA. Common exemptions that may apply are:

• The "debt not in default" exclusion. The FDCPA exempts debt collectors collecting debts that are not in default. Essentially when a manager collects debts before they are payable they are not a debt collector under the FDCPA.

• The "bona fide fiduciary" and "principal purpose" exclusion. Management companies will not be defined as a "debt collector" under the FDCPA when they:

(1) Have an agreement with an Association to act as its exclusive agent.
(2) Assist with the Association's tax filings.
(3) Prepare monthly financial reports.
(4) Prepare budgets for the Association.
(5) Maintain the Association's financial books and records.
(6) Purchase and maintain insurance for the Association.
(7) Investigate all accidents and claims and make all necessary reports to the insurance company.
(8) Negotiate contracts in the name of the Association for utilities.
(9) Enter into contracts on behalf of an Association for common area maintenance.

Although your management company may meet the foregoing categories, it can be classified as a debt collector if debt collection activities account for a critical percentage of the fees generated.

Until there are clear guidelines as to whether and when managers are considered debt collectors, it is best to use caution when collecting delinquent debts. If you decide to collect delinquent debt, the best practice would be to adopt a good FDCPA compliance policy at your company and consult with legal counsel.

2. Does Texas State Law Consider Your Company a Debt Collector?

Texas has enacted its own debt collection statutes that mirror the FDCPA. In Texas, there is the Texas Debt Collection Practices Act (TDCPA) under the Texas Finance Code §§392.001 to 392.404 and 396.001 to 393.353. The TDCPA expands on the FDCPA because it applies to collection agencies as well as creditors and prohibits much of the same conduct that the FDCPA prohibits, such as the use of threats, harassment, abuse, unreasonable communications, deceptive misrepresentation, and unconscionable collection tactics.

The TDCPA has a 2 year statute of limitation and provides for private remedies which include obtaining an injunction, actual damages, statutory damages at a minimum of $100 and a maximum of $500 per violation as well as the ability to recover attorney fees. Whereas the FDCPA has a 1 year statute of limitation and also provides the ability to obtain injunctions, actual damages, statutory damages at $1,000 per violation as well as the ability to recover attorney fees.

A point of caution would be to companies who undergo attempts to collect debts outside of Texas. If you are engaged in doing so, then you will need to comply with that state's collection laws.

3. Are You Collecting Time-Barred Debts?

Except for Mississippi and Wisconsin, the statute of limitations does not extinguish a debt. In fact, even a discharge in bankruptcy only eliminates the obligation to pay the debt. Although time-barred debts are generally valid and enforceable, courts have held that filing suit or threatening to file suit on time-barred debts violates the FDCPA.

The Federal Trade Commission (FTC) issued a report titled Repairing A Broken System, Protecting Consumers in Debt Collection Litigation and Arbitration where it commented that the act of collecting time-barred debt could "create a misleading impression that the collector can sue the consumer in court to collect the debt." The FTC took the position that a collector was required to inform the debtor that nothing will happen to them if they do not pay the time-barred debt. Furthermore, beware that there are courts that look at the limitation period for the state where the originating creditor is located for the applicable limitation period if it is shorter than the debtor's time-limitation.

4. Are You Utilizing Auto Calls, Auto Texts and Auto Voice Messages?

The Telephone Consumer Protection Act (TCPA) regulates telemarketing calls, auto-dialed calls, prerecorded calls, text messages, unsolicited faxes and the National Do-Not-Call list. The TCPA prohibits autodialed or prerecorded non-emergency calls to cell phone numbers unless the call is made with "the prior express consent of the called party."

Despite some exemptions for debt collection calls, there are state cases, especially in the collections area, that are in conflict in the federal courts. With TCPA claims on the rise, now is a good time to review what's going on and how it affects your company. It is recommended that if you have any questions as to the applicability of the TCPA to your organization that you should contact an attorney to get some guidance on best practices to comply.

5. Does the CFPB Regulate Your Company?

The U.S. Consumer Financial Protection Bureau (CFPB) is an independent watchdog agency tasked with drafting and enforcing regulations on debt collectors as well as other entities offering financial goods and services.

If your company is a large market participant then it is subject to CFPB examinations. Large market participants are generally companies that:

(1) Collect over $10 million from debt collections,
(2) Provide service to companies that collect over $10 million from debt collection, or
(3) Collect debt or provides debt collection services under $10 million.

There is some gray area in this arena as well. Even if your company does not meet the large market participant criteria, the CFPB can still examine your company. For example, the CFPB has declared that it can examine any company it believes is causing consumers harm.

The CFPB has no criminal enforcement authority, but it is authorized to conduct civil investigative demands for testimony, production of documents, subpoenas or responses to written questions to see if there are any violations. The CFPB also has the authority to institute "any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law," including, but not limited to:

- Enforcing restrictions and placing limitations on the functions of a company.
- Publishing public notifications regarding violations.
- Instituting administrative enforcement proceedings or Federal lawsuits.
- Awarding damages and other monetary relief.
- Disgorging fees.

It is important to note that the CFPB has rulemaking and enforcement authority over all companies who collect debts. As a result, any debt collector needs to ensure that they have an effective compliance management system in place for their business to avoid violating federal consumer financial laws. Consult with an attorney to make sure that you are informed and on top of your company's compliance obligations.

About the Author, Rick Anderson:

Rick Anderson is a shareholder in the litigation section .Mr. Anderson has an AV Preeminent Peer Review Rating from Martindale-Hubbell, which is a testament that his peers rank him at the highest level of professional excellence. His practice focuses on high-stakes litigation that includes complex commercial litigation, business litigation and professional liability.

Lien-Stripping and Associations: Where did the Money Go?
By Clint Brown

The Association received notice of the bankruptcy, properly flagged the account and filed its proof of claim with the Chapter 13 bankruptcy court. Now what? Does the Association begin to collect monthly payments from the bankruptcy trustee or is there something additional the Association needs to monitor? Unfortunately, there are instances where associations have done everything proper in the bankruptcy world and should receive payments, but are still subject to having the entire pre-petition balance wiped out or stripped. The final article in this bankruptcy series focuses on the last major bankruptcy issue, lien-stripping and its application to Chapter 13 bankruptcies.

First and foremost, lien-stripping only applies to Chapter 13 bankruptcies. It has absolutely no application to Chapter 7 bankruptcies. Overall, once a debtor files a Chapter 13 bankruptcy, they have some options in how they treat the association's pre-petition claim. One option is to simply pay the claim with interest (usually 5.25%) over a period of either 3 or 5 years. The other option is to completely wipe out or strip the HOA's pre-petition claim. This is known as lien-stripping. Lien-stripping occurs when the fair market value ("FMV") of the house is less than the 1st lien/mortgage amount + tax amount on the house ("underwater") and can be shown with the following formula:

FMV($) < Mortage ($) + Taxes ($)

If the Association's lien is stripped and the Chapter 13 Plan goes to completion giving the debtor a discharge, the Association can never go after the debtor for the pre-petition debt, either personally or in-rem. If, however, the debtor gets dismissed from the Chapter 13 Bankruptcy, then all bets are off and the Association can go right back to where they started with collection procedures. Debtors typically get dismissed for failing to make payments under the plan or failing to follow the bankruptcy rules and procedures.

The following are examples to help highlight the concept of lien-stripping.

Example 1
Debtor 1 files a Chapter 13 Bankruptcy. At the time the petition is filed, the Mortgage is $100,000.00, the FMV is $90,000.00, the County Appraisal District ("CAD") appraised value is $80,000.00, and no taxes are owed. The Association is owed a pre-petition amount of $2,000.00.

1. What is the value of the house?
   Answer: $90,000.00

2. Is the house underwater?
   Answer: Yes

3. If the house is underwater, by how much?
   Answer: $10,000.00

4. Can the HOA's lien be stripped?
   Answer: Yes

Example 2

Debtor 1 files a Chapter 13 Bankruptcy. At the time the petition is filed, the Mortgage is $100,000.00, the FMV is $120,000.00, the County Appraisal District appraised value is $90,000.00, and no taxes are owed. The HOA is owed a pre-petition amount of $2,000.00.

1. What is the value of the house?
   Answer: $120,000.00

2. Is the house underwater?
   Answer: No (The FMV is the value to rely on, not the CAD appraised value)

3. If the house is underwater, by how much?
   Answer: N/A

4. Can the HOA's lien be stripped?
   Answer: No

As you can see from the examples, the CAD appraised value is not always the actual FMV. In many instances the CAD appraised value and sometimes the CAD market value are much less than the actual FMV a private appraiser or realtor would associate with a property. This difference in value is where the argument between debtor's counsel and the Association's counsel arises. The Association wants the actual FMV to be used in determining whether a lien-strip is warranted as that is the amount that is typically the highest.

This is where the Association's counsel gets involved. The Association or its counsel will receive a Notice of Intent to Strip the Lien. From the point that notice is mailed, the Association has roughly 28 days to respond. If it fails to do so, the lien-strip will be considered uncontested and will be granted by the bankruptcy court. You should always immediately notify your legal counsel in the event of a Notice of Intent to Strip Lien. The association's attorney will review the facts and evidence, and will recommend to the association whether or not to fight the lien-strip based upon a number of factors.

About the Author, Clint Brown:

Mr. Brown is a senior associate with the firm and has been practicing since 2009. He practices Bankruptcy Law, Construction Law, Residential and Commer cial Real Estate, Corporate Law, and Community Association Law. Mr. Brown received a B.A. at the University of Texas at Austin in 2005, and graduated cumlaude from the South Texas College of Law in 2009.

San Antonio Appeals Court Bans Short-Term Rentals Based on "Residential Use" Restriction

By Mia Lorick and Frank Carroll

Homeowners Associations have a new tool to combat the rampant spread of short-term rentals—including Airbnb and VRBO-type services: the "residential use" restriction.

On November 16, 2016, the San Antonio Court of Appeals held that homeowner Kenneth Tarr's short-term rentals—ranging from 1 to 7 days—were in violation of the Timberwood Park Owners Association's "residential use" restriction. The court held that short-term rentals are not a "residential use" of the property, paving the way for challenges across the State.

The case began in 2014, when Kenneth Tarr began leasing out his home almost every weekend. In a period of 4 months, Mr. Tarr entered into roughly 30 leases. The Association determined this to be a violation of the residential use provision and subsequently sent Mr. Tarr a violation letter. Subsequently, Mr. Tarr filed suit against the Association seeking a determination that his short-term rentals were not a violation of the restrictive covenants. Attorneys Frank Carroll and Mia Lorick of RMWBH represented the Association and argued that Mr. Tarr's short-term rentals were in fact a violation because Mr. Tarr was leasing to multiple people from all over the county for periods of 1 to 7 days. The trial court found Mr. Tarr's short-term rentals to be transient in nature and more like a business use, and awarded the Association its attorney's fees. The San Antonio Court of Appeals affirmed the trial court's decision stating that short-term rentals to people who have no intent to remain for a substantial period of time (e.g. short-term rentals) are a violation of the residential use restriction.

So, what does this mean for community associations throughout Texas? It means that if a community has a residential use provision in its restrictive covenants—which almost all do—and a homeowner is leasing their property for periods of less than 30 days—that homeowner is likely in violation. This comes as good news as these short-term rental services increase in popularity, driving more and more people—and the increase in noise and traffic that comes with them—into single-family residential communities.

About the Authors:

Mia Lorick is an associate in the firm's litigation and appellate groups. Ms. Lorick completed her undergraduate studies at North Carolina School of the Arts where she earned a Bachelor of Fine Arts in Modern Dance. After completing her undergraduate studies, she attended University of Houston Law Center where she received her Juris Doctor.

Mr. Carroll practices in the firm's trial and appellate groups and has represented individuals and corporations in a variety of legal disputes ranging from catastrophic injury to complex commercial litigation.

After completing his undergraduate studies at The University of California at San Diego, Mr. Carroll attended the University of Houston Law Center where he received his Juris Doctor.

Austin Office:
111 Congress Plaza, Suite 1620
Austin, Texas 78701
(512) 279-7344

Dallas Office:
Mockingbird Station
5307 E. Mockingbird Lane, Suite 685
Dallas, Texas 75206
(214) 365-9290

Fort Bend Office:
Sugar Land Town Square
2277 Plaza Drive, Suite 290
Sugar Land, Texas 77479
(281) 207-7697

Houston Office:
2800 Post Oak Blvd, 57th Floor
Houston, Texas 77056
(713) 780-4135

San Antonio Office:
4630 N. Loop 1604 W, Suite 311
San Antonio, Texas 78212
(210) 731-8858

RMWBH PC
ROBERTS MARKEL WEINBERG BUTLER HAILEY

(800) 713-4625
www.RMWBHLAW.com