Legislation and Case Law Update

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NEW LAWS:

Process Servers and Service - The Governor signed a new law that affects gated communities. In those communities, employees are required to allow individuals attempting to serve process into the community for service. The law affects both condominiums and other private communities such as gated homeowners associations. The law is Public Act 98-966. Effective as of January 1, 2015.

Non-Condo Owner Leases - Until recently, there was certainty that owners leasing a home in an association that is governed by the Common Interest Community Association Act was automatically required to provide a copy of a lease to the association within 10 days of the lease being signed or the date of occupancy, whichever occurs first. Public Act 98-842 creates an exception to the blanket rule if an association's governing documents provide otherwise. Effective as of January 1, 2015.

Condo Insurance - Public Act 98-762 has modified the insurance requirements for condominium associations.

> Property Insurance - The association must still have full replacement insurance for the property and increased costs of rebuilding in compliance with building codes and the costs of demolition.
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> D&O Coverage - The association is still required to obtain D&O coverage. However, the law states which coverages must be included in the insurance policy, including non-monetary actions (injunction or declaratory judgment actions), defense of breach of contract claims (association does not pay its bills) and defense of decisions related to insurance. It also states that past, present and future board members must be covered while acting in their capacity as board members, property management company and employees of the board and the property management company.
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> Covering Improvements and Betterments - The law is clarified that there is no obligation to cover additions, alterations and upgrades installed or purchased by an owner.
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> Unit Owner's Coverage - The Association no longer has the expressed power to obtain an insurance policy when an owner fails to do so. Associations had trouble obtaining coverage anyway, so this provision does not change much.

This bill becomes effective on June 1, 2015 and only applies to policies issued or renewed after that date.

Leasing of Units - When an association takes possession of a unit pursuant to the Forcible Entry and Detainer Act, it has the right but not the obligation to lease the unit to a tenant. Public Act 98-996 provides guidance on when it can enter into those leases. The Association has to enter into the lease within 8 months after expiration of the stay. The lease can still be for a term of up to 13 months. If the Board desires to lease the unit for additional time, it can file a motion to do so. The law becomes effective on January 1, 2015.

Enforcement and Litigation - Some declarations contain a provision that a specified percentage of the membership must approve litigation prior to taking an action. Public Act 98-1068 nullifies those provisions, except arbitration provisions against owners. Thus, the Board does not have to obtain the approval of the membership to take enforcement actions against developers or anyone else. However, the membership can adopt restrictions requiring approval of the membership after turnover if it so desires if approved by 75% of the owners. The law only applies to condominium associations and is effective on January 1, 2015.

Adopting Rules on Electronic Notices - Public Act 98-735 gives the board of a condominium association the power to adopt rules allowing the Board to send electronic notices to members and the members to submit an email address or postal address that would be placed on the members list that is subject to inspection by the members. This law is effective on January 1, 2015.

Electronic Notices and Voting - The passage of Public Act 98-1042 permits formal communications between an association and its members to be sent using technology.

Notices - For condominiums, provided that an owner has opted in, notices can be sent via electronic means for all non-election matters. In order to send notices by electronic means for election matters, the association has to adopt rules or have authority in its declaration and by-laws to send notices by electronic means. For non-condominiums, there is no rule requirement for sending notices but owners still have to opt-in.

Voting - Both condos and common interest community associations can allow electronic voting in non-elections. To vote electronically in elections, associations must adopt rules and regulations concerning electronic votes, which in the case of a condo must be adopted at least 120 days before the election. If owners can vote electronically in an election, voting by proxy is prohibited. Instructions on how to e-vote must be sent 10 to 30 days in advance of the meeting.

LEGISLATION:

UPDATE - SB2664 – One of the most closely watched pieces of legislation this year in the industry was SB2664. As originally approved by the General Assembly, this bill would have limited a condominium association's recovery after a foreclosure to a maximum of 9 months of regular assessments. Currently, associations can get up to 6 months of common expenses, plus costs and attorneys' fees if they file a lawsuit to collect assessments. The Governor vetoed the bill with an amendatory veto, which allowed him to propose changes to the General Assembly. In this case, the Governor's amendatory veto still required the purchaser of a unit to pay up to 9

months of regular assessments, but it also made the bank responsible for everything else due to the association on the lien. When the bill went back to the General Assembly, the General Assembly chose to do nothing with the bill. Specifically, it did not adopt the Governor's changes or override his veto. Instead, the bill simply died because no action was taken. Therefore, the original language of the Illinois Condominium Property Act remains law.

NEW CASES:

Bank's Obligation to Pay Assessments - Last year, a Second District Court of Appeals case came out that created issues for associations trying to collect assessments after a foreclosure if they were not properly named as a defendant, with the court stating that it did not matter if the condominium association was named if the bank paid the assessments coming due after the foreclosure sale. In an opinion issued by the First District of the Court of Appeals, a bank was obligated to pay the entirety of the assessments that were due even if the association was properly named in the foreclosure, if the bank did not pay the amounts coming due after the sheriff sale. In that case, the bank failed to pay approximately 23 months of assessments after the sheriff sale. Because of this failure, the court made the bank responsible for more than $40,000 in assessments that came due prior to the sheriff's sale.

It is not clear at what point the bank has to pay the assessments coming due after the sheriff sale to avoid having to pay the assessments that should have been extinguished in the foreclosure case. 9(g)(3) of the Condo Act only makes the bank responsible for assessments that come due after the sale provided that the sheriff's sale has been confirmed by the court. If the bank does not pay assessments coming due after the sale in some reasonable time after the order confirming the sheriff's sale, the association should strongly consider pursuing collections.

The case is *1010 Lake Shore Association v. Deutsche Bank National Trust Company*, 2014 IL App (1st) 130692.

Association's Duty to Repair and Take Action - A recent case serves as a good reminder to boards about the importance of taking action and following a process when owners complain of damage to their units by the common elements. The case is *Schuh v. Plaza Des Plaines Condominium Association*, 2014 IL App (1st) 131999-U and is an unpublished opinion. In that case, the association ignored numerous requests and did not remedy the issues for at least 8 months after they were reported. The owner paid to remedy the issues in the unit and sought reimbursement from the association, which it denied. The case was filed as a small claims breach of fiduciary duty case. The court awarded under $5,500 in compensatory damages and $22,000 in punitive damages against the association.

Insurance Broker Does Not Have Duty to Secure Proper Insurance Coverage Under Condo Act - It is not unusual to hear of instances where an association's board thought that its insurance policy covered more than it did. In an opinion filed on September 2, the Second District of the Appellate Court addressed an issue that had not previously been considered by a court: whether an insurance broker is responsible for making sure that an association's insurance policy complies with the law and the declaration. In the case, the association obtained insurance coverage that included coverage with ordinance and law endorsements covering $1 million. One

of the buildings within the association burned down and in order to rebuild it, the association had to comply with a local ordinance which required the installation of sprinklers. The cost to rebuild the building to code was $1.3 million. The association sued the broker for failing to exercise ordinary care in securing an insurance policy that covered the full replacement cost of the building as is required by Section 12 of the Condo Act. The court found that the insurance broker does not have a statutory duty under Section 12 of the Condo Act to obtain the required coverage. The case is *Royal Glen Condominium Association v. S.T. Neswold & Associates, Inc.*, 2014 IL App (2d) 131311.

All Requests for Documents Are Not Created Equal - The Condo Act allows owners to submit a records request to see an array of documents. If a request seeks contracts, leases, and other agreements, a list of names, addresses and weighted vote of all members entitled to vote, ballots and proxies and the books and records of account, the owner must submit the request in writing stating with particularity the records requested as well as a proper purpose. In *Oviedo v. 1270 S. Blue Island Condominium Association*, 2014 IL App (1st) 133460, an owner sent in a request for records to be sent to his office within 15 days and stated that it was being requested due to a series of unauthorized expenses without giving many examples. The request also did not cite any statute that requires an association to produce records, which could include the Condo Act, the General Not-For-Profit Corporation Act and, because the association is located in Chicago, the Chicago Municipal Code. Additionally, four days before the "request" the owner received a demand notice for failure to pay assessments.

The appellate court deemed the request improper for a number of reasons. First, the court stated that it did not reference any of the statutes and also demanded production of records in a time frame (15 days) that does not appear in any of those laws. Additionally, nothing requires an association to mail documents to the owner. Instead, the association must make them available for inspection. Finally, the court stated that the request was sent in an effort to retaliate against the association considering that he never had an issue with the financial management of the association. His vague assertions of mismanagement were not enough. What makes the case even better is that the association did send some of the requested records via email and informed the owner that he could inspect the remainder of the records. There was no evidence that the owner ever sought to setup an appointment.

This case serves as a good reminder of an association's rights when records requests are submitted to it. It should analyze the request to make sure that it contains the required information. Most importantly, the boards should exercise its rights to have owners come in and inspect records rather than sending them to the owner.

Dangerous Dogs - Many associations have restrictions that prohibit certain breeds of dogs and those weighing in excess of 30 or 35 pounds. In *Tyrka v. Glenview Ridge Condominium Association*, 2014 IL App (1st) 132762, a condominium association was named as a defendant in a lawsuit related to a dog bite case. The plaintiff in the case alleged that the Association exercised control over the common areas where the attack occurred. The court stated that in order to find that an association could be liable for a dog attack, it must be shown that the association has knowledge of the dog's viciousness prior to the attack. In this case, vague allegations that there were three previous complaints about a dog attack without an explanation

of what was attacked was deemed insufficient. Accordingly, the court found that the association was not liable. However, the case serves as a warning to associations - if you know a dog is vicious, violent or has attacked people or animals, than the Board should take action to remove the dog from the property.