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TESTIMONY OF JOANE MUELLER-LONDON, ESQ. REGARDING RAISED SENATE BILL 325

AN ACT CONCERNING COMPLIANCE WITH THE REQUIREMENTS OF THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT BY THE UNIT OWNER'S ASSOCIATION OF A COMMON INTEREST COMMUNITY WHEN FORECLOSING A LIEN ON A UNIT

I. SUMMARY:

Raised Senate Bill No. 325 proposes to amend Section 47-258 of the Connecticut General Statutes to insert language that requires a common interest community/homeowners' association to comply with applicable provisions of the federal Fair Debt Collection Practices Act, 15 USC Section 1692, et seq., as from time to time amended (the "FDCPA"), including any regulations adopted thereunder, when an association is foreclosing a lien on a unit.

The Connecticut General Assembly should **NOT** adopt Raised Senate Bill 325, because the proposed inserted language creates dangerous confusion, conflict and uncertainty within the text of the statute. Moreover, the proposed language leaves associations and their counsel with no straightforward path of compliance with the remaining provisions of Section 47-258 and thereby thwarts the core purpose of the statute.

II. BIOGRAPHY OF ATTORNEY LONDON:

Joane Mueller-London is an attorney with the law firm of London & London. She is a graduate of Cornell Law School (JD 1991) and has over 20 years of experience practicing in the areas of corporate law and finance. She also represents creditors throughout the State of Connecticut, including condominium/homeowners' associations. She is a member of the Connecticut Bar Association, and CBIA's Small Business Advisory Council. She is a past President of the Rotary Club of Newington and a Paul Harris Fellow. She currently serves on the Board of the Connecticut Chapter of Community Associations Institute.

III. ANALYSIS:

Raised Senate Bill No. 325 is extremely problematic, because it creates serious confusion as to what would constitute compliance with C.G.S. § 47-258 in light of the proposed language that would mandate FDCPA compliance.

First of all, it is not at all clear, based on a review of case law, that the FDCPA even applies to condominium/homeowners' associations. As the association is the original creditor of any outstanding common charges assessed in a condominium/common interest community, the FDCPA arguably does not apply to an association in its efforts to collect outstanding common charges. 15 USCA 1692a(6).

While the FDCPA would apply to an attorney regularly collecting outstanding common charges on behalf of the Association, insertion of the proposed language in C.G.S. § 47-258 potentially creates an irreconcilable conflict within the statute itself. Specifically, the FDCPA's prohibition on communications with third parties [15 U.S.C. § 1692c] flies in the face of the notice requirements of C.G.S. § 47-258, which stipulate that the association (prior to foreclosing a lien on a unit) must provide the holders of certain security interests with written notice of outstanding, unpaid common expense assessments owed to the association as of the date of the notice. Read in the most literal terms, one could argue that the proposed language is a veiled attempt to negate the notice provisions of the statute, which require the association to provide the first and second mortgage lenders at least 60 days written notice before foreclosing on an outstanding association lien.

If the intent of the notice provisions of C.G.S. § 47-258 was to provide mortgage lenders the opportunity to step in and pay outstanding common charges on behalf of a unit owner (and thereby keep attorneys' fees and costs incurred in connection with an association foreclosure action to a minimum), insertion of the proposed text muddies the waters. Namely, it is unclear if the proposed language effectively bars counsel for the association from proceeding to notify the holders of security interests on a unit without a unit owner's prior consent, or in the event a unit owner disputes the balance owed. Accordingly, it clearly undermines the original intent of the statute and purports to create a new cause of action that a homeowner may raise when the association seeks to enforce its statutory lien.

Significantly, the obligation to pay common charges to a common interest community or homeowners' association is fundamentally different from a "debt" as defined under 15 USCA 1692. Section 1692a defines the term "debt" as

any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. (15 USCA § 1692a).

In contrast to the definition of a "debt" contemplated by the FDCPA, the obligation to pay common charges to a common interest community association or homeowners' association arises by statute under the Connecticut Common Interest Ownership Act (CIOA). Since the unit owner's obligation to pay common charges to an association arises by statute, the lien thereby created is a statutory lien. Moreover, the covenant of a unit owner to pay common charges to the association is recorded on the land records in the association's declaration and runs with the land. An association does not have to file a lien on the land records to foreclose its lien, because the association's lien arises by statute and is set forth in the recorded declaration.

Thus, a unit owner's monthly payment of common charges is arguably not a "debt" as contemplated by the FDCPA. Rather, it is a statutory obligation to pay that is imposed upon each unit/unit owner in the association. There is a compelling rationale for this rigid enforcement mechanism, because an association cannot function and fulfill its legal obligations to maintain common elements and provide insurance coverage if each unit owner is not contributing its proportional share to the association's budget in a timely manner. Without a fairly strict enforcement mechanism in place, the association quite simply cannot function effectively as a legal entity and institution.

Association attorneys have every incentive to comply with all federal and state requirements that apply to the collection of outstanding common charges. The proposed language, however, does not create a clear path of compliance for either associations or their counsel, because it makes no sense. The statute as currently written places an affirmative obligation on an association to notify in writing certain holders of a security interest on a unit prior to initiating a foreclosure action.

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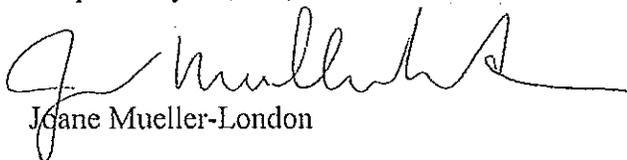
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Insertion of the proposed FDCPA compliance requirements conflicts with the notification provisions of C.G.S. § 47-258. The proposed language would also unnecessarily encourage unit owners to allege violations under the FDCPA, which arguably does not even apply to associations, in an effort to thwart associations' efforts to effectively enforce the statutory lien of C.G.S. § 47-258. Without an effective statutory lien enforcement mechanism in place, condominium units in Connecticut would quickly lose their value, as associations would be mired in litigation and could not reliably avail themselves of the foreclosure process to ensure timely payment of association common charges.

In sum, it is not at all clear how an association and/or its legal counsel are supposed to comply with the balance of provisions in C.G.S. § 47-258 *after* insertion of the proposed language. Therefore, the ability of an association in Connecticut to manage its community association receivables will be dangerously undermined if Raised Senate Bill 325 is passed.

Accordingly and for the foregoing reasons, the General Assembly should **NOT** adopt Raised Senate Bill 325.

Respectfully submitted:



Joane Mueller-London