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Micheve v. Wyndham Place – The Final Chapter

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(Editor's Note: Periodically, we invite guest authors to contribute to the CPA on a variety of relevant, timely topics. In this article, Kenneth Sauter provides a detailed review and analysis of the issue of an Association's ability to impose a capital contribution on the sale/resale of a condominium unit, which culminated with Governor Corzine's recent signature on legislation addressing this matter. A former accountant and CPA, Sauter has been an attorney since 1984 and is a partner in the real estate department of Ramsey Berman, P.C., located in Morristown, New Jersey. A substantial portion of his practice is devoted to the representation of Community Associations throughout New Jersey. He is the past chairperson of the Editorial and Education Committees of CAI-NJ and is the current chairperson of its Legislative Action Committee. For further information on this issue, Mr. Sauter may be contacted at ksauter@ramseyberman.com)

Background

In a November 3, 2005 decision, the Appellate Division of the New Jersey Superior Court, in a case captioned Micheve, L.L.C. v. Wyndham Place at Freehold Condominium Association, 381 N.J. Super. 148 (App. Div. 2005), opined that working capital contributions, membership fees, and similar charges (sometimes referred to in this article collectively as working capital contributions) could not be imposed and collected pursuant to the New Jersey Condominium Act (N.J.S.A. 46:8B et seq.) (the "Condominium Act").

The Board of Directors of Wyndham Place at Freehold Condominium Association (the "Association") adopted a resolution requiring purchasers to pay a one-time, non-refundable working capital contribution in the amount of \$750.00. A \$125.00 "processing" fee was also authorized in that resolution. Micheve, L.L.C. ("Micheve") purchased a unit in the Wyndham condominium development and acquired title via a sheriff's deed. (A sheriff's deed is the form of deed used following and pursuant to a judicial foreclosure of real property.) Micheve then resold the unit to another party and the Association required Micheve to pay the \$750.00 working capital contribution and the \$125.00 processing fee upon closing. To facilitate the closing, Micheve made these payments and then filed an action in the trial court seeking recovery of these payments. The trial court concluded that the \$750.00 working capital contribution violated the New Jersey Condominium Act and ordered the Association to refund the working capital contribution. (Micheve did not challenge or continue to challenge the \$125.00 processing fee.) The trial court's decision was appealed by the Association, resulting in the November, 2005 appellate court decision discussed above.

The appellate court's decision was generally based upon findings that the Condominium Act requires that common expenses be imposed proportionately (see N.J.S.A. 46:8B-3(e)) and that the imposition of the charge only upon



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purchasers (being “one class of condominium unit owners”) and not upon all unit owners was therefore a “discriminatory imposition” and violative of the holdings of Thanasoulis [Thanasoulis v. Winston Towers 200 Ass’n. 110 N.J. 650 (1988)] and Chin [Chin v. Coventry Square Condo. Ass’n. 270 N.J. Super 323 (App. Div. 1994)]. The trial court also held that the Association’s resolution was not permitted under or protected by the “business judgment rule” because the Association’s actions were not authorized by the Condominium Act or by the Association’s own bylaws or master deed. You may recall that the Association imposed the \$750.00 working capital contribution pursuant to a resolution adopted by its board of directors, rather than pursuant to a master deed or bylaw amendment approved by the members of the Association. Apparently, the master deed and bylaws were silent with respect to a working capital contribution fee or other closing charge.

A Range of Opinions

There have been many divergent opinions regarding the scope and applicability of the Micheve decision. The ambiguity of the appellate court’s decision generated a mix of opinions and advice to Associations in the intervening two years. However, a legislative answer has now been provided.

Some attorneys opined that Micheve was decided based solely upon the appellate court’s interpretation of the Condominium Act and, therefore, the decision only precluded the imposition of a working capital contribution by condominium Associations and would not apply, for instance, to homeowner Associations. Others said the court focused on the method of imposing the working capital contribution via board resolution rather than via master deed or bylaw amendment. This analysis would, however, seem contrary to the portion of the decision which states “the \$750.00 assessment upon transfer of title to a condominium unit violates the Condominium Act...”

Some attorneys believed that the appellate court’s decision was based upon its finding that the \$750.00 fee was not imposed uniformly upon all purchasers because it was not based upon the percentage

interests applicable to the units. And, some attorneys maintain that the working capital contribution would have been upheld, had it been a multiple of the respective unit owner’s monthly maintenance fee.

Remaining Questions

The business impact and reaction to the Micheve case has varied from Association to Association. Working capital contributions and other membership fees are often not a significant component of an Association’s budget. The bigger issue concerned the retroactivity of the appellate court’s decision.

Specifically, would the Micheve decision have opened the floodgates to mass litigation (i.e., a class action) seeking reimbursement of all working capital contributions dating back to the creation of the first condominium in the State of New Jersey? I have intentionally overstated the likely impact, as applicable statutes of limitations would provide a cutoff date (or dates) for retroactivity, but I believe this emphasizes the point; the amount at stake for condominium Associations was not simply the working capital contributions and other membership fees that could not be collected (or, if collected, could not be retained) for closings occurring after November, 2005. The amount at stake included such fees collected prior to the 2005 decision.

In addition, the analysis in the case could also have led to similar or perhaps more sustainable attacks upon the collection of working capital contributions collected by “non-condominium” Associations based, for instance, upon analysis of legislative history (or lack of legislative history) and similarities to the documents, practices and case law applicable to other Community Associations. (Any such action could not, however, be based upon a lack of authority under the Condominium Act.) A question which may remain unresolved is whether a homeowner’s Association board resolution imposing or amending a working capital contribution or other membership fee is valid, or must such a fee be adopted pursuant to an amendment to its declaration or bylaws? A subordinate question is, where the declaration or bylaws are silent, which governing document must be modified?



Micheve v. Wyndham Place *(continued from page 2)*

If for no other reason, legislative steps were necessary to clarify the appellate court's intention and the applicability of the Micheve case. The recently enacted legislation helps resolve many of the previously discussed issues, however, it does not answer either of the two preceding questions.

Legislative Action and Implications

On September 10, 2007, Governor Corzine signed Bill A2822/S2188, amending the Condominium Act and ***expressly permitting the imposition of a working capital contribution upon the sale or resale of a condominium unit.*** This bill was drafted and, at the request of the CAI-NJ Legislative Action Committee (LAC), was introduced in response to the Micheve decision.

The bill amends the New Jersey Condominium Act (specifically N.J.S.A. 46:8B-15). Section (e), as amended, now specifically states:

If authorized by the master deed or bylaws, the Association may levy and collect a capital contribution, membership fee or other charge upon the initial sale or subsequent resale of a unit, which collection shall be earmarked for the purpose of maintenance of or improvements to common elements to defray common expenses or otherwise, provided that such charge shall not exceed nine times the amount of the most recent monthly common expense assessment for that unit.

(Full text of the legislation may be viewed as a PDF document at http://www.njleg.state.nj.us/2006/Bills/A3000/2822_R3.PDF)

Accordingly, limits on the amounts which may be collected, although likely workable and acceptable to all condominium Associations, now exist. For instance, the working capital contribution may not exceed nine times the common expense assessment for the unit upon which it is imposed. As drafted, this sum (multiple) established a limit and not the methodology for calculating the charge. It therefore would not preclude a “discriminatory” fixed charge, such as the \$750.00 fee imposed by the Wyndham Place at Freehold Condominium Association in the Micheve case. In addition, the working capital contribution, membership fee or other charge must be earmarked, however, the permissible earmarked purposes are broad; they include the cost of

maintaining or improving common elements, subsidization of (defraying) common expenses, or otherwise. The “or otherwise” language is the same phrase that has existed in the Condominium Act regarding the levy, collection and use of common expenses. It should be noted that the bill was accompanied by a “Governor’s Statement” which attempted to clarify this “or otherwise” language.

But even when viewed most restrictively, the statement would allow the use of these working capital contributions, fees or other charges for an Association’s administrative charges, fees, and other expenses relating to the costs of maintaining or improving common elements and defraying common expenses. I cannot think of many Association expenses that would fall outside of these categories and, in any event, an Association will clearly have sufficient amounts of any one or all of these categories of expenses to which capital contributions or other fees may be applied.

A new section 2 also specifically “grandfathers” existing master deeds and bylaws, stating: “Any master deed or bylaws provision providing for the imposition and collection of a capital contribution, membership fee or other charge upon the resale or transfer of units prior to the effective date [September 10, 2007] of this Act is hereby validated.” This should close the door on any claim that capital contributions or other fees collected prior to September 10, 2007 (whether before or after the November 2005 decision) are subject to a claim for refund.

On a personal note, as the chairman of the Legislative Action Committee during the pendency of this bill, I had the opportunity to work with many of our legislators, advisors and fellow committee members, and I am taking this opportunity to express my deep thanks for their attention and assistance.

UPCOMING ISSUES:

- Association Surpluses, Deficits and Working Capital
- IRS Creates New Tax Form for Cooperative Housing Associations



NEWS AT THE FIRM

EMPLOYEE ANNIVERSARIES (Oct. – Dec.)

23 years **Annette Murray**
 22 years **Janine Zirrieth**
 21 years **Margot Julis**
Susan Klimcsak
 18 years **Carol Rosenvinge**
 9 years **Daniel Manning**
Vinay Navani
Donna Peskin
 8 years **Jill Carvalheira**
 7 years **Cristina McLaren**
 5 years **Joseph Chorba**

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Donna Peskin, Manager
Mohammed Salyani, Manager
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Elizabeth Peddicord, Senior
Twinkal Shah, Senior
Kimberly Ifantis, Advanced
Lauren Mazzella, Advanced
Laura Thompson, Advanced
Jennifer Villa, Advanced
Katie Vivenzio, Advanced
Dan Fiorentino, Intermediate
Nick Haralambopoulos, Intermediate
Stephanie Holston, Intermediate
Christine Hrycenko, Intermediate

WELCOME TO OUR NEW STAFF

Welcome to our new staff members:

Amber Ciez – Rider University
Jane Feldman – Monmouth University
Sam Schneider – The College of New Jersey

CONGRATULATIONS

It is with great pleasure that we announce the following promotions:

Deborah Norwicke, Principal

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