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Re: Open Letter Regarding HB 319

I am one of the Managing Partners of Goede & Adamczyk, PLLC, a law firm that represents approximately 400 community associations in the State of Florida. This letter addresses what we believe are serious problems with the proposed "safe harbor" changes in Florida Statutes sections 718.116 and 720.3085. Those changes are contained in House Bill 319, which has become widely known as "HB 319".

By way of background, our Firm is not a "collections firm". We operate a full-service community association practice and provide the same legal services that are provided by the law firms that support and endorse HB 319. I am an adjunct professor of condominium and homeowners association law at Ave Maria School of Law. Our Firm authors a column in *The Naples Daily News* in which we provide answers to common legal problems affecting community associations. All twelve (12) of our attorneys practice community association law on a daily basis.

As most of you know, HB 319 was filed by Representative George Moraitis, Jr. and is endorsed by Becker & Poliakoff ("B&P"), the law firm that operates the Community Association Leadership Lobby ("CALL"). Like Representative Moraitis and B&P, we also operate a real estate and title practice. We also represent banking institutions. We have significant experience with the issues and perspectives surrounding HB 319.

In a nutshell, why does HB 319 benefit the banks and harm community associations? Banks are not in the business of owning property. Further, banks need to control the inventory of foreclosed properties and therefore need to control the tempo of foreclosure cases. Slow or stalled foreclosure cases hurt associations because the association in almost every case is not receiving maintenance fees and late penalties while those cases drag on.

If HB 319 becomes law, the maximum liability of a foreclosing bank will be the lesser of twelve (12) months of assessments or one percent (1%) of the mortgage debt. Banks will no longer be responsible for late penalties, legal fees and collection costs associated with their own delays. The associations will have to absorb and write off those charges if a qualifying bank takes title. Since there will be little incentive to foreclose with reasonable speed, the banks can control the tempo of foreclosure cases almost completely at the expense of community associations. Is that a good result for community associations? No, and it is a very possible result.

Our Firm was not consulted by Representative Moraitis or CALL regarding HB 319. The number of community association professionals (and their backgrounds) who were consulted on HB 319 is unknown. As stated in B&P's open letter dated February 14, 2012, the language in the proposed law was drafted in a joint effort by Representative Moraitis and CALL to reflect what they believe the current law to be. The letter even states that there has never historically been <u>any</u> doubt that CALL and Representative Moraitis are correct on the law and that those who disagree or take a different approach are wrong.

I read one poll which stated that more than half of the community associations in the State of Florida routinely require foreclosing banks to pay the interest, late fees, attorney's fees and collection costs owed to the association. If Representative Moraitis and CALL are correct in their interpretation of the law, it would mean that more than half of the community associations in Florida have been violating Florida law in their collections efforts against banks. Is that plausible? No. There may be other polls out there that have varied results, but it is safe to say that HB 319 affects a large number of community associations in Florida that each stand to lose thousands of dollars if HB 319 becomes law. While the proponents of HB 319 aim to "clarify" existing law, in reality the new law will be a drastic change to the law that provides a cost free option for banks to further control the foreclosure environment.

What does an association stand to lose in a typical collections case if HB 319 becomes law? Consider the following example:

> A condo association has quarterly assessments of $1,000. A unit owner is in arrears since the first quarter of 2008 and owes assessments totaling $17,000 as of today. Since most associations can charge 18 percent interest annually and late fees on assessments, the association would also be owed $6,539.23 in interest and $425 in late fees. Most associations, regardless of their choice of legal counsel, would have also engaged legal counsel to attempt to collect these amounts from the unit owner. If the association was following standard collections protocol and also involved in a mortgage foreclosure, legal fees and costs would be approximately $2,000 depending on the tempo of the mortgage foreclosure and other factors. If the association elected to foreclose on its lien (which is becoming more common as banks continue to stall), legal fees and costs could be twice as much or more.
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> If the first mortgagee with a $250,000 mortgage foreclosed on this unit today (assuming HB 319 was law today), the bank would pay $2,500 to the association (representing 1% of the mortgage debt, which is less than four (4) quarters of assessments). After absorbing 100% of the interest, late fees and legal costs on the account (totaling $8,964.23), the association will recover $2,500 but experience a LOSS of $20,964.23 after writing off $14,500 in assessments not owed by the bank.
>
> Under current law, the association would recover $2,500 for assessments in addition to $8,964.23, for a total recovery of $11,464.23. After writing off the $14,500 in assessments, the loss is only $3,035.77.
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> (Note: In both scenarios, the association pays its legal fees and costs. The difference is that the association can recover those charges under current law provided the charges are reasonable. HB 319 forces the association to pay the legal fees and costs caused by the unit owner's delinquency and bank delays.)
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> If an association has only a dozen of these cases (and many have more), the cumulative effect of HB 319 will approach or exceed $200,000.

No matter what perspective one takes on HB 319, no objective person can argue that the above result is at all good for community associations. So, there must be good reasons for the new "safe harbor" law, correct? We will discuss the reasons offered by lobbyists endorsing HB 319. Those supporting HB 319 have argued that the limitation on amounts owed by banks will help re-sales of foreclosed properties. However, home sales are up and inventory is down under the

current law. Home values are a fraction of what they were in the housing "boom", and cash buyers are often in bidding wars over foreclosed properties. We have not seen any data from the proponents of HB 319 supporting the notion that housing values or sales are at all related to the lenders' liability for association fees. Regardless of whether HB 319 becomes law, banks are not in the business of owning properties. Banks are going to sell their foreclosed properties, and buyers are going to continue taking advantage of current values. The only thing HB 319 really accomplishes is that the bank's bottom line on each foreclosure will be better, and the association's losses will be greater.

Proponents of HB 319 are also concerned about a potential wave of litigation involving associations that pursue banks for what they believe is owed under the current law. In the thousands of foreclosure properties we have handled (both in representing associations and conducting real estate transactions), we have seen maybe a dozen lawsuits involving lender "safe harbor" liability under 718.116 or 720.3085. These lawsuits often involve a lender that lacks standing to pursue the "safe harbor" and is filing suit to bully the association. Banks have the money to pursue these lawsuits, associations often do not. These lawsuits, in our experience, are often resolved quickly and with a positive result for the association. These lawsuits are not a major concern, and even if there is some litigation from time to time involving overly aggressive associations, the adverse effects of HB 319 for community associations are far worse. The notion that banks will somehow be able to come back and successfully sue associations or directors years down the road for amounts previously paid on estoppels is not a sensible reason for supporting HB 319.

The proponents of HB 319 have also made it very clear that one of their chief goals with HB 319 is to eliminate the "cottage industry" of collections firms that have come on the scene during the foreclosure crisis. A balanced view of this issue requires an understanding of why a community association would hire one of these firms. Almost every board member we work with believes that it is better to have all of their legal matters in one office. However, a significant number of community associations became frustrated with their collections results. Foreclosures were dragging on, bankruptcies were filed, and as a result the aged receivables kept growing. The legal bills also continued to accumulate on a monthly basis. Collections firms provided the association with the option of having more aggressive representation at less expense. Who would not select this alternative? Many community association leaders who selected this alternative have saved their communities from financial ruin. Why attempt to take this option away? Whose interests does that serve?

We share the concern regarding "collections firms" to the extent that firms attempt to charge unreasonable rates. However, it is our position that these important decisions should be made by community leaders based on their own special circumstances and not by lobbyists and attorneys who happen to disagree with certain collections practices. If a firm is not producing results and is charging too much money, the association can fire that firm. However, if a firm is producing results and recovering reasonable collections fees and costs incurred by the association in the process, that is a tremendous result for the association. If an association, through the firm of its choice, is attempting to charge unreasonable collections fees, those fees can be challenged by banks that foreclose. Banks have lawyers, too, many of them.

Proponents of HB 319 have also focused on new foreclosure legislation as a way to deflect the fact that the "safe harbor" changes in HB 319 are terrible for associations. There is even an effort to amend HB 319 to include certain legal procedures and sanctions against banks that unreasonably delay foreclosure cases. Our Firm supports legislation that will make foreclosures

move faster. We would also support legislation that would increase the banks' "safe harbor" liability for assessments (although such a change is not part of HB 319). Given the unconscionable delays in these cases, this other legislation should happen anyway. But let us keep in mind that pushing banks to foreclose faster, even with new legislation, will still require associations to pay lawyers. While this new foreclosure legislation might sound good in theory, the legal costs incurred by the association to push foreclosures will be unrecoverable in most cases if HB 319 becomes law.

On behalf of our community association clients and other associations in Florida, our question is: Why not push for better foreclosure legislation, and at the same time, amend the "safe harbor" provision to clarify that mortgagees are in fact responsible for interest, late fees and reasonable attorney's fees incurred by the association in collections? While this might not be the preferred legal interpretation for proponents of HB 319, this amendment would achieve many of their goals and also put more money in associations' pockets. The law would arguably be clearer, but in a manner that helps associations. There would be fewer lawsuits over the "safe harbor", and there would be no delays in closings as banks would have no ability to challenge their responsibility for interest, late fees, reasonable attorney's fees and collections costs. If an attorney or collections firm attempted to recover unreasonable fees, a bank would absolutely have the right to challenge those fees as they do now.

Finally, this issue requires a consideration of fairness. If a bank forecloses but takes years to complete the job (or never completes the job), the association will incur thousands of dollars in interest and late fees. The association will also incur additional thousands in legal fees and costs attempting to make the homeowner pay and attempting to force the bank to finish its job. The association might even foreclose on its own lien in the process in an effort to generate some revenue for the association. Who should be responsible for all of these late penalties and legal costs? If HB 319 becomes law, the answer to this question will not matter because the association will pay and the banks will be off the hook for the delay. The above example demonstrating the financial impact of HB 319 shows that many communities may need to consider special assessments, loans or even borrowing from reserves to cover the losses.

As practitioners in this area, we have raised points in this letter to demonstrate that, without additional data, the reasons for supporting HB 319 could be speculative at best. Is there a reliable study or report showing that communities that agree with Representative Moraitis and CALL have homes that sell faster and for more money? Is there data or documentation from the litigation dockets to suggest that community associations as a whole are at a significant risk from defending their legal position against banks? Is there data to show that those community associations that engage "collections firms" are experiencing worse collections results than those that agree with Representative Moraitis and CALL? If one looks closely, could the net collections results be better?

Further, HB 319 should not be a turf war between community association law firms and collections agencies. B&P concludes its open letter by stating that "collections lawyers and agencies opposing HB 319 have no reason to help associations speed mortgage foreclosure cases along." We could not disagree more with that statement. As illustrated in the example above, it is the associations that pay legal bills and only collect 12 months of assessments or 1% of the mortgage debt that have no financial incentive to push foreclosures.

The professionals in this area should put their differences aside and let community leaders decide what is best for their homeowners. If a community association considers a proposal

from a collections firm with the goal of improving results, the details and potential risks can be discussed with the association's legal counsel. If a major aim of HB 319 is to prohibit collections firms from pursuing unreasonable collections fees and costs, a change is unnecessary. The law currently provides that associations are limited to recovering the "*reasonable* attorney's fees incurred in collection". If a lawyer or collection firm pursues unreasonable fees, the bank can challenge it. Remember, banks have lawyers, too. Why change the law to make things significantly easier on the banks, at the expense of community associations?

Thank you for taking the time to review our comments on this important issue. We hope that our analysis will result in a more fair legislative result for community associations.

Sincerely,

Mark E. Adamczyk