

Inequitable Public Policy supports HOA's survival: pay assessments regardless, or else!

I have written many times that it is the pervasive public policy in every state of our *New America* to support the survival of authoritarian homeowner association regimes. A level that equates HOA survival to a national security concern. It has to be so in order for an HOA to deny homeowners their rights and freedoms, since the states have not declared that the survival of HOAs is a necessity for the purposes of the state's interests.¹ Such a public policy was unheard of in the former America, where one's home was indeed his castle, and was so protected by public policy laws and court decisions.

Somewhere along the line we have forgotten those privileges and immunities that belong to every citizen, at both the national and state levels². The Supreme Court wrote in 1873 *Slaughter House Cases*,³ about the meaning of these privileges and immunities:

They are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country.

What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.

I have written about the inequities of adhesion contracts, of the surrender of rights and privileges by virtue of the "no need to see" constructive notice doctrine⁴, of HOA foreclosure rights, of transfer fee demands on sellers, not new owners, and of the mockery of due process with the empty requirements of only "an opportunity to be heard" by the HOA accusers. In this writing, I call your attention to the "pay until you die" public policy in support of HOA survival. No breaks for old age, retirement, medical bills and illness, or the common law right of offset arising out of a difference with the HOA regime.

It is long standing legal doctrine that assessments must be paid no matter what. Hyatt and French clearly state,⁵ *"The obligation of the homeowners under the Declaration to pay maintenance assessments is independent of the Association's duty to maintain the common areas."* [citing a Texas opinion]. Two Massachusetts cases are typical of this doctrine. In *Monga*,⁶ the appellate court held,

Absent an adjudication by a court of competent jurisdiction that the condominium association's adoption of its budget or imposition of its assessment was accomplished in bad faith or in excess of its authority, condominium charges by the unit owners' organization are not subject to set-off or some other form of self-help remedy.

The independent nature of the covenant to pay in timely fashion common charges to the condominium unit owners' organization is implicit in the contractual agreement of the association's members that maintenance charges and other proper assessments are necessary to the sound ongoing financial management and stability of the entire complex. (fn.8).

And in Prosser⁷ the state's Supreme Judicial Court reaffirmed, (footnote reference was added)

[W]e agree with the Appeals Court's recent statement that there is no right to a set-off⁸ against a lawfully imposed condominium charge. Such authority as there is elsewhere in this country also supports the proposition that a condominium unit owner may not properly withhold payment of lawfully assessed common area charges by asserting a right of offset against those charges.

The Court then went on to provide its rationale for its "pay or die" opinion, (emphasis added)

Whatever grievance a unit owner may have against the condominium trustees must not be permitted to affect the collection of lawfully assessed common area expense charges. A system that would tolerate a unit owner's refusal to pay an assessment because the unit owner asserts a grievance, **even a seemingly meritorious one, would threaten the financial integrity of the entire condominium operation. For the same reason that taxpayers may not lawfully decline to pay lawfully assessed taxes because of some grievance** or claim against the taxing governmental unit, a condominium unit owner may not decline to pay lawful assessments. If there were to be an exception to this principle, it would be due to extraordinary circumstances not shown on the record before us.

Hyatt & French add a detailed reasoning for this doctrine, which is rooted in the holding that the declaration is a bona fide contract, stating that 1) **no state laws or declarations make payments contingent upon providing maintenance services**, and 2) **the declaration makes no exemption whatsoever from making payments**, quoting the declaration's no exemption from payment for any reason.⁹ (With this issue we see the inequities in the recourse to HOAs as a contract or as ascribed with public entity attributes — whatever suits public policy to defend HOAs). The editors then rationalize the predicament that homeowners (those troublemakers) are always finding fault and seeking to withhold payments, which, understandably, the HOA cannot tolerate.

But, these learned people, the courts and legislators have all failed to provide protections for the homeowner to prevent an abuse of process, because, in their minds, the HOA will do no wrong. Failing to protect homeowners is endemic to HOA supporters and current public policy — it is seen as a threat to the survival of the HOA. It is also a rejection of the Constitution, and of our values and beliefs in holding individual rights and protections first and foremost.

If public policy were indeed not on the side of the HOA, a fair and just approach would be to view the homeowner as a consumer and protect the weaker homeowner with a law similar to the federal Fair Credit Billing Act¹⁰. This is the familiar law that pertains to disputes with merchants or credit card companies that sets forth a procedure for resolution to be followed by both parties.

It states that *"You may withhold payment on the disputed amount (and related charges) during the investigation. You must pay any part of the bill not in question."*

Above and beyond the fair and just treatment of homeowners, given the failures by state legislatures to hold HOAs accountable under the law, perhaps there should be a federal law applying the same billing protections to homeowners. That would quickly produce a sorely needed adjustment in HOA board and attorney attitude toward compliance. Provide those requests for records! Answer and respond to billing concerns! Provide the details in support of the HOA's position on payments and fines! Justify the HOA's actions with respect to the law or governing document authority to so act! And make those repairs that the HOA is obligated to make!

Qui Pro Domina Justitia Sequitur (*"who prosecutes on behalf of Lady Justice?"*)

Notes

¹ This is a reference to strict judicial scrutiny requirement of the courts in deciding the constitutionality of legislation that denies fundamental rights and freedoms. The requirement is for "a compelling necessity" and not merely a convenience for the government.

² All state constitutions have the equivalent of a Declaration of Rights, sort of a state Bill of Rights, which contain a reference to privileges and immunities. For example, Art 2 of the Arizona Constitution, section 13, reads: *"No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."*

³ *Slaughter House Cases*, 83 US 36 (1873).

⁴ **There are numerous instances, like these two cases, whereby the court makes new laws not reflected in the declaration "contract." The public has not been made aware of these interpretations and clarifications of additional contractual obligations, many of which are well beyond any reasonable expectations of contractual obligations at the time of purchase. This is a gross miscarriage of justice!**

⁵ *Community Association Law*, Hyatt & French, § 6.04(C) at 429 (Carolina Academic Press 1998). The Texas case is: *Pooser v. Lovett Sq. Townhomes*, 702 S.W.2d 226 (Tex App. 1985).

⁶ *Baker v. Monga*, 590 N.E.2d 1162 (Mass. App. 1992).

⁷ *Trustees of the Prince Condo Trust v. Prosser*, 592 N.E.2d 1301 (Mass. 1992).

⁸ Black's Law definition of set-off: *A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor.* Simply stated, for example, an assessment is withheld because the HOA failed to make necessary repairs, causing the homeowner damages, which he uses to reduce the amount of assessments due the HOA. Not allowed!

⁹ *Supra* n. 3.

¹⁰ *Facts for Consumers*, Federal Trade Commission, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre16.shtm>