Building Access As a Hidden Asset

Access to MDU property is a valuable asset. To maximize their benefits, property owners must understand their rights – which are more extensive than they may realize.

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The eclipse of exclusivity as a model for broadband services in multiple-dwelling-unit (MDU) communities requires property owners and homeowners associations (HOAs) to understand the legal issues surrounding property access. This article summarizes recent litigation concerning two issues that frequently arise in disputes over a provider's right to access private property for the purpose of serving MDU residents: the statutory right in most states of a condominium owners association to unilaterally terminate an unexpired bulk service agreement entered into by the condominium developer and an MDU owner's right to allow a competing provider to access and utilize existing inside wiring installed by the incumbent provider.

CONDO ASSOCIATIONS' RIGHT TO TERMINATE

Most states have provisions in their condominium statutes that allow an owners association, after control over the condominium's government body is transferred from the developer to a voting majority of condominium owners other than the developer, to cancel service agreements entered into by the developer prior to such transfer of control. These provisions were enacted to protect unit owners and condominium associations from contracts that are not on market terms, were made with an affiliate of the developer (self-dealing), are of extraordinarily long duration or are difficult to terminate based on poor service.

A Florida court found that a condo association had a right to terminate without cause a cable contract negotiated by the developer.

Section 718.302(1) of Florida's condominium statute deals with contracts entered into by a condo association that provide for the operation, maintenance or management of the condo association or property serving the unit owners of the condominium.

According to this section, once unit owners other than the developer have assumed control of the association, or once unit owners other than the developer own not less than 75 percent of the voting interests in the association, the unit owners may cancel any covered contract entered into prior to the assumption of control of the association by unit owners, as long as such unit owners have a supermajority of at least 75 percent of the voting interests in the association, other than voting interests owned by the developer. There is no time limit on this right to cancel covered contracts. (Under Section 718.302(4), a condominium developer must relinquish control over the association at the time when unit owners other than the developer elect a majority of the members of the board of administration of the association.)[1]

For unit owners or an association to terminate a contract, a service provider need not be in default. Nor is there any requirement for the unit owners or association to prove the contract is unconscionable or includes unreasonable provisions, or for the service provider to be reimbursed for capital expenditures invested in the condominium property for the provision of services. Rather, the contract may be unilaterally cancelled at will and without cause, and the service provider is not entitled to damages for breach of contract or to recover its

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costs. Needless to say, providers incur significant risk when they invest capital based on agreements with a Florida condominium developer (or condominium association prior to the transfer of control), as these are considered contracts for the management of condominium property and are therefore covered by Florida's condominium statute.

That assumption was tested in Comcast of Florida L.P. v. L'Ambiance Beach Condominium Association Inc., 17 So.3d 839 (Fla. 4th DCA, Aug. 26, 2009), decided by the Florida State Court of Appeal, Fourth District.

In 2002, prior to incorporating the owners association, the developer entered into a broadband services agreement with Comcast's predecessor, conveying to that provider an easement to install its cables in the condominium complex and the right to provide cable television services under a bulk billing arrangement. The agreement included a statement that it "may be terminated prior to expiration of its term subject to conditions and regulations required under 718 of the Florida Statutes." Relying on the agreement, Comcast installed wires and lock boxes and provided cable television services to all units.

Following incorporation of the homeowners association and transfer of control to the unit owners, the association voted to terminate the agreement, relying on section 718.302(1). Comcast filed a complaint for declaratory relief, breach of contract, trespass and permanent injunctive relief. Following a trial verdict in the association's favor, Comcast appealed and lost.

Comcast's primary argument was that Section 718.302(1) did not authorize the association to cancel the agreement because a cable television service contract is not an agreement "that provides for operation, maintenance or management of a condominium association or property serving the unit owners of a condominium." In support of this argument, Comcast pointed out that other sections of the statute, 718.115(1)(d), 718.301(4)(n) and 718.3025(4), specifically refer to "service contracts," and section 718.302 refers to "management contracts."

Courts tend to interpret contract-nullification provisions in condominium statutes liberally in favor of unit owners.

This argument is appealing because it straightforwardly relies on the plain meaning of the words used in the statute. Section 718.302 seems to be primarily directed at *property management and maintenance* contracts, in response to the historical reality of self-dealing relationships between condominium developers and property management and maintenance companies. The fact that the statute elsewhere refers specifically to "service contracts" clearly demonstrates that the Florida legislature understood the difference between service contracts and management or maintenance contracts in the context of condominium regulation.

The court rejected Comcast's argument. According to the majority, the fact that the agreement required Comcast to operate and maintain its cable system at the complex meant that the cable service agreement was a contract providing "for operation, maintenance or management of … property serving the unit owners." Moreover, another section of the statute, 718.115(1)(d), provides that the cost of cable television service provided via a bulk billing arrangement is considered a common expense, and common expenses include "expenses of the operation, maintenance, repair, replacement or protection of the common elements and association property."

In other words, even if the Comcast service agreement was not, by its terms, a contract for the management, maintenance or operation of condominium property, the fact that it was a bulk agreement meant that by paying the monthly bulk cable service fee, the association was in fact paying for the operation, maintenance or management of common elements – and therefore, the Comcast service agreement was, by implication, a contract for the operation and maintenance of property serving unit owners within the meaning of section 718.301(1). "Because the agreement provided for the cable television service for all unit owners, the cost was part of the monthly maintenance fee, and the service provider was required to service and maintain the cable television, we conclude that the agreement was one for the 'operation, maintenance, or management' of the cable television services."

The court's holding in Comcast of Florida L.P. v. L'Ambiance Beach Condominium Association Inc. means that at least in Florida, bulk cable service agreements fall squarely within the category of developer contracts that may be nullified by majority vote of unit owners under the state's condominium act. Furthermore, the fact that the court rejected Comcast's no-frills, plain-language interpretation of the statute illustrates the tendency of courts, and not only in Florida, to interpret contract-nullification provisions in condominium statutes liberally in favor of unit owners.

Condominium associations ought to familiarize themselves with applicable statutes to understand their legal rights and powers vis-à-vis cable operators that provide substandard services under bulk billing arrangements. These rights and powers may include not only the right to get rid of an underperforming provider but also the power to use nullification rights to force a renegotiation of an unexpired bulk agreement on terms more favorable to associations and unit owners.

MDU OWNERS' RIGHT TO ACCESS EXISTING INSIDE WIRING

Sycamore Management Group LLC, et al. v. Coosa Cable Company Inc., No. 1080667, 2010 Ala. Lexis 8 (Ala. Jan. 22, 2010) demonstrates how MDU owners may leverage assets that they may not realize they possess to extract new value from competitive cable and telecommunications providers.

Whether inside wiring is identified as a fixture of the real estate or as a trade fixture may determine to whom it belongs – the owner or the provider.

The Maple Village apartment complex was built in 2004. During construction, Coosa Cable, the franchised cable operator, installed at its own expense a complete cable distribution system, including inside wiring and equipment, and used the system to provide services to residents on an individual subscription basis without an access agreement with the owner.

In 2007, the property was sold to Sycamore Management Group, which did what new owners of acquired assets ought to do – namely, conduct a due diligence review to assess how the value of the asset might be enhanced with regard to existing cable and telecommunications arrangements. The fact that there was no ongoing right-of-entry agreement with Coosa presented an opportunity to negotiate such an agreement, including financial commitments, with either Coosa or an alternative provider. Sycamore signed an exclusive access agreement with DirecPath, a private cable operator, and under the agreement, DirecPath agreed to pay Sycamore a monthly share of its revenue derived from residents of Maple Village. The new agreement allowed DirecPath to use the existing inside wiring to deliver services to residents.

In response, Coosa sued both Sycamore and DirecPath for tortiously interfering with the cable operator's contractual relationships with its resident subscribers and won at the trial court. DirecPath was specifically enjoined from accessing and using Coosa's existing cable plant, including inside wiring. Sycamore and DirecPath appealed, and the case found its way to the Supreme Court of Alabama.

The crucial issue in this litigation concerned ownership of the existing inside wiring: If Coosa could not legitimately claim an exclusive right to use the existing wiring, and in the absence of an enforceable property access agreement, all its remaining claims would collapse like a house of cards.

Sycamore and DirecPath argued that the in-building wiring, even if installed in the past by Coosa, constituted a fixture of the real estate and therefore was the property of Sycamore. Coosa argued that the wiring constituted a "trade fixture" and was therefore the personal property of Coosa.

A fixture is personal property that is attached or affixed to real estate with the intention that it become a permanent fixture to the realty. The common law has developed certain indicia of "intention" in this context that are applied to the facts in any given case to determine whether an item constitutes a fixture. Once deemed a fixture, the item is considered part of the real estate and is the property of the party that owns the real estate.

By contrast, the concept of a trade fixture amounts to an exception to the rule of fixtures. A trade fixture is an item affixed to real estate for the specific purpose of enabling a tenant to perform a trade or profession and that can be removed without permanent damage to the real property. A trade fixture remains the personal property of the party that installed it even if the installation involves attachment to real property.

The obvious way for a cable or telecommunications provider to reserve inside wiring installed by the provider from fixture analysis is to insert into the access agreement a provision specifying that the wiring is and remains the personal property of the provider and may not be construed as a fixture to the real estate. If the classification of property as a fixture is ultimately a matter of the parties' intentions and a contract is, among other things, a declaration of what the parties intend, such a contractual provision may well be decisive.[2]

However, Coosa had no contract with Sycamore or the preceding owner of Maple Village. Coosa's trade fixture argument failed for two reasons: First, the coaxial cable installed inside the walls could not be removed without serious damage to the property. That implied that Coosa intended its installation of wiring to be permanently affixed to the building.

Second, a trade fixture is, by definition, property of a tenant, and there was no landlord-tenant relationship between Sycamore and Coosa. Therefore, the trade fixture exception did not apply, and the inside wiring was ruled a fixture to the real property owned by Sycamore.

CONCLUSION

In the age of nonexclusivity, in which competition is king, opportunities abound for homeowners associations and MDU owners to leverage existing assets and unlock new value vis-à-vis broadband services providers. As the cases discussed in this article suggest, such opportunities may arise from an informed use of existing statutes or regulations or from the recognition that existing assets, such as in-building wiring, have value that is not being realized.

In the current economic downturn, owners associations, property managers and owners can benefit by educating themselves about opportunities that may lie right beneath their noses. ❖

ENDNOTES

1 Under Section 718.302(2), the law sets a time limit within which covered contracts must be canceled. Any covered contract entered into by a developer, or by an association prior to the time when unit owners other than the developer elected a majority of the board, are deemed ratified unless rejected by a majority of the voting interests of unit owners other than the developer within 18 months after unit owners other than the developer elect a majority of the board of administration of the association.

2 However, even a contractual provision may not settle the issue. *See* Metropolitan Cablevision v. Cox Cable Cleveland, 604 N.E.2d 765 (Ohio App. 1992)(provision in subscriber agreement allowing cable operator to remove "equipment" from premises upon termination of agreement does not imply that inside wiring is not a fixture to the realty).