COMMUNITY MATTERS

LUEDER, LARKIN & HUNTER

LEGISLATIVE UPDATE

Published by the law firm of Lueder, Larkin & Hunter, LLC www.luederlaw.com | Summer 2020 edition

New Law Offers Added Protections to Community Associations from COVID-19 Litigation

by | **Daniel E. Melchi, Esq.**

A piece of newly-enacted Georgia tort reform legislation, known as Senate Bill 359 (or "SB-359"), is designed to lessen the legal exposure to nearly all businesses, corporations, associations, and entities (as well as those entities' employees, directors, and agents) from being held financially liable in the event that a person becomes sick or dies from exposure to or complications from COVID-19 when on the premises of that entity. On June 26, 2020, the Georgia House of Representatives and the Georgia Senate both approved SB-359 (as amended) by majority votes. On June 29, 2020, SB-359 was officially transmitted to Governor Brian Kemp for approval or rejection. On August 5, 2020, Governor Kemp signed SB-359 into law, and its operative language made the law effective that same day.

SB-359 requires claimants who become sick from (or such claimants' heirs, if the claimant dies from) exposure to COVID-19 to prove that a protected entity (such as a community association) acted with gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm. These increased burdens of proof are generally more difficult to prove than simple negligence, unintentional misconduct, or negligent infliction of harm, as many other torts require, and COVID-19 exposure would normally require without the heightened burden supplied by SB-359.

The protections in SB-359 apply to lawsuits for injuries or death arising through and including July 14, 2021.

SB-359 additionally has an important protection for entities such as community associations. If certain signage is placed at the entries to amenity or common areas, except in cases of gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm, the signage creates a rebuttable presumption of the assumption of the risk by a claimant. In order for an entity to avail itself to the protections of this presumption, SB-359 requires the following:

(1) A sign or text must be posted must state exactly the following:

> Warning
>
> Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.

(2) The lettering on the sign must be in at least one-inch Arial font. The bill does not state what "one-inch" means. So, in order to ensure full compliance with the law, ensure that (1) the font used is Arial and (2) the smallest, non-capitalized letter (the letter "a" for example) is at least one inch front top to bottom.

(3) The text/sign must be placed "apart from any other text." This requirement is also not very well-defined. To be safe, make sure the sign displaying the required text is not placed up on a bulletin board with other announcements or other rules and signs. It should be apart, fully away from other text and signs so that it stands out.

(4) The text/sign must be placed at the "point of entry" to the area. This is also not defined, but in order to be safe, such text/sign should be placed at ***all*** possible entries to the area. That would include ***all*** pool entries, clubhouse entries, tennis court entries, or other areas where people tend to enter the premises. If your community has a playground, it is advisable to place multiple signs around the equipment.

SB-359 does not necessarily prevent community associations from becoming involved in COVID-19-related litigation; but it does provide additional protections to community associations and will likely make it more difficult for litigants to succeed on the merits of such potential lawsuits. If you have any questions regarding this new law, please consult with your association's legal counsel.

Restrictions on Restrictions: New Law Allows Leasing Despite Covenant Limitations...Sometimes

by | **Daniel E. Melchi, Esq.**

Many communities have existing leasing restrictions in their covenants or are thinking about possibly amending their communities' covenants to add leasing restrictions.

Leasing restrictions benefit many communities by ensuring that owners of property actually live on-site, thereby better maintaining their property and following the community rules.

Under existing Georgia law, O.C.G.A. § 44-5-60(d)(4) ("D4") states that if a covenant is amended or enacted which would place a greater use restriction on property, that amended or enacted covenant *only* applies to the property owners who specifically agree to such new restriction. For example, if covenants allow the parking of vehicles on lawns, if an association later amends its covenants to restrict the parking of vehicles on lawns, then only those properties whose owners agreed to the new covenant restriction will be bound by it.

Importantly, O.C.G.A. § 44-3-116 (of the Georgia Condominium Act) and O.C.G.A. § 44-3-234 (of the Georgia Property Owners' Association Act) specifically state that the limitations of D4 do *not* apply to condominiums and POA-submitted homeowners associations. In other words, condominiums and POA-submitted HOAs are free to amend their covenants to place additional restrictions on property within the community, regardless of whether or not an individual owner agrees to the restriction. Consequently, D4 only applies to common law HOAs that are not submitted to the POA.

This summer, the Georgia Legislature passed and Governor Brian Kemp signed into law Senate Bill 442 (or "SB-442") which amends the POA's (but not the COA's) "D4-does-not-apply" provision. SB-442 amends O.C.G.A. § 44-3-226(a) by adding the following new text:

> Notwithstanding any other provisions of this subsection: No amendment shall be made to the instrument so as to prohibit or restrict a [non-owner] occupied lot from continuing to be leased or rented for an initial term of six months or longer pursuant to the [pre-amended] instrument; provided, however, that upon the conveyance for value of such lot, such lot shall be made to conform to the instrument as amended…

SB-442 then goes on to state that "conveyance for value" means the transfer of a lot for $100 or more or the transfer of ownership of an entity that owns a lot for $100 or more.

The gist of the new law is this: If a POA-submitted HOA amends its covenants in order to restrict leasing or rentals under terms of a lease that are six months or longer, such amendment will only apply to lots that are *not* currently being leased under the terms of such a lease. The new law basically adds a "grandfathering until conveyance" provision into the statute to prevent POA-submitted HOAs from restricting currently-leased lots from continuing to be leased until such lots are later transferred to a new owner.

Here are two examples to help illustrate the new law's effect. Each example involves a POA-submitted HOA:

(1) No leasing restrictions in place. Lot owner is leasing a lot to a tenant. Association then passes a leasing amendment that prohibits or restricts leasing. Because the lot is *currently* being leased, the leasing restriction will *not* apply to that lot (until it is later conveyed to a new owner).

(2) No leasing restrictions in place. Lot owner lives in a home on the lot. Association then passes a leasing amendment that prohibits or restricts leasing. Because the lot is *not currently* being leased at the time of the passage of the leasing amendment, the lot leasing restriction does apply to that lot immediately.

It is important to note that SB-442 is not retroactive, and it does not suddenly grant leasing rights in communities that already have leasing restrictions in place or in any way affect such restrictions. It is also very important to note that SB-442 does not take effect until January 1, 2021 and will only apply to leasing amendment restrictions that are enacted on or after that date. If a POA-submitted HOA wishes to amend its covenants to restrict leasing on a lot that is *currently* being leased or prohibit *further leasing* of a lot that is currently being leased after a period of time has passed (or after a current lease terminates), then that association should take steps to enact such a leasing restriction immediately, before SB-442 goes into effect. Such associations should contact their respective legal counsel sooner than later with any questions concerning this new law.

LUEDER, LARKIN & HUNTER

t: 770.685.7000 f: 770.685.7002

www.luederlaw.com | email: newsletter@luederlaw.com