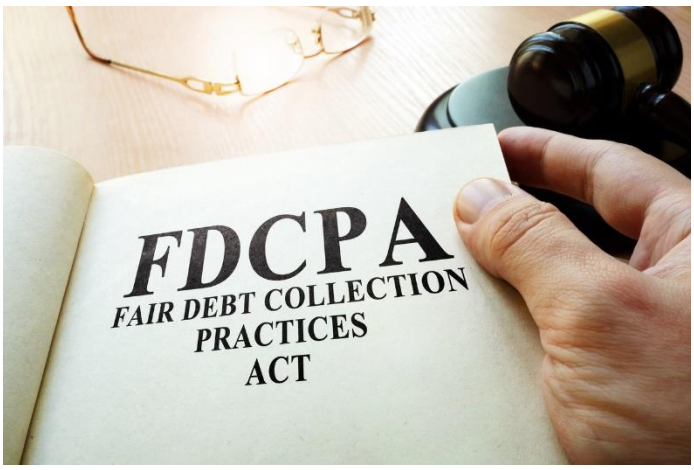
The Quarterly Assessment
Spring 2022 Edition

COLLECTIONS CORNER:

The "Validation Notice" and Complying with New FDCPA Regulations



By: Allen Warren

If your association refers delinquent accounts to our firm (or any other law firm or collection agency), you may notice a few changes to debt collection policies and procedures, such as references in collection status reports to sending a "validation notice" as the first written communication sent to a debtor. Why? Because on November 30, 2021, new federal regulations went into effect that govern how debt collectors must comply with the federal Fair Debt Collection Practices Act (FDCPA) when attempting to collect consumer debt. These new regulations (collectively referred to as Regulation F) were issued by the federal Consumer Financial Protection Bureau (CFPB) to address various restrictions intended to protect consumer debtors. These include, for instance, restrictions on how and when to communicate with debtors by telephone and by email, and restrictions on attempting to collect a deceased debtor's debt. In addition, Regulation F confirms existing law by expressly prohibiting debt collectors from suing for, or threatening to sue for, debt for which the applicable statute of limitations has expired (so-called "time-barred debt").

However, one of the most significant parts of Regulation F is a burdensome restriction on the type of information that can be included in a debt collector's first written communication to a debtor. This initial communication – referred to as a "validation notice" – can only include certain limited information regarding the debt and the debtor's consumer protection rights, including how to dispute the debt during the initial 30-day dispute window provided by the FDCPA. By using the CFPB's model (sample) validation notice and not adding extraneous information or demands to the notice, debt collectors demonstrate compliance with Regulation F's content requirements and the requirement that the notice be clear and conspicuous. Unfortunately, this model validation notice was developed by the CFPB without regard to differences in the type of debt being collected (whether credit card debt, medical bills, association assessments, etc.);

and, frankly, is likely to do exactly the opposite of what the CFPB intended – causing debtors to be more confused about the debt than if they had received the debt collector's standard initial 30-day demand letter being used prior to Regulation F. For instance, the one-page validation notice includes only an itemization of certain limited types of debt that accrued during a specified timeframe.

Consider for a moment that the CFPB's official publication of Regulation F and its related commentary and official interpretations are contained in a 653-page "Final Rule" and a 354-page supplemental Final Rule; these were then followed by a 116-page Compliance Guide, a 27-page "compliance aid" document to further explain just how to itemize the debt on the validation notice, and a 30-page FAQ document. What may have initially been a well-intentioned effort, in part, to provide clearer standards for complying with the FDCPA, instead ended up being an overly burdensome, one-size-fits-all approach that increases the cost of compliance for debt collectors (and thus ultimately the costs incurred by creditors or debtors) and likely creates more confusion and potential for legal disputes.

As the late John Madden said, "the fewer rules a coach has, the fewer rules there are for players to break." The CFPB seems to just like more rules, placing ever-increasing burdens on debt collectors regardless of what type of debt is being collected and regardless of whether they result in substantive practical benefits for consumer debtors.

Update on Virginia Law: Covenants Restricting Solar Panels

By Daniel D. Blom

Solar Panel Provisions Find a New Home

Effective October 1st, please be aware that the statutory provisions restricting the authority of associations to prohibit solar panels (and other solar energy collection devices) found a new "home" in the Virginia Code. Specifically, the restrictions formerly in Virginia Code Sections 67-700 and 67-701 ("Covenants Restricting Solar Energy Collection Devices") were moved to the Condominium Act and the Property Owners' Association Act as new Sections 55.1-1951.1 and 55.1-1820.1, respectively. This relocation is the result of a bill adopted during one of 2021's Special Sessions of the General Assembly. Of note, though, there were no substantive changes to these statutory restrictions – it was purely a relocation of existing statutory restrictions to a different part of the Virginia Code. We have posted an updated PDF version of our 2021 Virginia Statutes book on our firm's website at: https://www.chadwickwashington.com/resource-center.

Solar Panel Covenants and Restrictions

In Virginia, community associations cannot prohibit solar energy collection devices (i.e., solar panels) from being installed on an owner's property ***unless*** the association's recorded declaration establishes such a prohibition (see Virginia Code Secs. 55.1-1820.1 and 55.1-1951.1). Under the statutes, if an association wants to completely ban solar panels from the community, the recorded declaration must expressly provide for such a ban. The statutes do not allow for a strict prohibition against solar panels on individually owned property by board-adopted rule or regulation.

"Reasonable" Restrictions on the Size, Place, and Manner of Placement Permitted under the Statute

Community associations can still restrict the size, place, and manner of placement of solar panels on individually owned property, even if the recorded declaration does not expressly address solar panels. The statutes unambiguously provide

that community associations may establish ***reasonable*** restrictions concerning the size, place, and manner of placement of solar energy collection devices. Potential restrictions include board-adopted rules and regulations governing the visibility of the solar panels, the number and size of solar panels, screening requirements, and permissible locations, among others.

While associations have the right to regulate the size, place, and manner of placement of solar panels, such restrictions may be challenged as unreasonable under the applicable statute. Section 55.1-1820.1 of the Virginia Property Owners' Association Act and Section 55.1-1951.1 of the Virginia Condominium Act set forth the same objective standard for what is considered "reasonable" for solar panel restrictions. This objective standard may significantly hinder a community association's ability to regulate solar panels absent an express prohibition in the association's recorded declaration.

Under both statutes, a restriction is not reasonable if application of the restriction to a particular proposed solar panel design either:

(i) increases the cost of installation of the solar energy collection device by five percent (5%) over the projected cost of the initially proposed installation, or

(ii) reduces the energy production by the solar energy collection device by ten percent (10%) below the projected energy production of the initially proposed installation.

This objective standard of reasonableness may make it fairly easy for some homeowners to challenge certain restrictions. For example, restrictions that require solar panels to be installed only on the rear roof or prohibit solar panels on the front roof may be successfully challenged when only the front roof of a home receives sufficient sunlight. This may make enforcement of restrictions that would otherwise be considered reasonable (e.g., solar panels only permitted on the rear side of the lot/unit) quite difficult in certain circumstances.

<u>Homeowner Challenges to Reasonableness of Restrictions</u>

Significantly, the onus is on the homeowner to challenge the reasonableness of such restrictions, and associations still have the right to impose and enforce restrictions on the size, place, and manner of placement of solar panels absent a successful owner challenge. To successfully challenge the reasonableness of a solar device restriction in the Association's rules and regulations, a homeowner must provide:

- Documentation prepared by an independent solar panel design specialist who is
    - Certified by the North American Board of Certified Energy Practitioners, and
    - Licensed in Virginia.

The documentation must be satisfactory to the association to show that the restriction is not reasonable according to the criteria discussed above (i.e., increases the cost of installation by five percent (5%) or reduces energy production by ten percent (10%)). An association can require an owner who is set on having solar panels installed in conflict with an association's established rules and regulations to provide this documentation prior to installing the solar panels. Community associations interested in protecting their architectural standards should demand such documentation before capitulating to an owner request in these cases.

<u>Prohibitions on Common Area and Common Elements</u>

Community associations are still allowed to prohibit the installation of solar panels on common area and common element property, regardless of whether such prohibition is contained in the recorded declaration. Prohibiting owners from installing solar panels on common area and common element is generally advisable given the increased risk of liability to an association and the potential increase in insurance costs associated with allowing an owner to use the common area or common element to install solar panels. In addition, it may not be within the board's authority to allow

an owner to have exclusive use of part of the common elements or common area. Boards of directors should discuss the implications of installing solar panels on common area or common element property before approving any such requests or entering into any agreements with solar panel installation contractors.

Architectural Review Process

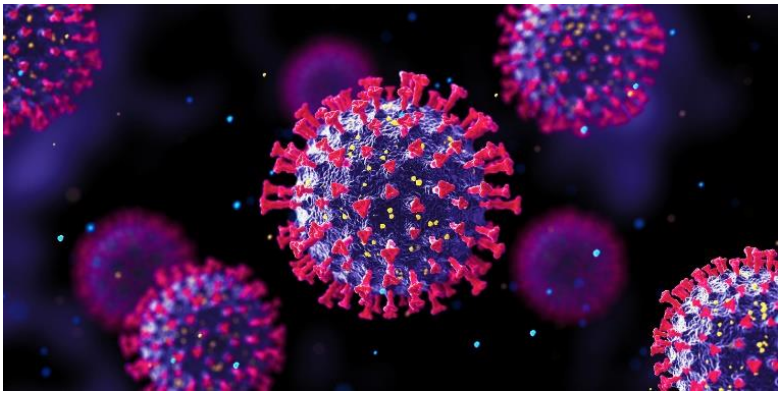
Another important consideration is that associations can still require owners to go through the regular architectural review process to ensure that the association's restrictions and established processes are being followed. An association can still deny an application to install solar panels if the proposed design does not comply with the association's covenants and architectural standards. Whether the association may be forced to accept a proposed solar panel installation hinges on (i) whether the recorded declaration expressly prohibits or restricts solar panels and (ii) whether the owner can supply the additional documentation from an NABCEP-certified solar panel design specialist showing that the association's board-adopted restrictions are not reasonable under the applicable statute.

If there are any questions as to the applicability of the solar panel statute in any given situation, boards of directors should contact their association's legal counsel to review the situation and discuss the association's options.

Latest COVID-19 Information:

- Virginia.

  - January 15, 2022, Virginia Governor Youngkin issued Executive Order No. 6, which directs the Virginia Safety and Health Codes Board to convene an emergency meeting in order to consider revoking 16 VAC25-220, the "Permanent Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19" ("Permanent Standard").



  - February 16, 2022, the Virginia Safety and Health Codes Board **voted 7-3** to **revoke 16 VAC25-220**. The Board's reasoning was that COVID-19 no longer poses a "grave danger" to Virginia workers. The Board also Directed a **30-day public comment period**, which will be followed by a public hearing and another vote by the Safety and Health Codes Board.

- District of Columbia. February 15, 2022, District of Columbia Mayor Bowser announced the lifting of most mask mandates and the proof of vaccine requirement for indoor public places, effective March 1, 2022. Private businesses may, but are not required to, continue to require masks.

- Nationwide. On February 25, 2022, the Centers for Disease Control and Prevention announced it is relaxing its mask guidance for communities based upon their COVID 19 Community Level. Those communities designated as HIGH should continue to wear masks indoors. You can find your community's Level at: COVID-19 by County | CDC

Firm Happenings

Brendan Bunn recently co-presented the annual Caselaw Update at CAI's 2022 Community Association Law Seminar.

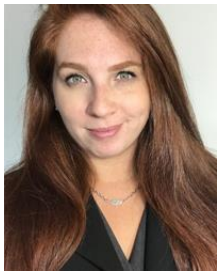
Sara Ross has been re-elected to the Board of Directors for the Washington Metro Chapter Community Associations Institute (WMCCAI) and will be serving as Vice President for 2022. Sara was also elected as Chair-elect for CAI's Business Partner Council for 2022, will serve as the Council's Chair in 2023, and will also serve on the CAI Board of Trustee for 2022 -2023. Sara will additionally be co-presenting the Business Partners Essentials course at the 2022 WMCCAI Conference and Expo on Friday, March 25, 2022 in Washington, DC.

Bruce Easmunt will be presenting at the 2022 WMCCAI Conference and Expo on Saturday, March 26, 2022. Homeowner volunteers are encouraged to attend, as many educational sessions are offered.

Michael Sottolano has been named a shareholder in Chadwick Washington. Mike is based in the firm's Richmond (Glen Allen) office and is a past president of the Central Virginia ("CVCCAI") and Southwest Virginia ("SWVACAI") Chapters of CAI.

Congratulations to **Olga Tseliak** on her 2021 Rising Star Award, to **Lauren Ritter** for her 2021 Committee Co-Chair of the Year Award, and to **Sara Ross** for her 2021 Chapter Appreciation Award, at the 2021 WMCCAI Annual Awards!

Lesley Rigney and **Lauren Ritter** will be the keynote speakers and **Jerry Wright** will be presenting the 2022 Legislative Update at this year's CVCCAI Community Associations Day Trade Show and Expo on April 22, 2022 in Richmond, Virginia.



Lauren Ritter and **Lindsey Davis** co-authored the article "Trends in Fair Housing" that is scheduled to be published in the March 2022 edition of *Quorum* magazine.

Tiago Bezerra recently joined Chadwick Washington as an attorney in its Fairfax office. Tiago is a frequent presenter at WMCCAI events and the author of numerous articles in the field of common interest community law. He was also the recipient in 2020 of the Virginia Public Advocate of the Year award from WMCCAI and named an Up & Coming Lawyer by *Virginia Lawyers Weekly* in October 2021. Tiago will be presenting a program entitled "How to Lose a Manager in 10 Days" at the 2022 WMCCAI Conference and Expo and is the author of an article addressing paperless community associations scheduled to be published in the April 2022 edition of *Quorum* magazine.

Chadwick, Washington, Moriarty, Elmore & Bunn, P.C.
3201 Jermantown Road, Suite 600
Fairfax, Virginia 22030
(703) 352-1900
www.chadwickwashington.com

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