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**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**EASTERN DISTRICT**

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No. 2325 EDA 2018

**North Point I Condominium Owners Association  
c/o Chancellor Properties, Inc.,**

*Appellant,*

v.

**Harry Burney,**

*Appellee.*

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*Appeal from the Order entered on July 17, 2018,  
in the Court of Common Pleas of Philadelphia County, Pennsylvania  
at Docket No. 170205509*

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**BRIEF OF *AMICUS CURIAE*  
COMMUNITY ASSOCIATION INSTITUTE**

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## **STATEMENT OF INTEREST OF *AMICUS CURIAE***

Community Associations Institute (“CAI”) is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 40,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 70 million homeowners who live in more than 344,500 community associations in the United States. In keeping with its longstanding interest in promoting understanding regarding the operation of community associations, CAI submits this *amicus* brief to present the perspective of community associations and the issues they face when dues and assessments

are not paid when due.<sup>1</sup>

## **SUMMARY OF THE ARGUMENT**

Homeowners in Pennsylvania and across the country rely on their community associations to be financially stable in order to carry out their functions and deliver essential services. This requires effective remedies to recover unpaid dues and assessments. The trial court's determination here that dues and assessments involve a "consumer credit transaction" will eliminate an effective remedy available to community associations to recover unpaid dues and assessments and result in increased costs to associations. In short, the trial court's decision will have a negative impact on the financial stability of community associations as they seek to carry out their functions and deliver essential services.

Moreover, the trial court reached its conclusion – that dues and assessments paid by an individual homeowner involve a

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<sup>1</sup> Pursuant to Pa. R.A.P. 531(b)(2), CAI states that no person or entity other than CAI or counsel (i) paid in whole or in part for the preparation of this brief or (ii) authored in whole or in part this brief.

“consumer credit transaction” – based solely on the fact that dues and assessments are for services that are primarily for personal, family or household purposes. In so ruling, however, the trial court failed to analyze whether those services are being provided pursuant to a financing arrangement – the essential prerequisite for a finding that a “consumer credit transaction” exists.

Here, Plaintiff/Appellant North Point I Condominium Owners Association c/o Chancellor Properties, Inc. did not enter into an agreement with Defendant/Appellee Harry Burney to provide services with the understanding it would be paid for said services remotely in the future, but rather with the understanding that it would be paid by him monthly in advance, as required by Section 9.01 of the Amended and Restated Declaration of Condominium of North Point Condominium One (“Declaration”).<sup>2</sup> Accordingly, the trial court’s determination that the payment of community association dues and assessments involves a “consumer credit transaction” is wrong as a matter of law.

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<sup>2</sup> In fact, association assessments are typically (but not in the instant case) imposed annually in advance, but are payable in monthly installments, subject to acceleration upon default.

Against this backdrop, the Court should reverse and reinstate the judgment in favor of Plaintiff/Appellant North Point I Condominium Owners Association c/o Chancellor Properties, Inc.

## **ARGUMENT**

### **A. The Trial Court's Decision Will Have A Negative Impact On The Financial Stability Of Community Associations As They Seek To Carry Out Their Functions And Deliver Essential Services**

Condominiums, planned communities and cooperatives – generically known as common-interest communities – are private real estate developments created under state law by a set of recorded documents governed and operated by an owners' association commonly known as a "community association."<sup>3</sup>

Associations vary in name and legal structure, but share three common features: (i) all homeowners are automatically members of the association and subject to the governing documents by virtue of ownership of a lot or unit within the

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<sup>3</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law*, at 19 (ALI-ABA 3d ed., 2000) (hereinafter, "Hyatt"). The governing documents for condominiums are typically known as the "declaration" and for planned communities the "covenants, conditions and restrictions." Hyatt at 19.

community, (ii) the association provides maintenance of infrastructure and common improvements, insurance and other services for property other than the individual lots or units, and (iii) the owners have a mandatory obligation to pay assessments.<sup>4</sup>

"[T]he community association operates ... with powers and responsibilities to operate, preserve, regulate and maintain the property...."<sup>5</sup> "Community associations are housing management organizations that deliver three core services to their residents: governance, community, and business services."<sup>6</sup> The homeowner "looks to the association for collective action to protect its interest in the common elements."<sup>7</sup>

Although not in the instant case, community associations typically rely on annual assessments imposed as of January 1 of each year (or the first day of that association's fiscal year) and

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<sup>4</sup> *Id.* at 7-8.

<sup>5</sup> *Id.* at 30.

<sup>6</sup> Foundation for Community Association Research, *The Community Association Fact Book 2016*, Sec. 3.2 (2017).

<sup>7</sup> *Terre Du Lac Association v. Terre Du Lac, Inc.*, 737 S.W.2d 206 (Mo. App. 1987).



paid in monthly installments by individual unit owners. Paragraph (1) of Section 8.01 of the Declaration provides that assessments are used to maintain common areas and to provide commonly-metered utilities, insurance, lighting, security, refuse removal, replacement reserves, amenities and other benefits. To do so, and to remain operational, community associations require a consistent flow of timely payments. Without a steady flow of assessments, common areas and essential services will deteriorate, leading to reduced property values and putting safety at risk. As stated by the Massachusetts Appeals Court, fees and assessments are the "life's blood" of an association and "[f]ailure ... to pay ... common expense assessments would have a serious financial impact on the stability of a condominium association."<sup>8</sup>

Community associations have limited resources and tools to enforce this essential obligation to pay monthly fees and assessments. Confession of judgment is one effective device, recognized in Pennsylvania and certain other states, enabling a community association to obtain a judgment against a delinquent

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<sup>8</sup> *Blood v. Edgar's, Inc.*, 632 N.E.2d 419 (1994).

homeowner quickly and efficiently without the need to jump through hoops to get service or file dispositive motions. The use of cognovit clauses is a most attractive collection technique from the creditor's viewpoint and is even faster and less expensive than a default judgment. The significance of confession of judgment clauses thus relates both to the amount of the losses and how much is spent on processing costs. This creditor remedy helps to reduce the past-due amounts that are eventually uncollectible. Conversely, the inability to use this remedy will increase costs to community associations, reduce the amounts owed which are actually collected, and delay collection efforts.

Community associations already struggle to collect from delinquent unit owners; the law in most states subordinates debt for assessments to that of first mortgage holders, so foreclosure is not always a practical option, and any further hindrance (which a ruling against Appellant would be) would make collection that much more difficult.<sup>9</sup> In Pennsylvania, Section 3315 of the

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<sup>9</sup> See Goldmintz, Daniel. Lien Priorities: The Defects of Limiting the "Super Priority" For Common Interest Communities, *Cardozo Law Review*, Vol. 33, No.1, at 268, Fall 2011.

Uniform Condominium Act provides for non-divestiture of up to six months of the assessments, but only if the proceeds of the foreclosure sale are sufficient after paying the mortgage lender. In this case, foreclosure would not have enabled the association to recover in accordance with its settlement with Mr. Burney. Also, the association could not require the mortgagee to foreclose; many lenders delay foreclosure to avoid paying association assessments. Therefore, the confession of judgment in this case was the most efficient and cost-effective method of ensuring that Mr. Burney honor the settlement agreement that he entered into voluntarily.

In short, the trial court's decision, if upheld, will have a negative impact on the financial stability of community associations as they seek to carry out their functions and deliver essential services.

**B. Homeowner Fees And Assessments Do Not Involve The Extension Of Credit And Thus, As A Matter Of Law, Cannot Be Considered A “Consumer Credit Transaction”**

The trial court’s conclusion – that the judgment was entered in connection with a consumer credit transaction because the judgment arose out of the failure to pay homeowner dues and assessments – is wrong as a matter of law.

Rule 2950 of the Pennsylvania Rules of Civil Procedure precludes judgment by confession in any “action” in connection with a consumer credit transaction:

As used in this chapter ‘action’ means a proceeding to enter confession for money pursuant to an instrument, other than an instrument executed by a natural person in connection with a consumer credit transaction, authorizing such confession.

Pa. R.C.P. 2950.

A “consumer credit transaction” is defined as a credit transaction where credit is extended to a person for services that are primarily for personal, family or household purposes:

a credit transaction in which the party to whom credit is offered or extended is a natural person and the money, property or

services which are the subject of the transaction are primarily for personal, family or household purposes.

Pa. R.C.P. 2950. Thus, a "consumer credit transaction" requires some type of financing arrangement between the parties in exchange for the services to be provided. *Willits v. Fryer*, 734 A.2d 425, 428 (Pa. Super. Ct. 1999) (striking confessed judgment where two natural persons entered into a promissory note to finance the closing costs for the sale of a home).

Here, the trial court concluded that there was a "consumer credit transaction" within the meaning of the rule simply because payment of condominium fees by a natural person living in the unit is primarily personal in nature and related to family and household purposes:

Here, plaintiff has filed on one hand an affidavit of non-consumer transaction, yet, on the other, has admitted that the instant judgment arises out of Mr. Burney's "failure ... to pay homeowner dues and assessments." This admission convinces the court that judgment was entered by confession in connection with a consumer credit transaction: this is particularly so considering that the condominium unit involved in the instant matter is located at

the same address as the residence of defendant. ***The court reaches this conclusion because payment of condominium fees is primarily personal in nature and related to family and household purposes.*** In conclusion, the judgment entered by confession is fatally flawed and thus void because the judgment was filed upon an instrument which had been executed by a natural person in connection with a consumer transaction.

Slip. Op. at 4 (emphasis added; footnotes omitted).

The fundamental problem with the trial court's decision, however, is that it erroneously conflates a consumer transaction with a consumer credit transaction. Indeed, while a consumer credit transaction is a type of consumer transaction, not all consumer transactions involve the extension of credit. In other words, that the payment of condominium fees may be primarily personal in nature and related to family and household purposes is not the end of the analysis. Thus, the trial court erred when it did not take the next step of determining whether a credit transaction was involved.<sup>10</sup>

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<sup>10</sup> Moreover, the mere filing of the affidavit averring that the confessed judgment was not being entered against a natural person in

Community associations are not in the business of lending money to individual homeowners. There is nothing in the documents governing a community association that contemplates the association offering or extending credit so that a homeowner can pay dues and assessments.

The reality is that payment of community association dues and assessments to an association does not involve the extension of credit or a financing arrangement between the parties in exchange for the services provided. Importantly, in this case North Point I Condominium Owners Association c/o Chancellor Properties, Inc. never entered into an agreement with Harry Burney to provide association services with the understanding that payment would be made for said services in the future. Rather, the association's governing documents obligated it to provide services to Burney and his fellow homeowners and Burney and his fellow homeowners are obligated by those same

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connection with a consumer credit transaction should have been dispositive on the question. *Lechowicz v. Moser*, 164 A.3d 1271 (Pa. Super. Ct. 2017) (record self-sustaining where affidavit attached to complaint attested that the debt incurred was not the result of a consumer credit transaction).

documents encumbering their homes to pay assessments in a timely manner. Unlike a consumer credit transaction where goods and services are provided on the promise of future payment, associations operate on a pay as you go basis: assessments are imposed in advance based on an annual budget and are to be paid monthly *in advance*.

Nor does the fact that the confession of judgment clause is in the agreement settling litigation over the unpaid fees and assessments change the analysis. An agreement settling litigation does not involve an offer or extension of credit and does not involve the provision of services primarily for personal, family or household purposes. Defendant/Appellee Harry Burney executed the settlement agreement to provide security for a debt already incurred (but which was not paid), and was not in any way related to an extension of credit for his personal purposes:

In the present case, the Judgment Note on which Appellee confessed judgment against Appellant was not executed in connection with a consumer credit transaction. Appellee never entered into a "credit transaction" with Appellant, in that Appellee never offered or extended Appellant a line of credit in regard



to the legal services Appellee provided, but instead Appellee provided legal services to Appellant for which Appellant simply refused to pay. According to Appellee's filings, the Judgment Note was executed by Appellant after Appellant had become delinquent in paying the invoices provided by Appellee. Accordingly, the execution of the Judgment Note by Appellant was done to provide security for a debt *already incurred*, not in relation to an extension of credit for Appellant's personal purposes.

*Lechowicz v. Moser*, 2016 WL 9406348, \*4 (PCCP Aug. 17, 2016), *aff'd*, 164 A.3d 1271 (Pa. Super. Ct. 2017) (italics in original; footnotes omitted).

In short, the trial court erred as a matter of law in holding that homeowner dues and assessments involved the extension of credit.

## CONCLUSION

For the reasons set forth above, Plaintiff/Appellant North Point I Condominium Owners Association c/o Chancellor Properties, Inc. respectfully requests that the Court reverse the Order of the Court of Common Pleas and reinstate the judgment confessed in favor of Plaintiff/Appellant North Point I Condominium Owners Association c/o Chancellor Properties, Inc.

Respectfully submitted,

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Dated: December 17, 2018

**CERTIFICATE OF SERVICE**

I, Henry F. Reichner, hereby certify that on December 17, 2018, a true and correct copy of the Brief of Amicus Curiae Community Association Institute was served via PAC file upon the following:

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Henry F. Reichner

## **CERTIFICATION OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Henry F. Reichner  
Henry F. Reichner