BECKER & POLIAKOFF COMMUNITY UP-DATE

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Volume I, 2006

Donna D. Berger, Esq. *Editor*

NAVIGATING The Collection Process

By: John R. Sheppard, Esq.

Anyone who has served on a Board or as a manager understands the importance of the prompt collection of assessments for a Condominium, Cooperative or Homeowners Association. If assessments are not collected, the Association cannot meet budgetary requirements and cannot provide the services necessary to maintain and operate the community. In fact, the most frequent dispute between Associations and individual unit owners involve the collection of assessments. The purpose of this article will be to outline the collection and foreclosure process, as well as to discuss some of the issues that can arise within that process that can delay or hinder an Association's ability to collect its assessments.

A Community Association's right to assess for common expenses and enforce the assessment obligation by liening or foreclosing on the owner's unit is based upon covenant and statutory authority. It is very important in determining the scope of an Association's authority to review the Declaration of Condominium for Condominium Associations, the Declaration of Covenants, Conditions, and Restrictions for non-condominium Homeowners' Associations, or the Articles of Incorporation and Bylaws of Cooperative Associations. However, significant differences exist in the authority of Associations to collect, lien, and foreclose, between Condominiums and Cooperatives on the one hand, and Homeowners' Associations on the other. Section 718.116, Fla. Stat., which governs Condominium

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TIDBITS
Did You Know

Allocation of RECONSTRUCTION EXPENSES

One of the most critical questions you face in reconstruction after casualty is how to allocate the cost of repairing damage for which you have no insurance proceeds. This is particularly pertinent with hurricane damage because of the substantial deductibles.

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NAVIGATING *cont.*

Associations, contains a detailed outline of a Condominium Association's rights to assess, lien, and foreclose, the procedures that must be followed in this process, and the relative priorities in the collection process between the Association and other lien or judgment holders. Likewise, although there are some differences with the Condominium Statute, Section 719.108, Fla. Stat., which governs Cooperatives, contains an almost equally detailed and specific description of a Cooperative's rights, procedures, and relative priorities. By contrast, Section 720.308, Fla. Stat., which governs Homeowners' Associations, leaves it up to the Homeowners' Association's Governing Documents to outline the Association's powers to lien and foreclose, the procedures to be followed, and the Association's relative priorities with other lien owners and judgment holders.

The Governing Documents and, for Condominiums and Cooperatives, the applicable statutes, are also the source of the Association's authority to recover interest, late charges, costs and attorneys' fees in the collection/foreclosure process. Equally important, the Governing Documents and applicable statutes also define the Board's authority to prepare a budget for the Association, allocate common expenses among the units, and levy regular and special assessments. The Association must follow the procedures set forth in its Governing Documents and its applicable statutes or there may be problems in the collection/foreclosure process as unit owners may have defenses or counterclaims which may defeat the ability of the Association to collect on its assessment. As long as the Association has complied with the requirements in its Governing Documents and applicable statutes, once a unit owner becomes delinquent in the payment of the assessments, the Association can commence the collection process.

It is highly recommended that every community Association establish a uniform collection procedure

TIDBITS *cont.*

Some condominium documents provide for the deductible to be levied as a common expense against all owners. However, most older condominium documents provide that the deductible is allocated to the entire community as a common expense for the cost of repairing damage to the common elements and is allocated to the owners of the damaged units to the extent of the cost of repairing those damaged units.

The Division of Land Sales has taken the position that the deductible is a common expense, regardless of what your Declaration says. The Division reasons that the deductible is a risk which should be shared by the entire community.

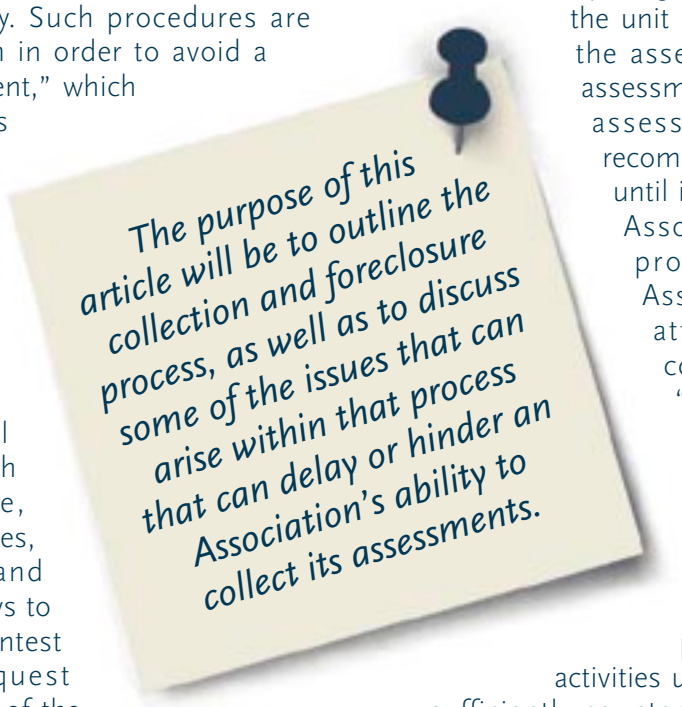
Even if you find the Division's position appealing or logical, the Division's position is not currently supported by any language in the Statute. The specific language found in Chapter 718.111(11) addresses what items must be covered by the Association's hazard insurance policy but does not discuss maintenance, repair or replacement issues nor does it address responsibility for uninsured losses such as deductibles.

If your Declaration already provides for the deductible to be allocated to all owners as a common expense, the Division's position does not create a problem for you. However, if your documents provide for the deductible to be allocated to all of the owners to the extent the damage affects the common elements and to the owners of the individual damaged units to the extent of damage to the units, the Division's position creates a problem. You will be forced to choose between ignoring the Division's position or ignoring the provisions of your governing documents.

For many of you, the conflict cannot be reconciled by amending your documents because you either cannot get the votes necessary to amend your documents or, in many cases, the reconstruction provisions cannot be amended without the consent of the mortgage holders. In these instances, you should rely upon Association counsel to assist you with this decision-making process.

NAVIGATING *cont.*

that should be followed, without exception, in the case of a unit owner delinquency. Such procedures are important for an Association in order to avoid a claim of "selective enforcement," which could defeat an Association's ability to collect a delinquent assessment. Once counsel is advised that a particular unit owner is delinquent in the payment of assessments, counsel will send a thirty day Initial Demand Letter ("IDL"). The letter introduces counsel for the Association, sets forth the exact amount due, including interest, late charges, costs and attorneys fees, and gives the unit owner thirty days to pay the account in full or contest the amounts due and request documentation. The purpose of the IDL is to comply with the Federal Fair Debt Collection Practices Act, (FDCPA) 15 U.S.C. Section 1692 et. seq. The IDL must contain five specific items and information:



1. The amount of the debt;
2. The name of the creditor;
3. A statement that unless the debtor within thirty days after receiving the notice disputes the validity of the debt or any portion thereof, the debt will be assumed to be valid;
4. A statement that if the debtor disputes the debt that the debt collector will obtain verification of the debt; and
5. A statement that the communication is from a debt collector, that the debt collector is attempting to collect a debt, and that all information obtained will be used for that purpose.

It is important to note that, under the FDCPA, your counsel must cease all collection activities if the unit owner provides notification within the thirty day period disputing the assessment. Therefore, if the unit owner disputes the validity of the assessment, the amount of the assessment, or any item related to the assessment, the attorney cannot recommence collection proceedings until information substantiating the Association's claims have been provided to the unit owner. Associations often blame their attorneys for "delays" in the collection process caused by "exchanging letters" with the unit owner, but the Association must understand that the attorney is bound by the FDCPA to respond to a unit owner who disputes the amounts due, and cannot proceed with further collection activities until those disputes have been sufficiently countered by providing evidence to justify the Association's claims. Only then can the attorney move forward with the second step in the process, the recording of the Claim of Lien and the Thirty Day Letter.

If the unit owner does not respond to the IDL, counsel will advise the Association and request authorization to file a Claim of Lien. The Claim of Lien is the document that perfects the Association's rights by notifying anyone reviewing the public records that the Association has a claim against a particular unit owner for an unpaid assessments. The Claim of Lien is recorded in the Public Records in the County in which the community is located, in the same place and the same manner as a deed or mortgage. Recording a Claim of Lien is a prerequisite to the filing of a foreclosure lawsuit.

The Florida Statutes govern the existence, filing, and priority of liens for Condominiums and Cooperatives, while a Homeowners' Association's Declaration governs the existence and filing of liens for a Homeowners' Association. Additionally, the Florida Legislature amended §720.305(2), Fla. Stat., in 2004 to prohibit a Homeowner's Association from liening for collection of a fine. One noticeable difference between the

NAVIGATING *cont.*

Condominium and Cooperative Statutes is that, under the Condominium Statute, an Association's lien for unpaid assessments exists even prior to the filing of the Claim of Lien, while, under the Cooperative Statute, the lien does not arise until a Claim of Lien has actually been filed. However, the filing of a Claim of Lien under a Condominium, Cooperative or Homeowners' Association is always a prerequisite to the filing of a foreclosure action.

Simultaneous with recording the Claim of Lien, another prerequisite to filing a foreclosure action, is sent; this is known as the Thirty Day Letter. A Thirty Day Letter is a certified letter sent to the unit owner advising that the Claim of Lien has been recorded, setting forth the amount due, including interest, late charges, costs, attorneys' fees, and demanding the mailing of payment within thirty days. The letter informs the unit owner that the Association will commence a foreclosure action if the account is not paid in full within the thirty day deadline.

For Condominiums and Cooperatives, a Thirty Day Letter is a statutory prerequisite that the Association is required to send to obtain a full foreclosure judgment. If the Association files a foreclosure lawsuit without sending this letter, the Association will lose its ability to obtain a judgment for its costs and attorneys' fees under the statute. The letter must be sent to the unit owner's "last known address" and, if sent, is effective upon mailing, even if it is not ultimately received by the unit owner. Under the Condominium and Cooperative Statutes, a Claim of Lien is good for one year from the date of the filing of the Claim of Lien, during which time a foreclosure action must be brought, or the Claim of Lien expires. This is true even if, which will be discussed later, the first mortgagee files a bank foreclosure action.

A foreclosure lawsuit is the process by which the Claim of Lien is enforced. The outcome of a successful foreclosure lawsuit is a judgment ordering the clerk to sell the unit at a public auction. Ordinarily, this occurs through a truncated procedure called a "Summary Judgment." Summary Judgments are awarded when there are no factual issues that the Court would need to consider evidence to determine. If a response is filed to the lawsuit by the unit owner which raises legal defenses and questions of fact which require testimony, the case may have to go to trial. Obtaining a trial date usually involves a much longer delay, which varies from judge to judge.

The most important part of the foreclosure lawsuit is extinguishing as many competing encumbrances on the unit as the law allows. Some encumbrances may be superior and others may be subordinate to the Association's lien. Encumbrances on the unit may include, for example, mortgages, federal tax liens, state tax certificates, construction liens, judgment liens, and leases. The fewer encumbrances on a unit at the time it is sold, the easier it is to sell, and the more it is worth to the person buying it at the foreclosure auction. The process of extinguishing encumbrances on

NAVIGATING *cont.*

the unit is accomplished by naming the holders of these encumbrances as defendants in the foreclosure lawsuit and proving that the association's claim of lien is superior to these interests. Ordinarily, the holders of encumbrances that are clearly superior to the Association's lien would not be named in the lawsuit.

The only interests that are always superior to a Condominium Association's claim of lien are real estate taxes, most federal tax liens, and a first mortgage recorded prior to the association's claim of lien. This means the buyer at the foreclosure auction will normally take title subject to the rights of the tax collector, the IRS, and the first mortgage holder. All encumbrances recorded after the Association's claim of lien are subordinate and will be extinguished by the Association's foreclosure lawsuit. Relative priorities between a Homeowners' Association's lien and other encumbrances are determined by Declaration.

Filing a foreclosure complaint initiates the lawsuit. All holders of encumbrances which are subordinate to the association's claim of lien must be named as defendants in the foreclosure complaint in order for their interests in the unit to be extinguished. Usually unknown tenants and spouses are named, too, in order to cut off any interest these parties may have. The foreclosure complaint must be properly delivered to (or served on) the unit owner and other defendants before the case can proceed. Delivery of the complaint is called "Service of Process". Proper delivery requires the sheriff or a licensed process server to locate and personally give each defendant a copy of the foreclosure complaint. The sheriff or process server then files an affidavit verifying he or she properly delivered the complaint. Each defendant has twenty (20) days from the day after service to file a response to the foreclosure complaint. If an individual defendant cannot be found after diligent search, the complaint can be "delivered" by publishing notice of the foreclosure lawsuit in a local newspaper. The notice must be published for four (4) consecutive weeks. The deadline for the defendant to respond is thirty (30) days from the first publication of the notice.

An additional complicating factor could be if any of the defendants are dead or die during the course of the lawsuit. The Association must then move to substitute the estate of the deceased person, or, if there is no estate, appoint a guardian for the benefit of the estate and all heirs. This process can add two to three months to the length of a lawsuit.

In most foreclosure lawsuits, there are four likely outcomes:

1. The unit owner will re-finance, sell, or otherwise satisfy the lien.
2. The Association will be paid out of the proceeds from the sale.
3. The Association will take title to the unit at the public auction. As the foreclosing plaintiff, the Association has the right to bid up to the amount of its foreclosure judgment at the auction without actually paying any money (except for the clerk's fee and documentary stamps). All other bidders must pay cash or pay in a form acceptable to the clerk. The rising housing market has created a demand for foreclosure sale units, so for the last few years most units have sold for more then the Association's judgment. This trend may begin to reverse itself in the near future if the predicted burst of the "housing bubble" in Florida occurs.
4. If the unit owner has a mortgage, the bank which holds the mortgage on the unit may ultimately foreclose as well. Failure to pay assessments is often a default under many mortgage documents. This usually prompts the Association to stop its own foreclosure action in midstream.

The filing of a foreclosure lawsuit by the holder of the first mortgage will have a significant impact on the Association's ability to collect delinquent assessments. This is because the Association's lien is almost always inferior to the first mortgage. Therefore, the first mortgage foreclosure lawsuit will ordinarily extinguish the Association's lien.

If the bank forecloses its first mortgage before the Association does, there are also two possible outcomes. First, if the bank takes title, the bank will

NAVIGATING *cont.*

have to pay Assessments beginning from the date the bank acquires title. In addition, with Condominiums, the bank may be obligated to pay some assessments which came due before the date the bank took title. In some cases, if someone other than the bank takes title to a Condominium unit as a result of the bank foreclosure, that person may be liable for past due assessments. As always, a Homeowners Association's individual Declaration must be reviewed as to the Association's relative priorities and the liability of a subsequent purchaser. However, if after the bank's judgment is satisfied, there remain proceeds from the sale, the Association may file a claim post-sale with the Court for disbursement of funds from what is called the "surplus". Surplus funds are disbursed in accordance with the relative lien priorities of the named defendants in the bank foreclosure action. The Condominium Statute makes a Condominium Association almost always first in line for surplus proceeds, but a Homeowners Association must review its Declaration to determine its priorities.

The Association's foreclosure lawsuit may be interrupted if the unit owner files for bankruptcy. If the first mortgage holder is also foreclosing, that lawsuit will also be interrupted by the bankruptcy. This interruption is based upon federal bankruptcy law which imposes an automatic stay (or stop) on any pending lawsuits or other actions against the unit owner for claims arising prior to the filing of the bankruptcy petition.

A unit owner bankruptcy filing should not always be viewed as the time to give up. In 2005, Congress substantially re-wrote the consumer bankruptcy code that would involve most bank or association foreclosure actions. These changes are complicated and beyond the scope of this Article; associations wishing to maximize their recovery in the event a unit owner files bankruptcy should contact their association counsel.

Although every lawsuit is different, if no unusual defenses are raised by the unit owner, the process normally takes about five to seven months. Some lawsuits may take less time and others may take longer. Of course, if the unit owner pays at any stage in the proceedings, the process is terminated early.

An important matter that could affect the timing of a foreclosure lawsuit is a special assessment. In the case of George v. Beach Club Villas Condominium Association, 833 So.2d 816 (Fla. 3rd DCA 2002), a Condominium Association had imposed two separate special assessments, one for mansard repairs and a second later special assessment for roof repairs. The Association had filed an initial Claim of Lien for the mansard repairs, for which it proceeded to foreclosure litigation, and in the foreclosure litigation sought both the initial claim of lien for mansard work and the second special assessment for roof repairs, which was passed after the lawsuit was filed. In denying the Condominium's recovery for the second special assessment for roof repairs, the Appellate Court ruled that while a condominium Claim of Lien would secure subsequently accruing general assessments and subsequently accruing installments of a special assessment referred to in the Claim of Lien, it would not cover a subsequently passed new special assessment, for which a new or an amended Claim of Lien would need to be filed. Additionally, the Court ruled that the Florida Rules of Civil Procedure would not allow the Condominium to recover the subsequently passed special assessment without amending the Complaint to refer to that special assessment or a new or an amended Claim of Lien which referred to that special assessment. The import of this ruling is that any special assessments that are passed after the Claim of Lien is filed require the recording of a new or an amended lien and a new Thirty Day Letter, as well as an amendment to the foreclosure complaint if the lawsuit has been initiated, a process that usually takes at least 90 days to accomplish for **each** newly passed special assessment. As you can see, 2-3 special assessments could cause substantial delays in completing a foreclosure action.

Once the foreclosure judgment is entered by the judge, a foreclosure sale is set. The sale cannot be sooner than thirty (30) days from the date of the judgment and is usually longer, up to forty five (45) days, depending upon the clerk's calendar. Assuming the sale generates sufficient funds to satisfy the Association's judgment, there is usually an initial 10-20 day delay after the sale before the Clerk actually disburses the proceeds to the Association.

CA DAY

SHARED VISION, SHARED VALUES

Wednesday, March 15, 2006 - State Capitol, Tallahassee, Florida

CA DAY Agenda - March 15, 2006

Arrive in Tallahassee (morning)

Welcome Orientation & Light Breakfast

Walk the Halls & Meet Your Legislators

Press Conference

Luncheon with VIP Speakers & Legislators

Walk the Halls & Meet Your Legislators

Visit to House Chamber

Adjourn (early evening)

CA DAY Travel Information

A nonrefundable (except as otherwise noted below) **$300.00*** fee is required for those taking the chartered plane. The chartered plane will leave from Fort Lauderdale International Airport on Wednesday, March 15th at 8:00 a.m. and will depart Tallahassee at approximately 6:00 p.m. the same day. The plane holds 172 passengers. **If we do not have at least 150 participants interested in taking the chartered plane, we will cancel these arrangements and all deposits will be returned.** Ground transportation will be provided to and from Tallahassee airport for those taking the chartered plane. Unfortunately, it is not economically feasible to charter multiple planes in various locations around the State. Other groups located around the state of Florida will be driving or taking buses to the event. We are more than happy to assist you with transportation and lodging arrangements if necessary. For more details call Cherell Murphy at (800) 432-7712 x 5237.

CA DAY Registration

HOW TO REGISTER: MAIL or FAX the completed Registration Form to Cherell Murphy at FAX: (954) 985-4176 / MAIL: Becker & Poliakoff, 3111 Stirling Road, Ft. Lauderdale, FL, 33312. Register ONLINE at www.becker poliakoff.com/seminars.

REGISTRATION CUT-OFF DATE FOR CHARTERED PLANE: Wednesday, March 1, 2006. For registrants wanting to take the chartered plane it is first-come first-serve as space is limited.

CA-DAY REGISTRATION FORM

Check the following as they apply: **breakfast, lunch & incidentals provided for all registrants*

❑ Yes, I will be taking the charter plane. **AMOUNT: $300.00**

❑ Yes, I will be attending CA Day but I will make my own travel and lodging arrangements. **AMOUNT: $50.00**

Name _____

Association _____

Address _____

Phone: _____ Email _____

Please select your shirt size: M Lg XL

*** GROUP DISCOUNT:** ***If more than 1 (one) member of your Association registers for CA Day, and will be taking the chartered plane, please make your check payable for the amount of $250.00 per person.***

PAY BY CHECK: (make check payable to Becker & Poliakoff)

CREDIT CARD PAYMENTS: Check appropriate box, fill in credit card information and sign.

❑ MASTERCARD ❑ VISA ❑ AMERICAN EXPRESS

CARD HOLDER NAME _____
(PRINT as it appears on credit card)

CREDIT CARD NUMBER _____ Exp. Date _____

SIGNATURE _____ AMOUNT _____

CALL

COMMUNITY ASSOCIATION LEADERSHIP LOBBY

BECKER & POLIAKOFF COMMUNITY UP-DATE

Legal and Business Strategists

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Volume XI, 2006

Donna D. Berger, Esq. *Editor*
David Muller, Esq. *Asst. Editor*

MANAGING OWNER PARTICIPATION AT MEETINGS

By: Angela Clark, Esq.

What can an association do when faced with a "problem owner" who refuses to behave himself or herself at association meetings? For instance, the owner, who is videotaping the board meeting and insists on walking around the room to get the best angle for his or her recording or obstructs the board's view by standing in front of the person speaking at the meeting. Alternatively, the owner who speaks for 15 minutes on every agenda item, and insists on discussing issues that are not on the agenda. The Board of Directors should be aware that it is entitled to promulgate reasonable written rules regulating owner participation at board and membership meetings.

For homeowner associations, Chapter 720 of the Florida Statutes, also known as the Homeowners' Association Act, provides that all parcel owners are permitted to attend meetings of the board except for meetings between the board and the association attorney with respect to proposed or pending litigation, or meetings between the board and the association attorney held for the purpose of discussing personnel matters. The right to attend these meetings includes the right to tape record or videotape the meetings, and to speak on any matter placed on the agenda by petition of not less than 20% of the total voting interests. A member may speak for at least three minutes on each matter placed on the agenda by petition, provided that the member signs the sign-in sheet, if one is so provided, or submits a written request to speak prior to the meeting. The statute further provides that the association may adopt reasonable rules expanding the rights of members to speak and governing the frequency, duration, and other

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MANAGING OWNER PARTICIPATION, *cont.*

manner of member statement. In addition, the association may adopt rules governing the taping of meetings of the board and membership.

Similarly, for condominium associations, Chapter 718 of the Florida Statutes, also known as the Condominium Act, provides that unit owners shall have the right to attend meetings of the board and membership, except meetings between the board and the association attorney regarding proposed or pending litigation. There is no exception in the Condominium Act for closed board meetings involving personnel matters. The right to attend the meetings includes the right to tape record or videotape the meetings, and speak on all designated agenda items. The statute further provides that the division shall adopt reasonable rules regarding tape recording and videotaping. In addition, the association may adopt reasonable written rules regarding frequency, duration and manner of unit owner statements.

Consequently, in both homeowner and condominium associations, owners have the right to record board and membership meetings. However, homeowner or condominium boards may pass certain restrictions pertaining to the manner in which it can be done.

For instance, the association may adopt the following types of restrictions:

1) an owner must give advance written notice if they intend to videotape or tape record a meeting,
2) the owner must set up the equipment before commencement of the meeting,
3) the owner may only use equipment that does not produce distracting sound or lighting,
4) no tape recording or videotaping of any meeting shall interfere with or obstruct the meeting, and none of the equipment used for taping shall interfere with or obstruct any unit owner's or director's view of the meeting or ability to hear the meeting; and
5) any person videotaping or tape recording a meeting cannot walk around during the meeting (i.e., the video camera or audio equipment must be placed on a stationary stand or the persons using the taping equipment must do so from their seats).

Although members have the right to attend all board meetings and record the meetings, the right to speak is not automatic. The Homeowners Association Act allows members to speak, for at least three minutes, on any matter that is placed on the meeting agenda by petition of the voting interests.

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MANAGING OWNER PARTICIPATION, *cont.*

This is different from the condominium association where owners are entitled to speak on any agenda item at a board meeting.

The Homeowners Association Act and Condominium Association Act allow the association to adopt rules governing the frequency, duration, and manner of owner statements at meetings. In order for the board to conduct business in an effective manner, as well as offer the owners an opportunity to speak, the board should establish a procedure for handling owners' comments and discussions at an association meeting. The procedure set forth by the board should be tailored to the specific needs of the community. For instance, depending on the size and nature of the community, the board may consider requiring an owner to submit a written request notifying the association in advance that he or she wishes to participate in the meeting and make a statement on an agenda item.

Additionally, the board may consider adopting a rule which states that an owner is not permitted to speak at the meeting until he or she has been formally recognized by the chair of the meeting. The chair shall recognize the owner subsequent to calling of the agenda item and prior to the discussion and vote by the board on that agenda item. This procedure gives the owner an opportunity to participate in association matters, and the board has the benefit of listening and addressing the owner's specific concerns on a particular item.

Another rule may limit the amount of time for the owner to make his or her statement. (i.e., the owner is permitted to speak no more than three minutes on an agenda item). This rule gives the owner a chance to discuss his or her concerns with the board and membership without engaging in a prolonged monologue. However, this rule should be flexible so that the chair of the meeting, with the consent of the board, has the authority to permit the owner to continue discussing the issue if the owner's statements or comments are valuable to the association and the board's decision-making process.

Lastly, neither the homeowners nor condominium statutes address the owner's ability to speak to items not on the agenda. Consequently, a rule may be adopted which prohibits discussion of non-agenda items at board or membership meetings unless the majority of the board or membership consents to the discussion of such a matter.

The board may also incorporate a method of enforcement in its rules. For instance, the board may adopt a rule which authorizes the board and/or chair of the meeting to eject or otherwise remove an owner who fails to comply with the rules. Therefore, the board and/or chair of the meeting has a mechanism for dealing with an owner who disrupts the meeting with his or her recording methods or equipment, or speaks on issues not designated on the agenda, or otherwise fails to abide by the previously adopted and

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MANAGING OWNER PARTICIPATION, *cont.*

published rules.

The rules provide guidance to both the board and owners as to how association meetings shall be conducted, and the type of actions that are permitted in these meetings. By adopting clear rules and adhering to such rules, the meetings will be more productive and less chaotic for the association. Before the board adopts any rules regulating owner participation at board or membership meetings, the board should consult with its attorney to ensure that the proposed rules are reasonable and conform to the requirements of the Homeowners Association Act and the Condominium Act.

MYTHBUSTERS REGARDING ASSOCIATION MEETINGS

DID YOU KNOW??

~ The President always votes; not just to break ties. The business of the Association is conducted by the Board, through its Directors. The President is a Director, and all Directors who are present at the meeting must vote, unless they have a valid reason to abstain from voting.

~ Once a quorum is established at a Board or Membership Meeting, the quorum remains established for the rest of the meeting, even if people leave early.

~ Once the ballot for Directors is received for a Condominium or Cooperative election, the Association cannot give it back. This is different than a proxy, which is revocable by the person who gave it, up to the time the Meeting is called to order.

~ Directors cannot use proxies for Board Meetings.

~ At a membership meeting, a quorum of the members must be present. A quorum of the Board of Directors is not required.

~ Before discussion occurs, there must be a motion (which has been seconded) on the floor.

McInerney v. Klovstad

935 SO.2ND 529 (FLA. 5TH DCA, 2006)

After receiving approval from their association's architectural review committee and local building authorities, the McInerneys began construction of an addition to their home. When the Klovstads realized the addition would be just 3.45 feet from the side yard line separating their property from the McInerney's property they filed a lawsuit because they felt the deed restrictions had been violated.

The declaration of covenants, conditions and restrictions required the side yard setbacks to be 5 feet on each side, with a minimum of 10 feet between buildings, and further stated that "if there is any conflict between this section and applicable zoning regulations of the proper governing authority, said zoning regulations shall take precedence". A local county ordinance provided for side yard setbacks of no less than 7 feet on one side of the property and 3 feet on the other side of the adjacent lot. While the minimum space between houses is 10 feet under both the declaration and the county ordinance, each provision divided that space differently from the side lot line between properties, which led to the dispute between these neighbors.

At trial, the court concluded that the declaration provision controlled over the county ordinance and ordered that the encroaching addition to the home be removed.

On appeal, the appellate court found that restrictive covenants will be enforced when they are clear, reasonable and have a lawful purpose, and that such covenants that run with the land must be strictly construed in favor of free and unrestricted use of real property. Additionally, a covenant which is substantially ambiguous is to be resolved against the party claiming the right to enforce the restriction.

The appellate court noted that the declaration provisions did not specifically define what "any conflict" between the declaration provision and applicable zoning regulations meant. The McInerneys believed it meant that if there was "any difference" between the two, the local county regulations would prevail, and thus their home addition would not violate side setback restrictions since it complied with the local county ordinance. On the other hand, the Klovstads believed the 5 foot set back as set forth in the declaration would control unless the local regulations were more restrictive, and thus the McInerney's addition to their home was in violation of the side setback requirements contained in the declaration.

The appellate court found that both interpretations were reasonable, and therefore the declaration provision was ambiguous. Such ambiguities are construed against the party seeking to enforce them, in this case the Klovstads, therefore the judgment of the trial court requiring the McInerneys to remove their home addition was reversed.

FREE Community Association Workshop

*Please register **ASAP** as space is limited and we want to accommodate you first!*

Please indicate on your registration form which location you will attend.

MIAMI AREA

Florida Keys
Holiday Isle Beach Resorts & Marina
84001 Overseas Highway
Islamorada, FL
January 13, 2007

Miami
The Alexander Hotel
5225 Collins Avenue
Miami Beach, FL
February 3, 2007

For further information: Contact Glexi Garcia at (305) 262-4433 or 1-800-533-4874

ORLANDO AREA

Melbourne
Imperial's Hotel & Conference Center
8298 North Wickham Road
Melbourne, Florida
January 19, 2007

Daytona Beach
Plaza Resort & Spa
600 N. Atlantic Avenue
Daytona Beach, FL
February 3, 2007

Orlando
Hilton Orlando/Altamonte Springs
350 S. Northlake Boulevard
Altamonte Springs, FL
February 23, 2007

For further information: Contact Dawn Portera at (407) 875-0955 or 1-800-232-5379

PANHANDLE AREA

Destin
Pelican Beach Resort & Conference Center
1002 Highway 98 East
Destin, FL
January 25, 2007

For further information: Contact Elay Gray at (850) 664-2229 or 1-800-852-4560

TAMPA BAY AREA

Clearwater
Ruth Eckerd Hall
1111 McMullen Booth Road
Clearwater, FL
January 27, 2007

For further information: Contact Sheila Koonce at (727) 559-0588 or 1-800-535-3318

SARASOTA AREA

Sarasota
The Meadows Country Club
3101 Longmeadow Drive
Sarasota, FL
Febuary 10, 2007

For further information: Contact Susan Reyes at (941) 366-8826 or 1-800-282-8613

PALM BEACH AREA

West Palm Beach
Kravis Center - Cohen Pavillion
701 Okeechobee Boulevard
West Palm Beach, FL
March 3, 2007

For further information: Contact Kelly Hibl at (561) 655-5444 or 1-800-462-7783

FORT MYERS AREA

Naples
Naples Bath and Tennis Club
4995 Airport Road North
Naples, FL
March 3, 2007

Fort Myers
Barbara B. Mann Center
8099 College Parkway S.W
Ft. Myers, FL
March 10, 2006

For further information: Contact Franklin Scott at (239) 433-7707 or 1-800-462-7780

BROWARD AREA

Fort Lauderdale
Coral Springs Centre for the Arts
A PFM Managed Facility
2855 Coral Springs Drive
Coral Springs, FL
March 31, 2007

For further information: Contact Michelle Soler at (954) 987-7550 or 1-800-432-7712

Be on the lookout for the

GRAND OPENING of **Becker & Poliakoff. P.A.'s Port St. Lucie Office early in 2007** and a separate invitation for this seminar in St. Lucie

We Look Forward To Seeing You There!

BECKER & POLIAKOFF COMMUNITY UP-DATE

Legal and Business Strategists

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Volume IX - X, 2006

Donna D. Berger, Esq. *Editor*
David Muller, Esq. *Asst. Editor*

FLORIDA CONDO & HOA PROPERTY OWNERS CALL ON ELECTED OFFICIALS, STATE GOVERNMENT TO TAKE ACTION ON INSURANCE CRISIS

RESPONDENTS IN COMMUNITY ASSOCIATION MEMBER SURVEY OVERWHELMINGLY SUPPORT EXPANDED REGULATION OF PRIVATE INSURERS

ASSOCIATION LEADERSHIP WARNS COMMUNITIES NEAR BREAKING POINT, AS VOLUNTEER BOARDS STRUGGLE TO COPE WITH ASSESSMENTS, FINANCING & UNPRECEDENTED CASHFLOW

FT. LAUDERDALE, FL (Wednesday, Oct. 11, 2006) – As Floridians prepare to go to the polls in November, nine out of every ten of the millions of property owners living in condos, homeowner and other community associations statewide say Florida's elected officials are doing too little to stop the sharp rise in storm-related insurance costs in their communities.

A new poll of residential property owners in Florida community associations conducted online from Sept. 22 through Oct. 1 found that fully 87 percent of respondents said they will be liable for increases in storm-related insurance costs in their communities this year. In a striking departure from conventional wisdom about Floridians' laissez faire attitude toward economic regulation, nearly two-thirds (64 percent) also said they want more government regulation of the private insurance industry and 61 percent want the State to operate as an alternative to private insurers.

A total of 702 community association property owners responded to the poll in a representative sampling of sentiment over the insurance crisis in Florida's nearly 68,000 condo, co-op, mobile home, timeshare and homeowner associations statewide. The survey was conducted by the 4,000 association-strong Community Association Leadership Lobby (CALL), a not-for-profit advocacy group established in 2003 by the law firm Becker & Poliakoff to advance the shared interests of Florida's common-interest ownership communities.

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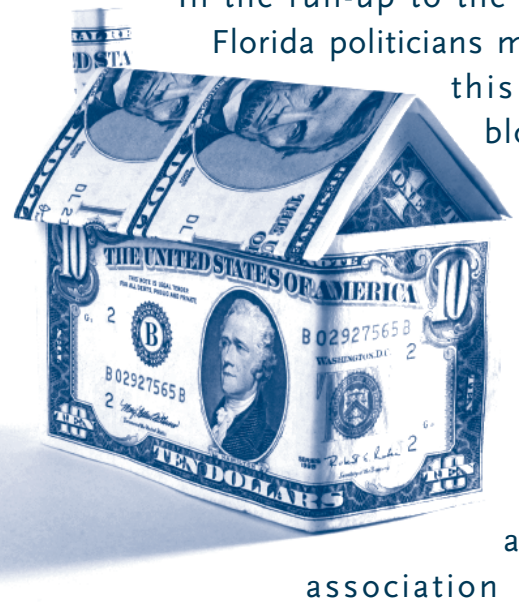
Published periodically by the law offices of Becker & Poliakoff, P.A. with offices in Boca Raton, Fort Lauderdale, Fort Myers, Fort Walton Beach, Jacksonville, Largo, Melbourne, Miami, Naples, Orlando, Port Charlotte, Sarasota, Tallahassee, and West Palm Beach. The administrative office is located at 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities' operations. This newsletter is prepared for and disseminated to clients of the Firm. Internet Address: http: // www.becker-poliakoff.com

INSURANCE CRISIS, *cont.*

Nearly half of the survey's respondents (48.2 percent) said they cannot afford to pay the amounts being required of them to cover their share of their community's storm-related insurance costs, while more than two-thirds (68.3 percent) said the increases are leading them or their neighbors to consider selling their property and leaving the state altogether.



"In the run-up to the Nov. 7 elections, Florida politicians must take notice of this powerful voting block of millions of Floridians living in condos, co-ops, HOAs, mobile home and other associations," said Donna D. Berger, CALL Executive Director and a community association attorney and shareholder with the Ft. Lauderdale law firm of Becker & Poliakoff. "These Floridians are understandably very upset and they are tired of listening to excuses from elected officials who say nothing can be done about this outrageous increase in storm-related insurance costs."

Community association leaders and experts in the field note that the spiraling storm-related insurance costs are straining Florida's community associations and their volunteer Boards of Directors to the breaking point. Across the state, the insurance crisis has association leadership struggling to deal with special assessments and outside financing to cover rate hikes and uninsured losses, not to mention the responsibility of managing previously unheard of amounts of cash-flow through association coffers.

"Governor Bush and other elected officials in Tallahassee should spend less time listening to the insurance industry and more time listening to Florida's citizens, who are demanding that public policy-makers act decisively to control rising insurance costs for homeowners statewide," said Kenneth S. Direktor, community association attorney, shareholder and Chair of the Community Association Practice Group at Becker & Poliakoff, who testified Oct. 4 before the Governor's Insurance Reform Committee in Tallahassee. "Unfortunately, the Insurance Reform Committee appears to be in search of solutions that will accommodate the insurance industry and seems to accept the industry claim that insurance premiums are too low, a concept that is very difficult to explain to community associations and homeowners whose rates have skyrocketed."

Additional important findings of the insurance survey show that:

- 90 percent of respondents said "No" when asked if elected officials are "doing everything they can to keep insurance costs reasonable for homeowners in Florida";

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INSURANCE CRISIS, *cont.*

- 56.2 percent of respondents said that increased insurance costs due to rising premiums are coming on top of previous monthly fee increases or special assessments levied to cover damages sustained during the 2005 Florida hurricane season;

- 50.4 percent of respondents said the increased insurance costs are being passed along to them directly through hikes in their regular monthly association fees, while 23 percent said they are being asked to cover the costs through special assessments; and,

- Of the 87 percent of respondents who said their associations faced increased insurance premiums this year, 24 percent also cited additional costs due to uninsured storm-related losses suffered by their community.

Community association leaders throughout the state are alarmed at the implications of the insurance crisis for associations and their elected volunteer Boards of Directors:

- In Hallandale Beach, FL, City Commissioner Joe Gibbons, a condo board President who sits on CALL's Members Council and is State Representative-elect for District 105, said: "Volunteer community association Boards and association members are in crisis over how to cover skyrocketing insurance costs, while also safeguarding community finances against abuses that can occur when so much money is flowing through so few hands. Serious allegations of abuse over storm-related expenditures -- such as those under investigation at Hallandale Beach's Parker Plaza condominium -- send a clear signal that we must aggressively pursue a solution to this insurance crisis, even as we prosecute those who try to profit from insurance-related graft and corruption."

- In Naples, FL, Ewing Sutherland, President of Gulfside Condominium Association and board member of the Gulf Shore Association of Condominiums, who also sits on the

CALL Members Council, said: "Spiraling storm-related insurance premiums put a strain on our communities and compromise the ability of elected

cont. on page 4

INSURANCE CRISIS, *cont.*

volunteer community association leaders to manage them effectively. Such premiums prevent allocation of sums prudent boards should channel to protective measures to reduce the risk of future hurricane damage and tempt international insurers back to Florida. Skyrocketing insurance premiums, on top of financing, collection and management of huge sums to cover insured and uninsured storm related damages, threaten unnecessarily to fan the flames of contention and spur conflict in even well-governed communities across the state."

$ In Boca Raton, FL, Bonnie Dearborn, a member of the elected Board of Directors at the Homeowners Association of Lands End, who also sits on the CALL Member's Council, said: "Following last year's hurricane season, many residents of Florida homeowners associations have been hammered by a combination of uninsured losses for storm-related damage and sky-high hikes in their association's insurance premiums. This has got to stop and our elected officials must act now if Florida is going to continue to remain attractive for individuals and families seeking secure and affordable lifestyles in our beautiful State."

More than 4,000 previously identified owners of property in condominiums, homeowners' associations, mobile home communities and cooperatives throughout Florida were invited by email to participate in the insurance survey. The margin of error for the total survey sample of 702 respondents was +/- 3% at the 95% confidence level. The survey results can be seen online at the website of the Community Association Leadership Lobby: www.callbp.com

About the Community Association Leadership Lobby (CALL)

The Community Association Leadership Lobby is the leading organization working to enhance the quality of life and protect property values for Florida's community association residents. CALL advocates on behalf of more than 4,000 member communities, including condominiums, homeowners' associations, mobile home communities and cooperatives throughout the state. More information on the Community Association Leadership Lobby can be found at www.callbp.com.

Survey of Community Association Property Owners on Issues Related to Insurance Increases in Florida

CONDUCTED ONLINE FROM SEPT. 20 – OCT. 1, 2006
SURVEY RESULTS BASED ON 702 RESPONSES

OCTOBER 11, 2006

Introduction & Methodology

This survey of Florida Community Association property owners on issues related to insurance rate increases in their communities was conducted online in the state of Florida between September 20 and October 1, 2006, under the auspices of the Community Association Leadership Lobby (CALL).

More than 4,000 previously identified owners of property in Florida common-interest ownership communities -- including condominiums, homeowner associations, cooperatives, mobile homes, timeshare and condo hotels -- were invited by email to participate in the insurance survey.

Participants were directed to an Internet landing page, where their responses were filtered with an initial question asking if the respondent owned property in a condominium, homeowner association or other type of community association in Florida. Those who responded "No" to this question were not allowed to complete the survey.

The results contained in this report are based on the 702 responses from participants who identified themselves as owning property in Florida community associations. Not all respondents answered all questions. The margin of error for the total sample is +/- 3% at the 95% confidence level. The survey was not random.

This survey report has been shared with members of the news media and is available for viewing online at the website of the Community Association Leadership Lobby: www.callbp.com

Survey Questions and Response Data

Listed below are the actual questions asked and responses collected in the Survey. The number of responses to each question is indicated by R = #.

1. The first question asked if a respondent owned property in a condominium, homeowner association or other type of community association in Florida. Those who responded "No" to this question were not allowed to complete the survey.

2. Have you received notification that storm-related insurance costs for your association will be increasing this year?

Percent	Response
87.4%	Yes
12.6%	No

(R = 562)

3. If you answered "yes" to #2 above, are those storm-related insurance costs related to:

Percent	Response
0.2%	Uninsured losses
63.6%	Increased insurance premiums
24%	Both uninsured losses and increased insurance premiums
12.2%	Don't know

(R = 500)

4. If storm-related insurance costs for your association will be increasing this year, does your association plan to pay for the insurance increase through:

Percent	Response
23.2%	Special assessment of unit owners
50.4%	Increase in monthly regular assessment fees charged to unit owners
1.9%	Transfer of funds from association's reserves
1.5%	Outside financing
12.6%	Don't know
10.4%	Other (please explain)

R = 538)

5. If your answer to #4 above was either "special assessment" or "increase in monthly regular assessment," can you afford to pay the amount being required of you?

Percent	Response
48.2%	Yes
22.3%	No
29.6%	Not sure

(R = 467)

6. If your answer to #4 above was "outside financing," has your association sought financing from:

Percent	Response
20.7%	Your regular lender

SURVEY, *cont.*

3.6%	U.S. Small Business Administration (SBA)
59.5%	Don't know
16.2%	Other (please explain)

(R = 111)

7. Are insurance-related increases leading you or your neighbors to consider selling your units/home and moving to another state where insurance rates are lower?

Percent	Response
68.3%	Yes
31.7%	No

(R = 537)

8. Were you previously hit with a special assessment or increased monthly fees to pay for storm-related repairs from the 2005 hurricane season?

Percent	Response
56.2%	Yes
43.8%	No

(R = 553)

9. Which of the following do you think is most likely to increase the availability of affordable insurance for condos and other community associations in Florida:

Percent	Response
64.7%	More state government regulation of the private insurance industry
24.8%	Less regulation of the insurance industry by the state – allow the free market to operate
10.4%	Maintain the same level of government oversight

(R = 536)

10. Do you think the state should operate as an alternative to private insurers and become directly involved in providing affordable property insurance?

Percent	Response
60.6%	Yes
39.4%	No

(R = 548)

11. Are our elected officials doing everything they can to keep insurance costs reasonable for homeowners in Florida?

Percent	Response
10%	Yes
90%	No

(R = 532)

- END -

H & H Painting & Waterproofing Co. v. Mechanic Masters, Inc.

923 SO. 2D 1227 (FLA. 4TH DCA 2006)

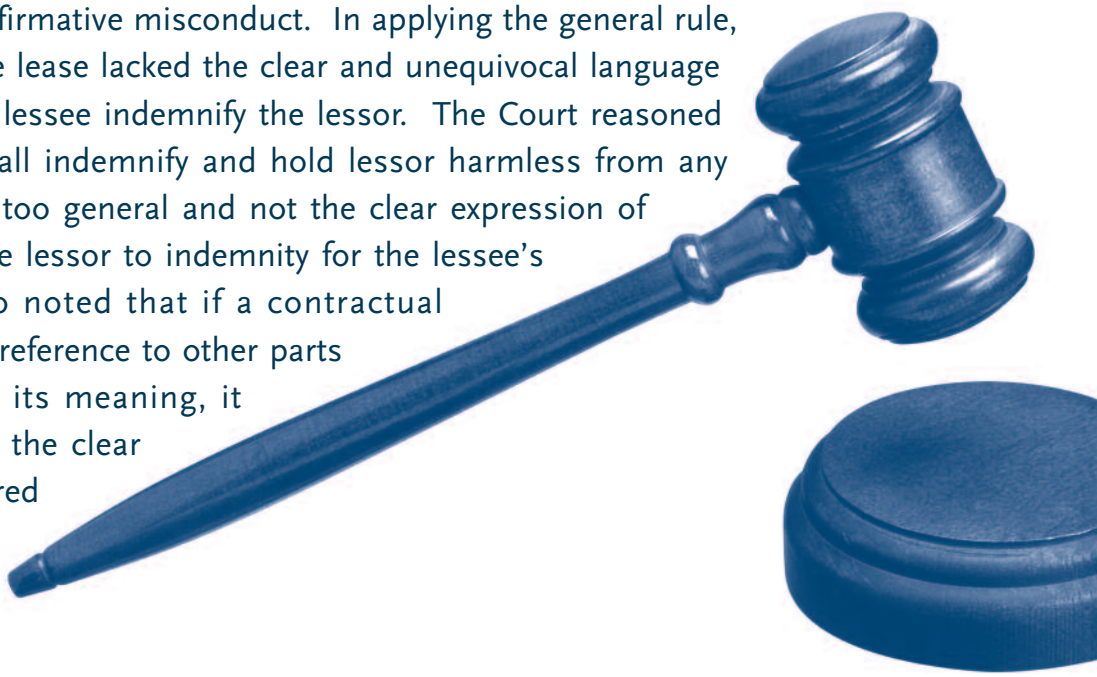
By: Aaron J. Pruss, Esq.

The Court determined whether, in a lease for construction equipment, the lessee agreed to indemnify the lessor for the lessor's own negligence.

H & H Painting leased a 20-foot scissor lift from Mechanic Masters for $350.00 per month. The lease agreement contained an indemnity provision which provided, in pertinent part:

> Lessee shall indemnify and hold Lessor harmless from any claims of third parties for loss, injury and damage to their persons and property arising out of Lessee's possession, use, maintenance or return of Equipment, including legal costs incurred in defense of such claims.

An employee of H & H fell off the lift and was injured. That employee filed suit against Mechanic Masters claiming his employer's negligence caused his injuries. Mechanic Masters thereafter filed a Third Party Complaint against H & H seeking contractual indemnification. The Court analyzed several other cases involving similar circumstances and identified the general rule that language must be clear and unequivocal if the parties intend to provide indemnification for consequences arising from affirmative misconduct. In applying the general rule, the H&H Court held that the lease lacked the clear and unequivocal language necessary to require that the lessee indemnify the lessor. The Court reasoned that the language "lessee shall indemnify and hold lessor harmless from any claims of third parities" was too general and not the clear expression of intent required to obligate the lessor to indemnity for the lessee's negligence. The Court also noted that if a contractual indemnity provision requires reference to other parts of the contract to ascertain its meaning, it necessarily does not contain the clear and unequivocal terms required for indemnification.



BECKER & POLIAKOFF COMMUNITY UP-DATE

Legal and Business Strategists

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Volume VIII, 2006

Donna D. Berger, Esq. *Editor*
David Muller, *Esq. Asst. Editor*

Community Association 2006 Holiday Survey

CONDUCTED ONLINE FROM NOV. 5 - 20, 2006 BY THE COMMUNITY ASSOCIATION LEADERSHIP LOBBY (CALL)

RESULTS BASED ON 459 RESPONSES FROM PROPERTY OWNERS IN FLORIDA COMMUNITY ASSOCIATIONS

NOVEMBER 28, 2006

Introduction & Methodology

The results contained in this report are based on responses from 459 participants in a survey of Florida Community Association property owners, conducted online in the state of Florida between November 5 and November 20, 2006, under the auspices of the Community Association Leadership Lobby (CALL).

More than 4,000 previously identified owners of property in Florida common-interest ownership communities -- including condominiums, homeowner associations, cooperatives, mobile homes, timeshare and condo hotels -- were invited by email to participate in the insurance survey.

Participants were directed to an Internet landing page, where their responses were filtered with an initial question asking if the respondent owned property in a condominium, homeowner association or other type of community association in Florida. Those who responded "No" to this question where not allowed to complete the survey.

This survey report has been shared with members of the news media and is available for viewing online at the website of the Community Association Leadership Lobby: www.callbp.com

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CALL *cont.*

ABOUT THE COMMUNITY ASSOCIATION LEADERSHIP LOBBY (CALL)

Established in 2003 by the law firm of Becker & Poliakoff to work toward enhancing the quality of life and protecting property values for Florida's community association residents, the Community Association Leadership Lobby advocates on behalf of more than 4,000 member communities, including condominiums, homeowners' associations, mobile home communities and cooperatives throughout the state. For more information, visit the CALL website at www.callbp.com.

Survey Questions and Response Data

Listed below are the actual questions asked and responses collected in the Survey.

1. The first question asked if a respondent owned property in a condominium, homeowner association or other type of community association in Florida. Those who responded "No" where not allowed to complete the survey.

2. Indicate the type of community association in which you own property:

Percent	Response
78.1	Condominium
0.2	Condo Hotel
3.6	Cooperative Association
15.5	Homeowners Association (HOA)
2.3	Mobile Home Community
0.2	Timeshare

3. Please indicate the location of your unit/home:

Percent	Response
41.3	Southeast Florida (Key West, Miami, Fort Lauderdale, W Palm Beach, Stuart)
34	Southwest Florida (Bradenton/Sarasota, Fort Myers, Naples and Marco Island)
5.7	Central West Florida (Crystal River, Clearwater and St. Pete/Tampa)
6.8	Central East Florida (Port St. Lucie, Melbourne and Daytona Beach)
2	Central Florida (Ocala, Orlando, Kissimmee/St. Cloud and Winter Haven)
2.9	Northwest Florida (Pensacola to Panama City)
0	North Central Florida (Tallahassee, Lake City, Gainesville, Cedar Key)

CALL *cont.*

0.9	North East Florida (Jacksonville, St. Augustine)
6.3	Other

4. How much does your association spend from its annual operating budget on Holiday-related decorations, parties and/or employee gifts or bonuses each year?

Percent	Response
44.6	0 to $99
12.3	$100-$199
16	$200-499
27.1	$500 or more

5. Does your association place Holiday decorations in common areas of the property during the month of December?

Percent	Response
78.2	Yes
21.8	No

6. If you answered "Yes" to #5, do those decorations include (choose all that apply):

Percent	Response
78.8	Christmas Decorations
36	Hanukkah Decorations
1.7	Kwanza Decorations
37.2	Non-denominational Decoration

7. If you answered "Yes" to #5, how does your association decide on what kind of decorations and where they are placed?

Percent	Response
22.9	The Board of Directors decides
23.5	A specially appointed Committee decides
0.3	It's spelled out in the association's Governing Documents
39.9	It's decided by tradition in the building
13.5	Other (please specify)

CALL *cont.*

8. Does your association have any restrictions on individual association members placing Holiday decorations on the outside of their properties?

Percent	Response
34.7	Yes
65.3	No

9. If you answered "Yes" to #8, how does your association deal with individual property owners who do not abide by those restrictions? (choose any that apply)

Percent	Response
25.9	Takes no action
53.7	Letter of warning from the Board
9.3	Authorizes Management to remove the decorations
4.3	Imposes Fines
3.1	Takes Legal Action
19.8	Other (please specify)

10. Does your association usually throw some type of year-end Holiday party for association members in December?

Percent	Response
37.4	Yes
62.6	No

11. Will your association throw some type of year-end Holiday party this year?

Percent	Response
39%	Yes
61%	No

12. How will your association pay for its year-end Holiday party this year?

Percent	Response
16.8	From the annual operating budget

CALL *cont.*

20.8	Monetary contributions from individual property owners
33.6	Pot-luck contributions of food an beverage from individual property owners
28.8	Other (please specify)

13. Does your association give end-of-year or Holiday monetary gifts or bonuses to association employees?

Percent	Response
55.1	Yes
44.9	No

14. If you answered "Yes" to #13, how do association members contribute to these end-of-year or Holiday gifts or bonuses?

Percent	Response
52.2	From the annual operating budget
30.5	Voluntary contributions from association members collected by the association
17.3	Voluntary contributions from association members given individually to employees

15. If you answered "Voluntary" and collected by the association, does the association post a list of all contributors in a visible place on the property?

Percent	Response
8.7	Yes
91.3	No

- END -

CALL *cont.*

FLORIDA CONDO, HOA HOLIDAY DECORATIONS MARKED BY SPIRITUALITY, TOLERANCE AND INCLUSION, SURVEY SHOWS

From Panhandle to the Keys, Community Associations Relax and Cooperate, Celebrating Year-End Holiday Season in Variety of Ways

FT. LAUDERDALE, FL (Nov. 28, 2006) – As year-end holidays approach, the spiritual "reason for the season" will be on display in lobbies, entrances, hallways and other common areas of the majority of condominiums and homeowner associations throughout the state of Florida, according to results of a statewide survey of community association members released today.

Nearly 80% of respondents to the survey, conducted online from Nov. 5-20 by the Community Association Leadership Lobby (CALL), an organization representing more than 4,000 Florida condominium and other community associations, said their communities choose to place holiday decorations in common areas of the property during the month of December.

Of those, fully 78.8% said the display includes Christmas decorations, while 36% said their association displays Hanukkah decorations in December, indicating that many condo buildings and homeowner associations (HOAs) choose to publicly celebrate both the Christian and Jewish holidays. An additional 1.7% said their association would celebrate Kwanza.

While 37.2% said the holiday display in their association would remain non-denominational, survey organizers said the responses show that the religious and spiritual messages of the holidays remain substantial in most Florida community associations.

"Clearly, most community associations in Florida recognize the spiritual origins of the holidays and tend to deal with different religious and ethnic traditions in a spirit of tolerance and inclusion," said Donna D. Berger, Executive Director of CALL and a community association attorney and shareholder with the Florida-based law firm Becker & Poliakoff. "The survey also showed that the display of decorations is sanctioned by association tradition in 40% of the cases, while the association leadership establishes the decorations policy more than half the time, either by a specially designated committee or a decision by the association's elected Board of Directors."

CALL *cont.*

A total of 459 property owners in condominiums, HOAs and other community associations from the Panhandle to the Florida Keys responded to the survey, conducted in an effort to identify trends and "best practices" in how Florida community associations deal with issues related to year-end holiday decorations, association parties and employee gifts and bonuses.

Key survey findings include:

- While more than 60% of associations shy away from throwing a year-end party, of those that do go in for a community-wide holiday bash only 16.8% are willing to foot the bill directly out of the annual budget.

- Nearly half (44.6%) of respondents said their association earmarks less than $100 in their annual budget to spend on these year-end holiday items, with 28.3% spending from $100-$500 and 27.1% saying their association spends more than $500 each year.

- Slightly more than half (55.1%) of associations give year-end gifts or bonuses to association employees -- of those, 52.2% have created an annual budget item for that purpose, while 47.5% fund employee gifts or bonuses through voluntary contributions from association members.

"A clear consensus is yet to emerge among associations on the question of whether and how to provide year-end holiday gifts or bonuses to employees," said Ms. Berger. "Often at issue for those that do provide employee gifts or bonuses is how to do so equitably, and on that point associations appear nearly evenly split between those that prefer to guarantee an amount through an annual budget line item and those that leave the amount to be determined by voluntary contributions from individual unit owners."

The survey also found that fully 65% of associations place no restrictions when it comes to holiday decorations and of those that do, nearly 80% said their association takes no action or sends a warning letter with no follow through in the case of a property owner who flaunts the restrictions.

"We found it interesting that the survey responses showed a more relaxed attitude on the part of community association leadership regarding enforcement of restrictions on what individual owners can display on doors, balconies and front yards," said Ms. Berger.

CALL *cont.*

The survey's sponsor, CALL, is a statewide organization established in 2003 to advocate on behalf of the interests of Florida's community associations by the law firm Becker & Poliakoff, which has the largest community association law practice in the state.

The full report on the survey results is available online at the website of the Community Association Leadership Lobby: www.callbp.com.

About the Community Association Leadership Lobby (CALL)

The Community Association Leadership Lobby is the leading organization working to enhance the quality of life and protect property values for Florida's community association residents. CALL advocates on behalf of more than 4,000 member communities, including condominiums, homeowners' associations, mobile home communities and cooperatives throughout the state. More information on the Community Association Leadership Lobby can be found at www.callbp.com.

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Legal and Business Strategists

NOTE: If you have questions or comments about this survey, please contact Michael Tangeman at The Pen Group Communications, 305-529-1944 or michael@thepengroup.com.

BECKER & POLIAKOFF COMMUNITY UP-DATE
Legal and Business Strategists
CURRENT NEWS FOR COMMUNITY ASSOCIATIONS
Volume VII, 2006
Donna D. Berger, Esq. *Editor*
David Muller, Esq. *Asst. Editor*

THINGS TO CONSIDER WHEN HIRING A COMMUNITY ASSOCIATION MANAGER

By: Bennett Miller, Esq.

The hiring of a community association manager ("CAM") can be a difficult decision for an association's Board of Directors. Not only must an association consider the additional expense of hiring a professional manager, many associations misunderstand the various laws regulating community associations and their managers. For instance, many board members wrongfully assume that Florida law mandates that large communities employ a CAM to assist in the day to day operations of their association. However, there is no requirement that a community association employ a CAM, because the board of directors bears the ultimate responsibility for managing an association. Generally, board members and officers of an association may perform community association management services without a license, if they receive no remuneration for their services. Unfortunately, many associations discover that former officers and directors have improperly paid themselves for services that require a license under Florida law.

The Regulatory Council of Community Association Managers licenses and regulates community association managers in Florida, pursuant to Chapter 468, Part VIII, Florida Statutes, and Rule 61G-20 of the Florida Administrative Code. The Regulatory Council is located within the State of Florida, Department of Business and Professional Regulation ("DBPR"). Section 468.432(1), Florida Statutes, which states in part that a person may not act as a community association manager or hold himself or herself out to the public as being able to manage a community association, unless that person is properly licensed. Section 468.431, Florida Statutes, provides definitions for community association manager and community association management. A community association manager is someone who is licensed to provide community association management services. Community association management means the performance of certain practices which require specialized knowledge, judgment, and managerial skill, when performed for compensation and when the

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COMMUNITY MANAGER *cont.*

association or associations served contains more than 50 units or the association has an annual budget or budgets in excess of $100,000.00. Examples of the specialized duties of a community association manager include disbursing the funds of a community association, preparing association budgets, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the association. Therefore, if an association has more than 50 units or has an annual budget or budgets in excess of $100,000.00 and the association wishes to employ a community association manager, then the manager must have a CAM license if the manager accepts any type of payment for their services.

Maintenance employees who do not assist with management services do not need a CAM license, but may not oversee the maintenance activities of others without a license. Clerical employees who work under the direct supervision of a CAM also do not need a CAM license. Many associations hire a clerical employee, but the board of directors should take great care to be sure that the employee does not engage in the practice of community association management. As an example, it is generally permissible for a clerical employee to type

documents that are prepared by the Board of Directors, but that same employee may not perform the actual drafting of the documents, such as the preparation of the budget. Clerical employees should not oversee maintenance employees without a CAM license.

Kristen Ploska, Press Secretary for the Department of Business and Professional Regulation advises, "Consumers can verify the licensure of a CAM as well as any disciplinary history by either visiting our web site at www.myfloridalicense.com or by calling the DBPR Call Center at 1-850-487-1395." DBPR also investigates allegations of unlicensed community association management. Recently, the DBPR has taken additional steps to protect the public by enhancing the level of protection against unlicensed individuals, such as creating a toll free number to report unlicensed activity. "If an Association wishes to file a complaint against an unlicensed CAM, they can file the report by calling 1-866-532-1440," added Ploska. However, the decision to file a complaint with DBPR is an important one that should be made carefully. Before an association files a complaint with the

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KENLEY v. INWOOD PROPERTY INVESTMENTS, INC., 931 So. 2d 1053 (Fla. 4th DCA 2006)

By: Michael Oliver, Esq.

In the above case, a child fell from a dock into an open body of water. The father of the child brought suit against the owner of the property for negligence based on the owner's failure to erect safety barriers and warnings around water located on the owner's property.

The Court found that an owner does not have a duty to erect safety barriers and warnings to protect people from inherent dangers associated with open bodies of water. In reaching this conclusion, the Court noted the fact that Florida contains a tremendous number of both natural and artificial bodies of water, and to require land owners to erect barriers and post warnings would be unreasonably burdensome. The Court held that a property owner does, however, owe a duty of care to construct a barrier and post warning signs around a body of water that contains an unusual element of danger that does not normally exist.

The Court concluded in this case that a parent's obligation to protect their children is paramount to requiring the property owner to erect safety barriers and post warning signs. It is important to note that this finding does not affect the requirement that an owner of an open body of water must follow all applicable laws and regulations. Further, this ruling does not alter the requirement that swimming pools must have an adequate barrier.

COMMUNITY MANAGER *cont.*

DBPR, it is recommended that you consult with a community association attorney to discuss the facts of your situation and any potential liabilities to the association.

The employment of an unlicensed individual can have consequences for some associations. Under certain situations, a condominium association may be vulnerable to an enforcement action by DBPR, if the board of directors employs an unlicensed manager and the manager is required to have a CAM license by law. The consequences of an enforcement action by DBPR can include monetary fines and other penalties.

Most CAMs are professionals who work hard each day to assist the board of directors and improve the quality of life in the community. As in all other professions there are unfortunately, a small number of CAMs who are unscrupulous or engage in questionable business practices. Associations that are considering hiring a CAM should have a community association lawyer review any proposed employment agreement to advise the association of the advantages and perils of the contract. In some cases, CAMs will require associations to sign away important rights or agree to terms that can be costly to the Association. Unfortunately, this article cannot provide an exhaustive list of contractual provisions that a unit owner controlled association should be concerned with before signing a contract. However, reviewing a CAM's licensure history is an important first step in deciding on a manager for your community.

EDLUND v SEAGULL TOWNHOMES CONDOMINIUM ASSOCIATION INC., 928 So. 2d 405 (Fla. 3rd DCA, 2006)

By: Thomas Deyo, Esq.

In this case, the Association's Declaration of Condominium contained specific provisions regarding unit sales. If an owner wanted to sell a unit, the Association had the option to purchase it on the same conditions the owner offered it to a third person. The Declaration required an owner to deliver written notice to the Board containing the terms of the offer, and the Board would then either consent to the transaction or designate in writing that the Association, or some other person, was willing to purchase the unit on the same terms. Any such designee would then be required to make a binding offer to buy the unit. At that point, the unit owner could either accept the offer or withdraw and/or reject the offer specified in the owner's notice to the Board.

Mr. Edlund purchased a unit in 1993. In 2001, he conveyed his interests in the unit to his parents via a quitclaim deed. Mr. Edlund failed to notify the Board of the proposed transfer and never received approval. Less than a year later, the Association advised Mr. Edlund that he was in violation of the Condominium Documents by failing to notify it of the transfer, and the Association sued Mr. Edlund and his parents. Shortly thereafter, Mr. Edlund's parents re-conveyed the property to him. At that point, the Association acknowledged the first transfer from Mr. Edlund to his parents, and amended its complaint to allege that the re-conveyance was null and void because it was not approved by the Association. Additionally, the Association pursued an action for specific performance to enforce its right of first refusal to purchase the unit.

The trial court entered summary judgment in favor of the Association finding that the initial transfer from Mr. Edlund to his parents had been approved by the Association (which made his parents the owners of the unit), and that the parents' re-conveyance to Mr. Edlund was null and void because it had not been approved by the Association. The trial court also concluded that the Association was entitled to specific performance of the portion of the Declaration allowing the Association a right of first refusal prior to the unit being sold. Since the re-conveyance to Mr. Edlund was for only ten dollars, the parents were ordered to sell the unit to the Association for fair market value to be determined by appraisal.

The decision of the trial court was appealed, and the appellate court found that there was no error in the trial court's conclusions that the initial transfer of the unit from Mr. Edlund to his parents was approved by the Association, and that the parents' attempt to re-convey the unit to Mr. Edlund was a nullity. However, the appellate court did not agree that the Condominium Documents could be enforced by requiring the parents to sell the unit to the Association.

The appellate court stated that courts have no authority to make new or different contracts for parties and may only compel performance of a contract in the precise terms agreed upon by the parties. In this case, the Declaration clearly and unambiguously stated that where the Association opts to exercise its right of first refusal to purchase a unit, the owner may still withdraw the decision to sell. Because of this, the trial court could not order the parents to sell the unit to the Association, rather the trial court could only allow the Association the opportunity to exercise its option to purchase along with the parents' option to withdraw their decision to sell. Therefore, the portion of the judgment requiring the parents to sell the unit to the Association for fair market value was reversed.

NO HARM. . . BUT STILL A FOUL!!!

By: David G. Muller, Esq.

MELVIN S. HOBBS AND SUZANNE HOBBS V. CHARLES WEINKAUF, ROBERT KRUEGER, RONALD THOMPSON, EUGENE COX, AND GRENELEFE ASSOCIATION OF CONDOMINIUM OWNERS NO. 1, INC.

2006 WL 2457204 (Fla.App. 2 Dist.), 31 Fla. L. Weekly D2242

Grenelefe Association of Condominium Owners No. 1, Inc. ("Grenelefe") and their board of directors were sued by Melvin and Suzanne Hobbs, the trustees of the Hobbs Revocable Trust. The Hobbs Revocable Trust held an ownership interest in a unit within Grenelefe. The primary issue in this suit involved the requirements of Section 718.111(12)(a)(11)(b), Florida Statutes, and Grenelefe's accounting records. Section 718.111(12), Florida Statutes sets forth the requirements concerning the maintenance of the official records of a condominium association. Among the required records are: "A current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due." Here, the Hobbs sought injunctive relief pursuant to Section 718.303, Florida Statutes, alleging that Grenelefe's accounting records were lacking.

During the nonjury trial, the evidence indicated that Grenelefe did not maintain an individual account for each unit. Instead, Grenelefe maintained a summary for all units owned by an individual owner. As such, if an owner owned multiple units, only one statement combining all of the owner's units was maintained.

After reviewing the evidence presented by both sides at the nonjury trial, the trial court granted an involuntary dismissal of the Hobbs' claim that Section 718.111(12), Florida Statutes, had been violated by Grenelefe. On appeal, the appellate court overturned the trial court's ruling on this issue. The appellate court held that Grenelefe had violated the plain language of the statute which requires that account information be maintained "for each unit." The appellate court concluded that the statutory requirements are designed to ensure that condominium associations maintain readily understood and accessible accounting records with respect to individual condominium units.

During the appellate proceedings, Grenelefe attempted to argue that the trial court's ruling on this issue should be upheld because "no harm occurred as a result of how [the accounting records] were kept." The appellate court rejected this argument stating that a violation of Chapter 718, Florida Statutes was, in and of itself, a harm for which Section 718.303, Florida Statutes, authorized injunctive relief. The appellate court determined that the statute required no additional showing of harm.

It is important to note that if an owner obtains a court order requiring an association to maintain or create a record, the owner may be entitled to attorney fees, even if the owner suffered no actual harm from the association's failure to create the record. It is also important to note that the appellate court in this case did not rule that an owner is entitled to an award of attorney fees if an association does not have every record required by statute in its possession. As is always the case when an owner (or the association) requests a court order requiring a certain action or prohibiting a certain action (known as an injunction) the court has discretion to consider various factors and decide whether or not it is fair or equitable to enter the order considering the particular facts or circumstances. However, this case demonstrates the importance of maintaining all of the records required by the statutes because an owner can file a lawsuit alleging nothing more than that a particular required record is not in the association's possession, and win unless the Association has a good reason as to why a particular record is not in its possession. Therefore, if an owner requests a record that the statutes require the association maintain, but for whatever reason, the record is not in the association's possession, the association should immediately contact its attorney, and allow the attorney to decide what the appropriate response should be.

THE TAXABILTY OF HURRICANE INSURANCE

By: Andrea Darling de Cortés, Esq.

THE TAXABILITY OF HURRICANE-RELATED INSURANCE PROCEEDS: MY HOME IS STILL COVERED IN BLUE TARP; WHAT DO YOU MEAN I HAVE TO PAY TAX?

Last year, many of our homes were hit by Hurricanes Katrina, Rita and Wilma, and we suffered financial losses as a result. Want more bad news? If you received insurance proceeds in excess of the amount needed to repair the damage to your home, those excess proceeds may be taxable income to you. There are no windfalls from the Internal Revenue Service, my friends.

Calculate Your Gain or Loss

The first step in determining the tax impact to you is to calculate whether you have a gain or loss as a result of the casualty:

(1) Take your basis in the property prior to the casualty (this is generally the amount you paid for the property plus the amount spent on improvements to the property);

(2) Determine the decrease in the fair market value ("FMV") of the property as a result of the casualty. On July 10, 2006, the IRS issued Revenue Procedure 2006-32 providing safe harbor methods for determining the decrease in value of personal use residential property and personal belongings as a result of Hurricanes Katrina, Rita and Wilma.

(3) Take the smaller of (1) and (2) above and subtract any insurance or other reimbursement received or expected to be received. A positive result is a loss and a negative result is a gain.

You Have a Gain

If your reimbursement is more than your basis or decreased FMV of your property (whichever is lower), you have a gain. So, now what? Well, the gain may be excludable in certain limited circumstances, you may be able to postpone the gain until a later date or you may just have to pay it.

Exclude the Gain. If your principal residence was destroyed due to a hurricane or other casualty, you can exclude up to $250,000 of the gain as if you sold your residence ($500,000 if the home was jointly owned).

Postpone the Gain. If you don't qualify for the exclusion (i.e., amount of gain exceeds exclusion amount or home was not completely destroyed), you still may be able to postpone the gain. If your home was destroyed and you received reimbursement in the form of similar property, you do not have to report the gain. You simply take a carry over basis in the replacement property. However, if you received reimbursement in the form of cash or dissimilar property (i.e., insurance proceeds) you must report and pay tax on the gain unless you purchase similar property within a specified replacement period. The replacement period for damaged property is two (2) years after the close of the tax year in which any part of the gain was realized. The replacement period is extended to four (4) years for property damaged in a Presidentially declared disaster area. The replacement period for victims of Katrina has been extended to five (5) years.

Pay the Gain. If you are unable to qualify for exclusion or postponement of gain, you are required to report your gain in the year you received the reimbursement.

You Have a Loss

If your reimbursement is less than the lower of your basis or decreased FMV of your property, you have a loss.

Limitations on Losses. The deduction for casualty losses resulting from property damage is generally limited to what is known as the $100 and 10% rules.

The $100 rule goes like this: Calculate your loss. Reduce your loss by $100. For instance, let's say your home was damaged in a storm and you calculated your loss to be $20,000. Your insurance company sent you a check for $10,000 to repair the damage. Your loss after reimbursement is $10,000 less $100. Your loss before applying the 10% rule would be $9,900.

The 10% rule goes like this: Once you have calculated your loss less reimbursement, you further reduce that amount by 10% of your adjusted gross income. Let's say your adjusted gross income is $80,000. Following on the prior example, you would reduce your loss by 10% of your adjusted gross income, which is $8,000. Consequently, the loss you would be able to deduct would be $1,900 ($9,900-$8,000).

You do not have to apply either the $100 or 10% rule if your casualty occurred in a Presidentially declared disaster area. If the casualty in our example occurred in an area hit by Hurricane Katrina, for example, the loss you would be able to deduct would be $10,000 (total loss less reimbursement).

When to Deduct Your Loss. Generally, you may deduct your loss only in the tax year in which the casualty occurred. If, however, your loss resulted from a casualty occurring in a Presidentially declared disaster area, you have the option of either deducting that loss on your current year return or amending your prior year return and taking the deduction on that prior year return.

Disclaimer. This document is intended for informational purposes only and does not constitute legal advice. If you have any questions about the article or would like to discuss a particular situation pertaining to domestic or international taxation, please contact Andrea Darling de Cortés at Becker & Poliakoff, P.A.

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ALTERNATIVE DISPUTE RESOLUTION METHODS

DESIRABLE - - BUT, AT WHAT COST TO A HOMEOWNERS' ASSOCIATION?

By: John P. Townsend, Esq.

The numbers tell the story – mediation works. Statistics supporting mediation programs implemented throughout the various dispute resolution forums in the State of Florida are almost universally available. Without fail, parties receiving their introductory comments from their mediator will be told how successful mediation has been in his or her experience.

If, in fact, the success of mediation is generally undeniable, how can it be that one might assail an attempt to implement the process as being an impediment to an expedient and less expensive means of resolving disputes?

Florida's courts are quite prone to remind litigants and their attorneys of their duties to avoid delay and expense associated with being unnecessarily litigious and politicians will not miss an opportunity to take their shots at the system and its participants. While such criticism is, unfortunately, too often deservedly given, it may be that our judiciary and its correlative branches of government also substantially share the responsibility for increased costs of litigation, for the flood of paperwork which has clogged the court system in this state, and for the substantial delays in resolution of disputes.

Consider the 1991 review and admonition given by the Second District Court of Appeal in Wrona v. Wrona, 592 So.2d 694 (Fla. 2nd DCA 1991), with regard to the expense of divorce litigation in Florida. Addressing the issue in his opinion, Judge Altenbernd said: "We are convinced that both the marital bench and bar are strongly committed to an efficient and effective system of divorce." Id. at 697. Four years after Judge Altenbernd's assessment of the commitment of the "bench and bar", the Florida Supreme Court adopted a complete new set of rules of procedure for family law cases which had the effect of almost doubling the physical size of Thomson West's "Florida Rules of Court". In addition to the fact that just the forms provided with the Florida's Family Law Rules of Procedure now comprise approximately 450 pages of the rule book, there is a "mandatory disclosure" requirement in rule 12.285 which is applicable in virtually every divorce case and may only be waived by agreement of the parties or by court order. Where a relatively simple divorce case may have gone to trial twenty five years ago with each attorney having his or her entire file in one file folder, the same case today may result in one or more "banker's boxes" of documentation being carted into the courtroom – generated primarily (and too often, needlessly) as a result of the mandatory disclosure rule and the additional paperwork now required by the rules of procedure.

Bearing the onus for burgeoning paperwork and delay in the construction defect litigation field, our legislature and governor in 2003 adopted chapter 558, Florida Statutes, derisively known as the "Contractors' Protection Act", adding to the level of paperwork and delay to be incurred by any "claimant" wishing to pursue a construction defect claim against a contractor, subcontractor, supplier, or design professional, a presuit notice requirement akin to that previously adopted for the protection

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ALTERNATIVE *cont.*

of medical professionals in chapter 766 of the Florida Statutes. While the relative merits of each of these statutory presuit provisions may be debated, it is undisputable that they increase the expense, paperwork, and delay to the litigants.

In 2004 the Florida legislature took aim on disputes involving homeowners' associations with its altruistic goal of reducing court dockets and ". . . offering a more efficient, cost-effective option to litigation." By amendment to section 720.311, Florida Statutes, homeowners' associations were required to engage in presuit mediation with regard to "[d]isputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association . . .", (section 720.311(2)(a), Florida Statutes).

The basic tenet of mediation is that an impartial, unbiased, neutral third person, properly trained and skilled, may have the ability to serve as a catalyst to facilitate an agreement between or among two or more parties through the exercise of reason and common sense coupled with a thorough assessment of the various risks involved with the uncertainties of litigation. In the context of a dispute with a homeowner who refuses to remove a dump truck load of trash from his yard, however, what is there that gives any indication that the offending respondent is going to: (1) even participate in the mediation process; or (2) exercise any degree of reason or common sense if he does participate in the process?

Specifically, with regard to one homeowners' association, requests were provided to its attorney to send demand letters to owners who were in violation of the covenants (for matters as diverse as having improper mail boxes, to improper parking of vehicles, boats, trailers and recreational vehicles, to failure to properly maintain yards, to improper fences, etc.) over a period of 11 months. In response to numerous demand letters, 56 owners brought their properties into compliance and no further action was required. Petitions for mediation were filed with the State of Florida, DBPR, Division of Florida Land Sales, Condominiums and Mobile Homes, with regard to 23 owners. Written responses were filed by 7 of the owners and impasse orders

were issued by the Department with regard to the non-responding owners. Of the cases proceeding to mediation, 2 have resulted in settlement and the remainder have resulted in impasse or remain pending. Of the 23 cases for which mediation petitions were filed, 12 are now in litigation. The average elapsed time from filing of the petition for mediation to the date of a mediation session being scheduled by the Department-assigned mediator for those cases has been 5 months. The average cost to the association for fees and costs for each case proceeding to a mediation session has been approximately $1,200.00. The average cost to the association for fees and costs for each case for which a petition for mediation was filed and an impasse order entered without necessity for a mediation session, or in the case of impasse due to no response being served, has been approximately $800.00.

Obviously, the historical beneficial attributes of the mediation process have not been of significant impact with regard to this association. To the contrary, the association has been required to suffer substantial additional delay and expense in its efforts to seek basic compliance by its owners with the governing covenants. It is suspected that the recent history with regard to this association is not unique.

The mandatory presuit mediation requirement of section 720.311 would have been slightly amended by House Bill 391, adopted by unanimous votes of both houses of the 2006 Florida legislature. Governor Bush, on June 27, 2006,

ALTERNATIVE *cont.*

vetoed the bill. Although it would have deleted the requirement for filing a petition for mediation as a precondition to filing a lawsuit to enforce covenants in every case, the amendment to 720.311 would have still required that "an aggrieved party" serve on the "responding party" a "Statutory Offer to Participate in Presuit Mediation", using a several page form specifically prescribed by the statute. The amended statute would have allowed the "responding party" a period of twenty days to respond in writing to the "statutory offer", after which time a failure to respond operates as an impasse. Absence of a timely response from the "responding party" would have been deemed an impasse, allowing the "aggrieved party" to proceed with litigation. If the "responding party" accepted the statutorily required offer, mediation would have been required. However, the mediation would have proceeded through a mediator privately selected by the parties statute, rather than through one appointed by the Division.

There is no doubt that mediation, in most of its applications, is a beneficial alternative dispute resolution...

House Bill 391, which also would have covered a number of other matters, would have served to reduce some of the additional delay and cost foisted on homeowners' associations in covenant enforcement matters by the current provisions of section 720.311. While associations, under the amended statute, would avoid having to file a petition for mediation in every case, thereby avoiding the $200.00 filing fee and the attorney's fees associated with preparation and filing of the petition, the statutory offer to mediate would have still been required. The speculation of this author, however, is that those owners accepting the mediation offer would, more likely than not, be the ones who simply want another forum to air their positions, not a format for possible resolution of the issues.

There is no doubt that mediation, in most of its applications, is a beneficial alternative dispute resolution method. Experience with its use as a "presuit requirement" in efforts to enforce subdivision covenants, as indicated by the example of the association given above, does not support the proposition that mediation is universally successful. To the extent a homeowners' association must endure several additional months of delay in seeking a resolution of its covenant enforcement issues, as well as thousands of dollars in additional fees and costs, a mandatory presuit mediation requirement does not appear to be a feasible approach to expediting the process or to reducing costs to the parties.

It is regrettable that House Bill 391 was vetoed by Governor Bush, especially in light of the indication that his veto may have been based on an erroneous assumption that the language in the bill would also have changed the alternative dispute resolution provisions for condominiums under chapter 718, Florida Statutes. The drafter of the provisions in House Bill 391 related to homeowner association mediation provisions, and the Florida legislature for adopting the bill unanimously, are to be commended for their efforts.

FREEDOM TO DISPLAY THE AMERICAN FLAG ACT OF 2005

By: Stuart J. Zoberg, Esq.

On July 24, 2006, President Bush signed H.R. 42, the Freedom to Display the American Flag Act of 2005. The Act requires community associations to permit members to display the U.S. Flag on a member's lot, in a member's home or unit, or on any other area where the member has exclusive use or possession (i.e. limited common elements). Although Federal law does not prohibit associations from passing rules "pertaining to the time, place, or manner of displaying the flag of the United States," the rule must be "necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association."

Florida's Condominium Act and Homeowners' Association Act also permit the flying of U.S. Flags (the Homeowners' Association Act also requires homeowners' associations to permit the flying of Florida flags). Florida law specifically states that the right to fly a U.S. flag is "regardless of any declaration rules or requirements dealing with flags or decorations" but permits the Association to require the flags be "portable, removable," and no larger than four and a half by six feet.

Florida and Federal law also both require the U.S. flag to be flown in a respectful manner. Chapter 1 of Title 4 of the United States Code provides that the U.S. Flag may only be flown from sunrise to sunset, unless properly illuminated during the hours of darkness, the U.S. flag may not be displayed on days when the weather is inclement, unless an all weather flag is used, may not be displayed with the union down, may never touch anything beneath it, such as the ground, may not have any marks, insignias, designs or other pictures on it, may not be used for advertising purposes, and must be properly destroyed when the flag is "no longer a fitting emblem for display."

Although the Florida and Federal laws have the same general purpose, they are not identically worded and there are questions on whether Florida community associations are bound by Florida law, Federal law, or the strictest aspects of both. This article is only an abbreviated discussion on what is undoubtedly a complicated issue. As a practical matter, if your community association wishes to regulate the flying of U.S. flags, it should do so in compliance with both Florida and Federal law to avoid costly and unpopular disputes with homeowners. If your community association does not regulate flags at all, an owner could probably fly a U.S. flag of any size whatsoever, and regardless of whether it is portable or removable. If your community association desires to regulate flags, you should contact your association attorney, because if there are rules in place that violate Florida or Federal law, it is unlikely that the Association will be able to enforce them, at least not without a costly legal battle.

For all the latest information impacting common interest ownership communities, please continue to log on to the CALL website at www.callbp.com.

Defacto Board Authority

By: Yeline Goin, Esq.

Paradise Lakes RV Park Condominium Association, Inc. v. Qualls, Arbitration Case No. 02-4832, Summary Final Order (July 31, 2002).

This case was decided by the arbitration section of the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division"). The Arbitrator found that there were no disputed issues of material fact and entered a Summary Final Order.

On April 29, 2002, the condominium Association (the Petitioner) filed a Petition for Arbitration. The units in the condominium consisted of individual plots of land upon which unit owners placed mobile homes, and the petition alleged that a unit owner (the Respondent) was keeping a dog in his unit, in violation of the Declaration of Condominium for the Association. The petition further alleged that the Respondent had made material alterations to the common elements. The alteration involved the installation of several bushes, trees, rocks and other landscaping by the Respondent which encroached approximately seven feet onto the common elements (a roadway).

The Respondent filed an answer to the petition acknowledging that he was keeping a dog in his home and that he had made the alleged changes to the common elements. As defenses, the Respondent argued that the Board of the Association had not complied with the election requirements in the statute, since it had not held an election since January 2001. The Respondent further argued that based upon the failure to hold an election, the Board was not legitimate, its rulings were invalid, and it had no authority to bring the matter to arbitration. The Respondent also alleged that since the condominium units consisted of individual lots and each lot is owned in fee simple, the condominium documents did not apply. Regarding the changes made to the common elements, the Respondent alleged that the area of the common elements encroached upon by the landscaping had never been used as a road and that the Respondent was given permission by the developer to landscape the area in question.

Regarding the Respondent's first defense (that the Board did not have the authority to bring the action against him, because the Board of Directors was not lawfully constituted), the Arbitrator held that the claim was without merit. Specifically, the Arbitrator stated as follows:

Individuals who are elected or appointed to an office notwithstanding his or her disqualification to hold office will be regarded as a de facto officer if they assume the duty of such office. See, 18B Am. Jur. 2D Corporations § 1416. The de facto doctrine is one of those legal makeshifts by which unlawful or irregular corporate and public acts are legalized for certain purposes due to necessity. 18B Am. Jur.2D Corporations § 1417. A de facto director may continue to act for and bind a corporation until such time as title to such office is judged insufficient. 18B Am. Jur. 2D Corporations § 1418; See, The Little Mermaid Condominium Association, Inc. v. Danny A. Hogan, Arb. Case No. 98-5449, Summary Final Order (May 7, 1999) (where the Arbitrator held that even assuming that an election by which the board came into authority was conducted illegally, and that those on the board were not qualified or entitled to occupy a board seat, the board is nonetheless entitled to exercise the authority of the board until such time as the election is set aside by a duly authorized court or arbitrator). Accordingly, the Respondent's challenge to the authority of the Board to bring this action is rejected.

The Arbitrator also rejected the Respondent's argument that the terms of the Declaration did not apply to him. The Arbitrator held that given that the units comprising the Paradise Lakes RV Park Condominium consists of plots of land, the restrictions on pets clearly applied and the only exception in the Declaration was for those cats that are kept inside the dwelling that is placed on the unit. Regarding the material alterations made by the owner, the Arbitrator held that although the Declaration did not include an express provision prohibiting a unit owner from modifying the common elements, Section 718.113, Florida Statutes applied and prohibited the material alterations unless a vote of the owners is obtained. The Arbitrator rejected the Respondent's assertion that the common elements had never been used as a roadway and stated that the use or non-use of a common element does not confer a right to a unit owner to alter or modify the common elements.

The Arbitrator ordered the Respondent to remove the dog within 30 days of the date of the order and to restore the common elements to their original condition.

Age restrictive rules held unenforceable

By: Lee H. Burg, Esq.

The United States of America vs. Plaza Mobile Estates, et al.273 F.Supp 2nd 1084

In this case the Civil Rights Division of the U.S. Department of Justice brought an action under the Fair Housing Act (FHA) seeking a declaration that the defendants' rules and regulations restricted or denied access to common facilities based upon age. The United States District Court held that:

1. The Mobile Home Park age restrictive rules supported a prima facia case of familial status discrimination under the above-referenced Act;
2. Preambles to the Park rules identifying the Park as being for adults established illegal steering;
3. Park absolute prohibitions violated the Act;
4. Park adult supervision requirements violated the Act;
5. Park rules hours of access restrictions violated the Act.

The Court granted a summary judgment in this case which pursuant to the Federal Rules of Civil Procedure shall be rendered only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The Court granted a summary judgment in this case which pursuant to the Federal Rules of Civil Procedure shall be rendered only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The age restrictive rules in question provided that:

a. Children under a certain age should not be allowed to ride bicycles on the Park streets without adult accompaniment;

b. Children under the age of eight (8) years old must be confined to a play area;

c. Children shall not be allowed to play on Park streets or common areas;

d. Residents under the age of 18 shall not be permitted to use the clubhouse without the accompaniment of an adult;

e. Residents under the age of 18 must be accompanied by an adult to use any recreation facilities;

f. Children under the age of 18 may not use the swimming pool during certain hours;

g. Children under the age of 18 are not permitted to use the saunas or Jacuzzis;

In 1968 Congress promulgated the Fair Housing Act, to prohibit discrimination under the basis of race, color, religion or national origin. In 1988 Congress enacted the Fair Housing Amendments Act amending the Fair Housing Act to prohibit "familial status discrimination" which is defined as discrimination against one or more individuals who have not yet attained the age of 18 years being domiciled with a parent or other person having legal custody. Pursuant to said Act it is unlawful to refuse to sell or rent a dwelling to any person because of familial status, to discriminate against any person in the terms of sale or rental of a dwelling because of familial status or to publish any statement with respect to the sale or rental of a dwelling that indicates any preference based on familial status. Moreover, it is unlawful to coerce, intimidate, threaten or interfere with any person in this regard or to steer a person away from a dwelling. "Steering" is not an outright refusal to rent or sell to a person within a class protected by the Statute, rather it consists of efforts to deprive a protected home seeker of housing opportunities.

The defendant in this case did not qualify for an exemption from the Act as housing for older persons. The Court held that the age restrictive rules created a prima facia case for discrimination as it was found that they treat children of families differently than adults only households. Although the health and safety of the children and other residents of the community are legitimate concerns these prohibitions, supervision requirements, and hours of access restrictions were not the least restrictive means to achieving such ends.

The Court held the Park to be in violation of the FHA notwithstanding a previously HUD- approved conciliation agreement wherein HUD- approved of the rules and regulations. The reasoning was that it is the Court and not HUD that is the final arbiter in determining whether rules are in compliance with the Act.

BECKER & POLIAKOFF COMMUNITY UP-DATE

Legal and Business Strategists

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Volumes IV-V, 2006

Donna D. Berger, Esq. *Editor*

SUMMARY OF THE 2006 LEGISLATIVE SESSION

By: Donna D. Berger, Esq.

The 2006 Regular Session of the Legislature produced only a few changes that will directly impact common interest ownership communities and several others that indirectly impact residents and owners in these types of communities. The two community association-based bills (HB 391 and SB 1556) that did pass out of both the House and Senate were both subsequently vetoed by the Governor. We also saw a return of some condominium "reforms" that again called for over-regulation and micromanagement of private residential communities in the form of Representative Garcia's HB 1227. This bill and Senator Siplin's anti-foreclosure bill (SB 586) were met with consternation from community leaders and owners alike and, as a result, were never even placed on a committee agenda.

Owners in all types of common interest ownership communities are more highly regulated by the State than other real property owners. As such, community association members must remain vigilant about the types of laws that are passed in Tallahassee which can and often do impact the manner in which they operate and administer their communities, the costs associated with such operations, and ultimately the value of their homes. It is possible for owners to become part of the process year-round by meeting with their legislators during the summer and early Fall when these individuals are back in their district offices and eager to meet with their constituents. Community members should make appointments to introduce themselves, their community and their particular concerns be it high-rise safety regulations, MRTA reinstatement for homeowners' associations, density issues, etc. Once the session starts each March, community members should become informed about the bills that are pending that impact their communities and weighing in at each committee stop for those bills. The information and tools provided on the Community Association Leadership Lobby (CALL) website at allow owners and board members alike to log on, read the bills and bill summaries and use the Legislator Connect tool to contact their representatives as well as all members of the committee hearing a particular bill. While there is no doubt it takes persistence and patience to participate in the political process, it is possible to ensure responsive and responsible community association legislation by getting involved.

Let's take a look at the bills that passed, the bills that were defeated, two proposed constitutional amendments regarding homestead exemptions and the two community association bills that were vetoed by Governor Bush.

BILLS THAT PASSED

HB 817 (Telecom Bill): Currently, even if only one unit in a multi-family property wishes to receive communications services from a last resort provider (be it phone service, television service, etc.) that provider must provide service regardless of whether it is profitable for them to do so. This bill modifies existing telecommunications service to multi-family properties so that:

- Telecommunications providers of last resort are not obligated to provide basic local telecommunications service to customers in multi-family properties under certain conditions which are specifically mentioned in the bill which would impair the telecommunications provider's ability to financially "break even".
- In the event that the conditions mentioned in the bill no longer exist, the telecommunications provider of last resort's obligation is reinstated.

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"SUMMARY" *cont.*

SB 24 (Hurricane Preparedness / Sales tax):
This bill creates a sales tax exemption for hurricane supplies. Although this year's exemption window has already passed, the bill creates an exemption window for next year from May 20, 2007 – May 31, 2007. The bill grants exemptions for items such as flashlights, radios, tarps or waterproof sheeting, ground anchors or tie downs, fuel tanks, batteries, non-electric coolers, carbon monoxide detectors, blue ice, portable generators, and storm shutters as long as these items are within the specified price cap for each item. For example, only storm shutters under $300 are exempt while only flashlights that are under $20 are exempt.

SB 1980 (Insurance Bill): SB 1980 was a comprehensive insurance bill consisting of nearly 100 pages. As such, the informational bullet points outlined herein are abbreviated by necessity to include those items of interest to consumers as opposed to insurers.

Funding the 2005 Deficit of Citizens Property Insurance Corporation

- The bill appropriates $715 million from General Revenue to Citizens Property Insurance Corporation ("Citizens") to offset the 2005 deficit, estimated to be about $1.73 billion. This appropriation is expected to reduce an estimated $920 million regular assessment against property insurers to about $205 million, and thereby reduce an estimated average 11 percent premium surcharge to about 2.5 percent for property insurance policyholders in the state (including Citizens policyholders). The bill also requires that the remaining estimated $800 million of the deficit must be amortized and collected from policyholders over a 10-year period.

Hurricane Loss Mitigation

- The bill establishes the Florida Comprehensive Hurricane Damage Mitigation Program within the Department of Financial Services ("DFS").
- Provides for free inspections of single-family homes that are primary residences and multifamily structures containing no more than four units to determine what mitigation measures are needed to reduce hurricane damage
- Provides for 50 percent matching State grants from DFS to encourage those eligible owners to retrofit certain enumerated improvements in order to reduce vulnerability to hurricane damage. There is also a cap on the grant amount. Those that are deemed eligible by a free home inspection are not assured eligibility for the receipt of grant funds.

Insurance Rates: Requirements and Exceptions for Approval by the Office of Insurance Regulation ("OIR")

Effective July 1, 2007, an insurer may increase or decrease rates by up to 5 percent on a statewide average, or 10 percent for any territory, for residential property insurance in those areas that a reasonable degree of competition exists, without being subject to a determination by OIR that the rate is excessive or unfairly discriminatory. This provision may be used by an insurer once in a 12-month period.

- Authorizes the Insurance Consumer Advocate appointed by the CFO to represent the public in insurance rate proceedings before an arbitration panel.

Eligibility for Coverage in Citizens (Non-homestead Property and $1 Million Homes)

•Effective March 1, 2007, non-homestead property is not eligible for coverage in Citizens and is not eligible for renewal unless the property owner provides a sworn affidavit from one or more insurance agents that they have made their best efforts to obtain coverage and that the property has been rejected by at least one authorized insurer and three surplus lines insurers (for all agents combined). Homestead property is defined in the bill.

- Effective July 1, 2008, a personal lines residential structure that has a dwelling replacement cost of $1 million or more, or a single condominium unit that has a combined dwelling and contents replacement cost of $1 million or more, is not eligible for coverage by Citizens. Such dwellings insured by Citizens on June 30, 2008, may continue to be covered until the end of the policy term and may reapply for coverage for up to an additional three years if the property owner provides a sworn affidavit from one or more insurance agents that they have made their best efforts to obtain coverage and that the property has been rejected by at least one authorized insurer and three surplus lines insurers (for all agents combined).

Rates Charged by Citizens

- Provides that Citizens' rate filings for personal lines, wind-only policies (i.e., in the high risk account) must be

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"SUMMARY" *cont.*

approved or disapproved by OIR within 90 days after receipt of the filing, or shall be considered deemed approved.
- Requires use of the public hurricane loss model as the minimum benchmark for determining windstorm rates for Citizens, after the public model has been found to be accurate and reliable by the Florida Commission on Hurricane Loss Projection Methodology.
- Makes the current requirement that Citizens' rates not be competitive with authorized insurers, inapplicable in a county or area for which OIR determines that no authorized insurer is offering coverage.

Other Changes to Citizens
- Requires a 10-day waiting period for new applications, but allows for Citizens to bind coverage during this period under certain circumstances. If an authorized insurer offers coverage during this 10-day period, the applicant is not eligible for coverage in Citizens regardless of whether the insurer appoints the agent who submitted the application. (That is, the "Consumer Choice" law, does not apply during the first 10 days after a new application for coverage has been submitted to Citizens.)
- Requires Citizens to offer policyholders quarterly and semiannual premium payment plans.
- Allows Citizens to adopt policies that provide more restrictive coverage than provided in the voluntary market.
- Requires that coverage on mobile homes built prior to 1994 be limited to actual cash value, rather than replacement cost.

Miscellaneous Provisions
- Requires that an insurer make a claims payment directly to the primary policyholder without requiring an endorsement from a lien holder or mortgage holder, for: a) personal property and contents; b) additional living expenses; and c) other covered items not subject to a security interest recorded in the dual interest provision of the insurance policy.
- Allows insurers to make electronic payment of insurance claims, under certain conditions, without written authorization.
- Clarifies that if a property insurer does not obtain a written rejection from the policyholder for coverage for the additional construction costs of meeting new building codes, commonly called "law and ordinance coverage," the policy is deemed to include such coverage limited to 25 percent of the dwelling limit, not the 50 percent limit that must also be offered. Current law is ambiguous on this point, but the bill conforms to the current interpretation used by OIR.
- Clarifies that the law requiring insurers to offer replacement cost coverage and, if elected, to pay the replacement cost whether or not the policyholder replaces or repairs the damaged property, does not prohibit an insurer from limiting its liability to the lesser of: the cost of repair, the cost to replace, or the limit of liability shown on the policy declarations page.
- Prohibits public adjusters from engaging in conflicts of interest by participating in the repair of damaged property that he adjusted.
- Provides procedures for the cancellation of a property and casualty insurance policy if the policyholder submits a check which is subsequently dishonored by a financial institution.
- The bill provides that an insurance policy can be cancelled from the beginning, or back to the first day of coverage if the insured does not timely cure a dishonored check within 5 days of notice.

SB 264 (Homestead Exemption):
- The bill provides that a transfer of homestead property to additional grantees does not result in the loss of the homestead exemption for the property if the grantor is also one of the grantees.

HB 1089 (Construction Contracting):
- Provides that the statutory condominium warranties given as a matter of law to condominium associations by developers and contractors do not apply where construction begins before the project is designated by the developer as a condominium. This is a significant change in the law providing that statutory condominium warranties will not be given to associations if a project begins as an apartment building and is subsequently converted to condominium while construction is ongoing.
- Lawsuits for construction defects must be filed within four years of completion of construction, except claims for latent defects, which must be filed within four years of discovery and under no circumstances more than ten years after completion of construction.

HB 1139 (Construction Defects):
- Currently, the law only requires alternative dispute

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"SUMMARY" *cont.*

resolution for construction defects arising from the construction of homes. This bill expands the alternative dispute resolution process to include construction defects arising from any real property.

- This bill also requires a claimant serve a statutory notice of claim (found in Section 558.005 of the Florida Statutes) on the contractor, subcontractor, supplier, or designer within a specified time period (at least 60 days before filing a complaint, or 120 days before filing a complaint in an action involving an association representing more than 20 parcels). The bill also requires the contractor, subcontractor, supplier, or designer be given a reasonable opportunity to cure the alleged defects.

SB 7121 (Hurricane Bill):

This bill includes many measures that attempt to remedy the problems with emergency systems exposed by the recent hurricanes. Especially relevant to high-rise and cooperative owners are the following provisions:

- Requires high-rises over 75 feet high which have an elevator to have at least one (1) of those elevators capable of running on a generator. The elevator must be able to operate each day over a 5-day period.
- Requires that building inspectors verify engineering plans for generators by December 31, 2006. Installation of the generator and all related equipment and storage facilities must be completed by December 31, 2007.
- **The association must maintain an Emergency Operations Plan (EOP) detailing operations before, during, and after an emergency. At a minimum, the plan must include: a life-safety plan for evacuation, maintenance of the lighting and electrical supply, and a provision for the health, safety, and welfare of the residents. A log of quarterly inspections must also be kept showing the emergency equipment is in good and working condition.**
- **The bill is not clear as to the effective date of the EOP requirement although given that no later date than July 1, 2006 is specified, the conservative approach is to have these emergency plans prepared and implemented AS SOON AS POSSIBLE. Given that each building is unique in the age of its membership, the number of building occupants, whether the building has storm shutters, and the complexity of existing life-safety systems, we strongly recommend that affected high-rises contact their association attorneys for the development of this very important plan.**

CONSTITUTIONAL AMENDMENTS

HJR 353 (Proposed Constitutional Amendment):

This joint resolution would amend Article VII, Section 6 of the State Constitution, to increase the maximum additional homestead exemption that a county or municipality may grant to low income seniors from $25,000 to $50,000. If the amendment is approved by voters at the next general or special election, the amendment for low-income seniors takes effect on January 1, 2007.

HJR 631 (WWII Veterans Constitutional Amendment):

The measure is a proposed constitutional amendment that would extend to disabled veterans of World War II a discount on the property taxes on their homestead property equal to the percentage of their disability. If the amendment is approved by voters at the next general or special election, the amendment for low-income seniors takes effect on December 7, 2006.

BILLS THAT WERE DEFEATED

SB 586 (Siplin's Anti-foreclosure):

- Would have removed reasonable attorney's fees from the amounts secured by an Association's lien for delinquent maintenance.
- Would have prohibited an association from bringing a lien foreclosure action or an action to recover a money judgment for any unpaid condominium assessments in amounts less than $2,500. The association would NOT be entitled to recover reasonable attorney's fees and costs incurred while trying to collect delinquent assessments.
- Would have prohibited a judge from entering a foreclosure judgment until at least 180 days after the association gives written notice to the unit owner of its intention to foreclose its lien to collect the unpaid assessments. Removes the ability of a court to award attorney's fees and costs as permitted by law to the Association for its collection efforts.

This is the second year in a row that this legislation was introduced and soundly defeated.

HB 1227 (Garcia's Condo Bill):

- Would have required all notices of proposed amendments to a declaration of condominium be sent to unit owners by certified mail, return receipt requested.
- Financial reporting requirements (i.e. to have your financial statements compiled, reviewed or audited) would not have been waived for more than 2 consecutive years.

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"SUMMARY" *cont.*

- If proceeds of the Association's hazard insurance policy (covering items such as windows and doors) were insufficient to pay the estimated costs of reconstruction, assessments would have been made against ALL unit owners to pay for same.
- Guest Disabled Parking-Residents with disabilities would not have been able to park in a disabled guest space unless their assigned parking space was in use illegally.
- When a unit owner filed a written inquiry by certified mail with the Board, the Board would have been required to respond in writing by certified mail, return receipt requested. This amendment also removed the ability of a Board to adopt reasonable rules and regulations regarding the frequency and manner of responding to unit owner inquiries within a 30-day time period.
- A unit owner would not have been able to serve as a director for more than 2 terms or longer than 4 years. A member would not have been able to serve as an officer for more than 1 term. Co-owners of a unit would not have been able to serve on the board during the same fiscal year.
- Would have removed the ability of an association to print the candidate information sheet on both sides of the paper to reduce costs.
- Would have allowed unit owners to petition Board via written request to place an item on the annual meeting agenda at least 90 days prior to the annual meeting.
- Would have provided that in the case of a catastrophic event, the Association may use reserve funds for nonscheduled purposes to mitigate further damage to the units or common elements or to make the condominium accessible for repairs.
- Associations would no longer be able to accelerate assessments for a delinquent owner until a lien has been filed.
- Board would have been required to yearly restate its hurricane shutter specifications at the annual meeting.
- Would have allowed boards to only enter into bulk cable contracts for BASIC SERVICE and nothing else. Majority of the unit owners can only cancel bulk cable contracts for basic service.
- Would have prohibited a lien from being filed on a condominium parcel until 30 days after the date a notice of intent to file a lien had been SERVED on the owner by certified mail or by personal service of process.
- Would have prohibited the association from entering into service contracts for terms in excess of three years and prohibits them from entering into contracts with automatic renewals.
- A contract for reconstruction or repair of the property that exceeds 10% of the total annual budget including reserves would have required the approval of an attorney hired by the Association.
- Would have required the board to notify anyone who is subject to an enforcement action by certified mail and the violator shall have 30 DAYS in which to respond in writing (except in the case of imminent danger to person or property). If no response is provided and the violation continues or is repeated, the Association may then proceed with enforcement.
- Would have given the Ombudsman the authority to operate independently of the DBPR and without the approval or control of the Department. The Department would have been required to render administrative support to the Ombudsman in terms of budget, personnel, office space, etc.
- Would have expanded the Ombudsman's powers to include the ability to "command" meetings between the board and unit owners and to make recommendations to the Division to pursue enforcement action in circuit court on behalf of a class of unit owners, LESSEES or PURCHASERS for declaratory relief, injunctive relief, or restitution against any developer, association officer or member of the Board or its assignees or agents when there is reasonable cause to believe misconduct has occurred. No one would have been able to question the Ombudsman's appointment of an election monitor or interfere with same.

BILLS THAT WERE VETOED

HB 391 (HOAs): At CALL's insistence, the bill underwent substantial positive changes from its inception and was passed unanimously by both the House and Senate. It was, however, vetoed by Governor Bush. Some of the important provisions of this bill included:

- Allowed high-rises until 2025 to complete common area sprinkler system retrofitting.
- Authorized a homeowner's association to use the procedures set forth in Chapters 720.403-720.407 to revive lapsed covenants.
- Prohibited local governments from establishing limitations on a unit owner's or association's ability to permit guests to use or access their units or common elements to access a

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"SUMMARY" *cont.*

public beach or private beach adjacent to the condominium.
- Allowed associations to pass changes to declarations or bylaws without lender consent where the proposed amendment does not affect either the lien security or priority.
- Required committee meetings to be open to all members when a final decision will be made regarding the expenditure of association funds, or when architectural decisions with respect to a specific parcel of residential property are approved or disapproved.
- Required committee meetings or other similar bodies to be open to all members when a final decision will be made regarding the expenditure of association funds, or when architectural decisions with respect to a specific parcel of residential property are approved or disapproved. Also allows an association to charge a fee in preparing documents as well as recovering attorney's fees.
- Created a passive reserve for HOAs. Upon a vote of the membership, a reserve may be created.
- Allowed more time to complete financial reporting and mailings
- Discouraged frivolous lawsuits against the association when the association acts reasonably.
- Required a developer to have the association's financial records audited by an independent certified public accountant from the date of incorporation through each fiscal year thereafter.
- Mediation fix: Made the qualifications of mediators consistent with other fields.
- Included a statutory, easy-to-use form notice for mediation.

SB 1556 (Termination of Condominiums):

- The bill required a plan of termination to be prepared and presented to the unit owners in the condominium for approval before termination can occur. The plan must have provide for the valuation of the individual units, the common elements, and the other assets of the condominium based upon their respective fair market values. The plan also further set out the share that each unit owner will receive if the plan of termination is adopted, and if the property is to be sold, it must have stated the minimum sale terms.
- The bill provided for quarterly reports prepared by the association, receiver, or termination trustee following the approval of the termination plan.
- Provided certain notice requirements to be followed before a vote for termination may occur.
- The value of each unit would have been determined based upon the fair market value of the units immediately before the termination by one or more independent appraisers or based upon he values maintained by the county property appraiser.
- The consent of mortgagees would not have been required for the adoption of a plan of termination under the provisions of the bill unless the proceeds under the plan are less than the full satisfaction of the mortgage lien encumbering the unit.
- The bill provided three methods for the termination of condominium ownership:
    - Economic Waste or Impossibility:
    - By Court Approval
    - Optional Method requiring a supermajority of voting interests.

The Governor has charged the Department of Business and Professional Regulation with holding townhall meetings around the State over the next few months to gather public input on the topic of condominium termination.

The last few legislative sessions have seen a rash of community association bills, some good and a lot ill-advised. There is every indication that this trend will continue especially since Governor Bush has indicated that he'd like to see a "move toward establishing a comprehensive common interest realty law" which may indicate bringing homeowner's associations, condominiums, cooperatives, timeshares, and mobile home communities all together under one statutory roof. Whether or not that is an idea that is appealing to members in these very different types of communities is debatable. However, it is more important than ever for common interest ownership members to make their voices heard on these issues early in the process before they become law. If you have any questions about the Community Association Leadership Lobby (CALL), please contact me at 1-800-432-7712 or via email at dberger@becker-poliakoff.com.

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LAMINATED GLASS/WINDOW FILM

DOES NOT NEGATE REQUIREMENT FOR ADOPTION OF SHUTTER SPECIFICATIONS OR PROVIDE AUTHORITY FOR ASSOCIATION TO PROHIBIT INSTALLATION OF HURRICANE SHUTTERS BY OWNERS

In re Petition for Declaratory Statement Watergarden Condominium Association, Inc.
State of Florida, Department of Business and Professional Regulation Division of Florida Land Sales, Condominiums, and Mobile Homes
Docket No. 2005060455

Section 718.113(5), Florida Statutes, provides in pertinent part:

Each board of administration shall adopt hurricane shutter specifications for each building within each condominium operated by the association which shall include color, style, and other factors deemed relevant by the board. . . . However, where laminated glass or window film architecturally designed to function as hurricane protection which complies with the applicable building code has been installed, the board may not install hurricane shutters. . . .

Wintergarden Condominium Association, Inc. ("Wintergarden") was constructed with "impact resistant glass" windows. Wintergarden's declaration contained a provision which called for the association to establish hurricane shutter specifications. The association's attorney filed a petition for declaratory statement requesting an opinion as to whether, since it had "impact resistant glass", Wintergarden could prohibit unit owners from installing hurricane shutters or window film. In a clarification letter, Wintergarden stated that it intended to amend its declaration to delete the provision for shutter specifications.

Answering Wintergarden's clarified question in the negative, the Division referred to the legislature's use of the mandatory word "shall" in the first sentence of section 718.113(5), and stated that the clear intent of the statute is to require that each condominium association's board of administration adopt hurricane shutter specifications.

According to the Division, the latter provision in the statute, which states that the ". . . board may not install hurricane shutters . . ." where laminated glass or window film has been installed in compliance with the applicable building

code, does not negate the mandatory obligation imposed on the association to adopt hurricane shutter specifications. Rather, as interpreted by the Division, this provision prohibits the association from undertaking the installation of hurricane shutters where laminated glass or window film has been previously installed. Wintergarden's board, according to the Division, is statutorily required to adopt hurricane shutter specifications, notwithstanding the existence of impact hurricane resistant glass in its units, and its unit owners cannot be prohibited from installing hurricane shutters which comply with specifications adopted by the association's board.

Still Waiting To Settle Your Insurance Claim?

The devastating effects of the 2004 and 2005 Hurricanes are still a sad reality for many homeowners throughout the state. Not only are residents still displaced, in many instances the Association is simply without the funds necessary to attend to crucial reconstruction efforts. While SBA loans, private financing and special assessments can provide funds on an expedited basis, only a fraction of commercial multi-family policy owners have been able to satisfactorily resolve insurance claims. The inability to obtain insurance proceeds creates additional pressure for Boards of Directors that are charged with the responsibility of repair and reconstruction of the community property.

Hopefully your community has already properly filed the appropriate insurance claims and submitted the Proof of Loss forms to the insurers. Inspections should already be complete and adjustment of the claim appropriate. However, many property owners are finding that the insurance companies are not willing to engage in a meaningful discussion regarding the extent of damages sustained and are simply unresponsive to requests for information, monetary advances or resolution of the claim itself. In other cases the insurers are requiring production of historical documents, statements under oath, and other types of "discovery" designed to obtain a justification to deny the claim or reduce the losses covered by the policy.

Fortunately, the Department of Financial Services (DFS) has created a hurricane related condominium mediation program which provides a no cost forum in which to discuss your claim face-to-face with a representative of the Association's insurance carrier. By law the insurance company is responsible for the costs of the administration of the program, as well as the mediator's fee. However, being prepared for the mediation conference is crucial to success of the mediation session. Preparation for the conference should include, but not be limited to, the following:

- Having a copy of the relevant insurance policy and all correspondence with the company (or agents/adjusters) regarding the claim;
- Having a detailed report prepared by a professional in the field regarding the losses sustained as a result of the storm. The use of a design professional (engineer or architect) is generally best, but under some circumstances a report prepared by a licensed general contractor will suffice. The report must specify which portions of the building are maintained and insured by the Association.
- A complete analysis of the policy with particular attention to any exclusions; and
- A complete report, with all supporting documentation, of any expenses incurred for mitigation, "drying in" and "drying out" the building, any emergency repairs and other losses under the policy.

Preparation and participation in the mediation program should not be undertaken lightly or without the assistance of Association Counsel. While the mediation conference itself is confidential, the documents produced by the Association and other information gleaned from the process may be utilized by the carrier to deny all or portions of the claim.

In the event that mediation is not successful, there are other avenues available to the Association to pursue. If an insurance company fails, in good faith, to attempt to settle claims when it could and should have done so if had it acted fairly and honestly toward its insured and with due regard for her or his interests, the insured may be entitled to damages. An insurance company is required to promptly settle a claim after the obligation has become reasonably clear and should not withhold undisputed amounts in order to influence settlement of the entire claim or other portions of the claim. For example, if it is clear that replacement of the roof is necessary as a result of the hurricane, the insurance company cannot withhold the funds necessary to replace the roof just because it disagrees that damages to other portions of the building are hurricane related.

Failing to handle disaster recovery adequately is one of the most prevalant causes of litigation in the community association setting, leading to increased expenses and even further delays.

Becker & Poliakoff, P.A. has successfully handled insurance claims resulting from Hurricanes Andrew, Opal, Charley, Jeanne, Frances, Katrina, Wilma and others. If your community has been unable to resolve its hurricane related claim, please contact your Association Attorney or our disaster/insurance claim resolution team leader Daniel Rosenbaum or Bill Cea at 1-800-432-7712 or via email at drosenbaum@becker-poliakoff.com or wcea@becker-poliakoff.com to discuss what actions you need to take to move the adjustment process along.

BECKER & POLIAKOFF COMMUNITY UP-DATE

Legal and Business Strategists

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Volume III, 2006

Donna D. Berger, Esq. *Editor*

"YOU'RE FIRED"

Employment Issues: What Every Association Needs to know

By: Jamie Goldberg, Esq.

In the age of the *Apprentice*, the words "you're fired" have been given new meaning. As a contestant on the *Apprentice*, being fired does not mean that you will be applying for unemployment and worrying about how you will pay your bills and feed your family, it means you will be signing your next book deal and although you may not be working for Donald Trump, you will certainly have no trouble paying your next electric bill. In the real world, however, saying the words "you're fired" is not quite as glamorous as when it is said by "the Donald" himself. This article is intended to give you a brief overview of some employment issues that may affect your association if you are considered an employer under the law and you are faced with the decision of whether to fire an employee.

It is important to understand that Florida is a right to work state and employment is considered "at-will." This means, you can fire an employee for a good reason, a bad reason, or no reason at all, as long as you do not fire an employee for reasons which violate the law. For example, you can fire an employee for repeatedly violating policies and procedures or you can fire an employee because an employee has violated your trust. However, you cannot fire an employee because your employee is pregnant or because your employee is a minority. Such reasons violate both state and federal law and there are very real consequences for taking such actions.

Although most decisions to terminate an employee are appropriate and made because the employee has violated the employer's policies and procedures, there is no 100% guarantee that you, as an employer, can avoid being sued by an employee. Some of the most common lawsuits faced by associations are for violations of the Americans with Disabilities Act ("ADA") and violations of Title VII of the Civil Rights Act of 1964. Also, lawsuits concerning non-compete agreements and worker's compensation issues are fairly prevalent.

Under the ADA, it is illegal to discriminate against an employee because of a disability or perceived disability. Even if an employee is not actually disabled, the employer could be in violation of the ADA if it limits the employee's job duties because of a belief that the employee is disabled within the meaning of the ADA. Under the ADA, a "disability" is defined as a physical or mental impairment that substantially limits one or more of the individual's major life activities; a record of having such an impairment; or being regarded as having such an impairment. An employer may be required to make a "reasonable accommodation" for an individual with a disability, so long as the individual is **qualified** and the accommodation does not **impose an undue hardship** on the operation of the employer's business. Bottom line, if an employee is disabled or is perceived as being disabled under the ADA, you, as the employer, will be required to provide the employee with a reasonable accommodation unless the employee is no

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"YOU'RE FIRED" *cont.*

longer qualified to perform the functions of his/her job duties. For example, you can terminate a maintenance worker who cannot ever return to hard labor due to a disability where the position requires the maintenance worker to perform hard labor. However, if you are concerned about a possible violation of the ADA, it is better to consult with your attorney prior to making that decision and to protect the interests of the association.

Title VII prohibits discrimination in employment based on race, color, religion, sex, or national origin. Employment refers to hiring, firing, compensation, and other terms, conditions, and privileges of employment. Possible penalties for violations of Title VII include back pay, benefits, reinstatement, reasonable attorney's fees, compensatory damages, and punitive damages. Most violations of Title VII are initially filed with the Equal Employment Opportunity Commission ("EEOC"). In Florida, once a discrimination charge is filed, the EEOC has 300 days to investigate the charge and issue a determination. The EEOC has no enforcement power; however, if it finds a violation, the EEOC can files suit in federal court on behalf of the affected employee(s). When faced with the issue of terminating an employee whom you believe may bring a charge for violation of Title VII, it is best to consult with your attorney prior to taking any such action. Although most Title VII lawsuits do not have very high dollar verdicts, awards of attorney's fees are often twice the amount of the actual damages awarded.

Another issue that often affects associations is lawsuits involving non-competition agreements. Since the recent amendment to the Florida "Unfair Competition" statute, lawsuits involving non-competition agreements have significantly dropped. Florida law now requires that the parties have a written agreement, that a legitimate business interest needs to be protected, and that it would be "unfair" for a person to go to a competitor under specific circumstances. Prior law allowed courts to strictly view non-competition agreements under contract law terms. Terms of prior non-competition agreements were generally upheld with modifications usually only made to the time and geographical scope of the agreement. Such issues usually arise with regard to hiring a management company and/or independent manager or security guards.

In a recent development of significance to association employment issues, the National Labor Relations Board ("NLRBa") indicated that associations may be deemed joint employers of the employees who are hired by these management companies and may be required to adhere to very specific protocol should a labor union attempt to organize the management company's employees.

Although the findings by the NLRB are being appealed, such a finding if upheld, may have far reaching implications making it imperative for an association to protect itself in the event of any future union activity. Such protective measures can include, but are not limited to, ensuring that an indemnification provision exists in the contract between the association and the management company/manager or the association may relinquish all control over employees hired by the management company and placed on the association premises in which event the association would most likely not be treated as a joint employer by the NLRB.

Lastly, associations are often faced with on the job injuries. Worker's compensation laws are designed to compensate employees who have been injured or killed in work related accidents according to a fixed monetary scheme, without resorting to litigation. Florida worker's compensation system is premised on a trade-off system between employers and employees. Employees receive worker's compensation benefits for on-the-job injuries and the limited worker's compensation benefits are the exclusive remedy against the employer, even when the employer was negligent. Of course, if an employee is injured on the job, it is imperative that the association notify both its legal counsel as well as its insurance agent. Failure to do so may resort in further legal ramifications to the association.

While firing an employee may never be an easy decision, even if you are Donald Trump, you can minimize your exposure to an employee lawsuit. Probably the single most important piece of advice is to document, document, document. Usually, employees are fired for reasons. Although employment in Florida is "at-will,"

cont. on page 3

"YOU'RE FIRED" *cont.*

having no provable, legitimate, non-discriminatory reason for firing an employee can greatly increase your exposure to a lawsuit.

In addition to the aforementioned advice, the following measures can also minimize your exposure to a lawsuit:

- Do not act too quickly in making a decision to terminate. An impartial investigation can often provide the factual support for the termination;
- Do not act too slowly either. It can create the appearance that you condone the employee's actions and also creates the appearance that another reason exists for the termination when you eventually terminate the employee;
- Always adequately and thoroughly investigate the allegations against the employee before taking action;
- Follow your own written termination policies and procedures;
- If possible and appropriate, give the employee an opportunity to take corrective action, before termination;
- Take action against other employees for the same offense;
- Consider alternatives to termination in appropriate cases;
- Give the employee the "real reason" for termination if asked. Do not provide a false or misleading reason for termination especially to a government agency such as the EEOC if investigating a charge;
- Fully consider the legal impact of the laws barring discrimination based on race, sex, age, disability, family medical leave act, pregnancy disability leave, ADA, and worker's compensation, as well as laws protecting whistleblowers. It is important to have at least some understanding of the laws that affect employment relations;
- If possible, have a witness present when you fire someone;
- Afford the employee being fired some dignity during and after the firing process;
- Do not give letters of reference to terminated employees that praise positive qualities and/or misrepresent their qualifications or conceal their shortcomings or misdeeds; and
- Do not discuss an employee's termination with persons who do not have a need to know, that could lead to a lawsuit against you for defamation, breach of the right to privacy, and negligent/intentional infliction of emotional distress.

Although, as stated, you can never 100% guarantee that you will not be sued by an employee after termination, you can minimize your exposure and limit potential claims brought against you. If you have questions concerning the possible termination and/or termination of one of your employees, you should contact your legal counsel to guide you through the process.

DOES THE ASSOCIATION HAVE A DUTY TO A PROSPECTIVE PURCHASER TO ADVISE OF POTENTIAL UPCOMING ASSESSMENTS

By: Mark D. Friedman

In the aftermath of the hurricanes many community associations have been confronted with whether pending assessments must be reported to potential purchasers. Many have asked whether a fiduciary duty exists on the part of the Association to volunteer such information.

In Maillard v. Dowdell, 528 So.2d 512 (Fla. 3d DCA 1988), the purchaser of a condominium unit which contained serious structural defects brought a claim against, among other parties, the condominium association for breach of fiduciary duty for failing to disclose those defects to the plaintiffs who were prospective

cont. on page 4

UPCOMING ASSESSMENTS *cont.*

purchasers of the unit. The trial court granted a motion to dismiss by the condominium association finding that the statutory duty of condominium association to the unit owners, pursuant to Section 718.111(1)(a), Florida Statutes, does not extend to prospective purchasers. The appellate court upheld the trial court's order of dismissal. Therefore, the association was not required to disclose information to prospective purchasers concerning the defective condition of the condominium building prior to sale.

Section 718.111(1)(a), Florida Statutes, provides in relevant part:

> The officers and directors of the association have a fiduciary relationship to the unit owners.

While Maillard concerned a condominium, the identical language regarding the fiduciary relationship between the Association and unit owners is found in Section 719.104(8)(a) (Cooperative Act) and similar language is found Chapter 720 (Homeowners' Association).

Section 720.303(1) provides in relevant part:

> The officers and directors of an association have a fiduciary relationship to the members who are served by the association.

As such, the holding in Maillard is arguably applicable to all types of community associations.

Additionally, the Condominium Act, Section 718.111(12)(e)(1), Florida Statutes, provides that the condominium association is not required to provide a prospective purchaser with information about the condominium or the association other than information or documents required by Chapter 718, to be made available or disclosed. The disclosure requirement is found in Section 718.116(8), Florida Statutes, which provides that within fifteen days after receiving a written request from a unit owner purchaser, or mortgagee, the association shall provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the unit owner with respect to the condominium parcel. There is no requirement to provide information on future or pending assessments.

In the Comprehensive Rider to the FAR/BAR Contract for Sale or Purchase of Condominiums, paragraph 3 reads: "Seller has no knowledge of any pending special assessment except as follows: $_____ imposed for the following purposes:_____."

The Rider puts the onus on the unit owner-seller to provide this information to the prospective purchaser. The Association, if asked by a current unit owner, must provide such information to the unit owner so that he or she may accurately complete this form. However, if the unit owner does not provide accurate information to the prospective purchaser, the Association is not under an obligation to do so in the unit owner-seller's place.

While technically an Association is not obligated to make such disclosures to prospective purchasers and is not required to respond to such inquiries, any response offered by an Association should never be misleading. Accordingly, if the Association is asked whether there are pending future assessments, it should indicate that the Association does not involve itself in disclosures to prospective purchasers and that the purchasers should pursue any information they want about the condominium building or future assessments from the seller. The Association may also wish to consider the advisability of confirming such discussions in writing to avoid any future mischaracterizations of the conversation. Additionally, if the Association goes beyond its legal responsibility there is the potential for being sued by a unit owner-seller if the contract for sale is subsequently voided by a prospective purchaser who receives such information about the community during conversations with the Association's representatives. The fact that the disclosure may have been completely truthful is not necessarily a shield against a potential lawsuit against the Association.

The rules stated above are inapplicable when a condominium, homeowners' association or cooperative is acting as the seller of the unit, such as in the case of a developer controlled association where the developer is still selling properties or a foreclosed unit which the Association purchased and now seeks to resell. In Johnson v. Davis, 480 So.2d 625 (Fla. 1986), the Supreme Court of Florida held that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used."

LET'S SAY IT AGAIN FOLKS!

31 Fla.L. Weekly D610a
UNITED GRAND CONDOMINIUM OWNERS, INC. v. THE GRAND CONDOMINIUM ASSOCIATION, INC., 3DCA, Case No. 3D05-1627. L.T. Case No. 04-27106

A mixed use condominium is not subject to Section 718.1255(4)(a) of Chapter 718, which reads, in pertinent part, "prior to the institution of court litigation, a party to a dispute shall petition the division for non binding arbitration."

The Grand (the Association) is a mixed use condominium with 810 residential units, 141 retail units, 259 commercial units and a parking unit. Certain residential units were unhappy with the association and formed their own non-profit corporation called U.G.C. Owners (the Owners). The Owners passed out and posted flyers on the condo property and held meetings in their units. The Association filed suit in the circuit court to stop this activity. The Association had not filed a petition with the Division prior to instituting the law suit, in the circuit court, for injunctive relief and damages.

The Owners filed a Motion to Dismiss the case because The Grand had not filed the prerequisite petition with the Division. The circuit court denied the owners' Motion to Dismiss. The Owners appealed.

This court found that the circuit court was correct in denying the Motion to Dismiss. This court found that the Division of Florida Land Sales, Condominiums and Mobile Homes ("Division") had enacted a rule stating that:

> *No petition for arbitration would be accepted by the Agency unless the dispute arises regarding a residential cooperative or condominium, and involves a residential unit or units.*

The court further stated that in a prior case which involved this same mixed use Association the Division had dismissed a petition for arbitration filed by the Association. In that related case the Division stated that The Grand was a mixed use rather than a residential condominium. Cantwell v. Grand Condo. Ass'n. No. 2004-03-1188 (July 1, 2004) (Mnookin, Arb.)

Also, important to note, this court stated further that the Division is legislatively charged with administering the statute, therefore the Division's interpretation of a statute is given great weight and should not be overturned unless clearly erroneous. See e.g. Brenner v. Department of Banking and Finance, 892 So.2d 1129 (Fla. 3DCA 2004).

This court upheld the prior interpretation by the Division of this section of the statute because the court did not find anything in the Division's rule which conflicted with its legislative mandate (administering the statute).

Therefore, of importance from this ruling are two findings:

1. A mixed use condominium is not subject to the mandatory non-binding arbitration requirement of 718.1255 4(a) prior to instituting a civil law suit.
2. The ruling of the Division, which is legislatively mandated to administer Chapter 718, will stand unless it is found to be clearly erroneous.

A BREATH OF FRESH AIR

Merrill v. Bosser

(Trial Court Opinion)

Secondhand smoke gets a lot of negative press. It lingers in the air hours after cigarette smokers are no longer present and reportedly causes or exacerbates a wide range of adverse health effects including cancer, respiratory infections, and asthma. Statistics regarding the adverse effects of secondhand smoke are readily available and yet, smoking cigarettes is a legal activity, perhaps one you yourself enjoy in your home. Can engaging in a legal activity in your own home create liability? Well according to one of the Broward County Judges it can, if the excessive smoke causes damages and otherwise interferes with the peaceful possession of a neighboring unit.

Ms. Merrill moved in to her condominium unit sometime in 2003 and didn't have any problems with secondhand smoke until her neighbor allowed a tenant to occupy his unit. The neighbor, Mr. Bosser, lived one floor up and one unit over from Ms. Merrill. He smoked approximately a pack of cigarettes a day in his home. Once the tenant, who was also a heavy smoker, moved in, Ms. Merrill and her family not only noticed the smell of smoke, but actually saw smoke seeping into her unit on a regular basis, particularly in the bathrooms.

The smoke was so bad at times that Ms. Merrill and her family members had to sleep elsewhere. She installed air purifiers in her unit, but that didn't help. She complained to the condominium association board who then installed a fan to draw the smoke from the unit to the vents on the roof, but that didn't help. The smoke was so excessive that it triggered her smoke detector! Finally the condominium association ordered the tenant to vacate the unit, which alleviated the problem for Ms. Merrill and her family.

Mr. Bosser probably thought the dispute was resolved at that point. The complaints regarding smoke intrusion stopped and the tenant was no longer residing in the unit. However, Ms. Merrill believed that she was entitled to reimbursement for expenses she incurred as a result of the excessive smoke and filed a lawsuit to recover those expenses.

The Court, noting that the smoke was so detrimental under the circumstances, ultimately ruled that Ms. Merrill was entitled to damages pursuant to three (3) separate legal theories:

1. Trespass. The Court noted that secondhand smoke that travels from one property to another would not normally be considered a trespass, but under these circumstances it "disturbed the possession" of the other property.

2. Common Law Nuisance. The Court concluded that the smoke went far beyond a "mere inconvenience or customary conduct" and interfered with Ms. Merrill's property rights.

3. Breach of Covenant. The Court concluded that there was a breach of the covenant of quiet enjoyment, which was contained in the Declaration of Condominium.

Ms. Merrill recovered the expenses she incurred when forced to vacate the unit as a result of the excessive smoke and also recovered her costs of bringing the lawsuit. Please note, this is a trial court decision and therefore does not carry any precedent, meaning that it does not have to be accepted by other trial courts or judges and may be appealed. However, it does provide an example of what action may be taken by a property owner directly against another property owner under these types of circumstances.

BECKER & POLIAKOFF COMMUNITY UP-DATE

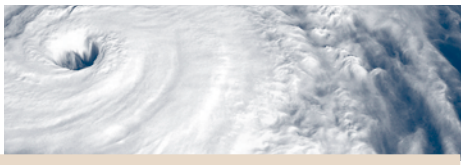
Legal and Business Strategists

Volume II, 2006

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

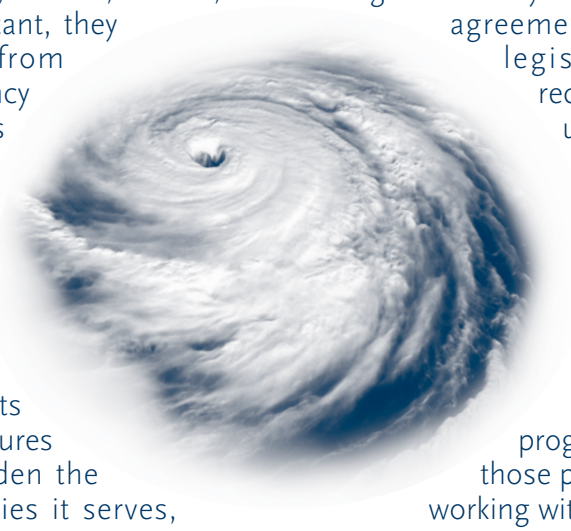
STORM SECURE | FPL's Five-Point Plan to Build a Stronger Grid for the Future



By: Donna D. Berger, Esq.

On January 30, 2006, FPL announced a comprehensive, progressive and industry-setting five-point program to build a stronger electrical grid for the future.

FPL developed its sweeping proposal over the past three months, conducting extensive analyses either directly or with the aid of external resources such as independent consultant KEMA, on the evidence of seven hurricane events over the last two seasons: Charley, Frances, Jeanne, Dennis, Katrina, Rita and Wilma. Equally important, they have received valuable input from local and state officials, emergency managers, community leaders and customers, whose expectations and sentiments have been expressed in the wake of this past storm season. After discussion and input from experts, emergency managers, government officials and customers, FPL has committed its company to implement the measures set forth below, which will harden the infrastructure of the communities it serves, both in the short-term and in years to come.



Hardening the Electric Network for the Long Term, including adopting National Electric Safety Code (NESC) extreme wind velocity zone criteria as the standard for all new construction and system upgrades (up to 150 mph in certain areas), using construction methods such as undergrounding, stronger poles (concrete poles in particular in many instances), shorter spans, guying, etc., as well as upgrading existing overhead main lines, initially targeting those serving top critical infrastructure facilities and major thoroughfares.

· **Aggressively Promoting and Investing in Underground Conversions,** including paying 25% of the cost of local government-sponsored overhead-to-underground conversion projects otherwise borne by the requesting locality; facilitating undergrounding projects by allowing cable, conduit and above-ground transformers and switch cabinets to be placed in road rights-of-way under specific standards and agreements; and aggressively pursuing legislation and local ordinances requiring all developers to provide underground service for new subdivisions, developments and projects.

Modifying and Enhancing FPL Current Pole Inspections, by adopting the Florida Public Service Commission's directive to have a systematic eight-year inspection program for all wood poles, including those poles owned by other utilities, and working with other utilities to address "joint-use" issues pertaining to loading.

Enhancing Line Clearing and Vegetation Management Practices, by increasing vegetation management and line clearing activities by nearly 30%, accelerating trimming along main lines to complete 75% of line clearing work before every year's peak hurricane season, completing line clearing for circuits that serve top critical infrastructure facilities prior to every hurricane season, ensuring a 3-year line

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STORM *cont.*

clearing cycle for all main lines, aggressively pursuing the "Right Tree Right Place" program to educate communities regarding the placement, removal, species and type of trees that should be placed in proximity to poles and lines, and supporting legislation that would do so as well.

Completing all post-hurricane repairs and targeted facility upgrades to prepare for the 2006 hurricane season, including removing all pole stubs and braced poles, as well as replacing or realigning leaning poles – all before the start of the peak hurricane season. In addition to FPL's own field assessments, customers are being encouraged to advise of any leaning poles, pole stubs or braced poles, so these can be addressed as quickly as possible.

As to trees and vegetation management in particular, evidence and analysis from the 2004 and 2005 hurricane seasons shows that trees and vegetation interfering, damaging or breaking poles, lines and other facilities were the greatest cause of hurricane-related outages. It is also an area that FPL cannot unilaterally control. Forensic analyses of tree-related distribution feeder (main line) and lateral (neighborhood line) outages from Hurricanes Katrina and Wilma in 2005 concluded that 81% of tree-related outages were not preventable by FPL; that is, no trimming standard or work performed by FPL would have prevented these outages from occurring. These outages were caused by damage to FPL facilities from trees located off rights-of-way or outside of FPL's property or its easements which toppled into FPL's poles, lines and other facilities, or by limbs breaking off from trees and vegetative material located outside of FPL's trim zone. That is why it is so essential that communities and government educate themselves about the "Right Tree Right Place" program and take action to regulate and enforce the location and types of trees and vegetation permitted in proximity to electric facilities, so that the prospect of interfering with, damaging or breaking electrical facilities is greatly reduced.

We have all experienced firsthand the significant impact of recent hurricanes in our state. No utility has had to respond to as many direct hits by hurricanes in recent years as FPL. If the recent cycle of increased hurricane activity is the new storm paradigm for our state, FPL's service area and its customers will undoubtedly be impacted. Without fundamental and significant changes in the way FPL prepares for storms and hardens its infrastructure to prevent outages, the level of disruptions to its electrical system may well continue into the future.

It is a reality that, regardless of the initiatives set forth above, when hurricanes and severe weather events impact our state, outages will occur. However, necessary steps can be taken to mitigate such impact. The tactical and strategic initiatives outlined by FPL not only address the resiliency of their system to future severe weather events, but also provide for an increased level of day-to-day reliability for their customers. In

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WHAT YOUR ASSOCIATION NEEDS TO KNOW ABOUT COVENANT ENFORCEMENT

By: Jennifer Perelman, Esq.

The governing documents of a condominium, including the restrictive covenants, are designed to depict the tone of the community, as well as set forth the standard of conduct expected of the condominium's residents. It is the enforcement of these documents and covenants that preserves the common scheme, as well as ensures the long-term goals and standards of the community.

Effective enforcement of the restrictive covenants is dependent upon the timeliness and uniformity of the action taken by the Association. It is imperative that the Association takes immediate action upon learning of a violation of the governing documents. Furthermore, the Association must enforce the documents uniformly throughout the condominium as to ALL unit owners. If the documents prohibit pets, the Association cannot enforce the restriction against one unit owner, while overlooking the same violation by another unit owner. The failure of the Association to enforce one of its restrictive covenants in a timely and uniform manner may result in the forfeiture of the right to enforce that restriction.

The essential elements for the effective enforcement of the restrictive covenants are the following:

1) Knowledge and understanding of the documents;
2) Notice and record of the violation;
3) Levying a fine (if permitted by the documents);
4) Mandatory non-binding arbitration; and
5) Additional litigation

Knowledge and Understanding of the Documents

In order to be able to effectively enforce the governing documents, it is essential that the unit owners, as well as the Board, have a clear understanding of the terms and provisions of the documents. Although knowledge of the governing documents is presumed, based upon the recordation of the original documents and any additional amendments, the Board is required to maintain copies of all governing documents.

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STORM *cont.*

addition to the initiatives outlined above, FPL intends to make further refinements to this action plan based on additional input and analyses, and will include such refinements as part of a 10-year hardening plan. FPL expects this plan to provide a clear roadmap to improving the long-term resiliency of their electric infrastructure. Furthermore, FPL will include localized hardening plans that they will share with respective community leaders and local emergency managers.

FPL will be working with communities to prepare for the upcoming hurricane season, including identification and validation of critical infrastructure facilities and local priorities with emergency managers. They will be also be making further enhancements, which will be ongoing, to their hurricane restoration processes and to their communications with customers, government officials and emergency managers before, during and after a major storm event. Working in conjunction with FPL to identify and resolve any areas of electrical infrastructure weakness in your community is a worthwhile part of any hurricane preparedness plan.

COVENANT *cont.*

Such documents are to be made available to all unit owners upon request. The Board must be thoroughly familiar with the governing documents in order to recognize a violation and enforce the covenants.

Notice and Record of the Violation

As soon as the Board is made aware of a violation of the Bylaws, Declaration, rules and regulations, the first step is to provide the violating party with a formal written notice of the violation. The notice should include a clear description of the prohibited act, as well as provide specific reference to the section of the documents that is being violated. In addition, the notice should provide a deadline for compliance, allowing the unit owner a reasonable opportunity to correct the violation.

From the time the violation first occurs, a record of such conduct should be maintained by the Board in order for the Association to succeed in its effort of formal enforcement. The documentation should include the date, time and nature of the violation, as well as the names of anyone who witnessed the violation.

Levying a Fine

The Condominium Act allows for a condominium association to levy a fine against a unit owner for violation of the covenants, if the condominium's governing documents so provide. If the documents allow for fining, the Board may levy a fine so long as the unit owner is given 14-day notice and an opportunity for a hearing before a committee of unit owners. In addition, the maximum fine amount is $100 per day and $1,000 total. If the Association's documents allow for fining, the procedure should be implemented with the assistance of the Association's counsel.

Formal Enforcement Actions

When the efforts to achieve voluntary compliance are not successful, the next step is to initiate a formal enforcement action. Depending upon the nature of the dispute, a formal action would entail either non-binding arbitration or filing suit in court. In addition, prior to an arbitration or a trial, there may also be voluntary or ordered mediation.

Florida law requires that certain disputes between governing boards and unit owners be heard before an arbitrator from the Division of Florida Land Sales, Condominiums and Mobile Homes ("the Division"). Prior to filing a petition for arbitration, the Board must provide notice to the opposing party of the intention to enter into arbitration. The notice must include a demand for relief and provide a reasonable opportunity to comply with the demand. The notice must also state that legal action will be commenced if the party fails to comply. A copy of such notice must be attached to the arbitration petition.

The arbitration process is intended to provide community associations with a more swift and inexpensive means of dispute resolution than is available in court. Although the final decision of the arbitrator is non-binding, the vast majority of parties do not choose to take the matter any further because of the potential cost. If a party is unhappy with the decision of the arbitrator and chooses to bring the matter to court, he/she will be responsible for the other party's attorney's fees (including their arbitration fees) if the court decision is not more favorable than that of the arbitrator. In addition, should one of the parties decide to "appeal" the decision in court, the opinion of the arbitrator may be used as evidence. If neither party file a complaint in court within (30) days of the arbitrator's decision, the decision becomes final. Once the decision becomes final, either party may file a petition in court to enforce the terms of the arbitrator's decision.

In the case of mediation, the parties are generally required to pay their own attorney's fees and split the expenses equally. In the case of arbitration, attorney's fees and costs are awarded depending upon the discretion of the arbitrator. Generally, however, the arbitrator will award some amount of attorney's fees to the prevailing party if the governing documents so provide. Similarly, in cases where the matter goes directly to court without arbitration, Florida statute allows for the prevailing party to recover attorney's fees.

COVENANT *cont.*

Types of Disputes
Generally, disputes between associations and unit owners fall into one of the following categories:

- Maintenance of common area property
- Architectural Standards
- Association approval prior to sale and/or transfer of property
- Association's Right of First Refusal (if provided in documents)
- Lease and rental restrictions Age limitations
- Parking and unauthorized vehicles
- Pet restrictions
- Guest and occupancy restrictions
- Election disputes

Pursuant to Florida statute, mandatory non-binding arbitration is required in cases that involve the following:

1) The authority of the Board to require an unit owner to take action involving his/her unit;
2) The authority of the Board to add or alter a common area or element;
3) Failure of the Board to properly conduct elections;
4) Failure of the Board to give proper notice of meetings and other actions;
5) Failure of the Board to allow inspection of books and records

All other types of disputes must be brought directly to county or circuit court, depending upon the nature of the claim.

Since enforcing the covenants and restrictions is one of the Board's most basic duties, knowing and understanding the tools to do so is essential.

Bay Holdings, Inc. v. 2000 Island Blvd. Condominium Assoc.

(Fla. 3rd DCA 2005)

In this case, the Court interpreted the provisions of Section 718.116(1), Florida Statutes, which provides a statutory cap on the liability of a first mortgagee or its successor or assignees for unpaid condominium assessments that become due prior to the first mortgagee's acquisition of title pursuant to a foreclosure proceeding. This statutory cap is the lesser of the unit's unpaid common expenses and regular periodic assessments which accrued or came due during the six months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or one percent (1%) of the original mortgage debt. Bay Holdings was the subsequent assignee of the final judgment of foreclosure obtained by Bank United, after Bank United became the foreclosing first mortgagee on a condominium unit in Miami Dade County. The Court held that because the statute clearly and unambiguously afforded the safe harbor only to first mortgagees or a "subsequent holder of a first mortgagee," Bay Holdings, a subsequent assignee of a final judgment of foreclosure, did not qualify for this safe harbor and their liability for unpaid assessments was not capped under the Statute.

Access 4 All, Inc. and Peter Spalluto v. The Atlantic Hotel Condominium Association, Inc. and Luxury Resorts International, Inc.

(U.S. District Court, S.D. Fla. 2005)

The Atlantic Hotel Condominium is a condominium/hotel consisting of 124 residential units, 1 hotel unit and 4 commercial units. In this hybrid configuration, the common elements are minimized and instead made a part of the "Shared Components" of the Hotel Unit. Ownership of the Hotel Unit was retained by the developer. The Association has very little responsibility or duties, and as a consequence bills the residential unit owners only $6.00 per month. The Hotel Unit owner charges a fee to the residential unit owners for the use of the "Shared Components" which ranges from $335 to $2,678 per month for the respective units. The owners of units may reside in their units, rent their units through the rental manager, rent their units on their own or not use their units at all. Most of the units were rented through the rental manager.

Suit was brought against the condominium association and the developer by Access 4 All, Inc., a non-profit membership organization and Peter Spalluto, a disabled person, seeking relief under Title III of the Americans With Disabilities Act (ADA). The allegations of non-compliance included inadequate number of accessible guest rooms, inadequate parking facilities, inadequate number of accessible entrances, inadequate operating devices in the guest rooms and inadequate common area restroom facilities. The defendants attempted throughout the proceedings to characterize the property as a hotel for zoning purposes and a condominium for ADA purposes, while the plaintiffs sought to have the Court invalidate the chosen form of ownership.

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." (42 U.S.C.§12182(a)) The Court found that the Atlantic Hotel Condominium was designed and intended for use as a public accommodation because individual unit owners who purchased a unit were likely to rent the unit for public use. In holding that condominium buildings may be covered as places of public accommodation if they operate as places of lodging, the Court stated, "Determining whether a particular condominium facility is a place of public accommodation would depend on the extent to which it shares characteristics normally associated with a hotel, motel or inn. The Atlantic is virtually indistinguishable from a hotel.".

After determining that the Atlantic Hotel Condominium was subject to the ADA as a place of public accommodation, the Court held that it had violated the Act in several areas, some of which were corrected during the litigation process, and entered an order granting injunctive relief and an award of reasonable attorneys' fees in favor the of the plaintiffs.