COMMUNITY UPDATE™

VOLUME I, 2009 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor

PRODUCTS - COMPLETED OPERATIONS COVERAGE – WHAT IS IT AND HOW DOES IT WORK?

By: Kenn W. Goff, Esq.
kgoff@becker-poliakoff.com

As often happens, an Association hires a general contractor to perform construction work at the condominium. As part of its due diligence, the Association confirms that the contractor has commercial general liability (CGL) insurance.[1] Typically, the general contractor provides the Association certificate(s) of insurance indicating the types of liability insurance in effect with the respective amounts of coverage for each type of insurance.

These types of CGL policies contain an insuring agreement clause, which usually provides that the insurance company "will pay those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." A definitions section in the policy will define certain key terms in the policy. Endorsements to the policy may expand or narrow the scope of insurance coverage. Exclusions in the policy indicate what risks the insurance company will not cover. Exceptions to these exclusions indicate what otherwise covered risks remain covered, notwithstanding the applicability of a particular exclusion.

Among the types of insurance that general contractors have obtained as part of their liability insurance is what is known as **"products - completed operations"** coverage. In general and subject to certain exclusions, this type of insurance provides coverage for property damage caused by an occurrence arising from **completed operations** that occur away from premises owned or rented by the insured. The insurance policy will typically define the terms "property damage"[2] and "occurrence."[3] In addition, the insurance policy will usually define when operations are completed. As the condominium's property is usually not premises that are "owned or rented by the insured" (i.e. the general contractor), this should generally not present a concern in regard to the applicability of completed operations coverage.

Why is this significant and how would this come into play in a real-life situation? For example, suppose that a general contractor performs construction work at the condominium. Several subcontractors are hired by the general contractor to perform various aspects of this work. All is well and good and the project is finished. Nevertheless, several months later, problems arise from this construction work. Unfortunately, the general contractor's [through its subcontractors'] faulty workmanship has resulted in property damage to the condominium.

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[1] In 1986 the Comprehensive General Liability policy was renamed the Commercial General Liability policy.

[2] **"Property damage"** has been defined in these types of policies to include "physical injury to tangible property, including all resulting loss of use of that property."

[3] **"Occurrence"** has been defined in these types of policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

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The Association wants to avail itself of its legal rights against the general contractor (and others as applicable). Part of the Association's analysis in this regard will be to determine whether the general contractor has insurance coverage to cover this resultant property damage.

Florida's Supreme Court rendered an Opinion that may provide some relief to an aggrieved Association. In *United States Fire Insurance Company v. J.S. U.B., Inc.,* 979 So. 2d 871 (Fla. 2007), the subject insurance policy had an exclusion for "property damage" to "your work" (a defined term in that policy) included in completed operations coverage with an *exception to this exclusion* if "... the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." In *J.S. U.B.* the subcontractor's use of poor soil, improper soil compaction and testing **caused damage to** the foundations, drywall and other interior portions (e.g. wallpaper) of various homes (i.e. the completed project).

Based upon the foregoing and the court's analysis of the applicable facts and insurance provisions, the Supreme Court of Florida in *J.S. U.B.* held that insurance coverage exists for a claim made against a general contractor under a post-1986 CGL policy with completed operations coverage for damage to the completed project caused by a subcontractor's defective work (provided no exclusions apply).[4]

Consequently, in evaluating potential construction defect claims against general contractors, consideration should be given to whether the general contractor's CGL policy has completed operations coverage with a clause that is the same or similar to the post-1986 completed operations clause referenced in the *J.S. U.B.* decision. *Importantly,* this would include whether such policy has the same type of "subcontractor" *exception* to the "your work" exclusion for completed operations. In addition, consideration should be given to the applicability of any other exclusion (e.g. breach of contract).

Consideration should also be given to whether there is a "property damage" caused by an "occurrence" that happened *after* the project's completion (assuming, of course, that there is completed operations coverage) and within the policy period. *State Farm Fire & Casualty Co. v. CTC Development Corp.,* 720 So. 2d 1072 (Fla. 1998) (Florida's Supreme Court observed (a) that these types of policies provide coverage not only for "accidental events," but also for injuries or damages neither expected nor intended from the standpoint of the insured, and (b) that defective construction can be an "occurrence" under Florida law)

Furthermore, consideration should be given to the issue of "property damage," including in particular whether such damage can be attributable to a subcontractor's defective work and how such defective work damaged the completed project (i.e. what damage was **caused by** or was **a result of,** and exists **beyond** the subcontractor's faulty workmanship). Florida's Supreme Court in *J.S. U.B.* discussed the differences between, (1) a claim for the cost of repairing or removing defective work, which is typically not a claim for property damage, and (2) the costs of repairing damage caused by such defective work, which is typically considered property damage.

In the end, it may well be that the Association will have a viable source of recovery available through the completed operations coverage provisions of the general contractor's commercial general liability policy. ■

[4] For example, the *J.S. U.B.* policy did not contain a breach of contract exclusion.

The Association wants to avail itself of its legal rights against the general contractor (and others as applicable). Part of the Association's analysis in this regard will be to determine whether the general contractor has insurance coverage to cover this resultant property damage.

ALLOWING ACCESS TO OFFICIAL RECORDS – NEW REQUIREMENTS AND PENALTIES

By: Angela Chao Clark, Esq.
aclark@becker-poliakoff.com

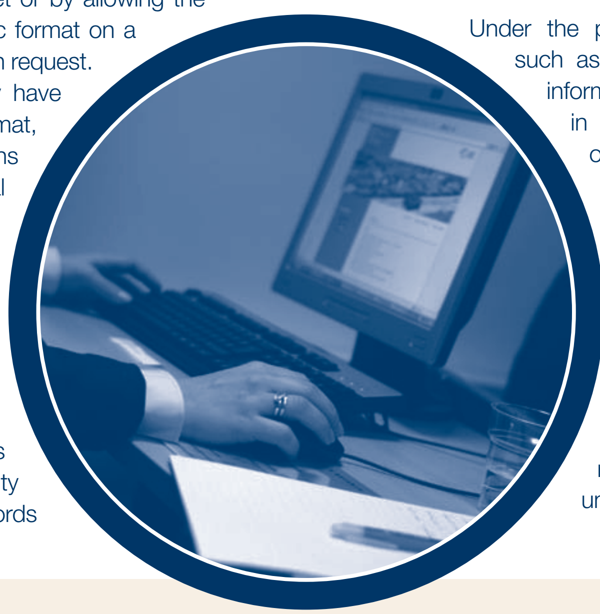
House Bill 995, which became effective on October 1, 2008, makes significant changes to Section 718.111(12), Florida Statutes, regarding the keeping of "official records" by a condominium association. First, the official records of the association must be maintained within the state for at least 7 years. The only exception in the law is that ballots, sign-in sheets, voting proxies and all other papers relating to voting by unit owners only need to be retained for a period of 1 year from the date of the election, vote or meeting to which the document relates.

Next, Section 718.111(12) of the Florida Statutes now provides that official records of an association must be made available to a unit owner within 45 miles of the condominium property or within the county in which the condominium is located. This distance requirement does not apply to an association governing timeshare condominiums.

Another significant change is that associations may now offer the option of making the records available to the unit owner either electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. Since many associations already have its official records in electronic format, this option will allow associations to process a request for official records in a more expedited and efficient manner.

The new law also provides that any person who knowingly or intentionally defaces or destroys accounting records, or knowingly or intentionally fails to create or maintain accounting records, is personally subject to a civil penalty from the state. Accounting records include all receipts and expenditures; a current account and a statement of monthly, bi-monthly or quarterly account for each unit designating the name of the unit owner, the due date, amount paid and the balance due; and all audits, reviews, accounting statements, and financial reports of the association. The statutes further require the Division of Florida Condominiums, Timeshares, and Mobile Homes ("Division") to adopt additional rules regarding information to be included in a financial report, such as a summary of the reserves which includes information as to whether such reserves are being funded at a level sufficient to prevent the need for a special assessment and, if not, the amount of the assessments necessary to bring the reserves up to the level necessary to avoid a special assessment. The statutes also provide that financial reporting may not be waived for more than three consecutive years.

In addition to the potential for civil liability for destroying or failing to maintain accounting records, the Condominium Act creates an ongoing duty by association directors, officers, employees, developers and managers to reasonably cooperate with the Division in investigations. In the event Division believes that a person has altered, destroyed, concealed or removed association records, Division shall refer the matter to local law enforcement.



Under the previous law, certain information, such as a unit owner's medical records, information obtained by an association in connection with the approval of sales or leases and attorney-client privileged information, were not available for unit owner inspection. The new law expands the exclusions by stating that Social Security numbers, driver's license numbers, credit card numbers, and "other personal identifying information of any person" are not part of the official records and not accessible to other unit owners. Since the statutes do

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not specify what “other personal identifying information” may include, this provision will be open to interpretation until it is clarified by administrative rules or court decisions.

Although Legislature made significant changes to the Condominium Act in regards to the maintaining of official records, these changes are not applicable to homeowners associations, which are governed by Chapter 720, The Homeowners Act. First, Section 720.303(4) of the Florida Statutes sets forth a list of documents which are considered official records of the association. Unlike the Condominium Act which requires all official records, with the exception of ballots, proxies and like documents, to be maintained for 7 years, the Homeowners Act only requires the association to maintain the following documents for 7 years: minutes of all meetings of the board and of the members, copies of the association’s insurance policies and all financial and accounting records of the association. The Homeowners Act does not otherwise prescribe the length of time an association must retain the remaining official records.

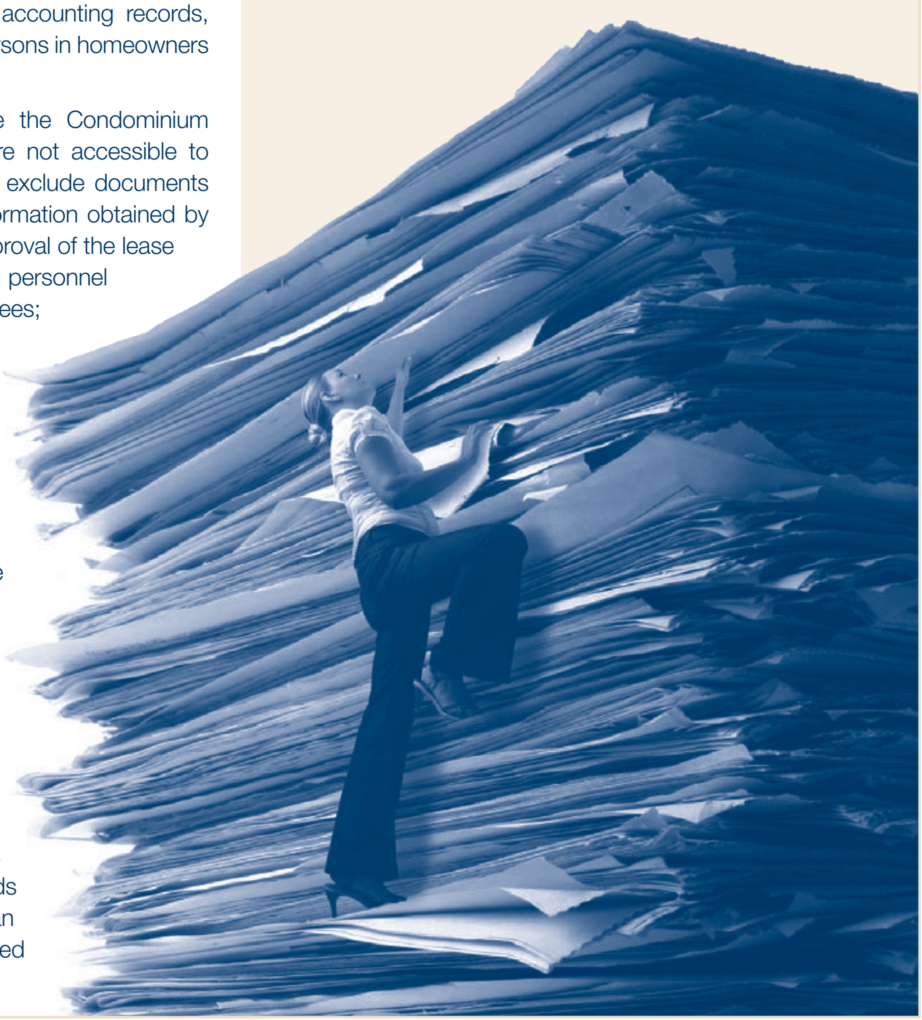
Unlike the Condominium Act which now requires the official records to be kept within 45 miles of the condominium property or within the county in which the condominium is located, the Homeowners Act requires that the official records must be maintained in the state. Next, although the Condominium Act now imposes civil liability against any person who destroys accounting records or fails to maintain accounting records, similar civil liability is not imposed upon persons in homeowners association setting.

Next, the Homeowners Act, much like the Condominium Act, provides that certain documents are not accessible to other members. The statutes specifically exclude documents protected by attorney-client privilege; information obtained by the association in connection with the approval of the lease or sale; disciplinary, health, insurance and personnel records of the association’s employees; and medical records of the owners or residents from inspection by other owners.

Both the Condominium Act and the Homeowners Act permit an association to adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections. However, the Homeowners Act further provides that the Association may not impose a requirement that the owner demonstrate a proper purpose for the inspection, state any reason for the inspection or limit a owner’s right to inspect records to less than one 8 hour business day per month. Generally, rules which restrict access to the official records to 3 or 4 times per month, for no more than 4 hours per viewing, during enumerated times of the day and at the offices of the association manager are considered reasonable.

This Article provided a general overview of recent changes in the Florida Statutes regarding the keeping of official records, as well as discussed certain differences between condominium and homeowners associations. Although an association may adopt reasonable rules governing the inspection of official records, it should seek competent legal advice and guidance prior to the adoption of such rules to ensure they comply with applicable Florida law. ■

Unlike the Condominium Act which requires all official records, with the exception of ballots, proxies and like documents, to be maintained for 7 years, the Homeowners Act only requires the association to maintain the following documents for 7 years: minutes of all meetings of the board and of the members, copies of the association’s insurance policies and all financial and accounting records of the association.



ASSOCIATIONS OWING ASSESSMENTS TO OTHER ASSOCIATIONS: SAY IT ISN'T SO!

By: Brian P. Miles, Esq.
bmiles@becker-poliakoff.com

The only thing worse than associations not being able to collect assessments from their members is associations having to pay assessments to one another. Is it possible? Yes, it is possible in communities where multiple associations govern and each association is statutorily authorized to record a claim of lien for unpaid assessments. This article seeks to explain how associations find themselves in such a mess and what can be done to prevent it.

The backdrop is the Florida Condominium Act (Chapter 718) and the Florida Homeowners' Association Act (Chapter 720). Both Acts provide that an owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. The "joint and several liability" phrase in this content, simply means the next property owner will be equally liable for all of the unpaid assessments incurred by the original owner. Generally, this provision serves to benefit associations in their efforts to recover unpaid assessments from new property owners, regardless of how title is acquired (i.e., by foreclosure sale or deed in lieu of foreclosure, there are limitations on the liability for first mortgagees). However, this provision can also operate against associations in that it requires associations who acquire title to property to pay all past due and owing assessments on a subject property to the other association.

Consider the following hypothetical. A community has master association and a subassociation. Both associations are statutorily authorized to record a claim of lien against a property for failure to pay assessments. An owner fails to pay assessments to both associations and, as a result, both pursue collections, including recording their own claims of lien against the property. Assume there are no other encumbrances (e.g. bank foreclosure, etc.) on the property. One association forecloses its claim of lien while the other association sits by and does nothing. Months later, the foreclosing association takes title to the property and, as a result, becomes jointly and severally liable for all unpaid assessments owed up to the time of transfer of title.

Most associations would be shocked to learn of their new financial obligation to pay assessments to another association, especially after having spent money to prosecute a foreclosure action, which seemed like a prudent decision at the time it was made. Come to find out, however, that decision may end up costing the foreclosing association more money than it was initially owed by the non-paying owner.

Some associations realize the implications of this situation and simply refuse to foreclose or hope the other association will foreclose first. Where both associations realize these implications and refuse to foreclose, a "standoff" may ensue where both associations are left wondering who will flinch first. Meanwhile, the non-paying owner is allowed to live in the community free of charge while other owners pay the non-paying owner's share of the assessments.

Some might think that this situation can be avoided by simply waiting for the owner's first mortgagee to foreclose its mortgage where a first mortgage exists on the property. However, simply because an owner is failing to pay assessments to the association does not necessarily mean that the owner is also in default of his or her mortgage obligation. Theoretically, an owner could be failing to pay the association but timely making mortgage payments. This places the association in the unenviable position of nearly being forced to foreclose no matter what the consequences. Accordingly, it behooves an association to promptly proceed with collection efforts, as doing so in most cases helps to minimize the association's potential exposure. ■

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ELEVATOR KEYS MUST BE UNIFORM

By: Bradley F. Rothenberg
brothenberg@becker-poliakoff.com

Your Association is strapped for cash and you've heard a rumor that you need to spend **thousands of dollars** this year to retrofit your elevators with uniform elevator key boxes to accommodate uniform elevator keys.

It's true. Florida Statutes, §399.15 requires:

> Every building in the State of Florida which is **six (6) or more stories in height,** including but not limited to, **hotels and condominiums, to change all keys for elevators that allow public access,** including but not limited to, service elevators and freight elevators, to allow elevators to operate in fire emergency situations with one (1) master elevator key (within each of the seven (7) State emergency response regions) **BEFORE OCTOBER 1, 2009.**

Uniform elevator keys must be applied for using Florida Department of Financial Services, Division of State Fire Marshal Form DFS-K3-1660 and must be mailed to an authorized vendor. Currently, there are only three (3) authorized vendors in the State of Florida. To obtain a master key, you must be either local fire department personnel, an elevator owner, an elevator owner's agent, an elevator contractor, a state-certified inspector or a State agency representative. You must further certify that you will not duplicate the key and that you will return the key should you become ineligible to possess it.

Does every property need to comply with this requirement? Florida Statutes, §399.15(4) provides, "If it is technically, financially, or physically impossible to bring a building into compliance with this section, the local fire marshal may allow substitute emergency measures that will provide reasonable elevator access."

Administrative Rule, 69A-47.019(1) also provides, "If the local fire official determines that it is technically, financially, or physically impossible to bring a building's elevators into compliance… the local fire official may accept as an alternative the **installation of a keyed lock box** that accepts the uniform key for that specific region..."

If the local fire marshal rejects your plea for relief from this requirement, you can appeal to the State Fire Marshal.

If you don't comply, Florida Statutes, §399.15(5) provides for a $1,000.00 fine, in addition to any other penalty provided by law.

Further information can be obtained by writing to the Division of State Fire Marshal, by visiting the Division of State Fire Marshal website located at http://www.fldfs.com/SFM/index.htm. or by calling your Community Association attorney. ■

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TO BE OR NOT TO BE: TERMINATING A CONDOMINIUM

By: Ray Newman, Esquire
rnewman@becker-poliakoff.com

Editor's Note: In certain circumstances, especially after a devastating casualty loss where due to code requirements, lack of sufficient insurance proceeds, coastal construction prohibitions and the like, it is appropriate to terminate the condominium form of ownership and dispose of the property (usually by sale to a developer). The proceeds of the sale are distributed to the former condominium owners. This article explains the procedures involved in terminating a condominium.

In 2007, the Florida Legislature completely rewrote and replaced the termination provisions of the Condominium Act (Section 718.117, Florida Statutes). Under the old law, a condominium could be terminated only as provided by the Condominium Declaration or, if no provision was contained in the Declaration, by consent of one hundred (100%) percent of the owners and the written consent of all of the holders of recorded liens. The new law, which went into effect July 1, 2007, liberalizes the requirements for terminating a condominium by abolishing the one hundred (100%) percent requirement in cases where the Declaration does not address termination and by providing for termination by a vote of owners which, in some cases, could require less of a majority than that required by the Declaration.

It is important to note that the new law did not negate or replace any provision regarding termination which was contained in a Declaration of Condominium upon the effective date of the statute. Instead, the new law provides two methods for termination in addition to what may be stated in a Declaration. In most situations, these additional statutory methods are less stringent than termination provisions that may be contained in a Declaration and consequently one of such methods will be used to effect a termination.

Termination as a result of "Economic Waste"

One new method of termination provides relief when circumstances create economic waste, disrepair or obsolescence of a condominium. The required circumstances exist when the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws and regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs, or if it becomes impossible to operate or reconstruct a condominium in its previous configuration because of land use laws or regulations. Termination of a condominium under this method requires that a plan of termination be approved by the lesser of the same majority of voting interests as is necessary to amend the Declaration of Condominium or as provided in the Declaration to approve termination of the condominium.

Voluntary Termination by Agreement of Condominium Owners

The second new method of termination allows any condominium to be terminated upon the adoption of a plan of termination approved by eighty (80%) percent of the voting interests. This provision applies regardless of anything to the contrary in the condominium declaration, and irrespective of any damage to condominium property. Termination may, however, be blocked if

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more than ten (10%) percent of the total voting interests reject the plan. For example, if 80% of the owners vote in favor of a plan of termination, 10% of the owners vote against it, and 10% of the owners do not vote, the plan of termination is approved and the condominium is terminated. If, however, 11% of the owners vote against the plan of termination, it is defeated, even if the other 89% of the owners voted in favor of the plan. Under either method of termination, approval of the plan of termination by mortgagees is not required unless termination will result in a mortgagee receiving less than the full satisfaction of the mortgage lien affecting the condominium parcel.

Impact Upon Association

One misconception is that termination of the condominium also causes dissolution of the condominium association. Termination and dissolution are mutually distinct events. Upon approval of a plan of termination, condominium ownership is terminated, but the condominium association continues to function with all powers and duties it had before approval of the plan. The association's board is limited, however, to functions related to the winding up of the affairs of the association. The functions of the Board, after approval of a plan of termination, are set out in detail in the statute.

In order to terminate a condominium under the provisions of Section 718.117, Florida Statutes, as it presently exists, there must be strict compliance with its provisions. Many of these are technical in nature and can be a trap for the unwary.

Plan of Termination

A plan of termination must be in writing, and it must be executed by the requisite percentage of voting interests with the same formalities as a deed. A copy of the proposed plan must be furnished to all unit owners in the same manner as notice for an annual meeting at least fourteen days prior to the meeting at which the plan of termination is to be considered. The approved plan of termination must be recorded in the public records of the county in which the condominium is located. The plan is effective upon recordation or upon the date provided for in the plan itself.

The plan of termination must contain:

- **The name, address, and powers of the termination trustee.**
- **A date after which the plan of termination is void if it has not been recorded.**
- **The interests of the respective unit owners in the association property, common surplus, and other assets of the association.**
- **The interests of the respective unit owners in any proceeds from the sale of the condominium property.**
- **Any interests of the respective unit owners in remaining insurance or condemnation proceeds.**

The plan of termination must allocate proceeds from the sale of condominium property in the manner provided for by the Declaration or, if the Declaration is silent, the proceeds must be apportioned between all units and common elements based upon their respective fair market values immediately before termination. The statute sets out three (3) methods for further apportioning the proceeds allocated to the units, and it permits other methods of apportionment of such proceeds as may be agreed upon in the plan of termination.

Association serves as Termination Trustee

The Association serves as termination trustee unless another person is appointed in the plan of termination. Upon the recording of the plan of termination (or later date, if specified in the plan), title to the condominium property vests in the trustee. (If the termination is conditional, the transfer of title occurs upon compliance with the condition.) After the vesting of title in the termination trustee, the former unit owners become beneficiaries of the proceeds realized from the plan of termination. The termination trustee must provide notice that a plan of termination has been recorded to all unit owners and lien holders within thirty (30) days after recordation of the plan. The trustee must also, within ninety (90) days after the effective date of the termination plan, provide a certified copy of the recorded plan to the Division of Condominiums, Timeshares and Mobile Homes.

The trustee may sell the former condominium property and distribute the proceeds. The termination trustee must give thirty (30) days notice to all unit owners and lien holders prior to the first distribution. This notice must include a good faith estimate of the amount of the distribution. The notice must also provide a deadline to unit owners and lien holders for notifying the termination trustee of any objections. In addition to presenting such objections, owners and lien holders also have the right to contest a plan of termination through judicial proceedings within ninety (90) days after the date the plan is recorded. If the court determines that the plan of termination is not fair and reasonable, it may void the plan or modify it to apportion the proceeds in a fair and reasonable manner under the guidelines of the Condominium Act.

The new termination statute will be of great benefit to owners of units in condominiums which should be terminated. Prior to the adoption of this statute, the approval of all of the unit owners and all of their lien holders was often required for the termination of a condominium. This had the effect of giving one unit owner the veto power over termination even if the financial interests of all of the unit owners would have been best served by termination. In addition, it was logistically very difficult to get lien holder consent. By removing these obstacles, the Legislature has provided a better method for owners of condominium units to preserve the value of their property interests.

In order to terminate a condominium under the provisions of Section 718.117, Florida Statutes, as it presently exists, there must be strict compliance with its provisions. Many of these are technical in nature and can be a trap for the unwary. Failure to properly follow the statutory requirements may have far reaching adverse consequences. For example, an improperly adopted and recorded plan of termination may be ineffective to terminate the condominium, but it may constitute a cloud on the title of each condominium unit. Competent legal advice and guidance must be secured and followed for each step in this complicated and highly technical process. ■

OBTAINING MORTGAGEE CONSENT A LITTLE EASIER FOR CONDOMINIUM ASSOCIATIONS

By: John Cottle, Esquire
jcottle@becker-poliakoff.com

The board of the Rolling Tide Condominium wants to amend its declaration to address two matters of immediate concern. First, the existing declaration, contains outdated language regarding insurance requirements. The board wants to update this section to bring it into conformity with current Florida statutes. Second, the board wants to adopt an amendment banning pets. The declaration requires a 60% membership approval for adopting amendments and the board is confident that it can secure the necessary vote. Unfortunately, the declaration also requires that every institution or individual holding a mortgage on any condominium unit must likewise approve the amendment, a condition the board believes will be impossible to meet. Must the board abandon its plan to amend the declaration or is there a way to avoid the mortgagee approval requirement?

A 2007 amendment to Florida law provides some relief to condominium associations faced with such a problem. Many amendments can now be adopted without mortgagee approval. Further, even in cases where mortgagee consent is required, the association is now in a better position to obtain that consent.

Section 718.110, Florida Statutes, provides that as to mortgages recorded after October 1, 2007, any provision in the declaration, articles of incorporation, or bylaws that requires mortgagee approval of an amendment is enforceable only as to certain specified matters. Basically, those matters involve the reconfiguration of units and appurtenances, modifications in how common expenses are apportioned, enlargement of the common elements, merger, and conversion to timeshare estates. Also, quite understandably, any amendment that affects the priority of a mortgage or otherwise materially affects the rights of a mortgagee will still require mortgagee approval.

If the mortgage was recorded before October 1, 2007, the statute provides that existing provisions requiring mortgagee consent are still enforceable. However, the statute contains two provisions that should be of help to an association needing the approval of a pre-October 2007 mortgagee. First, 718.110(11)(d) places the burden on the mortgagee to affirmatively reject the proposed amendment, provided the amendment is furnished to the mortgagee pursuant to the procedures set out in the statute. If the amendment is properly furnished to the mortgagee and the mortgagee fails to respond within 60 days, the mortgagee's silence will be deemed a consent to the amendment. Second, 718.110(e) provides that an amendment adopted without the required mortgagee consent is not void but only voidable by an affected mortgagee. The amendment is therefore still enforceable against the membership, notwithstanding failure to secure mortgagee approval, unless and until an affected mortgagee objects. An action to void an amendment adopted without mortgagee consent must be brought either within 5 years of the date of discovery or 5 years after its recordation, depending upon the nature of the amendment. Thereafter, the right to challenge the amendment expires.

Finally, 718.110(11)(f) and 718.111(11)(i) provide that notwithstanding any requirement of mortgagee approval imposed by the condominium documents, an association may amend its declaration in order to bring it into conformity with the statutory provisions dealing with insurance requirements. No mortgagee approval whatever is required for such an amendment, regardless of when the mortgage was recorded.

Therefore, the board of Rolling Tide may amend their declaration to update insurance requirements without seeking mortgagee approval for the amendment. As to the amendment banning pets, no approval is required of any mortgagee who recorded its mortgagee after October 1, 2007. As to mortgagees who recorded before that date, the board may proceed by notifying them of the proposed amendment and, if they make no objection within 60 days, their consent will be deemed given. Also, since the amendment is only voidable upon the objection of a mortgagee, the association may begin enforcement of the new policy upon securing owner approval, and no owner will have standing to object that a mortgagee did not approve it.

Determining whether mortgagee approval is required can often be a tricky issue. When questions arise about the requirements for adopting an amendment, the association should consult with its counsel. ■

COMMON DEFENSES MAY THWART COVENANT OR RULE ENFORCEMENT

It is crucial for an Association to consistently enforce its Covenants, Restrictions, Rules and Regulations as failure to do so can result in an owner's successful challenge of the Association's action.

An owner has an array of potential defenses to an enforcement procedure including:

Estoppel: A person is prevented by his own acts from claiming a right to the detriment of another person who relied on his conduct and acted accordingly;

Laches: Failure to do an act which should be done or to claim or enforce a right at a proper time. For example, a unit owner may allege that his change of position was induced or resulted from the conduct, misrepresentation or silence of the Association;

Waiver: Intentional or voluntary relinquishment of a known right, or when one in possession of any right with full knowledge of the material facts does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right. It is tantamount to the abandonment of a claim or privilege;

Selective Enforcement: The Association is "estopped" from applying a given regulation to one unit owner without applying the same regulation equally to all other owners;

Statute of Limitations: Most legal claims must be brought within a certain time of their occurrence or else they are waived. The Association's potential breach of contract claim is time barred because it was not brought within a specified period of time after the right accrued.

Every Association should adopt an enforcement procedure or method of handling different types of violations. The remedies available to the Association often depend upon the type of property (i.e. whether the property is a condominium, governed by a homeowners' association or a cooperative) and the particular governing documents. Many options may be available if the documents are amended to include enforcement procedures.

Maintaining the integrity of the covenants and rules and regulations is an important goal and one of the primary functions of the Board of Directors. Associations may have an easier time obtaining compliance by establishing enforcement procedures in advance and communicating those procedures to the membership. ■

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Can "blogging" help you stay up to date and informed about the latest trends and topics impacting communities?

The Florida Condo & HOA Law Blog can.

The goal of the blog is to provide readers with a continuous source of news, information and insight about community association issues. Several Firm attorneys will contribute information within their areas of expertise on issues such as board responsibilities, construction defects and disputes with contractors, collection of assessments and foreclosure issues, legislation, "green" building and improvements, retrofit requirements, trends in litigation and much more.

Log on, it's easy. Let's start the conversation now and help build an online community of interest around the issues that are important to all of us.

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STATE OF DISTRESS:

SURVEY RESPONDENTS URGE ELECTED OFFICIALS TO PROTECT THE INTERESTS OF COMMUNITY ASSOCIATIONS;

GARY A. POLIAKOFF, J.D. IMPLORES FEDERAL GOVERNMENT TO REQUIRE PAYMENT OF COMMUNITY ASSOCIATION ASSESSMENTS.

CALL recently completed its second annual Community Association Mortgage Foreclosure Survey. Almost two-thirds of the close to 1,600 respondents living in communities hit by mortgage foreclosures said lender foreclosures create budget deficits that negatively impacted association operations and maintenance of the property. Ninety (90%) percent of the survey respondents said lenders should bear more of the financial burden on associations that result from the statutory caps on the amounts they must pay when title is acquired as a result of foreclosure. In response to constituents' concerns, Florida legislators have filed several bills which are now pending before both the Senate and the House of Representatives. Community leaders are encouraged to log on to CALLBP.com to review the pending bills and participate in the legislative process.

On March 4 the U.S. Department of the Treasury issued an updated and detailed description of the Making Home Affordable program which is part of the President's Homeowner Affordability and Stability Plan. The program includes refinancing options to provide responsible homeowners with access to the historically low interest rates, even if falling home values caused the homeowner's equity to fall below 20%. The program also includes $75 billion towards loan modifications in an effort to avert additional foreclosures. Loan modifications may impact community association collections, especially in light of the fact that lenders are protected from financial responsibilities to associations in excess of the existing statutory caps. Consequently, Mr. Poliakoff brought this issue to the attention of the President of the United States in written correspondence. We have re-printed that correspondence in full.

BECKER & POLIAKOFF
Legal and Business Strategists

Emerald Lake Corporate Park
3111 Stirling Road
Fort Lauderdale, Florida 33312 6525
Phone: (954) 987 7550 Fax: (954) 985 4176
US Toll Free: (800) 432 7712

Mailing Address:
P.O. Box 9057
Ft. Lauderdale, FL 33310 9057

Reply To: Fort Lauderdale
Gary A. Poliakoff, J.D.
Direct dial: (954) 985 4150
GPoliakoff@becker poliakoff.com

ADMINISTRATIVE OFFICE
3111 STIRLING ROAD
FORT LAUDERDALE, FL 33312
800.432.7712 U.S. TOLL FREE

SWJW.BECKER-POLIAKOFF.COM
BP@BECKER POLIAKOFF.COM

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February 26, 2009

The Honorable Barack Obama
President of the United States
The White House 1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: The 60 Million Forgotten Victims of the Sub Prime Mortgage Crisis, Bank Failures, and Home Foreclosures

Dear President Obama:

Much has been said and written about the mortgage crisis and its impact on both banks and borrowers. And while the "Homeowner Affordability and Stability Plan" will, hopefully, go a long way towards stabilizing the housing market, there is one aspect of the problem which has been largely ignored: namely, the failure of banks and defaulting homeowners to pay their share of the common expenses necessary to maintain the Nation's 300,000 condominium, cooperatives and planned developments operated by community associations. As a direct result, innocent unit owners, those who are timely paying their share of the common expenses, are being forced to cover the bad debt for defaulting banks and unit owners. In some cases there just aren't sufficient funds to pay for electricity, ground maintenance, insurance, security, waste management, and other essential services necessary to preserve the property values.

To put this into proper perspective, according to the Community Association Institute (www.caionline.org) the value of homes in all associations is estimated at $4 trillion. Estimated annual operating revenue for U.S. community association operated homes, housing 60 million Americans, is more than $41 billion. To a large degree, the assessments paid by the unit owners are going to maintain the collateral of the banks and defaulting unit owners, neither of whom are paying their share of the common expenses.

There is a solution to this problem—banks receiving Federal bailout monies and unit owners offered restructured mortgages at lower interest rates, as a condition of their receiving Federal funds and lower interest rates should be obligated to bring their obligations to their Community Associations current.

I trust you will give this matter the important consideration it warrants. Feel free to call upon me if I might be of any assistance in finding a solution to this crisis.

Very truly yours,

Gary A. Poliakoff, J.D.

cc: Elizabeth Warren, Chair, TARP Congressional Oversight Panel for Economic Stabilization
Neel T. Kashkari, Interim Assistant Secretary of the Treasury for Financial Stability

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A ROSE BY ANY OTHER NAME: THE DISPARATE TREATMENT OF CONDOMINIUMS AND COOPERATIVES REGARDING HOMESTEAD RIGHTS – PART I

By: Lance D. Clouse, Esquire
lclouse@becker-poliakoff.com

Picture this: two physically identical buildings across the street from one another. One is a condominium, and the other is a cooperative. One family, the Smiths, sell their single family residence and are looking for another, smaller place to call home. Another family, the Joneses, also sell their home and begin looking for another place to live. The Smiths have an eight year old son, as do the Joneses. The Smiths buy a unit in the condominium and the Joneses buy an interest in the cooperative across the street and are assigned a lease to a cooperative unit that is exactly the same size, shape, and quality as the Smiths' condominium unit. For various reasons, only Mr. Smith's name is on the deed for the condominium unit; likewise, the Jones' cooperative interest is held in Mr. Jones' name alone. Both the Smiths and the Joneses move into their units with the intention of living in there as permanent residences. Although the units are physically identical in every detail, do the Joneses have the same legal rights and protections as the Smiths do? Condominium units and cooperative units are not created equal. Condominium units enjoy the benefits of all of the homestead protections found in the Florida Constitution, including the homestead tax exemption, the protection relating to descent and devise, and protection against forced sale. For cooperatives, it is not so simple.

This two-part article will address the disparate treatment of cooperative units as "homestead property" in the differing contexts, and how the disparities in treatment can impact a cooperative unit owner differently than a condominium unit owner under the same circumstances. Part I will address the constitutional provisions relating to homestead tax exemption and regulation of devise and descent.

The term "homestead" under Florida law is given three different contexts: taxation, exemption from forced sale, and devise and descent. The homestead protection in the taxation context stems from Article VII, Section 6 of the Florida Constitution. The homestead benefits in the devise and descent and the exemption against forced sale contexts originate in Article X, Section 4, of the Florida Constitution. Both condominiums and cooperatives enjoy the benefit of the homestead tax exemption. However, protection against forced sale of cooperative parcels is still subject to debate.

Article X, Section 4, of the Florida Constitution, in relevant part, provides:

> a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> > (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;
>
> (b) These exemptions shall inure to the surviving spouse or heirs of the owner.
>
> (c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child...

As to Article X, Section 4(c), regarding devise and descent, the Second District Court of Appeal of Florida in *Weber v. Agency For Health Care Administration, 2008 WL 5102897*, recently agreed that a cooperative unit was not subject to homestead protection relating to devise and descent, and cited the Florida Supreme Court case *Wartels v. Wartels, 357 So.2d 708 (Fla. 1978)*. In *Wartels*, the Court found that a cooperative apartment owner does not hold any type of proprietary interest in either the cooperative apartment or the apartment building or land upon which the building is situated, but instead, merely receives shares in the corporation that holds title to the land on which the cooperative building is located. Therefore, the court held that the cooperative unit did not constitute "real property" entitled to homestead protection in that context.

In *Phillips v. Hirshon, 958 So.2d 425 (Fla. 3d DCA 2007)* the Third District Court of Appeal in Florida also held that cooperatives cannot be considered homestead property for descent and devise purposes. While the courts seem to be in agreement that a cooperative unit cannot be considered homestead property in the descent and devise context, the issue as to whether a cooperative unit can be treated as homestead property to avoid a forced sale is still unclear. In Part II of this article, we will analyze the homestead protection against forced sale, particularly as it relates to cooperatives, and then will provide examples (using the Smiths and the Joneses) comparing the results of the differing treatment. ■

ENFORCING PARKING RESTRICTIONS BY TOWING VEHICLES

By: Kevin L. Edwards, Esquire
kedwards@becker-poliakoff.com

Parking is serious business. Whether this involves the allocation and regulation of guest or handicap parking areas, parking at the pool or clubhouse, or the ability of an owner to keep a certain type or number of vehicle on the driveway, most (if not all) association governing documents contain rules or restrictions on parking. Associations spend thousands of dollars each year trying to enforce these restrictions. Invariably, board members seek the quickest and easiest (if not cheapest) approach to enforcing its parking regulations. This typically evolves into a discussion as to whether the board may legally remove improperly parked vehicles within the association.

The starting point in any discussion involving the enforcement of use restrictions is to determine if the specific remedies exist to procure an owner's compliance and what is the process involved in doing so? The answers to these questions are usually found within the association's governing documents (e.g. the declaration of condominium or the declaration of restrictive covenants, articles of incorporation, bylaws and rules.) Likewise, the Florida Statutes (such as the Condominium Act and Homeowners Association Act) will provide guidance. The governing documents must give the board the authority to tow vehicles. This authority may be found in general language that empowers the association to engage in "self-help" to correct violations, or it may be found in a specific towing provision. If the association has the authority to tow vehicles, it must strictly adhere to the provisions of Section 715.07, Florida Statutes commonly referred to as the "towing statute."

The towing statute sets forth requirements which, if not precisely met, may result in the association having to pay for towing costs and any damages to the owner's vehicle. Some of the specific requirements in the statute include that signs must be prominently posted within the community clearly indicating, in not less than 2-inch high, light reflective letters on a contrasting background, that unauthorized vehicles will be towed away at the owner's expense. Moreover, the words, "tow-away zone" must be included on the signs in not less than 4-inch high letters. The notice must also provide the name and current telephone number of the person or firm towing or removing the vehicles and the sign structure containing the required notices must be permanently installed with the words "tow-away zone" not less than three (3) feet and not more than six (6) feet above ground level. The towing signs must be maintained on the property for not less than 24 hours prior to the towing or removing of unauthorized vehicles. Often, these signs may be purchased and installed by the towing company.

Once these notice requirements are met, the towing company must comply with several other requirements concerning how far the vehicle may be towed, giving notice to public authorities within 30 minutes of completion of the towing, and other statutory requirements. For example, the towed or removed vehicle must be stored within ten (10) miles of the point of removal; the storage site must be open for the purpose of redeeming the vehicle from 8:00 a.m. to 6:00 p.m., and at other times it must permanently display a sign indicating the number where the operator of the site can be reached. In addition, if the registered owner or authorized person arrives at the scene at the time the vehicle is being towed, the vehicle must be disconnected from the towing apparatus and that person shall be permitted to remove the vehicle on his or her own volition.

Clearly, the towing statute authorizes an association to tow vehicles that are improperly parked or maintained on the common elements and common areas. However, there is debate as to whether this right extends to vehicles parked on an owner's private property. The towing statute specifically empowers a condominium association to act as the "designated representative" of the property owner but there is no similar designation for a homeowners association. Thus, notwithstanding the specific authority to do so in the governing documents, it appears as if condominium associations have the power to tow vehicles improperly parked upon an owner's private property but homeowners associations do not.

Board members need to be careful when exercising a self-help remedy such as towing. Courts generally do not favor actions involving self-help to cure violations (as opposed to seeking legal redress in the form of an injunction or other court order). Therefore, the specific authority to tow vehicles must be in the governing documents. In addition, the board must closely follow the procedures outlined in the towing statute. The best approach would be for the board to first issue a demand letter to the owner in violation and allow the owner an opportunity to comply with the parking rules before the towing remedy is pursued. ■

OWNERS HAVE THE RIGHT TO ADD ITEMS TO HOA BOARD AGENDAS

By: Bradley F. Rothenberg, Esquire
brothenberg@becker-poliakoff.com

So, you want to petition to have an item added to the agenda of the next Board of Directors meeting at your Homeowners' Association…

Board of Directors meetings are a great place to express concerns about your neighbor's thirty-six (36) outdoor cats, your next door neighbor's trampoline, the person on the corner who has a garage sale every weekend, or any other issue affecting your community. However, there are strict statutory requirements to comply with before the Board of Directors of your community must consider your matter as an item of business. Florida Statutes, Section 720.303(2)(d), provides:

- Twenty percent **(20%)** of the **total voting interests** must petition the Board to address an item of business.
- The board must at its **next regular board meeting** or at a **special meeting of the board**, but not later than sixty **(60) days** after the receipt of the petition, put the petitioned item on an agenda.
- The Board must give all members fourteen **(14) days notice** of the meeting at which the petitioned item will be addressed.
- Each member has the right to **speak for** at least three **(3) minutes** on each matter placed on the agenda by petition, provided that the member signs the sign-up sheet, if one is provided, or submits a written request to speak prior to the meeting.
- Other than putting the petitioned item on the agenda for the meeting, the Board is not obligated to take any other action.

It is important to note that just because you've summoned up the courage to address the Board and other members of your community at a Board meeting, it is not a question and answer session. The Board need not comment, entertain a motion on your matter, or even answer your questions. Get involved in your community. Attend Board meetings, volunteer to serve on a committee, or even serve on the Board. You will be surprised at the difference you can make! ■

COMMUNITY UPDATE™

VOLUME IV, 2009 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor

PROTECT YOUR ASSOCIATION'S ASSETS AGAINST FRAUD

By: Gregory W. Marler, Esq.
gmarler@becker-poliakoff.com

Arguably, the most important function of a community association board of directors is to prudently administer the association's finances. It is quite common for a board of directors to rely on just one director or a property manager to take charge of financial operations. However, delegating the financial administration function to an individual, without also engaging in an appropriate level of oversight, can invite fraudulent conduct. Common fraud schemes involve fraudulent disbursements, misuse of association credit cards and business accounts, misappropriation of supplies, checks and petty cash, and even lucrative kickback arrangements. Importantly, lack of oversight that enables frauds to occur may constitute a breach of the directors' statutory standard of care.

Duty of Care When Handling Association's Finances:

The Florida Not For Profit Corporation Act has long provided that a director shall discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances. This "standard of care" has been expressly added to the Florida Condominium Act effective October 1, 2008, although it has long applied to condominium associations, and all other incorporated associations, through the corporation statutes. The "standard of care" attempts to create an objective standard by which the directors' decisions and conduct will be judged. Obviously, if an association is the victim of fraud, it will not be sufficient for directors to deny responsibility based upon the fact that they delegated the responsibility for financial administration to another; a prudent person serving on a board would not completely abdicate financial administration oversight. The board is ultimately responsible for all association functions and actions regardless if some or all functions have been delegated.

Despite the clear obligation of the board to monitor operations, a common theme in fraud cases is that the individual committing fraud was left alone with little or no oversight. Community associations that fall into this situation often do so because their boards are comprised of volunteer directors who are primarily involved in other activities. Community association directors are often either working men and women with families, or can be seasonal, Florida residents with distinct lives and activities in other states for several months during each year. Therefore, the ability of every director to engage in detailed and diligent oversight of the financial operations of a community association does not necessarily coincide with the actual level of involvement of volunteer directors. But there are some strategies and tools that can be used to assist directors in preventing fraud involving association finances. These strategies and tools require an understanding of how fraud occurs.

A common and useful analysis of fraud involves the "fraud triangle." The "fraud triangle" identifies the three primary elements that can lead to fraud as

1.) Incentive/ Pressures;
2.) Attitude / Rationalization; and
3.) Opportunity.

Communication is Key:

By actively and genuinely communicating with fellow directors and professional managers, you can identify persons who might be inclined

continued on page 2

If directors regularly communicate with one another and with managers, any feelings that might lead to the rationalization to commit fraud can often be identified and addressed through appropriate oversight in the future or by correcting any perceived injustice.

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to rationalize fraud. A manager who feels underpaid or unfairly treated is more likely to commit fraud. A director who serves very ably but feels that his or her service and contributions to the community are not properly appreciated is more inclined to commit fraud. If directors regularly communicate with one another and with managers, any feelings that might lead to the rationalization to commit fraud can often be identified and addressed through appropriate oversight in the future or by correcting any perceived injustice.

Eliminate Opportunities:

The most fertile ground for preventing fraud is to eliminate opportunities. Unfortunately, the best, most obvious way to do this is to have several people involved in every, minute detail of association operations. For the reasons discussed above, such a level of involvement by multiple people is rarely practical and most often impossible. But some essential measures must be taken.

For example, the common practice of requiring two signatures on every check is essential. I understand that fidelity bonding, which is required by statute, is generally not available unless an association has a dual signature requirement for checks and internal controls to implement this requirement.

Another essential procedure to have in place is to have multiple persons involved in the review of bank statements, financial transactions records, and the preparation of financial statements. One of the most common examples of fraud involves the writing of a check in excess of the invoice amount, or fraudulently entering excessive amounts in the general ledger and writing another check payable to himself to account for the excess. Both of these schemes require the perpetrator to destroy incorrect or voided checks or to make erroneous entries in the ledger. These practices can be prevented if multiple persons are involved in the day-to-day financial activities of the association, but that is often not possible.

Investigate New Banking Services:

Fortunately, new banking services have developed along with the internet to address this problem. I am aware that banks offer online account reconciliation service so that all checks, including voided checks or checks which were overpayments, can be viewed online. At least one bank offers a “Positive Pay” service which allows customers to upload checks it writes and then the bank can confirm that any check it receives for payment is consistent with what the customer advised was intended. These online services eliminate an opportunity for fraud because they create a permanent record that cannot be manipulated and because the potential perpetrator knows that at least one other set of eyes are monitoring the financial statements.

Preventing fraud requires diligent, consistent and frequent effort on the part of all community association board members. That level of involvement in the day-to-day financial activities of the association is not always consistent with the nature of volunteer directors. But the obligation of community association directors to take reasonable steps to prevent fraud is clear and cannot be avoided. Understanding and acting upon the three elements of fraud identified in the “fraud triangle” will help directors to meet their obligations and protect the association. ■

EARTH DAY IS APRIL 22!

By: Lisa Magill, Esq.
lmagill@becker-poliakoff.com

There are numerous events throughout the State of Florida to celebrate Earth Day, including many demonstrations of eco-friendly products and services to improve energy efficiency and sustainability efforts. Americans celebrated the first Earth Day in 1970 which led to the creation of the United States Environmental Protection Agency and the passage of the Clean Air, Clean Water, and Endangered Species acts.

Community Associations are slowly incorporating "green" building practices, largely to reduce energy expenses. Recent studies performed by the Florida Solar Energy Center (a research institute of the University of Central Florida) found that Floridians per-household energy consumption is among the highest in the United States, not surprisingly as a result of the hot and humid climate and density. Last year Governor Crist signed HB 7135 known as the Florida Energy Bill. That law provides the basis for a comprehensive energy policy in Florida, clarifies property tax exemptions and creates new tax credits and incentives associated with installation of energy efficient building components.

Community Associations (and their members) can and should take advantage of the cost-savings obtained through "green" retrofits. Moreover, associations must be cognizant of laws designed to provide homeowners with "green" savings. For example, Section 163.04, Florida Statutes specifically forbids enforcement of any deed restrictions or covenants prohibiting the installation of solar collectors, clotheslines or other energy devices based upon renewable resources. Section 720.3075, Florida Statutes likewise prohibits associations from enforcing any restrictions that would preclude a homeowner from installing xeriscape or Florida-Friendly landscape on his or her property. Boards of Condominium Associations, on the other hand, are specifically empowered to install solar collectors, clotheslines or other energy-efficient devices based upon renewable resources on the common elements or association property, without a vote of the owners, by Section 718.113(6), Florida Statutes.

We have compiled a brief sampling of the programs available to Floridians and expect to bring community association leaders more information on how to glean cost-savings from retrofits and building management practices designed to improve energy efficiency, reduce waste and conserve water.

Orange County - Solar Hot Water Rebate Program

Orange County offers a $200 rebate on newly installed solar hot water systems in the county.

http://www.orangecountyfl.net/cms/DEPT/CEsrvcs/epd/SolarWaterProgram.htm

Lakeland Electric - Solar Water Heating Program

Lakeland Electric, a municipal utility in Florida, offers solar-heated domestic hot water on a "pay-for-energy" basis. The utility owns and maintains the solar water heaters they install on participating customers' homes and bills them only for hot water delivered to the faucet. There is a waiting list for additional installations.

Orlando Utilities Commission - Pilot Solar Programs

The Orlando Utilities Commission (OUC), through its Pilot Solar Program, purchases environmental attributes or renewable energy credits (RECs) from customers who install a photovoltaic (PV) and/or solar thermal energy system on their property. It also, in cooperation with the Orlando Federal Credit Union (OFCU), provides customers with low-interest loans for solar photovoltaic (PV) systems and solar water heating (SWH) systems.

http://www.ouc.com/green/solar_pilots.htm

Renewable Energy Property Tax Exemption

Pursuant to Section 196.175, Florida Statutes, property owners may receive a tax exemption when a renewable energy source device is installed and operated. The exemption can save you the amount of the original cost of the device, including the installation cost. The exemption may apply for up to ten (10) years! Contact Taxpayer Services at the Florida Department of Revenue for more information.

Solar Energy System Incentives Program

The Department of Environmental Protection (DEP), provides rebates to Florida residents, businesses, non-profits and public facilities that purchase and install new photovoltaic (PV) systems, solar water heating systems and solar thermal pool heaters. Unfortunately, the funding for this program is exhausted, although applications are still being accepted in the event funding becomes available.

http://www.dep.state.fl.us/energy/energyact/solar.htm

Florida Power and Light – Energy Efficiency Rebates

Florida Power and Light offers incentives for upgrades to HVAC systems, building envelopes, water heating, refrigeration or lighting systems with energy-efficient equipment. In addition to these incentives, FPL also offers a free Energy Evaluation and a custom incentive that rewards energy-saving innovations. ■

A ROSE BY ANY OTHER NAME: THE DISPARATE TREATMENT OF CONDOMINIUMS AND COOPERATIVES REGARDING HOMESTEAD RIGHTS — PART II

By: Lance D. Clouse, Esq.
lclouse@becker-poliakoff.com

In Part I we addressed constitutional provisions relating to homestead tax exemption and regulation of devise and descent in both condominiums and cooperatives. In this part, we analyze the applicability of Florida constitutional homestead protection against forced sale, particularly as it relates to cooperatives, and then provide some examples.

The Fifth District Court of Appeal, in determining whether a cooperative unit could be subject to forced sale, concluded that "an owner of a co-op may qualify as an 'owner' of a 'residence' under article X, section 4(a)(1) of the Florida Constitution." *Southern Walls, Inc. v. Stilwell Corporation, 810 So.2d 566, 572 (Fla. 5th DCA 2002).* Thus, the *Southern Walls* court held that the Constitutional homestead exemption from forced sale applies to "any beneficial interest in land." Thus, the owner of a cooperative apartment was entitled to the Constitutional exemption against forced sale in this case.

In contrast, the Third District Court of Appeal, in *Phillips v. Hirshon, 958 So.2d 425 (Fla. 3d DCA 2007)* concluded that cooperative units are not entitled to homestead protection in both the devise and descent context and in the forced sale context.

Due to the conflict between the Districts on the issue of homestead protection against forced sale, the Third District certified the question to the Florida Supreme Court for guidance as to whether Article X, Section 4, of the Constitution, can be interpreted one way in the devise and descent context and another way in the forced sale context. Unfortunately, the Florida Supreme Court declined to accept jurisdiction to review the *Levine v. Hirshon, 980 So.2d 1053 (Fla. 2008)* case. Therefore, the issue as to whether cooperative units qualify for homestead protection against forced sale is still unresolved by the Supreme Court and differs depending upon the jurisdiction.

Going back to the Smiths and the Joneses, let us explore what the practical effect would be by the differences in treatment for homestead purposes.

Example No.1: both the Smiths and the Joneses each applied for the homestead tax exemption for their units to reduce their property taxes. Did they both qualify? Yes, both the Smiths' condominium unit and the Jones' cooperative unit are entitled to the homestead tax exemption. So far, so good.

Example No.2: Mr. Smith and Mr. Jones, being lifelong friends, are both riding in a car together to the store, when suddenly a dog runs into the street. Mr. Smith swerves to miss the dog but crashes into a light post, killing them instantly. Before their deaths, Mr. Smith and Mr. Jones each had changed their wills to devise their "homestead" units to the charity of their choice. What happens with Mr. Smith's condominium unit? The court would hold that the will provision is in conflict with the Florida Constitution regulating homestead rights in the devise and descent context and, therefore, is invalid. The result: Mrs. Smith will have a life estate in the condominium with the remainder interest going to the Smith's minor child. On the other hand, what happens to the cooperative unit? Since the courts have held that the cooperative unit does not qualify for the homestead rights relating to devise and descent, Mr. Jones' devise of the cooperative unit to the charity is upheld and Mrs. Jones and her son are not entitled to claim homestead protection.

Example No.3: Mr. Smith and Mr. Jones are business partners who run into financial trouble and cannot meet their business obligations. Mr. Ramirez, a supplier for their business, sues and wins a judgment against Mr. Smith and Mr. Jones personally. Mr. Ramirez attempts to enforce his judgment by seeking to have both Mr. Smith's condominium unit and Mr. Jones cooperative unit sold to satisfy the judgment. Since the condominium unit qualifies for homestead protection against forced sale, the Smiths' unit cannot be sold to satisfy the judgment. However, for the Jones' cooperative unit, the answer is unclear. In the Fifth District Court of Appeal, the court will most likely hold that the Jones' cooperative unit is protected from forced sale. In the Third District, however, the court would most likely find that the Jones' unit is not protected against forced sale and would allow Mr. Ramirez to force the sale to enforce his judgment. The result in one of the other Districts in which the issue has not been addressed would depend upon whether or not the court finds that the *Wartels* decision is controlling.

Clearly, this disparity in treatment of cooperative units versus condominium units should be addressed by the Legislature. Unless and until that happens, current and prospective cooperative unit owners should consult with an attorney to carefully consider his or her asset protection and estate planning goals. ■

The issue as to whether cooperative units qualify for homestead protection against forced sale is still unresolved by the Supreme Court and differs depending upon the jurisdiction.

Tax & Estate Planning

ESTATE AND INCAPACITY PLANNING TOOLS EVERY BOARD OF A COMMUNITY ASSOCIATION SHOULD UNDERSTAND

By: Andrew Berger, Esq.
aberger@becker-poliakoff.com

The financial crisis has impacted almost everyone. Associations are struggling particularly hard and it is critical for Associations to be in a position to protect income stream in the event a unit owner passes away, becomes ill or incapacitated or is placed in a nursing home. In order to accomplish this, each member of the Board of Directors should be familiar with, and make the members aware of, certain estate and incapacitation planning tools and issues. Additionally, the Board may wish to regulate transfers by will or gift, a right not often provided for in typical Association governing documents.

1. Transfers of a Unit for Estate Planning Purposes. The potential for conflict and litigation is particularly present when an Association challenges an owner's desire to transfer ownership of a unit by will or gift to a family member or to a trust for estate planning purposes. In one recent case, although an Association's governing documents required Association approval of a "purchase" or "sale" of property, the governing documents did not regulate gifts. The court rejected the Association's argument that the language in the governing documents should be interpreted to include the transfers of gifts, holding that if a restriction in a covenant is ambiguous, the covenant is to be construed against the Association. Therefore, if an Association wishes to regulate the non-sale transfer of a unit, such as a gift between family members for estate planning purposes, this must be expressly stated in the Association's governing documents.

2. Durable Power of Attorney. A durable power of attorney is a lifetime document that allows the principal to designate a representative, known as an "attorney in fact," to step into the shoes of the principal and perform certain actions should he or she become ill, incapacitated or otherwise unable to manage his or her affairs. Without a power of attorney, the principal's spouse or other loved one(s) would have to endure the delay and expense of seeking approval from the court to carry out needed financial transactions. With a power of attorney in place, for example, the attorney in fact could pay any assessments and/or dues owed to an Association immediately upon the incapacitation of the principal.

3. Revocable Trust. A revocable living trust is often the central instrument in planning for disability and death and may offer the most comprehensive, cost-effective, and flexible planning tool available to administer an estate. Such trusts are often referred to as will substitutes in that they dispose of assets held in the trust at death without the need for probate administration, which can be time-consuming and costly. In addition, revocable trusts play an important role in disability planning because they can provide a mechanism for the management of assets if the owner becomes incapacitated, without the need for a

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conservator to be appointed to manage the assets. In this way, planning that incorporates the use of a revocable trust not only benefits the grantor and his or her heirs, but also an Association in that its income stream is not disrupted by probate, in the event of death, or the need for a conservator to be appointed to manage financial affairs, in the event of incapacitation.

4. Legal Form of Ownership. The legal form in which title to property is held is extremely important because it indicates how the property will pass upon the death of an owner and who is responsible for upkeep of the property and payment of taxes, maintenance, insurance and other costs of ownership. Joint ownership of property is sometimes suggested as a useful tool in disability planning under the theory that the competent joint tenant can manage the property during the incapacity of the other joint tenant. The three basic forms of co-ownership are as follows:

a. Tenants in Common. A tenancy in common is one in which each tenant owns an undivided fractional share of the entire property. Each tenant has the right to deal with his or her share and to dispose of that share without the knowledge or consent of the other tenants. Tenants in common do not have rights of survivorship; upon the death of a tenant in common, his or her share passes by will or intestacy like any other individually owned property.

b. Joint Tenancy. A joint tenancy is one in which each joint tenant owns the entire property subject to a right of survivorship in the other tenants and the rights of the other tenants. All joint tenants have equal rights, and each joint tenant shares a non–exclusive right of possession with the other tenants. When one joint tenant dies, the property passes immediately to the surviving joint tenants by right of survivorship, i.e., by operation of law, not by will or intestacy.

c. Tenancy by the Entirety. A tenancy by the entirety is a joint tenancy between husband and wife that exists only during marriage and terminates upon divorce. Neither spouse acting alone can terminate the tenancy or convey the property. As in a joint tenancy, the property subject to a tenancy by the entirety passes by right of survivorship, i.e., by operation of law, to the surviving spouse immediately upon the death of the other spouse.

For additional information on this or any other tax and estate planning issue, please contact Andrew Berger, 954-364-6074 or aberger@becker-poliakoff.com. ■

COMMUNITY UPDATE™

VOLUME V, 2009 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor

PAYING FOR CASUALTY DAMAGE REPAIRS – THE PLAZA EAST/OPT-OUT DILEMMA

By: Robert Rubinstein, Esq.
rrubinstein@becker-poliakoff.com

By now, all condominium associations are familiar with the infamous declaratory statement of Plaza East Association, Inc., DS 2005-055 (1/13/06). This decision reversed decades of established legal principles and instantly rendered the governing documents meaningless when a casualty struck. However well-intentioned the Department of Business and Professional Regulation might have been, it caused great anger, frustration, confusion and expense to all condominiums. By the time the Florida Legislature got around to dealing with casualty insurance, the Plaza East methodology for handling casualties was deeply ingrained. Like a full speed locomotive on a one-way track, it was too difficult for the Legislature to understand how the governing documents interacted with the statute for casualties and too difficult to embark on extensive statutory changes that would have eliminated the requirements established under Plaza East. Taking the easier route, the Legislature codified the Plaza East methodology into a revised Florida Statutes, Section 718.111(11), making the law consistent with the DBPR's interpretation of the prior statute. Fortunately, all was not lost, as the Legislature gave us a way to return to the law as it existed prior to Plaza East.

Many community leaders and unit owners were quite upset to learn that the State required casualty damages to the units to be paid for as a common expense. Understanding the options available under the law and the impact of each option is crucial.

Many condominium associations and owners felt the law (as established through Plaza East) was unfair and expensive because it made all the owners responsible to pay for damages to a single unit. The essential principles of the law are:

- The Association is responsible to repair or replace any item damaged in a casualty, if the Association insures that item for casualty.
- The cost of repair or replacement is a common expense, whether or not any insurance proceeds are received to cover the repair or replacement.
- The casualty insurance deductible is a common expense.
- The first three rules apply notwithstanding anything in the governing documents to the contrary.

For example, if the windows in one unit were damaged by a storm and had to be replaced, the cost of the window replacement was a common expense payable by all owners. That is because the association insures the windows for casualty, so is responsible to replace the window damaged by a casualty as a common

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Before blindly following the statute or before embarking on a vote to opt out of the statute, a condominium association should seek legal counsel to ensure it understands the full risks and consequences of either action.

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expense, regardless of how the governing documents mandate casualty repairs. Contrast that to the law prior to Plaza East, where the cost of the window replacement would be governed by the Declaration of Condominium, most of which required the unit owner whose window needed replacement to bear the cost of that replacement.

The above is the current, statutory default for handling casualty damage, but as stated above, there is an escape clause. Florida Statutes, Section 718.111(11)(k), states:

> An association may, upon the approval of a majority of the total voting interests in the association, opt out of the provisions of paragraph (j) for the allocation of repair or reconstruction expenses and allocate repair or reconstruction expenses in the manner provided in the declaration as originally recorded or as amended. Such vote may be approved by the voting interests of the association without regard to any mortgagee consent requirements.

Basically, by a vote of the unit owners, the association can opt out of the statutory allocation for casualty repair and replacement expense and revert back to the manner in which the Declaration of Condominium allocates such expenses. Essentially, the four basic laws of Plaza East are abolished and the casualty provisions in the Declaration of Condominium control. Thus, harmony in the universe is restored. Or is it? There are certain risks and consequences that result from opting out of the statutory casualty repair and replacement expense allocation.

First and foremost, the Declaration of Condominium must be reviewed to determine whether it provides for a method of allocating the expenses for casualty repair and replacement. If not, then opting out is not a viable alternative, unless the Declaration of Condominium is amended to create the appropriate provisions. Even if the Declaration of Condominium contains provisions for allocating casualty expenses, that method may not be to the association's liking. Again, in that instance, opting out is not a viable alternative, unless the Declaration of Condominium is amended to change to a more favorable method for allocating casualty repair and replacement expenses.

Second, the statute is not a model of clarity. The portion of the statute containing the method for allocating casualty repair and replacement expenses also contains exceptions making a unit owner responsible for certain repair and replacement expenses. Those exceptions include:

- Intentional conduct, negligence, or failure to comply with the terms of the declaration or the rules of the association.
- If the casualty losses were known or should have been known to a unit owner and were not reported to the association until after the insurance claim of the association for that casualty was settled or resolved with finality, or denied on the basis that it was untimely filed.

Because the allocation of casualty repair and replacement expenses is part of the same paragraph as the exceptions that make owners responsible for certain casualty damages, it is not clear whether opting out from the allocation of casualty repair and replacement expenses also results in opting out from the exceptions making unit owners responsible for certain repair and replacement expenses. Therefore, when opting out of the statute, there is a risk the association could also be opting out of the important unit owner exceptions.

Third, even though many condominium associations and many unit owners prefer having the Declaration of Condominium govern allocating casualty repair and replacement expenses because that most likely results in each individual owner paying the expenses for casualty damages to that owner's unit, many associations and owners want the casualty expenses shared by all owners as a common expense. The cost of casualty damage can be very expensive and that cost is reduced when shared by all the owners. In addition, the manner in which the insurance deductible is allocated and the manner in which repairs are paid for damage not covered by insurance can be a financial burden on an individual owner, if the Declaration of Condominium requires the owner to bear that responsibility. This is especially important in condominiums where the owners have low or fixed incomes. The results of opting out of the statute can have devastating financial consequences for individuals.

The law involving casualty insurance and how the expense of casualty repair and replacement is handled is very complex with many nuances. Before blindly following the statute or before embarking on a vote to opt out of the statute, a condominium association should seek legal counsel to ensure it understands the full risks and consequences of either action. ■

First and foremost, the Declaration of Condominium must be reviewed to determine whether it provides for a method of allocating the expenses for casualty repair and replacement.

THE NEW RULES FOR MANDATING HURRICANE PROTECTION

By: Kenneth S. Direktor, Esq.
kdirektor@becker-poliakoff.com

In the wake of Hurricane Andrew, the Florida Legislature amended the Condominium Act to prevent Associations from denying unit owners the right to install shutters and to provide a vehicle by which Associations could mandate hurricane shutters. Under these amendments to Sections 718.113 and 718.115, Florida Statutes, the Association through the Board could adopt specifications and guidelines for shutter installations, and, by a majority vote of the membership, could mandate the installation of hurricane shutters. The Statute did not require an amendment to the Declaration, but simply a resolution adopted by a majority of the owners. Most communities adopted specifications and guidelines for shutters, but did not take advantage of the opportunity to mandate hurricane shutters. Instead, most Associations chose to amend their Declarations to mandate hurricane shutters in a manner similar to one of the options offered by the new version of the Statute.

Although there may have been economic reasons, there were certain aspects of the initial amendments to the Statute that made the option to mandate hurricane shutters less appealing. First of all, after the mandatory installation was complete, future maintenance, repair and replacement of the hurricane shutters became a common expense of the Association. Secondly, any owner that had any form of hurricane protection, including laminated windows, was grandfathered in and exempted from any installation requirements on the windows and doors serving each unit. The limitations on the type of hurricane protection permissible, the burden of future maintenance, repair and replacement, and the grandfathering in of installations that may no longer be functional or may not be current enough to allow the Association to obtain the desired insurance premium discounts discouraged many communities from mandating hurricane shutters under the Statute.

In 2008, Sections 718.113 and 718.115, Florida Statutes, were amended to add new flexibility. Under these amendments, the requirement of hurricane protection is now undertaken through a vote to amend the Declaration. As such, whatever vote is required to approve an amendment to your Declaration is now required to mandate hurricane protection. The amendment to the Declaration can make either the Association or the unit owners responsible for installation, maintenance, repair or replacement of hurricane protection.

Under the new Statute, the Association may also amend the Declaration to require forms of hurricane protection other than hurricane shutters. This allows Associations to mandate impact glass and other forms of hurricane protection, which may be more suitable for certain windows and doors. As such, this amendment codifies in the Statute what many Associations have done over the years through amendments to their Declarations.

Perhaps the most important change is that the required hurricane protection must meet the current code. Accordingly, owners with older hurricane protection which may no longer be in working order or which may not meet the current code so as to entitle the Association to an insurance premium discount can be required to update their hurricane protection.

In many communities, mandatory hurricane protection was not supported by the owners because the cost of installing hurricane protection at common expense was considered unfair because the number and size of the windows did not correlate to the allocation of common expense. Under the new Statute, if the Association votes to require the unit owners to install, maintain, repair and replace the hurricane shutters, the installation cost may be allocated on a cost per unit basis rather than using the percentages for the allocation of common expense from the Declaration. This often results in a more equitable allocation of the cost and reflects the true cost per unit for the installation of hurricane protection.

As this Statute is new, there are still some questions to be answered. For example, the Statute appears to continue to afford the owners the right to install hurricane shutters, where shutters can be safely installed. Most attorneys interpret this Statute to require compliance with any amendment to the Declaration to mandate a particular form of hurricane protection, but allow the owner the right to install hurricane shutters in addition to any specific form of hurricane protection required by the Declaration.

Hurricane protection has been and will continue to be an issue of critical importance to all community associations. There is no function of the Association more important than maintaining the “skin” of the building, and that includes maintaining a level of protection for the owners and the building interior from hurricanes and tropical storms.

If you have questions as to how these changes in the Statute can benefit your community and explore the options available to you with regard to hurricane protection, please contact your Association attorney. ■

Employment Law

ASSOCIATION AS EMPLOYER

By: Jamie B. Dokovna, Esq.
jgoldberg@becker-poliakoff.com

Q: What is the impact on the Association if a discharged worker files for unemployment insurance?

Once a former employee makes a claim for unemployment insurance, assuming the former employee is not otherwise disqualified from receiving benefits, the unemployment compensation benefits are paid from the Unemployment Compensation Trust Fund and are charged to the employer on a pro rata basis. The potential percentage chargeable is based on the employer's pro rata portion of the total wages paid to the former employee ("claimant") in the base period of the claim. For example, if there are only two base period employers and each paid the claimant $4,000 in the base period, each employer would be chargeable with 50 percent of the benefits paid to the claimant.

If it is determined that an individual was separated under disqualifying conditions, has refused suitable work, or it is established that the claimant received benefits improperly, benefits paid will not be charged to the account of the taxpaying employer. However, to be eligible for non-charging, the taxpaying employer must have furnished the required information to the Unemployment Compensation Claims and Benefits of the Agency for Workforce Innovation. Benefits shall not be charged to a taxpaying employer's account if the claimant was discharged for unsatisfactory job performance during an established 90 day initial employment probationary period providing, (1) the employee was informed of the probationary period within the first seven work days, and (2) the employer replied to the Form UCB-412, Determination Notice of Unemployment Compensation Claim Filed, within the ten day time limit.

Q: Is it worthwhile to challenge a claim for unemployment insurance?

It depends on how and why the employee was separated from his/her employment to determine whether it is worthwhile to challenge a claim for unemployment insurance. An individual may be eligible for benefits if the discharge was for reasons other than misconduct. Misconduct is defined as intentional or controllable acts or failures to take action, which show a deliberate disregard of the employer's interest. Inefficiency, unsatisfactory job performance, inadvertencies, or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not deemed to be "misconduct" within the meaning of the law. This means, if you, as an employer, can establish that the employee was terminated due to misconduct, it may be worthwhile to challenge the claim for unemployment insurance.

It may also be worthwhile to challenge a claim for unemployment insurance if the employee quits without good cause that is attributable to the employer. If an individual voluntarily quits, a disqualification must be issued unless the employee can prove good cause for leaving. The law provides that good cause may only consist of a cause attributable to the employing unit, illness or disability of the claimant, recall by the claimant's permanent employing unit within six calendar months of a temporary termination or the military transfer of a spouse.

Editors Note: The Firm has several employment law attorneys in various offices throughout the State. Please submit employment related questions to cu_editor@becker-poliakoff.com for inclusion in later Volumes of Community Update.

COMMUNITY UPDATE™

VOLUME VI, 2009

Serving Florida's Communities Since 1980

Lisa Magill, Esq., Editor
Marilyn Perez-Martinez, Esq., Assistant Editor

THE INSURANCE PREDICAMENT FOR CONDO OWNERS & ASSOCIATIONS

By: Lisa Magill, Esq.
lmagill@becker-poliakoff.com

On June 1, Governor Charlie Crist vetoed SB 714, which was the major bill impacting community association operations this year. While a full legislative report will appear next month, SB 714 would have relieved Condominium Unit Owners from maintaining individual property insurance and likewise relieved Associations from the burden of requesting insurance certificates.

Governor Crist rejected the bill primarily as a result of the extension of time to comply with life safety improvements. High-rise communities throughout Florida will have to retrofit their buildings, or partially retrofit (if authorized by membership vote to opt-out of installing sprinklers in units) by December 31, 2014. We will include more information about the options available to high-rises in future publications and in the Firm's blog.

www.floridacondohoalawblog.com

With regard to condominium insurance, please remember:

1. Unit Owner contents (HO-6) coverage is mandatory.
2. Unit Owner insurance coverage must contain $2,000 "special assessment" coverage. SB 714 would have corrected the language to "loss assessment" coverage.
3. The Association must be named an additional insured and loss payee on insurance policies issued to Unit Owners.
4. Condominium Associations are required to request insurance certificates from the owners. The Association is permitted, but not required, to force-place the coverage if the owner fails to furnish evidence of insurance.
5. Association boards must set the master policy insurance deductible at an open board meeting - the notice of the meeting must contain the amount of the proposed deductible, available funds and cite the assessment authority as well as estimate potential assessments against each unit for possible casualty costs that are not funded by insurance proceeds.

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LEGISLATIVE UPDATE - NEXT VOLUME. Find out what passed and what did not pass and how that impacts your community operations.

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6. Unit Owners are still required to insure "improvements and additions" that benefit fewer than all the owners. This is problematic from a number of perspectives, especially in light of the fact that the terms "improvements and additions" are not defined. This provision in Section 718.111(11)(g)(1), Florida Statutes may be interpreted to mean that Unit Owners bear responsibility for portions of the property traditionally insured by the master policy, such as balconies, vehicle enclosures such as carports (if the coverage is available), storage spaces and the like.
7. The master policy includes all HVAC equipment, regardless of whether the equipment is located in the units or elsewhere. The master policy is required to include coverage for heat pumps, air conditioning compressors and air handlers, duct work and the like. The insurance industry recommends consulting with an HVAC professional to determine the amount of additional coverage required.
8. Fidelity bonds (or director/employee dishonesty endorsements) must be in an amount that will cover the maximum amount of funds subject to association (or management) control. At a minimum, coverage should be equal or exceed all reserve funds and operating accounts. However, if the association has a line of credit or a loan, coverage for that exposure is likewise important.

Compliance with all of these requirements is tricky and obtaining the insurance certificates may be a tremendous administrative burden upon the Association. Many Associations were confused by item 5, and did not know how to calculate potential assessments against the units for casualty losses. Association leaders and managers have to take uninsurable losses into consideration for items that are typically excluded from master policies such as awnings, perimeter fences, landscaping, accessory structures and the like. Moreover, if the Association does not have coverage for code and ordinance upgrades, these costs must be taken into account as well when calculating potential assessments against the members.

While changes to the Statute are likely in the future, for now all condominium owners and associations are governed by these provisions and there is potential liability for violating the statute. ■

On June 11, 2009, Shareholders Herb Brock and Ken Direktor presented the first in a series of webinars regarding Hurricane Preparedness and Insurance Claims Recovery. The webinar, entitled **"Hurricane Season 2009: Are You Ready to Weather the Storm?"** covered disaster planning, insurance coverage review, building & facility hardening, financial planning, and rules relating to securing property, emergency powers and disaster plan activation. This webinar format allows you to participate from your home or office. Please join us for upcoming webinars:

June 30 - Noon - 1:15 PM (EST)

"Don't Let This Happen to You: Avoiding Pitfalls in Construction Contracts." The program addresses property damage and reconstruction issues, including contractor selection, engineer vs. public adjuster, contract forms & terms, and lien laws.

July 20 - 3:00 PM - 4:15 PM (EST)

"The Insurance Company is Not Your Friend – Preparing and Presenting an Insurance Claim for Maximum Recovery." Covers strategies for proper reporting and preparation of claim, appraiser selection, mediation & litigation options when insurer rejects claim, and strategies for reopening a claim for newly discovered damage.

Register for the webinars at: http://www.becker-poliakoff.com/events/seminars.html.

TO SECURE OR NOT TO SECURE

By: JoAnn Burnett, Esq.
jburnett@becker-poliakoff.com

With foreclosures on the rise, many associations are collecting only a portion of the maintenance assessments necessary to operate the association. These associations are struggling to prioritize payment of the necessary and discretionary bills and services. The association's inability to collect maintenance assessments has threatened the continuation of many associations' core services such as lawn care, pool maintenance and security services. Cutting back on lawn care services, while maybe not aesthetically pleasing, does not appear to cause a potential threat of harm. However, what about contractually required services, such as security, that could impact the safety of the owners? What is an association's potential liability for the failure to provide security services that the association is contractually required to provide – at a time when they simply cannot afford the service?

Years ago, the courts evaluated an association's liability for alleged security breaches or failures using a "notice" or "forseeability" standard. For example, the courts would evaluate whether the association was aware of any criminal conduct on or near association property and/or whether or not the actual crime that occurred was similar in nature to past crimes. If the association was unaware of any prior criminal conduct or if the prior crimes and actual crimes differed, the court could determine the association was not liable for any damages because the crime was not "foreseeable" and/or the association did not have notice of similar criminal conduct. This standard is now limited to situations in which a duty to prevent harm from criminal conduct arises only as an aspect of the common law duty to exercise reasonable care to keep the premises safe as opposed to a contractual duty.

The standard used to evaluate an association's liability for security breaches or failures is much different for associations who have a contractual duty or who have undertaken the responsibility to provide these security services. In the case of *Vasquez v. Lago Grande HOA*, 900 So.2d 587 (Fla. 3rd DCA 2005) the Court found a condominium association, the management company and the security company liable for the death of a visitor who was shot and killed by her ex-husband in a friend's unit. In holding the association liable for the death, the court explained that since the association advertised the complex on the basis of safety and collected a specific portion of the condominium maintenance for the safety and security services provided, the association had a duty to exercise reasonable care to prevent any criminal incident from occurring. The fact that this was the first crime of its kind was irrelevant.

Further, the association attempted to avoid liability arguing that by hiring a security company to provide security services, the security company assumed the duty and contractual obligation to provide the services and therefore, the association had fulfilled its contractual obligations. In holding the association liable to the estate of the deceased, the court explained that the association had a non-delegable contractual duty with its members. Additionally, in this case, the association was negligent in retaining the security company after notice of the security company's prior security deficiencies.

When an association is considering what cut-backs to make in these tough economic times, the association must determine if it has a contractual responsibility, or if it has undertaken the obligation, to provide security services to its members. If the answer is no, the association could be liable for foreseeable crimes on the property. If the answer is yes, the association could be liable for security breaches if it fails to exercise reasonable care to prevent any criminal incident from occurring. A cut-back in security services may be deemed a breach of contract, despite the fact that the association is unable to pay for the services. If you are unsure of your association's obligations under your governing documents, contact your association attorney for advice. ■

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Government Law & Lobbying

TAXATION OF GOLF COURSES

By: Keith Poliakoff, Esq.
kpoliakoff@becker-poliakoff.com

In the wake of the current economic crisis, some governmental entities have attempted to seek additional ad valorem revenue by taxing common elements. In Seminole County, the Tax Assessor sought to tax a golf course located within a platted residential subdivision of a condominium association. On May 14, 2009, the Attorney General reviewed this issue and found that under Florida Statute section 193.0235, “so long as the golf course, located within a platted subdivision and designated on the plat, approved site plan or otherwise as a common element for the exclusive benefit of lot owners, is not included within the lots that constitute inventory for the developer which inventory is intended to be privately owned or is currently privately owned, such property would appear to qualify as a common element for proration of taxes pursuant to section 193.0235, Florida Statutes.” Accordingly, rather than being taxed independently, the value of such land designated as common element for the exclusive benefit of lot owners must be prorated by the Property Appraiser and added to the assessment of all the lots within the subdivision.

Under Florida Statute § 193.0235, ad valorem taxes or non-ad valorem assessments by a county, municipality, special district, or water management district may not be assessed separately against common elements utilized exclusively for the benefit of lot owners within the subdivision, regardless of ownership. Included within the meaning of the statute to be considered a common element is any subdivision property not already sold or that is intended to be sold into private ownership that is designated on the plat or plan as a common element. Therefore, in order to qualify as common element, and thus be exempt from additional ad valorum tax assessments by the municipality, the golf course must be actually and exclusively used by the lot owners, regardless of ownership, and designated as such on the plat, approved site plan, or otherwise as a common element for the exclusive benefit of lot owners. For example, a golf course that is open to the general public for play in exchange for a fee may not be classified as “common element.” However, the use of a golf course by guests and relatives of lot owners, as a benefit thereof, will not likely jeopardize the exclusivity of such use. Accordingly, if you find that your common elements are being taxed improperly you may wish to determine if Florida Statute § 193.0235 is applicable. ■

COMMUNITY UPDATE™

VOLUME VII, 2009

Serving Florida's Communities Since 1980

Lisa Magill, Esq., Editor
Marilyn Perez-Martinez, Esq., Assistant Editor

SPECIAL LEGISLATIVE ISSUE

SUMMARY OF THE 2009 LEGISLATIVE SESSION

By: CALL Co-Executive Directors- Yeline Goin, Esq. and David G. Muller, Esq. Becker & Poliakoff, P.A.

The 2009 Legislative Session was very eventful as there were a number of bills filed that would have impacted community associations. However, the number of bills that passed this year was relatively small compared to previous years and none of the major community associations bills passed. The 2009 Legislative Session was mostly noteworthy for the bills that did not pass. This article will provide an overview of the legislation adopted in 2009 that affects community associations, and the legislation that was not adopted that would have impacted community associations.

HB 1718- RELATING TO THE STATE JUDICIAL SYSTEM

HB 1718 imposes increased filing fees for certain lawsuits, including foreclosure lawsuits. In some instances the filing fees are dramatically increased. When the "value of the claim" is less than $50,000, which presumably would encompass most community association-driven foreclosure lawsuits, the filing fee in circuit court is raised $100, from $295 to $395. When the "value of the claim" is more than $50,000 but less than $250,000, the filing fee is raised to $900. When the "value of the claim" is $250,000 or more, the filing fee in circuit court is raised to $1,900. Additionally, probate filing fees (for formal administration cases) are increased $115 to $395. The filing fee for landlord-tenant disputes are reduced from $265 to $180. HB 1718 has been signed by Governor Crist and has an effective date of July 1, 2009, but the filing fee increases became effective June 1, 2009.

SB 2064- RELATING TO CONSTRUCTION DEFECTS

SB 2064 amends Section 558, Florida Statutes, which requires certain procedural steps be taken prior to initiating litigation concerning construction defects. The bill provides that the construction defect law will apply unless the parties agree that the law will not apply; that the applicable notice requirements are not required for a project that has not reached the stage of completion of the building or improvement; and that the contractor may not impose a construction lien for destructive testing or for repair damage caused by destructive testing, except if the owner contracts for the destructive testing or restoration. Further, the bill specifies that when a contractor forwards a notice under this section to any applicable contractors, suppliers, etc., the act of sending the notice may not be construed as an admission of any kind. The term "discoverable evidence" is further amended by this bill and requires any person served with notice under this statute to exchange, within 30 days, any design plans, specifications, as-built plans, expert reports, etc. Finally, unless the parties agree that this section does not apply, all contracts for improvement of real property entered into between an owner and a contractor must contain a notice which states as follows: "ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES."

SB 2064 was approved by Governor Crist on June 18, 2009 and the effective date is October 1, 2009.

SB 2080- RELATING TO WATER RESOURCES

SB 2080 amends Section 166.048, Florida Statutes. The prior version of this statute addressed "xeriscaping", which is a type

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Editors note: The Community Association Leadership Lobby (CALL) monitors and responds to legislation in Tallahassee and advocates on behalf of the firm's 4,000+ communities. To learn more visit: www.callbp.com or email call@becker-poliakoff.com.

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of landscaping that conserves water and is drought tolerant. The prior law stated that a deed restriction or covenant adopted after October 1, 2001 may not prohibit or be enforced so as to prohibit any property owner from implementing xeriscape landscape on his or her land.

SB 2080 amends Section 166.048, Florida Statutes, and removes the provisions dealing with xeriscaping and replaces them with provisions dealing with "Florida-friendly landscaping." Florida-friendly landscaping is defined as "quality landscapes that conserve water, protect the environment, are adaptable to local conditions, and are drought tolerant." The principles of such landscaping include planting the right plant in the right place, efficient watering, appropriate fertilization, mulching, attraction of wildlife, responsible management of yard pests, recycling yard waste, reduction of storm water runoff, and waterfront protection.

The prior law regarding xeriscaping only applied to deed restrictions entered after October 1, 2001 (which is the date that the xeriscaping law became effective). However, SB 2080 is not limited to covenants recorded after the effective date of SB 2080. Rather, it will retroactively apply the Florida-friendly landscaping requirements to all covenants and restrictions, even those recorded prior to the effective date of SB 2080. As such, this law may be interpreted as an impairment of the rights of community associations, particularly homeowners associations, to require certain landscaping in their communities, pursuant to recorded covenants. It will be interesting to see how this law is ultimately interpreted by the courts, as there exists an argument that SB 2080 unconstitutionally impairs contract rights set forth in covenants recorded prior to the effective date of the law.

SB 2080 was approved by Governor Crist on June 15, 2009 and has an effective date of July 1, 2009.

SB 2330- RELATING TO CORPORATIONS

SB 2330 contains substantial changes to Section 617, Florida Statutes, which governs not-for- profit corporations. This statute does have applicability, in certain contexts, to community associations which are generally established as not-for-profit corporations. Most noteworthy, SB 2330 creates a new Section 617.1703, Florida Statutes, which states that in the event a conflict arises between Section 617, Florida Statutes, and the other statutes governing community associations (e.g. Sections 718, 719, 720, 721, 723), these other community association statutes will control over the provisions contained in the not-for-profit statute.

Several noteworthy changes to the not-for-profit statute include the following: places limits on the distribution of assets, allows documents (subject to certain restrictions) to be filed electronically with the department of state, allows for corrective documents to be filed with the department of state within thirty days (as opposed to the prior law which provided for ten days), creates a definition and new requirements for "mutual benefit corporations," allows for proxies to be rejected if there is a "reasonable basis" doubting the validity of the signature, amends the conflict of interest provisions, amends the requirements for mergers, amends the requirements for dissolutions.

The bill also amends the time-frames for action by written consent. Written consents must be obtained with 90 days after the date of the earliest dated consent (as opposed to 60 days in current law) and written notice must be given to non-consenting members 30 days after obtaining the authorization by written consent (as opposed to 10 days under current law).

The bill was approved by Governor Crist on June 18, 2009. The effective date of the new law is October 1, 2009, subject to limited exceptions specifically referenced in the statute.

HB 61- RELATING TO TEMPORARY ACCOMMODATIONS

HB 61 amends Section 125.0104 regarding the Tourist Development Tax, Section 125.0108 regarding the Tourist Impact Tax, Section 212.03 regarding the Transient Rentals Tax, and Section 212.0305 regarding the Convention Development Tax to specifically subject certain timeshare rentals to the taxes. The bill further expands the authority of sellers (as defined under Section 721, Florida Statutes, which governs timeshares) to offer debt cancellation products. The scope of the term "facility" defined in Section 721.05, Florida Statutes, is revised to mean a "permanent amenity." HB 61 also amends Section 721.07 to require the public offering statement to include information regarding the owners' obligation to pay assessments.

HB 61 was approved by the Governor on June 10, 2009. The effective date of the new law is July 1, 2009.

HB 821- RELATING TO COMMUNITY DEVELOPMENT DISTRICTS

HB 821 amends Section 190, Florida Statutes, the statute governing community development districts ("CDD" or "CDDs"). HB 821 revises the deed restriction enforcement rulemaking authority for CDD boards of directors by expanding their powers over real property, both within and outside the CDDs geographic boundaries, and authorizes covenant enforcement by the CDD in certain instances. Power over property outside the CDDs geographic boundaries can only be created via interlocal agreement or consent of the county or municipality. HB 821 further revises the procedures to amend CDD boundaries and merge CDDs. The bill creates a new definition of "compact, urban, mixed-use district" which is defined as a district located within a municipality and within a community redevelopment area created pursuant Section 163.356, Florida Statutes, that consists of a maximum of 75 acres, and has development entitlements of at least 400,000 square feet of retail development and 500 residential units.

HB 821 was approved by Governor Crist on June 10, 2009. The effective date of the new law is July 1, 2009.

HB 1495- RELATING TO PROPERTY INSURANCE

HB 1495, the insurance bill, will impact many community associations because it includes a provision allowing Citizens Property Insurance Corporation to increase premiums by 10% per year, until such time as its rates are actuarially sound. It also repeals the requirement to disclose a property's windstorm mitigation rating in any property sale over $500,000 in the wind-borne debris region. The Legislature was considering a condominium mitigation loan program to assist condominiums in mitigating units against wind damage in a prior version of HB 1495. Unfortunately, this program did not pass because there was no money to fund the program.

HB 1495 was approved by the Governor on May 27, 2009 and became effective on the approval date (May 27, 2009).

HB 521- RELATING TO AD VALOREM ASSESSMENTS

HB 521 pertains to the challenge process for ad valorem tax assessments. It states that a property appraiser's assessment is presumed correct if the appraiser proves by a preponderance of the evidence that the assessment was arrived at by complying with Section 193.011, Florida Statutes. If a challenge is asserted, the burden of proof is on the party initiating the challenge to prove by a preponderance of the evidence that the assessment does not represent (1) the just value of the property, (2) the classified use value or fractional value of the property and (3) the generally accepted appraisal practices for comparable properties.

HB 521 was approved by Governor Crist on June 4, 2009. HB 521 became effective on June 4, 2009.

LEGISLATION THAT DID NOT PASS

SB 714- RELATING TO CONDOMINIUMS

SB 714 had many positive impacts for condominium associations including clarifying and fixing a number of the provisions from last year's condominium bills, and extending the date for fire sprinkler retrofitting from 2014 to 2025. However, Governor Crist vetoed the bill and expressed his concerns regarding the fire sprinkler retrofitting extension in his veto letter.

SB 714 included the following changes (which will now not go into effect because of the veto).

Mandatory HO-6 Insurance: SB 714 would have reversed the 2008 change to the statute which required condominium associations to require unit owners to show proof of individual insurance and gave condominium associations the option of "force placing" coverage if the owner failed to provide proof of the required insurance.

Loss Assessment Coverage: SB 714 would have amended Section 627.714, Florida Statutes, to require that HO-6 policies, issued or renewed after July 1, 2009, must include "loss assessment coverage" of at least $2,000, with a maximum deductible of $250.

Replacement Cost Requirement: SB 714 would have required that the insurance appraisal the condominium association is required to obtain at least every 36 months be based on the "replacement cost" of the property, amending the 2008 law that required an appraisal for the "full insurable value."

Setting The Deductible: SB 714 would have eliminated the requirement for the notice of the board meeting where insurance deductibles are set to disclose the amount of the proposed deductible and potential assessments that may be adopted.

Association As Named Insured: SB 714 would have amended the condominium statute to no longer require that the unit owner's HO-6 insurance policy name the condominium association as a named insured and loss payee.

Board Elections: If there are fewer candidates who run for the board than there are open seats, the current law provide that the incumbents were automatically re-seated on the board. SB 714 would have changed this to say that incumbents who do not seek re-election are "eligible for reappointment"; it would no longer be automatic.

Co-Owners of Units on Board: Co-owners of units would have been eligible for simultaneous board service if they own more than one unit and are not co-occupants of a unit.

Fire Sprinkler Retrofit: SB 714 would have pushed back the fire sprinkler retrofitting requirement applicable to certain high-rise buildings from 2014 to 2025.

Director Delinquencies: The 2008 change to the statute provided that if a director was delinquent by more than 90 days in the payment of regular assessments, they were disqualified from further board service. SB 714 would have provided that a director is disqualified from continuing on the board if they are more than 90 days delinquent in the payment of a fine, fee, or any type of assessment, whether regular or special.

Director Certification: SB 714 would have eliminated the requirement for the condominium association's first notice of annual meeting to include a form to be signed by candidates which certifies that the candidates have read and will enforce the provisions of the condominium documents and Florida law, and would have replaced it with a requirement that directors who are elected will be required to certify in writing that they have read the condominium documents and will uphold them to the best of their ability. Alternatively, SB 714 would have permitted a newly elected director to submit a certificate of completion of an educational program administered by the State.

Timeshare Condominium Associations: SB 714 would have presumably exempted timeshare condominium associations from the law passed in 2008 which prohibits multi-year terms, except where the bylaws provide for two-year staggered terms and where a ratification vote is taken. Additionally, SB 714 would have exempted timeshare condominium associations from the provisions in the current law restricting co-owners from simultaneously serving on the board.

Fire Prevention: SB 714 would have provided that a condominium that is one or two stories in height and which has an exterior means of egress corridor is exempt from installing manual fire alarm systems as required by Section 9.6 of the most recent edition of the Life Safety Code, which is incorporated in the Florida Fire Prevention Code.

Elevator Safety: SB 714 would have repealed Section 553.509(2) of the Florida Statutes. This law, adopted in 2006, requires buildings of at least 75 feet in height to have at least one public elevator capable of operating on an alternate power source for emergency purposes.

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The main impacts of the veto of SB 714 include:

- Condominium association boards will continue to be required to set the deductible at a meeting with fourteen days notice by mail and posting and the notice must state the proposed deductible and the available funds and the assessment authority relied upon by the board and estimate any potential assessment amount against each unit, if any.
- Unit owner insurance (i.e., “HO-6 insurance”) remains mandatory and condominium associations will have to continue to request proof of insurance from the unit owners. “Force-placed” insurance is still an option per the statute, but associations are not required to force place insurance.
- Co-owners of a condominium unit cannot serve on the board, regardless of the number of units which they may own, and there will be no exemption for timeshare condominium associations.
- Candidates for the board of a condominium association will have to continue to certify that they have read and understand the Condominium Act and administrative rules.
- Condominium associations will be required to retrofit their buildings with firesprinklers, or obtain a vote of the owners to forego retrofitting, prior to December 31, 2014 (high-rise buildings may not opt-out of retrofitting the common areas).
- There will be no exemption to the manual fire alarm system requirements in the Life Safety Code for buildings that are one or two stories in height and have an exterior means of egress corridor.
- There will be no repeal of the requirement that certain high-rise buildings have a generator installed to power at least one elevator.

SB 880 - Relating To Community Associations: The Legislature was close to passing SB 880, which CALL had been working on and promoting. SB 880 would have (1) allowed condominium members’ voting rights to be suspended if they are delinquent in paying assessments, (2) allowed condominium associations to suspend use rights to common facilities, (3) allowed associations to collect unpaid assessments from tenants, (4) allowed for the collection of costs imposed by a management company related to the recovery of unpaid assessments and (5) amended the Homeowners Association Act, Section 720, Florida Statutes, to provide a vehicle to allow a homeowners’ association, if approved by the members, to acquire golf courses or other recreational facilities. SB 880 also addressed the purchase of units by “bulk buyers.” The intent of this legislation was to stimulate the condominium market by encouraging purchasers to buy units in bulk. This would have especially helped distressed properties with large numbers of units that were never sold by the developer. Unfortunately, in the waning days of the Legislative Session, SB 880 became a vehicle for many amendments that would have been harmful to community associations including amendments prohibiting associations from imposing transfer fees, and limiting board authority. Because of this, SB 880 ultimately did not pass.

SB 1012- Submerged Land Lease Fee Increases: SB 1012 dealt with submerged land leases (i.e. the leases coastal land owners enter into with the State to utilize non-tidal, navigable waters). The bill proposed to increase the amount charged under these submerged land leases. Waterfront community associations would have been significantly impacted by the increase. The ultimate defeat of this bill was a victory for waterfront community associations.

HB 1397—Relating to Community Associations: HB 1397 had many community association impacts including: (1) Limiting the ability of associations to make campaign contributions, charitable donations, and to hire lobbyists. This would have prohibited an association from even hiring someone to lobby local government with respect to a proposed development near the community; (2) Limiting the association’s access to units by requiring that the association give unit owners written notice of not less than 24 hours of its intent to access the unit and such access must be by two persons, one of whom must be a board member or manager and the other person must be an “authorized representative of the association”. The identity of the authorized representative must be provided to the owner prior to entering the unit; (3) Requiring the time and place of regular board meetings to be set by a majority vote of the unit owners. Once the time and place of the board meetings have been selected by the unit owners, it could not be changed except by a majority vote of the owners. Regular meetings of the Board held on weekdays could be held no earlier than 6 p.m.; (4) Requiring that if the bylaws can be amended by the board, an amendment to the bylaws must be approved at two consecutive meetings of the board held at least 1 week apart; (5) Limiting the ability of the board to enter into a line of credit or borrow funds for any purpose unless the specific use is set forth in the notice of board meeting with the same specificity required for special assessments or unless the borrowing is approved in advance by two-thirds of the entire voting interests.

Lender Liability for Assessments- Based on the dramatic results obtained from CALL’s 2009 Florida Community Association Mortgage Foreclosure Survey Report–*State of Distress: The Mortgage Foreclosure Crisis within Florida’s Condominium and Homeowner Association Population*, a strong push was made during the 2009 Legislative Session to adopt reforms in the area of collecting delinquent assessments from lenders. Proposals to require lenders to complete their foreclosures within a year, or to raise the statutory cap on liability for unpaid assessments, encountered fierce resistance from lenders and did not survive the committee hearing process despite the hard work of CALL and our members on this issue. In the end, the banking lobby was successful in their efforts to defeat this legislation. Notwithstanding, CALL will continue to make this issue a top priority going forward as needed change to the lender liability laws are long overdue.

COMMUNITY UPDATE™

VOLUME VIII, 2009

Serving Florida's Communities Since 1980

Lisa Magill, Esq., Editor
Marilyn Perez-Martinez, Esq., Assistant Editor

The following is an excerpt from Gary Poliakoff and Ryan Poliakoff's new book titled *New Neighborhoods: The Consumer's Guide to Condominium, Co-Op and HOA Living.*

For more information on the book and the authors, please visit www.newneighborhoodspublishing.com

In general, Americans are not really "rules" people. In fact, one way of looking at the American Revolution is that it began in response to a dictatorial board of directors (the British parliament) that declared an unfair assessment (taxes) without listening to the will of the people (a membership vote). That negative reaction to authority has been an American tradition for hundreds of years.

Further, as we discussed way back in Chapter 1, there is a long-held belief that we should be absolutely unencumbered by external rules in our own homes. But the reality is this: As soon as a family broadens into a community, whether it's a commune, a condo, a city, or a country, rules become inevitable. Even the earliest human communities decided at some point that certain things weren't such a great idea—skewering your neighbor on the end of your spear, for instance—at least not if you're the one who ends up on the pointy end of the argument. In fact, when you boil it down, all rules are a form of conflict resolution. They're an attempt by society to provide a framework for avoiding disputes or resolving them without escalating to violence. The problem is, there are dozens of different theories about how to balance rules, and whether to err on the side of fewer or greater restrictions. Every community is different, and consequently, so is every set of rules. You'll find SOCs [Shared Ownership Communities] with very few restrictions as well as those that tell you how early you're allowed to turn on the television. Different strokes for different folks.

The vast majority of rules are designed to regulate interaction between neighbors and to ensure that each can enjoy their property as undisturbed as possible. Rules designed to protect the common elements and prevent the deterioration of property values, however, make up a very important minority. These are the rules that govern how your shutters look or what you can do to your balcony. In general, every rule belongs to one of these two categories: avoiding conflict or protecting property. And some actually do both.

It's important to remember that rules are not optional. They're not optional for the board to enforce, and they're certainly not optional for owners or their guests to follow. Don't bring your potbellied pig or bobcat into a pet-restricted condominium, thinking, "They can't possibly care—who would say anything?" They *will* care. Arbitrators and judges are inundated with hundreds of cases on just these issues, and absent disability

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BECKER & POLIAKOFF
Legal and Business Strategists

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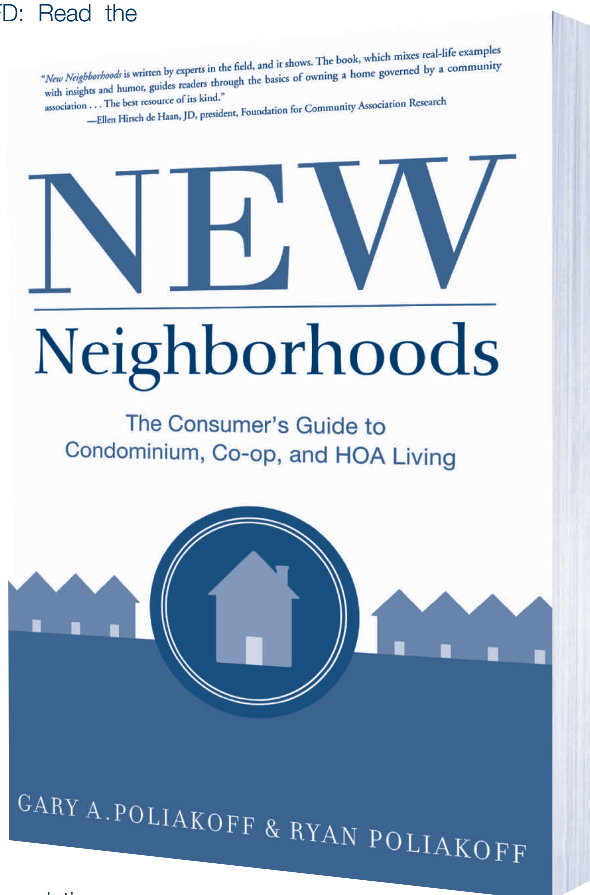
or other exceptions, the rule violator is going to lose practically every time. Rules and regulations are contractual covenants. They're not permissive, and they're not suggestions—they are terms that you constructively agreed to, in writing, when you bought your unit. That makes them fully enforceable, down to specific compliance. That is, if you finished your floors with $30,000 worth of Italian marble but your documents only allow carpet, a judge is not going to care one whit about your investment or the hardship you will incur by removing the tiles. You are going to have to remove them at your expense, under court order—no question. So again, to paraphrase a saying in the electronics industry, "RTFD: Read the *(cough, cough)* documents!"



Before we run through the most common rules and regulations that you'll find in an SOC, it's necessary to explain that the rules are separated into two classes, and these classes are treated very differently. For simplicity, they are referred to as Class I and Class II regulations.

A Class I regulation is a covenant, rule, or restriction that is written into the documents and recorded into the public record. This includes anything in the original documents as written by the developer, and it's safe to assume that this probably also includes any rules promulgated later by the board but also publicly recorded. Class I restrictions are clothed with a very strong presumption of validity, as owners have the opportunity to know about them before purchasing a property; if it's in the public record, you're assumed to know that it exists (remember constructive notice?). A Class I regulation will not be invalidated by a court unless the restriction is wholly arbitrary in its application, is in violation of public policy, or contradicts a fundamental constitutional right. The simplest example of an invalid Class I regulation would be a restriction against a particular race or religion buying into the community; this violates public policy, as well as various state and federal statutes. Another example might be a rule that gives the board the power, at its sole discretion and on a case-by-case basis, to regulate what unit owners wear on the common property (a case of arbitrary application). These types of rules will generally be invalidated if they are ever challenged in court, whether or not they have been recorded in the public register. But otherwise, Class I regulations are almost entirely bulletproof, so it's very important that any prospective SOC owner reviews the covenants, rules, and restrictions in the public record extremely carefully. If there's a rule that says no loud music on Tuesdays, it doesn't matter how odd or random that might appear—if there's any explanation for the rule, then it will be presumed to be valid and it may be enforced by the board. (In fact, as we've already discussed in Chapters 5 and 6, it really *must* be enforced by the board for the directors to satisfy their duty to the owners.)

Class II regulations are those rules that have been promulgated by the board over the years but never recorded publicly. The important thing to remember about these rules is that a court may invalidate them if they are unreasonable, or if they circumvent a right granted or inferred from the recorded covenants, conditions, and restrictions. For example, assume that a board of directors wants to pass a rule that no pet snakes are allowed in a condominium. Living in the community is famed herpetologist Ssssimon Sssschwartz, and he has an entire menagerie of reptiles living in his home—including more than one hundred snakes. The board passes the regulation, and Simon ssssues.

If this had been a Class I restriction existing in the public record our friend Simon would be sssscrewed. He would have to find new homes for all of his snakes—or a new condominium for himself. But as a Class II restriction, the court must first determine whether the rule is reasonable. Simon certainly wouldn't think so, but the test for reasonableness is only to determine whether the rule has some legitimate and explainable basis for existence. In this case, the board was worried that the snakes would escape, get into the walls, and breed, requiring a major and expensive eradication effort—and that's certainly enough of a basis to be deemed reasonable. For a rule to be found unreasonable it would have to have absolutely no basis in policy, and that's relatively rare.

However, there's another hurdle for the board to face: Does the rule circumvent a right granted or inferred from the recorded documents? The documents are silent on pets, which at first glance might seem to mean that the board is free and clear. But what it actually means is that, since there are no restrictions on pets, they are presumptively allowed. Assuming that they aren't illegal breeds, Simon has a right to keep the snakes in his home, and the board can't promulgate a rule restricting this preexisting right. Simon wins in court.

Assume, however, that the owners feel extremely strongly about this issue and decide to pass the rule by member vote, using whatever percentage is required to amend the documents.

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They still can't restrict those pets that Simon already has in the building. His snakes will be "grandfathered" into the rule, or permitted because the violation existed before the rule was initiated. As long as they're alive, Simon's snakes can stay. However, Simon will be prevented from replacing his snakes, and new owners will not be allowed to bring new snakes into the building. Of course, the grandfather provision can be very hard to enforce. What is to prevent Simon from clandestinely replacing his dead pets with lookalikes and claiming that they have never passed on? At least one pet lover has attempted to skirt the issue by purchasing a new poodle of identical size and weight, and even dying its hair to match the look of her original pet. People do crazy things for their animals.

There are a couple of defenses, however, that owners can raise to *lawfully* prevent an SOC from enforcing a rule: estoppel and selective enforcement. Here's how they work.

As a general principle, the law requires any rule to be enforced within a reasonable amount of time; otherwise, the violator may assume that the rule is not going to be applied. In the case of contractual covenants, this rule is called *estoppel* or *waiver.* In essence, if the board does not act in a timely manner to enforce a regulation, it will be *stopped* from doing so altogether. Take our friend Simon again. Assume that his condo *had* a no-pet restriction, and Simon was in the habit of walking his snakes every day, on dozens of tiny leashes, out in plain view on the property. Despite this, the board of directors failed to notify Simon that he was in violation of the community rules. If a significant amount of time has passed, when Simon is taken to court he is going to argue that the board is estopped from enforcing the rule, because he was openly violating it while the directors ignored it. And Simon is probably going to win the argument. The only way for an SOC to correct a situation where it has neglected a rule is to notify all owners, in writing, that from this point forward it intends to enforce the rule—but anyone who has been violating up until that point will be allowed to continue to do so. This is why it is critical for a board to enforce every rule and regulation, unless the directors are darned sure that they *never* want to enforce the rule (that is, that they are essentially abandoning it).

When a board of directors truly *doesn't* want to enforce a rule, this presents an interesting twist. A proposed amendment to the Uniform Act would allow boards to essentially "decriminalize" certain rules by officially stating that they will not be enforced for policy reasons. This would give boards a tool to fix unusually restrictive rules that were inserted into the documents by the developer, or that are no longer needed due to changes in the community.

The second defense, *selective enforcement,* plays out exactly as it sounds. Just like our own government, an SOC cannot enforce a rule against one resident but intentionally ignore another similar violation. When Simon is taken to court, perhaps he can demonstrate that there's an eighth grader in the building with a pet turtle, and that the board is aware of the violation but failed to enforce it. If so, Simon is going to be allowed to keep his menagerie because the rule was enforced selectively rather than universally. It's a case of "what's good for the goose is good for the gander"; rules are to be applied either universally or not at all.

The wrinkles involved in community rules and regulations can actually be rather difficult for the majority of SOC owners to grasp. Society encourages cooperation and reasonable application of laws. "I know dogs have to be on a leash," a pet owner will say, "but not my dog! He's the best boy ever!" But that owner is going to be the same person who hits the roof when her dog is attacked by a less friendly animal that is also breaking the rules. Unit owners will plead for the board to "be reasonable," and often, because of the complex social interactions involved in SOC service, the directors relent. But wavering on rules opens the doors to valid claims of estoppel and selective enforcement, even when application of the rule might be extremely important to protect either the property or the residents. So, as difficult as it may be to accomplish, it's very important to enforce every rule, every time. ■

As a general principle, the law requires any rule to be enforced within a reasonable amount of time; otherwise, the violator may assume that the rule is not going to be applied. In the case of contractual covenants, this rule is called estoppel or waiver. In essence, if the board does not act in a timely manner to enforce a regulation, it will be stopped from doing so altogether.

Employment Law

ASSOCIATION AS EMPLOYER: APPLICABILITY OF FAIR LABOR STANDARDS ACT

By: Jamie Dokovna
jdokovna@becker-poliakoff.com

Q: Is Florida increasing its minimum wage for employees?

A: No, but federal law is increasing its minimum wage on July 24, 2009.

Q: What is the new federal minimum wage?

A: The new federal minimum wage is $7.25 per hour.

Q: How much do we have to pay our employees?

A: Under federal law, employers are required to pay the higher of the federal minimum wage or any applicable minimum state wage. Currently, federal law requires an employer to pay a minimum of $6.55 per hour and Florida law requires an employer to pay $7.21 per hour. Therefore, as a Florida employer, you are required to pay your employee a minimum of $7.21 per hour. However, effective July 24, 2009, the federal minimum wage is being increased to $7.25 per hour. Accordingly, all Florida employers paying a minimum wage of $7.21 per hour are required to raise the wages of those affected employees to $7.25 per hour commencing July 24, 2009.

Q: Is there a minimum number of employees an employer must have before the new wage limits will apply?

A: The answer depends; however in most instances, you are only required to employ one to two persons for the wage limits to apply. Florida law defines an employer as any private individual, firm, partnership, institution, corporation or association that employs ten or more persons. Federal law defines an employer as any person acting directly or indirectly in the interest of an employer in relation to an employee. Under federal law, there are two types of coverage: enterprise or individual. For enterprise coverage to apply, the employer must have at least two employees. Individual coverage will apply where the person is engaged in interstate commerce, engage in the production of goods for commerce, closely related process or occupation directly essential to production, or the person is engaged in domestic service. Almost every employee in the United States is covered by the Fair Labor Standards Act ("FLSA") which requires payment of minimum wage.

Q: We use a professional employer organization ("PEO"), are we still considered an employer under the law?

A: It depends, joint employer status may exist where two or more businesses/employers exercise some control over the work or working conditions of the same employee, or group of employees. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A joint employer relationship will typically exist where: (1) there is an arrangement between the employers to share an employee's services or to interchange employees: (2) one employer acts directly or indirectly in the interest of the employer in relation to the employee; or (3) the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Q: If we are sued by an employee for violation of the FLSA, are we covered by our Director and Officer's Insurance Policy or some other type of insurance policy maintained by the Association?

A: Although each insurance policy is different, generally, insurance policies do not cover wage and hour claims brought under state or federal law. Wage claims can be quite costly for an employer. Employers found to be liable for violating such wage and hour laws, can be required to pay the amount of overtime pay, liquidated damages in an amount equal to the amount of overtime wages, interest, costs, and attorney's fees for the employee (as well as the employer's own attorney's fees and costs).

COMMUNITY UPDATE™

VOLUME IX, 2009

Serving Florida's Communities Since 1980

Lisa Magill, Esq., Editor
Marilyn Perez-Martinez, Esq., Assistant Editor

HURRICANE INSURANCE CLAIMS – WHAT DO YOU NEED TO DO TO RECOVER INSURANCE MONEY?

By: Sanjay Kurian, Esq.
skurian@becker-poliakoff.com

Although there is a lot of information on how Associations can be prepared for hurricanes, there is less information as to what happens after the hurricane, particularly as it pertains to insurance claims. ***Managers and board members need to consider what is required after a hurricane to ensure compliance with the applicable insurance policy and recover money which may be owed.***

NOTICE OF CLAIM

Providing notice of the claim is the critical first step. Know what the policy requires for notice, and where the notice should go. It is imperative that notice be provided to the insurance carrier within the time allotted in the policy. Notice should be provided to the address on the policy, not just the local agent.

After receiving notice of the claim the insurer may do several things. The one we hope happens is that the insurer steps in, investigates the claim and provides funds to help the Association start on the road to rebuilding and recovery. Unfortunately that does not happen as often as we would like. The law requires you to cooperate in the investigation of the claim. Remember, what you perceive as delay will be argued by the insurer as a thorough investigation and evaluation. It is important to cooperate in that process as failing to cooperate could invalidate your claim.

REQUEST FOR DOCUMENTS BY INSURANCE CARRIER

The documents requested may include repair records, maintenance records, meeting minutes, financial statements and a variety of other documents. The insurance company wants to establish what damages existed prior to the claim and evaluate whether the insurance application was truthful and accurate.

You must provide these documents to the carrier. Each request should be reviewed and compared to the Association records to determine what exists and then produce them. This can be a very time consuming process as you may be dealing with a voluminous amount of information. It is not unusual to have to produce thousands of pages of documents. You may believe this is a waste of time and that the insurance company can evaluate the claim without those documents, but remember that the policy allows the insurer to request the documents and also requires the Association to cooperate.

EXAMINATIONS UNDER OATH

After receiving the documents, the insurer may ask for the examinations under oath of a variety of individuals. An examination under oath is essentially a deposition. The witness is placed under oath, and the attorney for the insurance company will ask a series of questions which the witness is required to answer, all of which is transcribed by a court reporter. It can be an intimidating process. It is important for counsel to be present for these examinations.

Generally, the examination under oath is only required of the insured, which would be the President or the person designated

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by the Board of Directors. However, where the insured does not know the technical details of the damages or repairs, producing consultants for an examination under oath may be necessary. In some cases the insurer may ask to take the examinations of several board members, the manager and consultants in order to evaluate the claim. The Association's legal counsel should advise the Board which witnesses it must produce for this process.

SWORN STATEMENT IN PROOF OF LOSS

The sworn statement in proof of loss ("proof of loss") is the trigger under most policies for the coverage determination. The policy will contain language that within a set number of days after the proof of loss is submitted a coverage determination will be made. An insurer may state that the proof of loss is not sufficiently detailed as to trigger the policy requirement to make a coverage determination.

Submission of the proof of loss should be done carefully. This is especially true when using estimates, as some policies only allow recovery for costs that have actually been incurred. It is important to sit down with consultants and contractors and have all documentation to determine what has actually been spent, what is reasonably estimated to complete the restoration and then submit a proof of loss.

The proof of loss establishes the value of the claim. It is a very important document and one which you should take very seriously. Although this document may be prepared by a lawyer or a public adjuster, the Association, through the president, is the signatory. Once signed and submitted, the proof of loss represents what the insured is representing, under oath, is the amount owed to the Association. Although the proof can be supplemented, the original and any supplements need to be as accurate as possible.

Once signed and submitted, the proof of loss represents what the insured is representing, under oath, is the amount owed to the Association. Although the proof can be supplemented, the original and any supplements need to be as accurate as possible.

DISPUTE RESOLUTION TECHNIQUES

The two primary ways to resolve an insurance claim without litigation are an appraisal or pre-suit mediation. The appraisal process is governed in the insurance policy itself, and the pre-suit mediation process is governed by the Division of Insurance.

APPRAISAL

An appraisal is essentially a binding arbitration proceeding which avoids the legal process. Sounds good to many, but you must be careful of making a demand for appraisal. Many policies contain a provision for appraisals, which either party can invoke.

An appraisal requires that each side pick an appraiser who then meet and try and agree on the value of the claim. If they cannot agree, they select an umpire, who will issue a binding decision. The appraisal process can be one sided and there may be no appellate remedy for an association. You will be stuck with what the umpire decides. However, the insurance company may not be stuck with that decision, as the insurer may retain the right to deny the claim even after the appraisal award by finding no coverage existed. Understand the risks before asking for an appraisal.

MEDIATION

Subsequent to the 2004 and 2005 hurricanes, the state created a pre-suit mediation program for condominium associations. An association could make a demand for mediation to the Division of Insurance and the Division would contact the insurance company and request the mediation. The mediation was mandatory for insurers. Although some cases settled through this route, in my experience the larger ones did not. Mediation is not a binding process, and there is resolution only if both sides agree to a resolution of the claim. The mediator, unlike the umpire, cannot bind the parties nor make them agree to something the party does not wish to do. However, if both parties are interested in resolving the claim, mediation can be a useful tool to try and resolve claims, partially or wholly, without litigation.

LITIGATION

If you are forced to file suit many issues need to be considered, such as venue, legal theories, basis for recovery, size and scope of the claim. These are all important consideration which will be considered by your counsel. Also of high importance is the statute of limitations. Typically, an insured has 5 years from the date of denial of the claim to file suit. However, your policy may have language that attempts to shorten this limitations period.

INSURANCE COMPANY DEFENSES

The insurer is likely to raise several defenses to any claim. The first one will be that the association failed to cooperate with the requirements under the policy and therefore the insurer is not obligated to pay anything. Whether an insured cooperated with the policy or not is a very fact specific issue. ***If the insurer can prove that the association failed to cooperate then no payment is due under the policy, regardless of the size of the claim.*** This is the reason that cooperation to the extent possible with the insurer's investigation of the claim is important.

Another defense is that the Association committed fraud in the application for insurance or in the presentation of the claim. Like the failure to cooperate defense this is fact specific, but if the insurer prevails will result in no portion of the claim being paid. This is true even if the alleged fraud was only as to part of the claim. What this means is that if the Association submits a multi-million dollar claim, but the Association was found to have been fraudulent in submitting some portion of the claim then the entire claim can be wiped out!

A recent trial court case is illustrative of this. In *Citizens Property Insurance v. Monaco Beach Club,* the Association presented a claim for approximately Twenty Million Dollars. The trial took two weeks. QBE Insurance defended the case primarily on the issue of fraud. There was no argument that the entire claim was fraudulent, but rather that some items of the claim, included in the proof of loss, were fraudulent. While the allegedly fraudulent items were insignificant in comparison to the entire claim, any fraud as to a portion of the claim would invalidate the entire claim. The jury found in favor of QBE after a few hours of deliberation, and awarded nothing to the Association. This was

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an incredibly harsh result, but one that was required under the law once the jury determined that any portion of the claim was fraudulent. The case is currently on appeal.

You must be truthful in all aspects of dealing with an insurer. There is no room for exaggeration or embellishment in pursuing your claim. The safest course of action is to be conservative in presenting the claim. This means providing a proof of loss that covers the actual work performed, or if an estimate is provided that the estimate be accurate and all fluff removed. Be truthful in any testimony given, and understand that presenting your claim improperly could have a negative impact on not just a small part of your claim, but the whole claim.

CONCLUSION

In addition to claims against the insurance company for breach of the insurance contract, there may be claims against other parties as well. Given the size of the deductibles involved, there could be claims for construction defects or under warranties as to the developer, general contractor or other contractors, i.e., roofing company for an improperly constructed roof.

Remember, presenting an insurance claim is not as easy as it sounds. We would all love for the insurance company to simply write a check. However, the reality is that in sizeable claims the insurance company will evaluate the claim by requesting documents, taking examinations under oath and asking for a sworn statement in proof of loss. The best advice for anyone making a claim is to be prepared, be accurate and be truthful.

DANCING IN THE END ZONE: GETTING YOUR ATTORNEY'S FEES PAID BY THE OTHER SIDE

By: Scott K. Petersen
spetersen@becker-poliakoff.com

So, once again, the forces of truth, justice and the Association way have prevailed over the dark and evil forces of those who would keep overweight dogs or paint their houses bright puce contrary to all that is right and good and in the Declaration. You've won your judgment. But wait! Did Babe Ruth stop on third? Did Jim Brown spike the ball on the 1-yard line? Does Tiger Woods take a "gimmee?" No! And neither should you.

It's time for you, as the prevailing party, to move for an award of attorney's fees. How does one do so, you ask?

Simple: move for attorney's fees. Florida Rule of Civil Procedure 1.525 provides:

> *Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.*

It seems so obvious. Yet, it's surprising how many attorneys manage to fumble this seemingly simple task.

Many provisions in Chapter 718 provide for an award of attorney's fees to the prevailing party, including:

- F.S. 718.111(12)(c): related to inspection of association records;
- F.S. 718.1124(5): related to appointment of a receiver
- F.S. 718.116(5)(a) and (b): incidental to the collection process to secure unpaid assessments;
- F.S. 718.116(6)(a): in an action to foreclose a lien for assessments;
- F.S. 718.125: if the contract or lease between the owner or association and the developer contains a provision allowing attorney's fees to the developer under the contract or lease;
- F.S. 718.302(6): in an action related to the transfer of association control from the developer to unit owners;
- F.S. 718.303(1): in any action for damages or injunctive relief for failure to comply with Chapter 718, the declaration of condominium, the documents creating the association or the bylaws;
- F.S. 718.401: related to leaseholds;
- F.S. 718.503(1)(a): in any action in which the purchaser claims a right of voidability based on the contractual provisions of F.S. 718.503(1)(a);
- F.S. 718.506: in an action to rescind a purchase agreement or for damages based on false or misleading information in a prospectus or advertising materials; and
- F.S. 718.612: related to the exercise of a right of first refusal in conversion to a condominium.

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Chapter 720 also has provisions allowing an award of attorney's fees to the prevailing party, including:

- F.S. 720.304(4)(c): actions involving violations of the right of homeowners to peaceably assemble;
- F.S. 720.305(1): actions involving homeowners' associations and the obligations of its members under Chapter 720, the governing documents of the community and the rules of the association;
- F.S. 720.3085: involving enforcement of liens and actions to foreclose; and
- F.S. 720.311: dispute resolution and arbitration proceedings.

Now that we know when to file our motion for attorney's fees and for what actions we can recover fees, we must evaluate whether the association is in fact the prevailing party. According to the case entitled, *Moritz v. Hoyt Enterprises, Inc. 604 So. 2d 807 (Fla. 1992),* a party is a prevailing party if it succeeds on the significant issues in the litigation and which achieves some of the benefit the party sought in bringing suit. Another court held that the fact a party recovers a net judgment is a significant factor, but does not necessarily control the determination of "prevailing party" status. Note that this standard also applies in arbitration proceedings. *The Laurels at Margate Condominium Ass'n, Inc. v. Slonecky, Arb. Case No. 93-0039F, Final Order on Motion for Attorney's Fees (July 28, 1994); West Wind Condominium Ass'n, Inc. v. Becker, Arb Case No. 94-0301F, Order on Motion for Attorney's Fees (August 15, 1995).*

The trial court has discretion to determine which party prevailed on the significant issues and should evaluate each count of a multi-count complaint that is separate and distinct (as opposed to an alternate theory) to determine which party prevailed on that claim. The trial court's discretion includes the discretion to determine that no party was the "prevailing" party and thus decline to award fees at all. *Trytek v. Gale Industries, Inc., 3 So. 3d 1194 (Fla. 2009); cf. Sorrentino v. River Run Condominium Ass'n, 925 So. 2d 1060 (Fla. 5th DCA 2006)* (holding that trial court must analyze result obtained at close of litigation and, if one party clearly prevailed on the significant issues, then reasonable attorney's fees must be awarded).

The party requesting an award of prevailing party fees has burden to prove they are entitled to the award. The other party may oppose the award and then has the burden of specifying exactly which hours should be deducted from the amount claimed. The proof required at a hearing to establish the amount of attorney's fees is set forth in *Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).* In *Rowe,* the Supreme Court held that in determining the amount attorney's fees, the trial court must determine the number of hours reasonably expended (typically by examining the time records) along with a reasonable hourly rate. Expert witness testimony is required in such a determination.

Once you've followed these steps and obtained a judgment for attorney's fees, you still need to collect the money. The work involved in collecting a judgment will be explained in future Volumes of *Community Update*. If you do that, then it's really time to dance in the end zone.

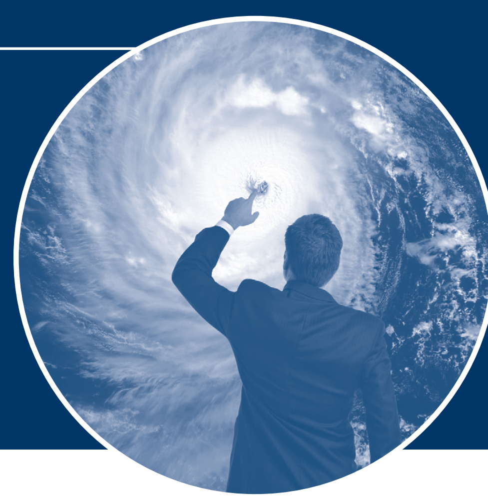
Becker & Poliakoff's hurricane & Disaster Recovery Team presented a series of webinars for clients over the Summer but capacity was limited and the available slots were taken very quickly.

These webinars are available to view and replay.

Hurricane Season 2009:
Are You Ready to Weather the Storm?
http://events.vcall.com/VCall/ReplayLogin.aspx?room=2146003661

Don't Let This Happen to You:
Avoiding Pitfalls in Construction Contracts:
http://events.vcall.com/VCall/ReplayLogin.aspx?room=2146003747

What the Insurance Carrier Doesn't Want You to Know:
Preparing and Presenting Your Claim for Maximum Recovery:
http://events.vcall.com/VCall/ReplayLogin.aspx?room=2146003830



COMMUNITY UPDATE™

VOLUME X, 2009

Serving Florida's Communities Since 1980

Lisa Magill, Esq., Editor
Marilyn Perez-Martinez, Esq., Assistant Editor

IT'S 1 A.M. DO YOU KNOW WHERE YOUR MONEY IS?

TOP TEN POTENTIAL ACCOUNTING AND FINANCIAL PLANNING DISASTERS

By: Ellen Hirsch de Haan, J.D.
edehaan@becker-poliakoff.com

In today's economy, it is crucial that each board of directors have a clear grasp of the financial and accounting aspects of association operations. Even when you have professional management handling the association's finances, the buck stops with the board.

Here are the top 10 potential disasters facing boards in the current market, in no particular order:

1. Failure to document approval of contracts, and expenditures for work to be done, in an open board meeting. It is very important that the awarding of a contract be set forth in the Minutes of the meeting at which it was approved. If you are levying a special assessment to pay for the work to be done, be sure to send out the necessary notices at least 14 days prior to the date of the board meeting at which the assessment is adopted.

2. Inadequate budgeting to accommodate shortfall caused by foreclosures and delinquencies. Associations need to accept that "bad debt" is a reality of life, and you will need to include it in your annual budget; as well as build it in to your annual and special assessments, to cover when less than 100% of the owners pay the assessments. And, bad debt is required to be booked monthly, under generally accepted accounting standards.

While we are talking about budgeting, don't forget to include a realistic estimate of the cost of year-end financials, including an occasional audit, in the annual budget.

3. Failure to keep receipts and other documentation of expenditures. Every expenditure should be accompanied by the applicable receipt, and explanation of the purchase. And, the purchases should all be recorded in the accounting records as they occur. If you've ever had the experience of dumping out an envelope full of receipts and trying to reconstruct the purchases at the end of the year, you have first hand knowledge of why that is a poor accounting practice. And, why would you want to subject yourself to possible claims of misappropriation of funds or accounting irregularities?

When the CPA is trying to produce your year-end financial

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report, proper handling of those receipts will be very important. The board should have a strict policy which requires any director, Professional Manager, maintenance person, committee member, etc. who is authorized to spend "petty cash" to produce the receipts before being reimbursed. The policy should also set guidelines for use of petty cash, and set dollar limits, requiring board approval for larger expenditures. The receipts should be kept for reconciliation of accounts, and for inspection by owners who request access to accounting records.

4. Failure to change account signatories when the Board of Directors changes. If the board changes, your bank accounts should immediately be updated. The Minutes of the organizational meeting of the board should reflect who is an authorized signatory, and whether checks require two signatures. You should also develop a policy for how accounts payable are to be processed – who reviews and approves the invoices? Who cuts the checks? Who signs the checks, when and where (at a board meeting? In the management office? In the association office?) Keep in mind – if a person is a signatory on the association's account(s), he/she has the authority to withdraw money from the account(s), without further authorization from the board.

Do not forget to have fidelity bond insurance for any person who has access to the association's funds.

5. If at all possible, budget for and accumulate funds to pay insurance premiums a year ahead, so you have the cash when the policy is renewed. This will avoid having to scramble to find a loan or levy a special assessment or find other financing (which will add to the costs because of the carrying charges – interest, finance charges, closing costs, and so on).

6. Whether the board does its own accounting, or you have a management company or a bookkeeping service, or even a CPA company, providing the association with monthly accounting services, it is critical that the year-end financial report be produced by an independent CPA, who has not been involved in the monthly accounting. This is an important part of checks and balances to ensure financial health of the association. It is never a good idea for the person who writes and signs the checks to reconcile the bank account. These days, stories of theft and mismanagement of accounts are coming in on a weekly, and even daily basis, and they all involve an individual who has sole responsibility for the association's monthly accounting, cuts checks and then reconciles the checking account; and is altering checks after they are signed, issuing checks to themselves or family members, or otherwise juggling the books.

7. Sorry folks - It is not legal to "borrow" from Reserves. The Department of Business and Professional Regulation has ruled that use of Reserve funds for unscheduled purposes is a change of the use of the funds, which requires approval of the association membership (a majority of those who vote at a duly-called membership meeting at which a quorum of members is present). Technically, you cannot take the money from Reserves if it is not for one of the categories for which the Reserves have been collected, even if you plan to pay it back before the end of the fiscal year, unless you get the membership approval. (This applies to condominiums and cooperatives, and for the statutory reserves in homeowner associations.)

Consider obtaining a professional reserve study or the required building inspection report for your association, on a periodic basis, so you have the opinion of an expert on which to rely when one of the owners challenges the board's numbers.

8. Association credit cards are not a good idea. I hear from CPA's in the industry that they have become a source of abuse and fraud involving personal purchases. If you want to have a credit card for the local home improvement store, adopt a policy to regulate the use of that card, including who has authorization to use it and under what circumstances. In the alternative, use petty cash.

9. Never, never, never arrange for or agree to the issuance of an ATM bank card for and of the association's accounts. (The latest story I heard involved an ATM card for the association's operating account and a machine at the local casino.)

10. And, last but not least, in a condominium or a cooperative, you must deposit reserves with the same frequency as assessments are paid. (Florida Administrative Code Rules 61B-22 and 61B-76) This means, if you collect assessments monthly, the reserve funds collected must be deposited within thirty days of the due date. If your assessments are collected quarterly, you still only have thirty days from the due date to make the deposit. You are not permitted to fund your reserves one time annually, or twice a year, or at the end of the quarter, etc.

Responsible minding of other people's money is a basic part of the definition of fiduciary duty. And mishandling other people's money is a fast road to legal disaster. When in doubt, consult with the association's attorney, and with a CPA who does community association work.

CALL
COMMUNITY ASSOCIATION LEADERSHIP LOBBY

Participate in our CALL Survey on Community Association Financial Stability, Deadline - October 25th

If you have not done so already, please share your thoughts about the impact of mortgage foreclosures on units/homes on your community association.

Go to:

http://www.surveymonkey.com/s.aspx?sm=DZD4ue0BIEVb_2fG0ZSIluMw_3d_3d

The deadline for responding is Sunday, October 25, at midnight. We need to show our elected officials that Association concerns deserve top priority in the 2010 legislative session.

RECOVERING INSURANCE PROCEEDS FROM EMPLOYEE THEFT

By Robert Rubin, Esq. and Cara Thomas, Esq.
cthomas@becker-poliakoff.com
rrubin@becker-poliakoff.com

In a recent issue of the Community Update (Vol. IV, 2009), Gregory W. Marler, Esq., discussed techniques by which the Board can protect the associations' assets against fraud. This article will discuss the importance of insurance protection to cover losses from employee theft and how associations may successfully pursue a claim for reimbursement.

INSURANCE PROTECTION

Fidelity bonding, sometimes called "employee dishonesty coverage," or "crime coverage," is a relatively inexpensive type of insurance designed to protect an association against theft or embezzlement by employees, directors, management personnel, or others who might have access to association funds.

In fact, Florida's Condominium Act requires every Condominium association to maintain insurance or fidelity bonding of persons who control or disburse the funds of the association, which includes, but is not limited to, those individuals authorized to sign checks on behalf of the association, and the president, secretary, and treasurer of the association. The statute also requires that the insurance policy or fidelity bond cover the maximum funds that will be in the custody of the association or its management agency at any one time. The association assumes the responsibility for the costs of the required insurance or fidelity bonding as a common expense of the association.

While general safeguards built into governing documents and the contracts with outside management companies, such as policies requiring two signatories on all association checks, help to provide an extra level of protection against employee theft, insurance protection is essential to ensure replacement of any losses.

CLAIMS FOR REIMBURSEMENT

Becker & Poliakoff, P.A. ("B & P") recently was successful in recovering a $50,000 policy limit plus attorney fees from a large insurance company (our settlement contained a confidentiality provision), who would not honor its insurance policy for employee theft with a firm's client. Like many associations, this one contracted with a management company to manage the condominium. An employee of the management company forged numerous checks, which were cashed at the association's bank without a co-signatory from the Board, in violation of the association's policies and procedures.

After approximately eight months, the Board finally realized that the theft was occurring and made a claim for fraud to its bank. Although the bank made partial reimbursement, there was still a substantial loss to the Association, since the depository contract between the Association and the bank only provided for reimbursement if a claim was made within sixty days of the fraud.

A demand letter was sent to the insurance carrier for reimbursement pursuant to the "employee theft" provision of the policy, but, incredibly, the insurance company denied the claim, stating that the Association had "fraudulently misrepresented" its check cashing procedures in its policy application by not requiring two signatories. Of course, the check cashing procedures were not misrepresented in any way, because the employee of the management company fraudulently circumvented the second signature policy.

The insurance denial was clearly made in bad faith. Therefore, B & P filed a Declaratory Judgment Action, pursuant to Florida Statute §86.021, to recover the value of the policy, in addition to attorney's fees. Two weeks later, B & P also filed a Summary Judgment Motion, under Florida Rules of Civil Procedure 1.150, to have the judge declare, as a matter of law, that this was a covered loss. The purpose of the Summary Judgment Motion was to avoid expensive discovery and put additional pressure on the insurance company by forcing an immediate judicial decision on the merits of the case. Fortunately, within one month of filing the lawsuit, the insurance company capitulated and paid the full policy limits, as well as all of the attorney's fees.

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Important Considerations:

Fidelity/Dishonesty Insurance Mandatory

Need Check/Balance System for Association Funds

Review Original Invoices

Review Bank Statements Every Month and Compare to Check Register

Review Insurance Denials When You Have a Claim

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LESSONS LEARNED

The lesson here is simple, an association must first protect itself against losses from employee theft by purchasing necessary insurance. Second it should set forth policies for the handling of association funds, such as requiring two signatories. Finally, in the event of a loss, when the insurance company denies the claim, the Association needs to have its attorney go over the basis for the denial. Denial letters often contain long recitals of the insurance policy language and multiple irrelevant grounds to deny a claim; such that insurance companies hope that they can either confuse the issue or wear down the insured to avoid paying on the claim. However, with prompt and aggressive legal action, the association could prevail in its efforts to get the denial rescinded and thus recover its losses.

A FEW REMINDERS FOR COMMUNITY LEADERS

Condominium Associations

Staggered Terms:

Did the membership ratify two-year staggered terms? If not, all directors elected in 2009 only serve a term of one-year. If yes, the Firm recommends recording a Certificate evidencing the membership vote in the Public Records. That way there is formal notice of the ratification.

Building Inspection Reports:

Required by §718.113(6), Florida Statutes. Has the membership voted to waive the required inspection? The inspection report is very useful for calculating appropriate reserve schedules and is helpful in connection with the year-end audit.

Insurance:

Has your community requested evidence of insurance coverage from the owners? Has an insurance appraisal been performed within the last 36 months? Has your board considered whether or not to ask the owners to 'opt-out' of the Plaza East method of allocating responsibility for casualty repairs?

Homeowners' Associations

Reserves:

Does your community include statutory reserves in its budget? Are you aware of the distinction between statutory and non-statutory reserves? Does the year-end financial report include the required disclosures?

Litigation:

Considering filing a lawsuit where the amount in controversy exceeds $100,000? Make sure you obtain the homeowners' approval in compliance with §720.303, Florida Statutes. Do your documents require a membership vote? If so, please consult with your attorney to determine how to proceed.

Architectural Control:

Does your community have its guidelines in place? What about standards for maintenance and repairs?

Estoppel Certificates

Authority to charge a fee must be in a written resolution adopted by the board or set in a written management, bookkeeping or maintenance contract.

The amount of the charge must be included on the actual estoppel certificate.

COMMUNITY UPDATE™

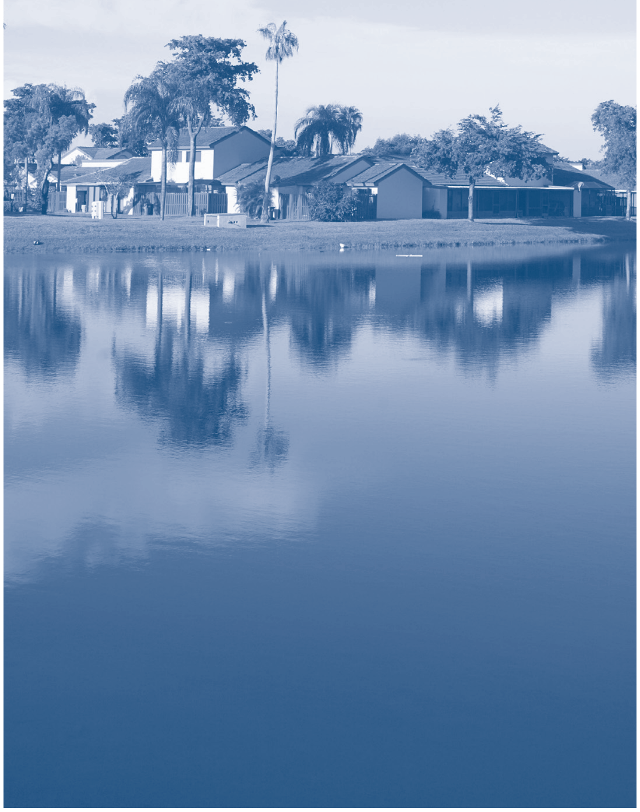
VOLUME XI, 2009

Serving Florida's Communities Since 1980

Lisa Magill, Esq., Editor
Marilyn Perez-Martinez, Esq., Assistant Editor

ARE THEY LAKES OR RETENTION PONDS?

WHAT YOU NEED TO KNOW ABOUT SURFACE WATER MANAGEMENT



By: Sarah Spector, Esq.
sspector@becker-poliakoff.com

When developing a residential community, a developer is required to submit its proposed plans to federal, state, and local scrutiny before breaking ground. Water management is one of the primary issues that need to be addressed by a developer. However, the Association generally bears responsibility for all water management issues, including compliance with permit requirements, indefinitely. Therefore, it is prudent for Association Directors, Officers and Managers to understand a few basics about the process and the responsibilities eventually assumed.

What Is an Environmental Resource Permit?

Construction of a development impacts wetlands, alter surface water flows and may contribute to water pollution. Consequently, a developer is required to obtain an Environmental Resource Permit ("ERP") from the appropriate water management district (the "District") prior to construction. An ERP regulates items such as dredging and filling in wetlands, constructing flood protection facilities, providing stormwater containment and treatment, site grading, building dams or reservoirs, and other activities affecting state waters. Each ERP is subject to General Conditions set forth in Section 40E-4.381, Florida Administrative Code and may be further subject to Special Conditions specific to the proposed project.

Changes to an ERP, either to amend the original plans or to allow for construction of portions of the project not previously permitted, are approved through modifications to the ERP.

What Happens After the District Issues the Environmental Resource Permit?

An ERP is divided into two phases: construction and operation. During the construction phase, the Permittee, which is typically the developer, is responsible for constructing the surface water management system as permitted. The Permittee is also responsible for the operation and maintenance of the system has until the ERP has been converted to the operation phase. The construction phase continues until an independent engineer certifies that the system has been constructed according to the terms of the ERP and the District accepts the engineer's certification or the ERP expires. The construction phase of the ERP expires five years from the date of issuance or as made a condition of the ERP.

When Is the Association Responsible for Maintenance and Operation of the System?

Provided that the District accepts the engineer's certification, the ERP is then ready to be converted to the operation phase. It is during this phase that the Operating Entity, identified in a Special Condition to the ERP, accepts operation and maintenance

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responsibility for the system covered by the ERP. With respect to residential communities, the Operating Entity is typically an owner's association, such as a Condominium Association, a Homeowners Association, or a Master Association.

Before the District will allow for conversion to the operation phase, it requests certain assurances that the Association is empowered to operate and maintain the system and that it acknowledges its responsibility to do so. Accordingly, the following documents must be filed with the District: (1) a request for conversion of the ERP from Construction Phase to Operation Phase and transfer of the ERP to the Operating Entity, (2) an checklist relative to Association documents, and (3) proof that a copy of the ERP has been attached as an exhibit to the Declaration or notice of its issuance has been recorded separately in the Public Records of the appropriate county. Each of the five (5) Districts throughout the state has specific forms it uses for this purposes.

The operational phase of the ERP is perpetual for operation and maintenance, but your community may need to take action to re-certify the system from time to time.

What are Common Issues an Association Faces with Respect to its ERP ?

1. Turnover of the Association prior to conversion of the ERP

As set forth above, the Permittee is responsible for the operation and maintenance of the system until the ERP has been converted to the operation phase. Where the developer is the Permittee, it is in the developer's best interest to convert the ERP while turning over control of the Association. When turnover and conversion are handled simultaneously, the developer relinquishes rights and responsibilities pertaining to all aspects of the Association at the same time. However, it is not unusual for a developer to turnover control of the Association without converting the ERP to the operation phase. Doing so often causes problems for both the developer and the Association.

When non-compliance issues arise, the District will first look to the Permittee. Nonetheless, despite the fact that the Permittee remains liable for operation and maintenance until conversion, the District may take enforcement action against the Association as well. If the Association is cited for operating a system without a permit, which can carry a fine up to $10,000 per day. While the Association may still have a claim against the developer with regard to deficiencies in the system, the Association should take steps toward conversion so as to avoid penalties.

2. Insolvent or Dissolved Developer Corporations

Where a developer becomes insolvent or dissolves prior to conversion of the ERP, the District has no recourse other than to place all responsibility on the Association. And if no successor developer has or will be identified, the Association really has no option but to convert the permit.

3. Lack of Engineer's Construction Completion Certification

Before an ERP can be converted from construction to operation, a licensed engineer must certify that the system has been constructed and operates in the manner in which it was permitted. Yet developers often fail to obtain this certification once the system has been constructed and many years may pass before the District takes enforcement action for failure to certify a system. This, coupled with the fact that it is rare to find an engineer to certify a system that he or she did not design, makes this the largest hurdle for an Association to overcome when the developer has not converted the system. And it is even more rare to find an engineer who will perform this service free of charge. Therefore, it is also a costly hurdle but a hurdle which the Association must overcome nonetheless.

4. Document Deficiencies

As set forth above, the District requires certain provisions in the recorded Association documents and will not process the conversion request until it has proof that these provisions are present. If the governing documents do not contain the required language, an amendment to the appropriate document(s) must be recorded.

5. Improperly Named or Non-Existant Operating Entities

Operating Entities are named when the ERP is originally issued. However, development names change, property is transferred, and associations are formed and dissolved before the system is ready to be converted – all without the Permittee updating the ERP file to reflect this change of information. This ultimately places the burden on the party converting the ERP to identify, and sometimes even reinstate or create, the proper Operating Entity.

Adding to the difficulty in identifying the correct Operating Entity is the fact that an ERP may actually be issued for the construction of a water management system composed of several different systems. Individual projects may be served by a subsystem which connects to one master system, often referred to as a "backbone system " Technically, the Operating Entity identified in the ERP should be a master association responsible for the maintenance and operation of the backbone system. Where modifications of the permit are issued to allow for construction of a subsystem to serve a development within the overall project, the Operating Entity identified should be the applicable sub-association. However, in reviewing older ERPs, this was not always done. Sometimes a master association is identified as the Operating Entity for the permit and all modifications. Other times, a sub-association is identified as the Operating Entity for portions of the system outside of its development.

Mishandling the permitting issues and the operation and maintenance of the surface water management system is likely to become an expensive headache for community leaders and managers. Therefore, if your community has recently transitioned from developer control or you are not familiar with the water management requirements for your community, please contact your community association attorney. Researching these issues and learning what is required of the Association, as the Operating Entity, may save your association thousands, if not hundreds of thousands, of dollars preventing problems or violations later on.

MANDATORY PRE-SUIT MEDIATION FOR HOMEOWNER ASSOCIATIONS: FREQUENT PROBLEMS – PRACTICAL SOLUTIONS

By: Jason R. Himschoot, Esq.
jhimschoot@becker-poliakoff.com

This article discusses some of the issues that have arisen when a mediation demand is made pursuant to Florida Statute Section 720.311. To refresh the memories of seasoned board members and to make new board members aware, Florida Statute 720.311 became effective On July 1, 2007 and requires that pre-suit mediation take place before suit can be filed in a covenant dispute in a Homeowners Association (HOA). The party bringing the action must send the alleged violator (or respondent) a certified letter demanding the mediation. The demand letter must comply with the form referenced in the Statute which gives the respondent a brief description of the violation and a list of five (5) mediators from which to choose. The respondent has twenty (20) days to select of one of the mediators listed. Because the Statute is relatively new, there is very little appellate case law from the Florida Courts that interpret some of the issues that have arisen once a demand has been sent.

A frequent issue arises when an Association sends a demand letter to a homeowner regarding a covenant violation and the homeowner then contacts the Association or its attorney within the twenty (20) days and expresses their desire to rectify the violation. For purposes of this scenario, let's assume the homeowner has a commercial vehicle that is parked overnight in the driveway which is prohibited by the covenants. The homeowner calls up the attorney on the twentieth (20) day and promises that the truck will no longer be parked in the driveway and that the homeowner will comply with the parking restriction from now on. How can the Association protect itself from having to restart the mediation demand process six (6) months down the road if the homeowner violates the parking restriction again? One way to approach this issue is to have the homeowner sign an agreement which has the homeowner acknowledge that they have chosen to comply with the covenant in question in lieu of proceeding to mediation. Further, it should be acknowledged in the agreement that the respondent has waived pre-suit mediation and that any future violations will result in a lawsuit being filed by the Association in court. Finally, the agreement should provide that the Association will be entitled to all attorneys fees associated with the initial pre-suit demand and all attorney's fees incurred if it is deemed to be the prevailing party in any future litigation. This type of agreement can give the Association a strong basis to file suit directly without having to go back through the mediation process for any subsequent violation of the same type and obtain an award for almost all fees expended trying to enforce the particular covenant.

Another scenario arises where the homeowner selects a mediator, but the selection does not come in the mail until a few days after the initial twenty (20) days has passed. Can the Association then pursue the matter in court because the homeowner failed to respond within the initial twenty (20) days? The Statute does not address this issue directly. Florida Statute 720.311(2)(b) states that the respondent shall reply in writing within 20 days from the date of the mailing of the statutory demand. However, the Statute only takes into account the scenario where a respondent does not reply at all. The Statute does not address what happens if the respondent sends their reply a few days late. Obviously, an argument can be made that the failure to timely respond is a failure to respond and that suit can now be filed. On the other hand, the respondent could assert that the plain reading of the Statute does not automatically treat a late response as a failure to respond. In addition, the respondent could argue that pre-suit mediation is highly encouraged pursuant to the intent of the legislature and that the matter should be mediated before suit can be filed. Further, a responding party may also assert that they were out of town on a European vacation for a month, or they miscalculated the date, or come up with any number of "the dog ate my homework" excuses. Ultimately, if a court agrees with the respondent's position and dismisses the action, the Association would have to start over again resulting in additional and unnecessary attorney's fees and costs.

A way to anticipate and guard against a defense that the late response situation is valid is to have the initial response calendared for twenty-five (25) days after the initial demand is sent. This builds in a timeframe for mailing, miscalculation and miscellaneous excuses. Then, if no response is received on the twenty-fifth day send another certified letter attaching the original demand and give them another ten (10) days to respond. This will result in a total of thirty-five (35) days to respond via two (2) separate notices. If no response is received by the second deadline, it should be much more persuasive to the court that the respondent is refusing to respond and that filing suit is now proper. The conservative approach where a response is made a few days after the initial twenty (20) days has passed, is to agree to have the mediation scheduled between the parties. This will eliminate the issue altogether and eliminate the risk of having a court decide that suit was filed prematurely.

In sum, there are minor gaps in the legislation as pointed out above. Regarding the first issue, the Statute could be amended to provide that any repeat offense can allow the aggrieved party to bypass mediation and file suit. However, that may end up causing even more litigation about what constitutes the same offense. Ultimately, the signed settlement agreement may be an adequate solution. The second issue regarding late replies could probably be resolved fairly easily. The Statute could be amended to state that late responses are deemed to be a failure or refusal to participate in mediation and that suit can then be filed. Until then, the approaches mentioned above may help plug the gaps in the Statute.

DOCUMENTING RULE VIOLATIONS IN PREPARATION FOR LITIGATION OR ARBITRATION

By: K. Joy Mattingly, Esq.
kmattingly@becker-poliakoff.com

While every Association hopes that litigation will not be necessary to enforce its governing documents, oftentimes it is required. Therefore, every rule violation must be approached with the thought of potential litigation. The Association should document every rule violation in a uniform manner in preparation for potential litigation. This uniformity ensures the Association will have a strong position and a higher likelihood of prevailing in the event of litigation. The following are some documentation tips in easing the litigation process:

- Document all violations as soon as the Association is aware of them.
- Immediately notify the unit owner in writing of the violation, giving the specific provision or rule that is being violated, and the penalty for the violation. Keep a copy of the notification for Association records. It is crucial that the Association review its governing documents to determine whether the documents detail a procedure for dealing with the violation. If so, the Association must follow this procedure.
- Investigate whether any other residents are guilty of similar rule violations. If so, notify these residents, in writing, of the rule violation, giving the specific provision or rule that is being violated, and the penalty for the violation. Keep a copy of the notification for Association records. This investigation and uniform application of the governing documents will protect the Association from a claim of selective enforcement, should litigation ensue.
- If the rule violation is not remedied with a short time frame, notify the Association's legal counsel of the rule violation. Keep a copy of the notification for Association records.
- If the rule violation is ongoing:
  - document the violation by taking pictures of the violation whenever possible;
  - document all violation occurrences;
  - obtain statements from the surrounding residents to support the Association's position; and
  - surrounding residents are complaining, inform them that the Association is aware of the problem and recruit their help in documenting violation occurrences. The residents' accounts of the violation occurrences can be used in building the case against the violator should litigation ensue.

If the violation continues for a considerable amount of time, the Association must seriously consider enforcement of its governing documents through litigation. Allowing the violation to continue could result in other residents deciding to violate the governing documents and if litigation ensues, the trial court could find the Association consented to the violation by failing to act within a reasonable amount of time. The Association should contact its legal counsel to begin the litigation process and enforce its governing documents.

COMMUNITY UPDATE™

VOLUME XII, 2009 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor

MESSAGE FROM FIRM PRESIDENT, ALAN S. BECKER, ESQ.

For more than thirty-five years this Law Firm has excelled at providing top notch legal services to community associations. The Firm continues to be the leader in this field of law, successfully handling significant construction claims, hurricane losses from Andrew, Opal, Charlie, Jean, Francis, Katrina and Wilma (among others), continuing to develop law and legislation impacting community association operations through the efforts of both attorneys and staff in Tallahassee and throughout the State, making our CALL advocacy effort the most respected of its type statewide. The Firm is also the leading educator of both professional community association managers and volunteer board members – beginning large format workshops and seminars in 1977, this publication in 1980 and creating numerous other educational materials for our clients and industry leaders over the years. More than thirty thousand people have read materials published on the Firm's blog in this, its first year, alone. We created and then 'broke' the mold for Community Association Law Firms over and over again. Now I believe it is time to renew our commitment to client service as the top priority of Becker & Poliakoff, P.A.

To this end, I am pleased to announce the creation of the Becker & Poliakoff Client CARE Center. The CARE Center is a one stop client service center that handles all client questions, concerns or suggestions about our services. Our CARE Center staff will respond to inquiries within 24 hours and proactively reach out to our clients periodically.

We all know that businesses that treat their clients well will not only survive today's economic troubles, but actually thrive. We have been doing written surveys of our clients for years and feel this more interactive approach will ensure that our clients have such a positive experience working with Becker & Poliakoff that they are willing to recommend us to others.

We created this program because we CARE. Please feel free to contact the CARE Center at 954-364-6090 or email Care@becker-poliakoff.com with your comments or concerns.

Best wishes for the holiday season and New Year.

BECKER & POLIAKOFF
Legal and Business Strategists

NOMINATE YOUR COMMUNITY!

The 2010 Florida Communities of Excellence Awards is accepting nominations of communities that demonstrate best practices and accomplishments in several key categories. The only statewide independently judged program is sponsored by the Florida Community Association Journal and Becker& Poliakoff. Other sponsors include: Comcast, Progress Energy, Continental Group, Associa, GEM, Condo Conduit, Association Financial Services, Superior Bank, Aquatic Systems Inc, and Ameri Flood.

The 2010 Florida Communities of Excellence Awards will salute the dedicated efforts of communities across the state who are setting the standards in meeting today's challenges. Submissions will be reviewed and evaluated by a panel of independent judges and three finalists will be chosen in each of the nine categories. Judging of communities with less than 200 units and more than 200 units is done separately, for a total of six finalists in each category.

The 2010 Awards will recognize significant accomplishments in the following categories:

Environmental Protection & Preservation

This award recognizes communities that have adopted initiatives to promote natural conservation and restoration as well as communities with a strong record of environmentally sound policies.

Energy/Water Conservation

This award recognizes communities that have invested in energy management and/or water reclamation & conservation programs that achieve cost economies while promoting environmentally-friendly practices.

Disaster Preparedness

This award recognizes community associations that have developed and implemented comprehensive, effective plans for protecting lives and property in the event of a disaster as well as for community restoration in the aftermath of the emergency.

Safety & Security

This award recognizes innovative programs, policies, and procedures that are designed to protect and ensure the safety of residents and property within the community.

Financial Innovation

This award recognizes community associations that have established innovative policies and procedures to ease the impact of financial burdens during challenging economic times.

Community Relations & Communications

This award recognizes outstanding efforts of community associations that demonstrate an extraordinary commitment to fostering harmony within the community.

Best Website

This Award recognizes that Web sites offer the most immediate access and the potential to distribute information in the most thorough and effective manner. It will go to the Web sites chosen by the judges as most effective in promoting positive community relations through effective communications.

Civic Volunteerism & Advocacy

This award recognizes community associations that actively contribute to civic welfare and improving society through creation of volunteerism programs to support local and regional non-profit and charitable causes.

Family Friendly Programs & Initiatives

The Family Friendly Programs & Initiatives award recognizes communities in which family participation and well-being are actively promoted.

Finalists will be recognized in the March Florida Community Association Journal and honored at the first annual Florida Communities of Excellence Conference & Awards Ceremony, Tuesday, March 23, 2010 at the Fairwinds Alumni Center of the University of Central Florida Main Campus in Orlando. The conference will focus on educating board members and professional managers with presentations by last year's winners, judges and experts in the industry. It will culminate with a gala awards ceremony and reception.

For more information or to nominate your community, go to www.communitiesofexcellence.net.

2009 YEAR IN REVIEW – THE ARTICLES

VOL I

Products – Completed Operations Coverage – What is it and How Does it Work? By Ken W. Goff, Esq.

Information concerning types of losses covered by Contractor insurance and why it is important to require Completed Operations Coverage in construction contracts.

Allowing Access to Official Records – New Requirements and Penalties By Angela Chao Clark, Esq.

Associations Owing Assessments to Other Associations: Say it Isn't So! By Brian P. Miles, Esq.

Alerting community leaders to potential liability for assessments after foreclosure.

Elevator Keys Must Be Uniform
By Bradley F. Rothenberg, Esq.

VOL II

To Be or Not To Be: Terminating a Condominium
By Ray Newman, Esq.

Obtaining Mortgagee Consent a Little Easier for Condominium Associations By John Cottle, Esq.

Advice how to create valid amendments in light of mortgagee consent requirements.

Common Defenses May Thwart Covenant or Rule Enforcement

VOL III

State of Distress:

Gary A. Poliakoff implores the federal government to require payment of community association assessments.

A Rose by Any Other Name: The Disparate Treatment of Condominiums and Cooperatives Regarding Homestead Rights – Part 1 By Lance D. Clouse, Esq.

Enforcement Parking Restrictions by Towing Vehicles
By Kevin L. Edwards, Esq.

Owners Have the Right to Add Items to HOA Board Agendas By Bradley F. Rothenberg, Esq.

VOL IV

Protect your Association's Assets Against Fraud
By Gregory W. Marler, Esq.

More and more community associations have been victimized by fraud or theft from rouge board members, managers and employees – protect yourselves with these practical tips.

Earth Day By Lisa Magill, Esq.

A Rose by Any Other Name: The Disparate Treatment of Condominiums and Cooperatives Regarding Homestead Rights – Part II By Lance D. Clouse, Esq.

Estate and Incapacity Planning Tools Every Board of a Community Association Should Understand
By Andrew Berger, Esq.

VOL V

Paying for Casualty Damage Repairs – The Plaza East / Opt-Out Dilemma By Robert Rubinstein, Esq.

Understand how to address casualty claims pursuant to the statute and options available for tailoring those procedures to the needs of the community.

The New Rules for Mandating Hurricane Protection
By Kenneth S. Direktor, Esq.

Association as Employer: Unemployment Insurance
By Jamie B. Dokovna, Esq.

VOL VI

The Insurance Predicament For Condo Owners & Associations By Lisa Magill, Esq.

Impact of the Veto of SB 714

To Secure or Not to Secure By JoAnn Burnett, Esq.

Taxation of Golf Courses By Keith Poliakoff, Esq.

VOL VII

Summary of the 2009 Legislative Session
By Yeline Goin, Esq. and David G. Muller, Esq.

VOL VIII

Excerpts from Gary Poliakoff and Ryan Poliakoff's new book

New Neighborhoods: *The Consumer's Guide to Condominium, Co-Op and HOA Living.*

Association as Employer: Applicability of Fair Labor Standards Act By Jamie Dokovna, Esq.

VOL IX

Hurricane Insurance Claims – What Do You Need To Do to Recover Insurance Money? By Sanjay Kurian, Esq.

Dancing in the End Zone: Getting Your Attorney's Fees Paid by the Other Side By Scott Petersen, Esq.

VOL X

It's 1 A.M. Do You Know Where Your Money Is?
By Ellen Hirsch de Haan, J.D.

More tips to safeguard association funds.

Recovering Insurance Proceeds from Employee Theft
By Robert Rubin, Esq. and Cara Thomas, Esq.
A Few Reminders for Community Leaders

VOL XI

Are They Lakes or Retention Ponds? What You Need to Know About Surface Water Management
By Sarah Spector, Esq.

Mandatory Pre-Suit Mediation for Homeowner Associations: Frequent Problems – Practical Solutions
By Jason R. Himschoot, Esq.

Documenting Rule Violations in Preparation for Litigation or Arbitration By K. Joy Mattingly, Esq.

FREE EDUCATIONAL FORUMS FOR BOARD MEMBERS, PROPERTY OWNERS AND MANAGERS

Becker & Poliakoff's Annual Community Association Leadership Conferences, now in their 34th year, will focus on strategies for communities to deal with the economic crisis. These free educational forums for board members, property owners, managers and others will be held at 14 locations throughout Florida. This year's theme is Staying Afloat: Strategies for helping your community in difficult Economic Times. Topics will include Collections in Today's Economy including liability of owners vs. subsequent purchases and foreclosing the claim of lien as well as options available to associations including collecting rents in lieu of assessments, depositing rents in to the court registry, extraordinary receiver appointments and extra judicial remedies, among others.

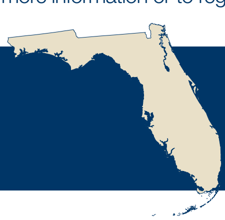
In addition, a panel of attorneys will answer questions on a wide range of issues including employment law, covenant enforcement, dealing with local governments, 2010 Legislative Session, construction defect claims and related issues. The conference has been approved for two (2) continuing education credit hours in Insurance and financial management for Community Association Managers. Other attendees will receive a Certification of Participation from Becker & Poliakoff .

The first conference will be held on January 15 in Ft. Myers and will wrap up on March 27 in Daytona Beach. All events begin at 8:30 with registration and breakfast. The conference begins at 9:00 am and ends at 12:30 pm. There will be an exclusive "Client Only" breakfast at 8 am with Firm Founder Gary Poliakoff (schedule permitting) who will be speaking about and signing his new book, New Neighborhoods, The Consumer's Guide to Condominium, Co-Op, and HOA Living. Each Becker & Poliakoff client received one complimentary copy of the book by mail and others will be available for sale at the conference.

2010 COMMUNITY ASSOCIATION LEADERS CONFERENCE SCHEDULE AND LOCATIONS;

Friday	January 15, 2010	Barbara B. Mann Center, Ft. Myers
Friday	January 29, 2010	Hilton St. Petersburg Carillon Park, St. Petersburg
Saturday	January 30, 2010	Port St. Lucie Civic Center, Port St. Lucie
Saturday	February 6, 2010	Hilton Naples, Naples
Saturday	February 6, 2010	Hawks' Cay Island Resort, Duck Key (Florida Keys)
Friday	February 12, 2010	Emerald Coast Conference Center, Ft. Walton Beach
Saturday	February 13	Hyatt Sarasota, Sarasota
Friday	February 19, 2010	The Boardwalk Beach Resort, Panama City Beach
Friday	February 26, 2010	Hilton Orlando, Altamonte Springs
Saturday	March 6, 2010	Signature Grand, Ft. Lauderdale
Friday	March 12, 2010	Holiday Inn - Viera Conference Center, Melbourne
Saturday,	March 13 2010	Kravis Center - Cohen Pavilion, West Palm Beach
Saturday	March 20, 2010	Hilton Miami Airport, Miami
Saturday	March 27, 2010	Plaza Resort, Daytona Beach

For more information or to register for this FREE educational conference, go to www.becker-poliakoff.com/events/ca / for the event nearest you.



NEW ON FLORIDA CONDO & HOA LAW BLOG

- Bank Liability for Assessments During Foreclosure
- Avoiding Pitfalls when Obtaining Loans
- FHA Condo Guidelines