Community Counsel

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Association Beware

One of the most misunderstood areas of association operations lies at the intersection of association, employment and insurance law, and involves the troublesome issue of workers compensation. This is an area many associations either gloss over or just get flat-out wrong, misunderstanding completely the so-called exemption which small contractors can claim. Occasionally the chickens come home to roost and when they do, the Association invariably takes a very hard fall.

Case in point. A security guard provided through a security service is injured in a slip and fall accident while on-duty. Most persons would assume that he would be covered by his employer's worker's compensation – which he was. But he also sued the Association and won.

Most people would also assume that the Association would be immune from suit when a worker is covered by a valid worker's compensation policy held by an outside contractor. Immunity from suit, after all, is the very purpose of worker's compensation from an employer's point of view. But they would be wrong. This is precisely why, when a small contractor claims to be "exempt," any right-thinking association will turn and run the other way. In essence, the contractor is offering to sue the Association without any limits, in the event of an accident.

ASSOCIATIONS WITHOUT A "CONTRACTUAL DUTY" ARE OPEN TO SUIT FOR EVERY INJURY.

What is most troubling about the result of Smith v. Mariner's Bay Condominium Association, Inc., 26 FLW D 1807 (3rd DCA 7/25/01) is that under the reasoning of the case, most associations will lose most of the time. While the Association is in the business of contracting for services on behalf of its members, in order to be deemed a "statutory employer" protected by the workers compensation policy of its contractors, such as the security company, the Association's duty to obtain the services must also arise by contract. In condominiums and cooperatives in particular, the Association's duty to its members is said to be statutory, not contractual. In the absence of a contractual obligation between the association and its members, the provisions of Section 440.10(1)(b), F.S. operate to strip the Association of immunity and lay it open to suit by any worker who is injured on the job, even though directly employed by another and even though covered by the employer's policy. To be protected, every service for which the Association contracts must be spelled out in its governing documents. Hopefully, the presence of the various services in the documents will operate to immunize the association. HOA's need to take heed also, since most documents do not define the various services provided to the members with any specificity.

REMINDER

- **Friday, September 28, 2001 is C.A. Day for the local chapter of CAI. Held at the Expo Center in Downtown Orlando, vendors and professionals exhibit their wares and various programs are offered, including a 2001 Legal Update presented by Wean & Malchow, P.A.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

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RECENT CASE SUMMARIES

In **Buttonwood Hammock Homeowners Association, Inc. vs. Obas**, 8 Fla. L. Weekly Supp. 636b (17th Circuit 7/16/2001) Association brought an action against Owner seeking the removal of an above-ground swimming pool. Association claimed that the above-ground swimming pool was a violation of the recorded declaration of covenants. The trial court ordered the parties into mediation in order to attempt to amicably resolve the dispute. At mediation, Owner agreed to remove the swimming pool and the Association agreed to waive the accrued fines levied as a result of the violation. The parties agreed that determination of entitlement to and the amount of attorney fees and costs would be left up to the court. In resolving the issue of entitlement to an award of attorney fees, the trial court followed the general principals established in prior Florida case law. The court determined that the Association was the prevailing party because it prevailed on the significant issue of the case, *i.e.,* obtaining the removal of the swimming pool. The trial court determined that the Association was the prevailing party notwithstanding that the case was resolved at mediation rather than as a result of a trial before the court.

In **In re: Petition for Recall Arbitration, Gloucester E Condominium Association, Inc., vs. Unit Owners Seeking Recall**, Case No. 01-2606 (Powell, Summary Final Order Certifying Recall 3/23/2001), Association was served with a written agreement for the recall of a single member of the board of directors. There were 32 voting interests in the Association. As such, 17 votes were required to recall a director. The board of directors of the Association met and determined not to certify the recall. According to the minutes of the board meeting, the written agreement consists of 20 ballots for the recall of the single director. The board determined not to certify the recall because it disputed six of the ballots. Of those six ballots, four ballots were discounted because rescissions were received prior to the board's meeting. All four rescissions were dated and served upon the board after service of the written agreement on the board but prior to the board meeting to vote on certification of the recall. The arbitrator held that the rescissions received after service of the written agreement on the board were ineffective to revoke the recall votes cast by the four unit owners. As such, the board of directors improperly rejected the four votes. Therefore, when the improperly rejected votes were added to the votes which were not in dispute, 18 votes were cast for the recall of the director. Therefore, the recall of the director was certified.

In **In Re: Petition for Arbitration, The Vistas of Boca Lago Condominium Association, Inc., vs. Handelsman**, Case No. 99-0030 (Pasley, Final Order 4/23/1999) Association filed a petition for arbitration alleging that Owners' use of a treadmill in their second floor unit created an intolerable noise and constituted a nuisance. Association further alleged irreparable harm in that Owners' use of their treadmill had created a health and safety hazard to other unit owners and jeopardized the structural integrity of the building. The evidence at the hearing showed that Owners' use of the treadmill damaged a downstairs neighbor's unit by 1) causing a ceiling fan to separate from the ceiling, exposing wires; 2) causing a smoke detector to fall from the wall; 3) causing a picture to fall, breaking the glass; 4) causing the living room ceiling to "bow"; 5) causing the track lighting in the living room to dip; 6) causing the "popcorn" finish to fall from the ceiling; and 7) causing nail-holes – from nails used to hang wall-hangings – to elongate. Based upon the evidence and testimony, the arbitrator enjoined use of the treadmill within the unit.

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