COMMUNITY COUNSEL

April, 2002 A Publication of Wean & Malchow, P.A. Volume 6, Issue

RECENT CASES

- **Although Association's insurance agent failed to arrange for response to suit, default vacated.**
- **Assessments must be consistent with Governing Documents**
- **New owner excluded from judgment against old owner of**

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Law Firm Violated Fair Debt Collection Law

In a March, 2002 decision, the United States District Court in Tampa found a large Florida law firm and one of its local attorneys in violation of the Fair Debt Collection Practices Act. In doing so the Middle District of Florida firmly entered the column containing those federal jurisdictions that have held that assessments owed to community associations are "consumer debts" within the meaning of that federal statute. Chief Judge Elizabeth Kovachevich rejected the holding of at least earlier two state court decisions interpreting the same federal law. The judge also had no problem finding the law firm to be a third party "debt collector" to whom the law applies.

The suit was based on a letter sent to members of a property owners association in an attempt to collect assessments from them. At least two separate classes were certified by the court, with the difference between them being the date on which the letter was sent. Since different statutes of limitation would apply to claims made under state and federal law, the plaintiffs (unsuccessfully) attempted to assert claims under the Florida Consumer Collections Act as to the earliest letters, since that statute has a longer statute of limitations.

THE STANDARD APPLIED BY THE COURT WAS THE "LEAST SOPHISTICATED CONSUMER"

It appears from the text of the letter that the association may have been turned over by the developer with poor accounting records. The demand letter sent by the attorney could not state an exact amount due from the owners. Instead it made an offer as to the delinquents based on the length of their indebtedness. Nevertheless, the letter also contained a statement on the owners' liability for attorney's fees and costs which the court paraphrased as follows:

Defendants assert that, if Plaintiffs fail to respond to the letter on or before thirty days of the date of the letter, Plaintiffs will incur "a substantial amount of attorney's fees and costs, which [Plaintiffs] are personally liable for and which can also constitute a judgment against any property [Plaintiffs] own, whether within or without the State of Florida.

The Court first determined that the appropriate standard to be applied to claims under the Fair Debt Collection Practices Act (as in many consumer protection statutes) is "the least sophisticated consumer" standard. This standard asks whether a hypothetical least sophisticated consumer would be deceived or misled by the debt collector's practices. The Court proceeded to find that… ….. **an unsophisticated consumer reading a letter originating from a lawyer and stating that the consumer would incur 'substantial amounts of attorney fees and costs' would very likely interpret the letter to mean that there was no chance in prevailing once a lawsuit was filed.**

As such, this statement in the letter was found to be misleading and deceptive as to the least sophisticated consumer, subjecting the law firm to liability to *all* members of the class asserting federal claims. Though the statutory penalty is small, it also includes an attorney's fees provision. When considering the number of plaintiffs, the total financial liability the firm faces could be substantial. The case presents a clear and ominous warning that written communications to collect assessments must be *carefully* drafted.

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RECENT CASE SUMMARIES

In **Coquina Beach Club Condominium Association, Inc. v. Donna Wagner & Douglas Wagner, 27 Fla. L. Weekly D873a (Fla. 2nd DCA 4/19/2002)**, Condo Association was served with a negligence action brought by the Owners. The complaint was served on the Association's manager, who in turn forwarded the complaint to the Association's insurance carrier. Due to family health problems, the insurance agent failed to forward the complaint to the insurer's underwriting department. As a result, a default was entered against Association for its failure to file a responsive pleading in the action within the required period of time. When the Association manager became aware of the default, it contacted the insurance agent who then took the appropriate action to forward the complaint to the defense counsel appointed by the insurer to represent Association. Within two weeks of the entry of the default, Association, through its appointed counsel, filed a Motion to Set Aside the Default based on excusable neglect. In finding for Association, the Court relied on Affidavits filed by Association, which outlined the steps taken by the manager as well as the insurance agent's inadvertent mistake in failing to forward the complaint to the necessary persons despite the manager's action in confirming receipt of the papers. The Court followed current case law which provides for the liberal setting aside of default judgments to allow cases to be tried on their merits.

In **PGA PROPERTY OWNERS ASSOCIATION, INC. v. GOLF VILLAS II, A CONDOMINIUM AND GOLF VILLAS I, A CONDOMINIUM, 27 Fla. L. Weekly D828a (Fla. 4th DCA 4/10/02)**, "PGA" is a master association governing the entire community of PGA Village, which includes Golf Villas I and II. In 2000, PGA increased the monthly assessments charged to Golf Villas I and II by $31.00 per month. PGA contended that a benefit was being conferred to Golf Villas I and II because of the installation of a guard house and security gate and the services of a twenty-four hour roving security guard. However, the facts revealed that the Golf Villas communities were not in the portion of the community where the guardhouse and security gate were constructed. The Golf Villas filed an action for declaratory judgment requesting that they not be charged for these services since their owners did not benefit from them. The trial court re-calculated the percentage to be charged to the Golf Villas based on the total PGA budget. PGA appealed the trial court's calculation of the new assessment to Golf Villas I and II. The Fourth District Court of Appeals found that the trial court's formulation was inconsistent with the clear language of the documents. Under the Master Declaration for PGA, two types of assessments were permissible. The first was a base assessment which was to be charged equally to all owners. Funds from such an assessments were to be used for the betterment of the entire community. The second assessment was a "sub-district" assessment which was to be charged to each individual development for services that benefited that particular district. Because the trial court failed to structure an assessment that fell within either assessment category, the trial court's order was reversed with further instructions to determine the benefit conferred to the Golf Villas and support for the charges imposed to these two sub-districts.

In **JOSEPHINE PARDO v. THE DECOPLAGE CONDOMINIUM ASSOCIATION, INC., 27 Fla. L. Weekly D515a, (Fla. 3rd DCA 3/6/02)**, Condominium Association brought an injunction action against Owners and Tenant of a unit to prohibit Tenant's use of the unit as a real estate office. Association was successful and moved for an award of attorneys fees under Section 718.303, Florida Statutes. The trial court entered a proposed judgment agreed to by the parties, which awarded Association the amount of $25,856 against all defendants, jointly and severally. Thereafter, Defendant Pardo moved for relief from the judgment on the basis that she was not the owner of record of the unit when the action was filed. Because there was no legal basis for the entry of a judgment against Ms. Pardo and the inclusion of Ms. Pardo as a defendant amounted to a "mistake" as provided for under Florida Rule of Civil Procedure 1.540(b), Ms. Pardo was entitled to have the judgment amended to exclude her as a defendant.

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