COMMUNITY COUNSEL

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RECENT CASES

- **Condo made a reasonable accommodation once informed an owner had MS, by offering to allow that owner to have a washer / dryer, even though no one else can use it.**
- **Developer may have to pay attorneys fees for misleading potential class action members if he acted in bad faith.**

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.

COOPERATING WITH MORTGAGE LENDERS

A troublesome issue that repeatedly surfaces in our practice is the responsibility of an Association to cooperate with lenders and those working with them and their customers - particularly real estate agents and mortgage brokers.

Most mortgage lenders are large banks. Most banks lend residential mortgage money following the underwriting guidelines of one or more federal programs. By doing so they can resell the loan on the secondary market after it is closed and receive back further funds to lend again, rather than having to hold loans for the term of the loan, usually thirty years.

The loan application process is tedious enough for the borrower; answering loan application questions, providing historical verifying documents, fulfilling loan conditions and paying fees. But when the loan processor has questions beyond the borrower and the specific residence involved, everyone involved often turns to the community association and its manager, if any, for answers. This is when problems can arise.

Usually questions are posed in writing on an official-looking form and ask for all manner of information, much of which can not be precisely known by anyone, since it relates to aggregated statistics. For example, who has actual knowledge of how many units in a community are owner-occupied, or which are first or second homes. Even if the Association has an inkling on such matters, the accuracy of its information is suspect, most likely coming from anecdotal information.

Very often the forms contain language that makes the person answering them "certify" the answers, apparently to add some weight and heft to the answers given.

Regardless of the form, though, it is obvious that the lender intends to consider and rely on this information when deciding whether to write the loan. If the Association's information turns out to be inaccurate and the loan cannot be resold, or if the borrower defaults, what liability if any does the Association and/or its manager have to the lender? If you are either of these parties, do you really want to find out?

RESIST THE THREATS AND DEMANDS OF BROKERS AND SLEEP BETTER AT NIGHT

The Coop and Condominium Acts and most HOA documents provide owners with the right to inspect all documents (the same records managers and officers examine to try to answer questions), and with the right to have an estoppel letter as to assessments on the property in question. Condominiums also have the "frequently asked question and answer" sheet they are required to keep current. Beyond this, however, there is no legal requirement that the Association provide information to anyone, even if for the benefit of a member. Use of a disclaimer may only create a defense if the Association is later sued. Therefore the best advice is to politely but firmly decline to provide information you may not know and thereby avoid consequences you may not foresee.

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RECENT CASE SUMMARIES

In **Chateaux du Lac Condominium Association, Inc., vs. Yarbrough**, Case No. 01-3451 (Scheuerman, Final Order dated June 6, 2002) Unit Owners purchased the condominium unit in June of 2000. In approximately July of 2000 the Unit Owners installed a washer and dryer in the condominium unit in violation of the Association's governing documents. In July of 2001 the Association filed an arbitration action against the Unit Owners to compel removal of the washer and dryer. In September of 2001 the Unit Owners filed an answer and affirmative defenses to the Petition for Mandatory Non-Binding Arbitration. In their answer and affirmative defenses, they alleged for the first time that one of the Unit Owners was afflicted with multiple sclerosis (MS) and as such, needed the washer and dryer as a reasonable accommodation pursuant to the provisions of the Fair Housing Act. However, at the time of the filing of the answer and affirmative defenses, the Unit Owner did not physically occupy the condominium unit and the unit was leased to tenants. The arbitrator found that prior to the filing of the arbitration petition, the Unit Owner had not notified the Association of her condition, nor had she made a demand on the Association for a reasonable accommodation. The arbitrator determined that MS constitutes a physical impairment which entitled the Unit Owner to protection under the Fair Housing Act. The arbitrator further found that, immediately upon learning of the Unit Owner's disability, the Association expressed a willingness to provide a reasonable accommodation to the Unit Owners to permit them to keep the washer and dryer, since the Association is required to provide a reasonable accommodation for the Unit Owner's disability. Furthermore, the arbitrator found that the Association's offer to allow use of the washer and dryer in the unit for so long as the Unit Owner is actually occupying the unit constitutes a reasonable accommodation. Therefore, the arbitrator ruled that the Unit Owner is permitted to use the washer and dryer during those times which she actually resides in the unit. The arbitrator further ordered that the washer and dryer remain installed in the unit whether or not the Unit Owner actually lives in the unit. However, the arbitrator ruled that the accommodation is personal to the afflicted Unit Owner and that no one, including the other Unit Owner nor any other tenant or occupant, is permitted to operate the laundry machines. The arbitrator further ruled that when the unit is sold or title to the unit is otherwise transferred, the washer and dryer must be removed from the unit.

In **The North County Company, Inc., vs. Bologna**, 27 Fla. L. Weekly D1275 (Fla. 4th DCA May 29, 2002), North County was the developer of a recreational vehicle condominium park. A provision in the condominium documents reserved to Developer the exclusive right of rental of a lot if the lot owner was not then using the lot and wished to rent it to another person. The gross rent received for the lot rental would be shared 50/50 between Developer and the lot owner. Developer sued Lot Owner claiming the Lot Owner had rented some of her lots in violation of the rent sharing provisions of the governing documents. The Lot Owner countersued Developer, challenging the validity of the rent sharing provision and seeking class action status for herself as Class Representative and on behalf of other similarly affected lot owners. The trial court granted certification of the class and notices of the class action were sent to all affected lot owners. Each affected lot owner was provided an opportunity to "opt-in" or "opt-out" of the class action. Very few of the affected lot owners "opted-in" the class action lawsuit. Upon further investigation, the Lot Owner discovered that Developer contacted many of the potential class members and, in urging them to opt-out, had described with some hyperbole the dire consequences that likely would befall any owners who remained in the class, including liability for thousands of dollars in attorneys fees. Armed with this information, the Lot Owner sought an order striking the class action responses and requesting additional relief, including sending out new notices and prohibiting Developer from contacting any owners and making any additional threats or other acts intended to intimidate owners from opting-out of the class. In addition, the Lot Owner sought recovery of attorney fees as a sanction against the conduct of Developer in tainting the class certification process. The trial court granted Lot Owner the attorney fees and costs incurred to cure the class certification process. However, the Fourth District Court of Appeal reversed the granting of attorney fees on technical grounds. The appellate court determined that the trial court failed to make express findings of bad faith conduct and further, the trial court failed to detail its factual findings of misconduct with a high degree of specificity as required by law. The appellate court remanded the case to the trial court to revisit the motion for attorney fees and to make specific findings of bad faith and specific findings of misconduct as required by law.

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