COMMUNITY COUNSEL

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NEWS OF NOTE

As of 1/15/03 our new mailing and physical address will be:

646 E. Colonial Drive Orlando, FL 32803

Our new local phone will be:

407-999-7780

Our Toll free Number will remain:

800-895-wean

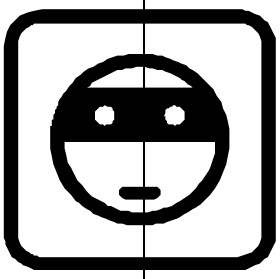
Our new fax number will be:

407-999-5291

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.

Bad Checks and Community Associations Part 1

These two articles were written by request of a client. With so many people being members of community associations, it is inevitable that your association will eventually receive a worthless check in payment of monthly assessments. Florida Law provides ample civil remedies to collect worthless checks, including the right to recover a civil judgment for three (3) times the face value of the check (I.e. treble damages) plus bank charges, attorney fees and costs. In addition, such conduct may be criminal in nature. This article will very briefly describe what actions your Association must take in order to support a criminal conviction for uttering a worthless check.



Bad Checks given to Associations will usually be a misdemeanor

Section 832.05, F.S. makes it a crime to issue a worthless check when the maker knew, or should have known, that there were insufficient funds in the account at the time the check is presented. In any prosecution for uttering a worthless check *the making or delivery of a check which is refused because of lack of funds is prima facie evidence of intent to defraud or knowledge of insufficient funds*. Therefore, once a check is returned for insufficient funds, there is a *presumption* in the law that the check was issued with the knowledge that there were insufficient funds in the account to pay the check.

Generally, issuing a worthless check is a first degree misdemeanor. However, if the check is for more than $150.00 and the check is issued *contemporaneously* with the receipt of goods and services, then the maker may be charged with a third degree felony. The penalty for a first degree misdemeanor is a maximum of 1 year in jail and a $1,000.00 fine. The penalty for a third degree felony is a maximum of 5 years in jail and a $5,000.00 fine. However, payment by bad check on a pre-existing debt will not support a felony conviction. *As such, the payment of an association assessment by use of a worthless check will almost always be a first a first degree misdemeanor.*

The first thing that the Association should do when it receives a worthless check is to provide to the person who wrote the check a statutory notice, as required by Section 832.07(1)(a), F.S. This statutory provision contains a "form" notification which should be given to the person who wrote the check. This form notification demands that the check, and all bank charges, must be paid within seven (7) days from receipt of the notice. The notice must be mailed to the address printed on the check or given at the time of issuance of the check by certified mail, return receipt requested, so that proof of delivery can be obtained. However, actually delivery and receipt of the notice are not required. It is sufficient to prove receipt simply by mailing the notice by certified mail to the address of the maker as required by the statute.

(Concluded Next Month)

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RECENT CASE SUMMARIES

In **Basch vs. Garden-Aire Village Condominium Association, Inc., et al.**, 4D01-2372 (Fla. 4th DCA, November 27, 2002) Unit Owner brought suit against Association and the Association's President and Vice President, alleging a failure to comply with the governing documents of the Condominium Association and for breach of fiduciary duties in violation of the Florida Condominium Act. The Unit Owner argued that the Association had improperly paid the officers compensation for their services as officers in violation of the Florida Condominium Act and the Association's Bylaws. The Unit Owner alleged that the members in the Association had neither authorized nor approved payment of compensation to the officers. The Unit Owner sought reimbursement to the Association for the improper compensation and an injunction against any future unauthorized compensation. The President of the Association filed a motion for summary judgment. This motion explained that the compensation paid to the officers was for services they rendered to the Association beyond their duties as officers, and not for work performed within their officer capacities. However, this motion did not describe any of the services which were allegedly performed. The trial court ruled that there were no disputed issues of material fact and that the compensation paid to the officers was for services beyond and outside the duties described for the offices which they held. The Fourth District Court of Appeal reversed this ruling on two grounds. First, the Unit Owner alleged in the complaint that the compensation paid to the officers was not authorized by the members of the Association. The motion for summary judgment offered nothing that would have given the Association authority to pay officers compensation beyond what the members had previously set. Second, the motion for summary judgment claimed that the services of the officers were extraordinary and beyond the scope of their duties as set forth in the Bylaws. However, neither the Association, the President, nor the Vice President furnished any description of these alleged extraordinary services, and thus nothing in the record supported that defense. Thus entry of summary judgment for the officers and the Association was not proper due to the presence of material disputed facts requiring a trial.

In **Hufcor/Gulfstream, Inc. vs. Homestead Concrete & Drainage, Inc., et al.**, 4D02-412 (Fla. 4th DCA, November 27, 2002), Hufcor brought suit against Homestead for breach of contract. Homestead was a general contractor on a public construction project. Homestead subcontracted a portion of the work to Hufcor. When Homestead failed to pay Hufcor for the work it performed, Hufcor filed suit against Homestead. The parties attended mediation and were able to reach an agreement to the dispute. Under the agreement, Hufcor agreed to forgo collecting the full amount owed of $86,000.00 and instead Hufcor would settle the claim for $75,000.00, provided that the payments were made pursuant to an agreed-upon schedule. If payments were not received when due, the agreement provided that Hufcor could give written notice of late payment. If the payment was not received within five days of the written notice, an agreed final judgment in the amount of $86,000.00, less amounts paid, would be entered against Homestead. The agreement made time of the essence. Homestead timely paid the first two payments totaling $60,000.00. The third and final payment of $15,000.00 was to be delivered to Hufcor by November 27, 2001. Homestead failed to make this payment and on November 29, 2001 Hufcor's attorney sent written notice of the late payment. On December 17, 2001, some eighteen days after the written notice was sent, Homestead made the third payment of $15,000.00. Later, Hufcor filed a motion for final judgment pursuant to the agreement, seeking a judgment of $26,000.00 ($86,000.00 less the amount paid of $60,000.00). After a hearing, the trial court awarded Hufcor $15,000.00, the amount that was tardily tendered. The Fourth District Court of Appeal reversed the trial court. The appellate court noted that generally stipulations entered into are binding on both the parties and the court. The stipulation was expressly made upon the condition that time was of the essence. The appellate court noted that there is almost no such thing as substantial performance of payment between parties when the duty is simply a general duty to pay. The settlement stipulation was clear and unambiguous in its terms and time was of the essence. The appellate court noted that although the result seems harsh, since payment was not received within the grace period following the notice of default, Hufcor was entitled to a judgment of $26,000.00.

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