COMMUNITY COUNSEL

January, 2003 A Publication of Wean & Malchow, P.A. Volume 7, Issue 1

BULLETIN

In his January 20, 2003 budget proposal, Gov. Jeb Bush recommended the complete deregulation of the Florida CAM industry and elimination of the current Regulatory Council.

Please contact your legislators and clearly express your views on this significant proposal.

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.

Is There a Bankruptcy in Your Future?

The new year is starting fast, with a number of significant developments in the area of community association law. (See the adjacent sidebar about another important development.) One case decision handed down at Thanksgiving time portends increased consideration of bankruptcy as a legitimate business option for community associations.

After a long and tortured history, the Westwood Community Two Association, Inc., was found liable for violation of the 'familial status" provisions of both state and federal fair housing laws. A judgment for substantial damages – in excess of $1 million – was entered against the Association, which then filed a Chapter 7 liquidation bankruptcy in an effort to avoid the debt. The Trustee in Bankruptcy, after unsuccessful efforts to challenge the debt, attempted to use the Association's documents and the Trustee's power to stand in the shoes of the debtor association to levy a special assessment against all lots for an amount in excess of $7,000.00 each, in order to pay the judgment. Owners who did not pay were threatened with lien foreclosure proceedings. When collection activity commenced, a group of owners , acting as an ad hoc group, unsuccessfully challenged the Trustee's actions in the bankruptcy court. They appealed the adverse judgment to the U.S. District Court for the Southern District of Florida, sitting in review of the Bankruptcy Court. That court reversed the decision, though the basis for its ruling is sufficiently unclear as to leave some doubt as to the effect of bankruptcy on future association filings.

As insurance becomes more expensive, association bankruptcy may become more common.

First, the court ruled that the Trustee was not marshalling the association's assets when it levied the special assessment, saying that the monies belonged to the owners, not to the corporation's bankruptcy estate.

Additionally, even though the association documents did not contain a limitation common to HOA special assessments (limiting their use to the addition of, or repair and replacement of capital improvements) the court found that the *absence* of a restriction on the purpose of assessments did not amount to *de facto* authority to assess for any purpose. Additionally, under the wording of the association's documents, none of the stated purposes for assessments could be construed to encompass payment of a judgments against the corporation, consisting mostly of punitive damage awards.

It is not clear whether the primary basis for the decision is found in apparently conventional wording of Westwood's documents, or in limitations on a bankruptcy trustee's powers. The Trustee unsuccessfully relied on the 1994 case of Ocean Trail Unit Assn. v. Mead, in which the Florida Supreme Court allowed assessments against association members to pay an adverse judgment in order to protect the corporation's property and assets. The District Court's attempts to distinguish the cases raises the possibility that associations' power to assess could be strictly construed, allowing associations to consider using bankruptcy as a means to avoid onerous contracts and tort liability. In light of the escalating costs of insurance, bankruptcy planning may become more important in association business plans.

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RECENT CASE SUMMARIES

In **Padrow vs. Knollwood Club Association, Inc.**, 28 Fla. L. Weekly D___ (Fla. January 29, 2003), Association filed a complaint against Owner to collect unpaid maintenance assessments. Owner denied any delinquency in the payment of assessments. In June, 2002, Association filed a motion for summary judgment. In July, 2000, Owner sent Association a $2,000.00 check. Association acknowledged receipt of the check and indicated that it would apply the payment in accordance with the Florida Statutes. Thereafter, the trial court denied the motion for summary judgment on the finding that all past due assessments, including late fees and interest, had been paid by the tender of the amount due when Owner sent in the check. Seven months later Association filed a voluntary dismissal of the lawsuit, thereby waiving any claim it may have had for the remaining amounts which were then due and owing for attorney fees. Two weeks later the Owner filed a motion for attorney fees asserting that he was the prevailing party. The trial court denied Owner's motion for attorneys' fees. The trial court ruled that Owner had paid the claim, that Association got most of what it sought, and that "almost anyone, not hindered by a law degree, would believe that the time for fighting or litigation had passed…." and as such, the trial court denied Owner's motion for fees. In upholding the trial court, the Fourth District Court of Appeal noted that to find that Owner was the prevailing party in this litigation would be contrary to the goal of the applicable statutes, which is to discourage needless litigation by encouraging settlement. Consistent with the intent of the statute, Association took the expeditious route of unilaterally dismissing the case to put an end to the litigation thereby foregoing its colorable claim for attorneys' fees.

In **Dornbach vs. Holley**, 28 Fla. L. Weekly D66 (Fla. 2nd DCA December 27, 2002), Holley brought suit to enforce residential restrictive covenants against Dornbach. Dornbach leased the home to ResCare Florida, Inc., for use as a community residential home in accordance with Chapter 419, Florida Statutes. The group home was intended to house between four and six developmentally disabled adults. Holley alleged that the use of the property as a group home was a violation of the covenants restricting the use of the property for single family, private residential purposes and also such use constituted a business use of the property. The trial court held that the use of the property as a group home was a violation of the covenants and entered a permanent injunction against Dornbach. On appeal, the Second District Court of Appeal reversed the trial court. Dornbach argued that the enforcement of the restrictive covenants was contrary to the United States Fair Housing Amendments Act of 1988 (FHAA) and the Florida Fair Housing Act, which is nearly identical to the FHAA. Both Acts provide that it is unlawful to discriminate in the rental of or to otherwise make unavailable a dwelling because of the handicap of any person intending to reside in the dwelling after it is rented. These Acts include within the definition of discrimination a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. The Second District Court of Appeal was persuaded by and adopted the federal court's interpretation of the FHAA which holds that discrimination can occur in any one of three ways. First, the FHAA prohibits intentional discriminatory conduct towards a handicapped person. Second, the FHAA prohibits incidental discrimination, that is, an act that results in making property unavailable to a handicapped person. Third, the FHAA prohibits an act that fails to make a reasonable accommodation that would allow a handicapped person the enjoyment of the chosen residence. The Second District Court affirmed that this three-pronged approach is equally applicable to the Florida Fair Housing Act. As such, the appellate court held that Holley's attempt to enforce the deed restrictions was impermissibly discriminatory. The appellate court noted that enforcement of the restrictions resulted in incidental discrimination since the residence is made unavailable. Additionally, the failure or refusal to waive the restrictions was a refusal to offer a reasonable accommodation, which also amounts to discrimination. Therefore, the Second District Court of Appeal held that the enforcement of the restrictive covenants was discriminatory in two of the three ways and as such, was contrary to state and federal law.

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