COMMUNITY COUNSEL

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RECENT CASES

- **The Division decides that informal polling and extra-meeting deliberations violate fundamental operating requirements of condominiums.**
- **The Division rules that condo owners have the right to recall master association representatives they elect to the Master Association's Board.**

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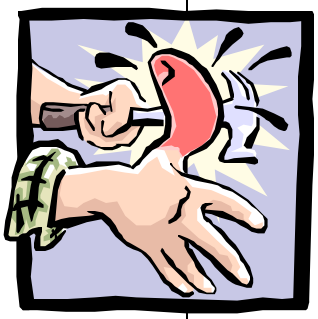
Another Horror from This Year's Legislation

Several months ago we summarized the most significant issues that came out of the 2003 legislative session. Since then we have tried to explore some the most profound changes in greater detail. This month we look at SB 1286, which was supported by the construction industry. The bill, which is now law, affects all new residential construction, whether single or multifamily, as well as all remodeling of existing residential housing. The term "remodeling" is not defined, so it is best to understand that this law relates to *any* claim that one may assert against a contractor, subcontractor, supplier or design professional for an alleged defect in new construction or repairs and renovations.



Before any suit can be brought, a claimant has to give at least sixty (60) days written notice of a construction defect to the person(s) the claimant intends to hold responsible. (If a suit is brought before complying with this new statute, the suit must be abated.) The notice has to state with particularity the nature of the alleged defects.

Within five (5) days of the notice, the claimant must make the property available for physical inspection and testing, including destructive testing. Recipients of a notice have ten (10) days to give notice of the claim to subcontractors and others who the recipient feels may be liable to the recipient, and those persons in turn have another five (5) days to come and inspect and test the property. The act is silent on who bears the cost of fixing the results of any destructive testing.

Each recipient of a notice of claim then has twenty-five (25) days to send a written response to the person who sent it. There are three response options. If the recipient denies responsibility for the defect and/or declines to do anything about it, then a claimant may proceed to bring suit. **But if a recipient of a claim responds with either an offer to fix the problem or to make a monetary settlement, the claimant must proceed very carefully.**

A Construction claimant must be careful how he/she proceeds

A claimant has only fifteen (15) days in which to reject an inadequate offer. The time period for a community association is forty-five days (45) days. **To reject, a claimant *must write the word "REJECTED" on the offer itself and deliver it back to the recipient. It is not adequate to write a letter or make a call rejecting the offer or making a counteroffer***. If an offer is not properly rejected, it is deemed accepted and no suit can be brought after that.

Because of the specificity governing how an inadequate offer must be rejected, the law presents a major trap to the unwary homeowner and association, one that can prevent meritorious claims from reaching the courts and obligate claimants to accept inequitable and inadequate settlements.

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RECENT CASE SUMMARIES

In **McTaggart v. Burgundy Unit Two Condominium Association, Inc.**, Case No. 02-5879 (7/18/2003, Scheuermann, Arb.) the condominium arbitrator entered a final order after protracted settlement discussions between the parties which obviated the needs for a detailed discussion of the facts of the case. In addition to summarily entering an order requiring Association to meet its fundamental duties to operate in the sunshine, to follow its documents, and to open its books and records up to the membership, the final order also indicates that the Board was shown to have been meeting informally and voting via written polls, whereby board members were consulted on matters outside of a board meeting and then expressed their votes on matters that would later come before the board at an official meeting. The arbitrator stated:

> The board shall cease from conducting its informal polling and instead shall conduct its meetings in accordance with the statute and documents, with due notice, open to all unit owners. *Board meetings are intended to embrace the discussion of matters coming before the board for consideration, deliberation, and an eventual vote*, and the association shall honor the letter and spirit of the law. The board is a public body that is charged with having its deliberations and decisions made in the sunshine. (Emphasis supplied)

In condominiums (and HOAs by analogy) it is now harder to draw the line between proper informal dialogue between individual directors and the improper conduct of business outside of a properly noticed meeting. The order makes it clear that activities to be conducted at official meetings encompass not only decisionmaking, but meaningful discussion and consideration. We suggest that the proper line to be drawn is that in dialogue, the director refrains from expressing a final decision on an issue, but accepts input and offers ideas. At minimum, replay of such dialogue must be part of the deliberations that occur at the official meeting.

In **Palm Greens at Villa Del Ray Recreation Association, Inc., v. Schlossberg,** Case No. 2003-07-3298 (8/13/03, Scheuermann, Arb.) the Division considered the procedure for recalling directors in Master Association, which operates recreational amenities shared by owners in two Sub-Association condominiums. The petition alleged that the voting members of Master Association consist solely of three (3) representatives elected by the owners of each Sub-Association. A recall by written agreement was served on Master Association, purporting to recall the three (3) voting members of one Sub-Association, even though the Bylaws of Master Association did not allow recall by written agreement. The recall was refused certification by Master Association's Board. The arbitrator rejected Master Association's contentions that its only members were the six representatives that comprise its Board, such that only these persons could recall themselves. To agree with Master Association would have allowed representatives from one Sub-Association to vote on recalling persons elected by members of another corporation. Because Master Association is an "association" within the meaning of Section 718.103(2), Fla.Stat., it is axiomatic that if owners of a condominium can elect their representatives to Master Association, they can also recall them. Allowing others to remove directors elected by members of a condominium disenfranchises the electing members. Because the documents of Master Association gave the voting rights to the owners of the Sub-Associations for several limited purposes, including the election of their representatives to the Board of Master Association, the Master Association documents created a second, *de facto* class of members, consisting of the owners of the Sub-Associations. Those owners had the ability to recall the representatives they elected, with the recall being conducted in either of the two methods permitted by statute, regardless of the content of the Master Association Bylaws.

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