COMMUNITY COUNSEL

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RECENT CASES

- **In Condominiums non-statutory, documentary restrictions on Board service are not permitted.**
- **Seller and Brokers liable for failure to disclose construction defects to buyer even with an "as-is" clause in their contract.**

The Upcoming Legislative Session

At this time the 2004 legislative session looks like a scene from "Alice Through the Looking Glass." All manner of bizarre events loom on the horizon. In large part this is due to two committees that have been barnstorming the state during the late summer and early fall. One committee, the Governor's Task Force on Homeowners Associations is looking at changes to Chapter 720 because of a perception that HOAs are anti-consumer and vested with too much power which is wielded too arbitrarily.

The other committee is a select committee appointed by the Speaker of the Florida House of Representatives. Its charge is to look at similar issues on the condominium front, and the chairman of the committee, in a recent committee appearance in Kissimmee, before an audience of five (5) persons, made no secret that he approaches the process with a similar mind set.

Both committees will likely sponsor legislation and, at least in the case of the Speaker's committee, it is expected to be extreme and ill-conceived because some committee members come to the task with an attitude and little practical experience with the entities they are examining. The Governor's committee has some more knowledgeable personnel, but it also has some equally bellicose members, some with possible personal agendas. In both cases, watchers of community association legislation are gearing up for defensive tactics to defeat vindictive and poor legislation

Be sure to keep an eye on 2004 legislation. There are some very bad things coming.

In the realm of possible legislation originating on planet Earth, there are initiatives to fix the myriad of problems found in Chapter 558, Fla. Stat., which was passed in 2003 and contains the so-called notice and opportunity to cure law for construction defects. On the other hand, bills have been pre-filed that would make this bad law even worse for everyone but developers.

Two modest affirmative initiatives by the Florida Legislative Alliance Would do the following:

1. Immunize community associations that maintain automatic defibrillators as long as they offer periodic training on its use, and prevent insurers from requiring association to carry medical malpractice insurance if they keep an automatic defibrillator, and

2. Further protect condominium associations that answer mortgagee questionnaires, and

3. Require notice to all HOA members at least 14 days in advance of action to assess or change rules regarding use of the members' parcels.

4. Create a system allowing HOAs with lapsed restrictions to re-instate them.

Another bill will re-write the poorly drafted HOA disclosure required to be given by all sellers to each buyer.

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RECENT CASE SUMMARIES

In the **Petition for Arbitration: Sandra E. Schultz vs. La Costa Beach Club Resort Condominium Association, Inc.**, Case No.: 2003-08-3347 (Scheuerman, Amended Summary Final Order, November 21, 2003), Petitioner filed a petition for mandatory non-binding arbitration alleging that Petitioner was improperly removed from the board of directors of Condominium Association. Association alleged that it was empowered to remove Petitioner by virtue of the provisions of the bylaws of Association. The bylaws stated that ". . . . no member shall continue to serve on the board should he be more than thirty days delinquent in the payment of an assessments and said delinquency shall automatically constitute a resignation, effective when such resignation is accepted by the board of directors." Petitioner argued that she became delinquent due to an illness and that the provisions of bylaws are invalid as a matter of law. It was undisputed that Petitioner was more than thirty days late in the payment of her assessment. The arbitrator noted that condominiums are strictly creatures of statute. The Florida Statutes (§718.112(2)(j)) permits members to remove board members through the recall procedure. A removal of a board member by any means other than a recall would have the effect of disenfranchising the unit owners, who have the statutory right to elect their board members. If the board were free to remove board members, this would permit the board to undo the results of duly held elections and would put the board in the position of determining the composition of the board. The arbitrator noted that the Condominium Act contain no facial qualifications on the right on an owner to run for the board other than the restriction against being a convicted felon. Therefore, if an delinquent owner is qualified to run for the board, then that delinquent owner is qualified to sit on the board once duly elected. As such, the arbitrator ruled that the bylaw provision was invalid as a matter of law and further ordered Petitioner to be immediately reinstated to her position on the board. Additionally, the arbitrator opined that other such provisions may also be invalid and unenforceable. For example, provisions deeming a board member to have resigned for missing 3 consecutive board meetings, or provisions requiring that an owner must actually reside in the condominium in order to run for the board, or provisions which prohibit more than one owner of a unit owned by more than one person to sit on the board may all be invalid.

In **Syvrud vs. Today Real Estate, Inc., et al.,** 28 Fla. L. Weekly D2505 (Fla. 2nd DCA October 31, 2003) Buyers of a condominium unit brought suit against Listing Broker, Selling Broker, and against Sellers for rescission of the contract and damages. The damages claim was predicated on an alleged failure to disclose hidden defects which materially affected the value of the property. On May 7, 2001, Buyers and Sellers entered into a contract for the purchase and sale of the condominium unit. The contract was the standard preprinted form approved by the Florida Association of Realtors and The Florida Bar (i.e., a "FAR/Bar" contract). The contract also included a lengthy typewritten addendum which was expressly made a part of the contract. The addendum was, in essence, an "as is" clause, which permitted Buyers to cancel the contract after inspection of the property and after delivery of Sellers' disclosure statement. Sellers' disclosure statement failed to identify or list any hidden or known defects in the condominium unit. Thereafter, Buyers closed on the purchase of the property. After the purchase, Buyers learned that there were a number of defects in the property including, but not limited to, water intrusion, mildew damage, structural cracks and other structural defects. Additionally, these defects were not limited to Buyer's unit, and a number of the buildings in the condominium had substantial structural defects. The expenses to repair these defects caused the condominium to impose on all unit owners extraordinary assessments estimated to be in excess of $20,000.00 per unit. Buyers closed on the purchase on May 31, 2001. Buyers attached to their complaint a series of letters from the association to the unit owners (including Sellers) which detailed serious structural defects in the buildings and announced the hiring of a structural engineer, a roof consultant, a repair contracting firm, an architectural firm, a law firm, and a licensed public adjusting firm to address the multiple problems faced by the project. The first of these letters was sent to all unit owners in 1999. Buyers alleged that Sellers and Selling Broker failed to disclose the defects disclosed in the letters from the condominium association. The trial court granted summary judgment in favor of the Brokers and in favor of Sellers. The trial court held that the "as-is" addendum to the contract relieved Sellers from the obligation to disclose the defects. The Second District Court of Appeal reversed the trial court and held that Sellers were obligated to disclose known hidden defects notwithstanding the language of the "as-is" addendum to the contract. Specifically, the "as-is" addendum to the contract specifically references only paragraph "D" (termites/wood destroying organisms) and paragraph "N" (inspection, repair and maintenance) of the standard FAR/BAR contract. The "as-is" addendum failed to relieve Sellers of the provisions of paragraph "W" of the FAR/BAR contract, which required Sellers to warrant that there are no facts known to the Sellers which materially affects the value of the property. The appellate court further held that the "as-is" addendum to the contract failed to relieve Listing Broker of liability on the theory of negligence. As such, the appellate court held that Sellers breached the duty to disclose known defects affecting the value of the property when Sellers prepared and delivered the disclosure statement which failed to disclose all hidden defects known by Sellers to exist throughout the condominium.

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