COMMUNITY COUNSEL

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RECENT CASES

The Fair Debt Collection Practices Act did not require a law firm to stop the court clerk from recording a lien in the clerk's possession after a consumer asks for verification of the debt.

A traffic easement is enforced to stop construction of an office building.

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The 'Kick Me" State Has Had Enough!

Yes, Florida's populace certainly has had enough of severe weather and gasoline lines; of grappling with plywood, praying for water, ice, power and a dry day. Fortunately, the latest weather forecasts now predict a quieter second half of the hurricane season, which ends on November 30, 2004.

The four named storms aside, it was only a matter of time before Florida's property owners awoke to realize what the insurance industry had wrought following the shambles left by Hurricane Andrew. To protect insurers and their reserves, the law was changed in 1993 to allow hurricane deductibles pegged to a percentage of the value of the insured improvements, with a separate, identical deductible applicable to each named storm. Indeed, the way most policies read, anytime a watch or warning is issued for a named storm (even one of lesser force than a hurricane) anywhere in the state, the deductible can automatically apply to any property loss occurring up to three days after the watch or warning is lifted, even a loss not directly caused by a windstorm event. Now that's protection!

Although some unfortunate property owners have already encountered the harsh operation of this policy provision, Charley, Frances, Ivan and Jeanne brought the reality of the permissiveness of state regulation of property insurers to the great masses. It didn't take long for the howls of angry citizens to replace those of the stiff winds. As it looks now, property insurance reform may be a big issue to be addressed by the Florida Legislature. A special session may be called for November and the incoming speaker, Alan Bense, has created a Hurricane Work Group, chaired by Representative Leslie Waters. Suggestions for changes in the law are coming fast and furious. Representative Randy Johnson has already commenced drafting a bill that would cap the annual deductible property owners could be required to pay, effectively removing the use of multiple deductibles.

The "Drab Four" have come and gone, but the insurance storm is just starting.

Additional work is needed in the condominium context, where associations are faced with the dilemma of either allowing owners to make time-sensitive repairs to their own units or assuming that responsibility in order to protect other portions of the condominium property from conditions that create and then spread mold and mildew. In addition, greater latitude needs to be given to Boards to use reserves during or immediately after named storms. The current law hampers the making of speedy decisions by persons who are on-site. Meeting notice provisions need to be relaxed as well, so that decision makers can communicate without fear of breaking the law.

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RECENT CASE SUMMARIES

In **Shimek vs. Forbes, et al.**, Case Number 03-14428 (11th Cir., June 22, 2004), Owner brought suit against Homeowners Association and Law Firm alleging various violations of the Fair Debt Collection Practices Act (FDCPA). Owner alleged that Law Firm, while attempting to collect a $260 fee owed by Owner to Association, engaged in deceptive and unfair collection practices in violation of the FDCPA. The facts of the case are simple and were not disputed. On May 16, 2002, Law Firm mailed an equitable lien to the clerk of court to secure the debt owed to Association for unpaid assessments and fees. On that same day, Law Firm sent Owner a collection letter notifying Owner of the debt and that it had mailed an equitable lien to the clerk of court for recording. This collection letter also notified Owner of his right to dispute the debt within 30 days. On May 28, 2002, Owner paid the balance in full "under protest" and also demanded verification of the debt. On June 4, 2002, the lien was recorded by the clerk of the court. On July 3, 2002, Law Firm sent verification of the debt to Owner. On July 12, 2002, Law Firm sent a cancellation of the lien to the clerk of court for recording. The clerk of the court recorded the cancellation of the lien on August 16, 2002. The district court of appeal ruled in favor of Law Firm and granted summary judgment against Owner. On appeal, Owner raised six alleged violations of the FDCPA. Four of Owner's reasons for reversal were affirmed without discussion. The Eleventh Circuit Court of Appeal addressed two issues which were questions of first impression before the courts. The first question was whether a debt collector's filing of a lien with the clerk of court at the same time it sends a demand letter to a consumer, all prior the consumer requesting verification of the debt, violates the FDCPA. The second question was whether the debt collector violates the FDCPA by failing to prevent the clerk of court from recording the lien after the consumer requested verification of the debt. Owner alleged that Law Firm's ". . . . reckless pattern and practice of sending liens to the clerk of the court for recording prior to or contemporaneously with sending out its initial dun letter to the consumers" was an unfair or unconscionable means of collecting the debt because ". . . . it permitted the recording of liens against the consumer's property after the consumer had requested verification of the debt in writing." The appellate court held that because Georgia law permitted the filing of a lien as a legally permissible method for securing the debt, it cannot be deceptive under the plain meaning of the FDCPA. As for the second question, the appellate court noted that under the plain meaning of the FDCPA, a creditor is required to cease collection of the debt once verification of the debt is requested. However, the FDCPA did not require Law Firm to take positive action and interfere, even if it was able to, with the clerk of court's duty to record the lien. In this case, Law Firm took no action **after** receiving the request for verification. As such, Law Firm did not violate the FDCPA by failing to intervene or interfere with the clerk of court's duty to record the lien.

In **Publix Super Markets, Inc., vs. Wilder Corporation of Delaware, Inc.**, 29 Fla. L. Weekly D1471 (Fla. 2nd DCA June 18, 2004), Wilder sued Publix for declaratory judgment as to the meaning of the parties' reciprocal easement agreement. The parties were successors in interest to an easement agreement which conveyed a nonexclusive easement to each other so that vehicles and pedestrians could have access into and out of the parking lots on the adjoining properties. Both parties agreed to pay one dollar as consideration for the easement, to maintain the easements on their own properties, and not to use the easements in any manner that would unreasonably interfere with vehicle and pedestrian traffic. Finally, the easement provided that at no time would Wilder ". . . . construct any improvements in the area located to the North of the Wilder building without the express written consent of Publix." This final restriction is in the nature of a restrictive covenant which runs with the land. In 2001, Wilder requested Publix's consent to allow development of an approximately 7900 square-foot building on the north parcel of Wilder's property. Publix refused to grant consent citing inadequate parking, line of sight problems, and lack of approval from governmental authorities. The trial court sided with Wilder and concluded that Publix could withhold consent based only on ingress or egress concerns and that Publix had breached the agreement and the implied covenant of good faith. On appeal, the Second District Court of Appeal noted that restrictive covenants will be enforced if (1) they are unambiguous, (2) they are reasonable, and (3) the parties' intent is clear. The appellate court reversed the trial court and held that the easement agreement was clear and unambiguous. Publix had the right to refuse to grant consent for the proposed construction. Furthermore, Publix presented credible evidence that its refusal was based upon good faith grounds and was commercially reasonable, and therefore did not constitute a breach of good faith as a matter of law. As such, the appellate court reversed the decision of the trial court.

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