

# COMMUNITY COUNSEL

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## RECENT CASES

- ♦ **Condo Unit Owners found to have committed fraud on the court by altering a copy of their payment check. Not smart!**
- ♦ **Seller has a duty to disclose all material facts and conditions to buyer of residential property. Failure to do so allows rescission.**

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## New Bankruptcy Law and Associations

As the media has widely reported, President Bush signed a sweeping bankruptcy bill into law on April 20, 2005. Much has been and will be said about this extensive legislation elsewhere. This article focuses on what the new law means for condominium associations, cooperative associations and homeowners' associations.

The principal reason a debtor files for bankruptcy is to obtain a "discharge" of debts, legally excusing further payment obligation. The bankruptcy code lists many types of debts which are not permitted to be discharged. Under prior law, one type of debt that was an exception to discharge was an assessment owed to condominium associations and cooperative associations. By some glitch, however, the prior law did not cover assessments owed to homeowners' associations. In addition, the prior law excluded condominium and cooperative assessments from discharge only if the assessment became due and payable after the date of the bankruptcy filing and only if the debtor either continued to occupy the unit or if the debtor rented the unit to a tenant and received rent payments from the tenant. Assessments arising before the bankruptcy filing were discharged and uncollectible.

Under the new statute, which mostly becomes effective in October, 2005, assessments arising before the bankruptcy filing are still discharged. Otherwise, the new statute eliminates all of the other conditions to excepting as-

sessments from discharge and covers all types of associations, including homeowners' associations. As long as the debtor or the bankruptcy trustee has any legal, equitable or possessory interest in the lot or unit, assessments arising after the date of filing bankruptcy are excluded from the debtor's discharge and must be re-paid.

Also, although the bankruptcy discharge includes assessments arising before the bankruptcy filing, the discharge only concerns the debtor's *personal* obligation to pay. The discharge *has no effect on any association lien*, under either the old or the new law. If the bankruptcy debtor does not pay all assessments, including assessments arising before the bankruptcy filing, the debtor still stands to lose the house or unit in foreclosure. However, a discharge of assessments means the debtor has no personal obligation to pay any deficiency after the foreclosure is completed.



**The Discharge in bankruptcy of assessments has no effect on the Association's Lien rights.**

The exception to discharge provision is the only part of the new law that specifically relates to community associations, though other changes may have an effect on how associations are treated in bankruptcy. Overall, the likely effect of the new law will be to make it more difficult and expensive for debtors to file bankruptcy. It remains to be seen whether this will impact the number of owners who file bankruptcy as a means of avoiding paying assessments to community associations.

## RECENT CASE SUMMARIES

In **Andrews vs. Palmas de Majorca Condominium Association, Inc.**, 30 Fla. L. Weekly D779 (Fla. 5<sup>th</sup> DCA 3/18/2005), Association brought suit against Owners to foreclose a lien on their condominium unit for failure to pay a special assessment. The primary issue at trial was whether the special assessment could properly be levied by a vote of the directors, or whether the unit owners had the right to vote on the assessment. The trial court concluded that the assessment required a vote of a majority of the unit owners, but found that Owners had acquiesced to the special assessment by tendering a check to Association for the first installment due under the special assessment. At trial, Association offered a photocopy of Owners' check into evidence to support its position that Owners acquiesced to the assessment by making a partial payment. The photocopy of the check was smaller than an actual check and was somewhat dark; therefore some of the writing on the check was not clearly visible. The parties stipulated that the check was a key piece of evidence in the case and was relied upon by the trial judge in making his ruling. After entry of an adverse judgment against them, Owners filed an appeal with the Fifth District Court of Appeal. Association cross-appealed the trial court's ruling that a vote of the members was required to levy the special assessment. After filing their initial brief with the appellate court, Owners sought a temporary relinquishment of jurisdiction back to the circuit court asserting that "new evidence. . . material to the trial court's conclusion that most likely directly resulted in the entry of the final judgment in favor of. . ." Association had been discovered. Specifically, Owners alleged that they had discovered a photocopy of Owners' check on which the words "Under Protest" were clearly visible. Owners concluded that Association's submission of falsified evidence for the purpose of misrepresenting the true state of the facts constituted a fraud on the court. Based upon these allegations of fraud, the appellate court relinquished jurisdiction to allow the circuit court to hear Owners' motion for relief from judgment based upon this newly discovered evidence. Just minutes prior to the hearing on Owners' motion for relief from judgment, Owners' attorney spoke with a representative of the bank, who had been summoned to the hearing by Association. Based on that conversation, Owners' attorney announced that he no longer felt that the check that was presented to him was credible enough to ethically present it to the court. Consequently, he sought to withdraw the motion and apologized to the court. Even though Owners withdrew their motion, the trial court permitted Association to proffer the testimony of the bank representative so that this testimony could be reviewed by the appellate court. The bank representative produced an actual copy of the check which cleared the bank. The words "Under Protest" were not on the original check that was processed by the bank. Association then made a motion for sanctions, contempt, and attorneys' fees for the attempted fraud perpetrated by Owners. The trial court granted the motion for sanctions and reserved jurisdiction pending further review by the appellate court. Once jurisdiction returned to the appellate court, Association filed a motion to dismiss the appeal based on Owners' attempt to defraud the court. The Fifth District Court of Appeal noted that the sanction of dismissal with prejudice due to fraud on the court has long been an available remedy. Dismissal is an appropriate remedy for knowingly submitting forged or altered documents with the intent to deceive the court. The appellate court dismissed the appeal based upon Owners' misconduct. Such misconduct must be discouraged in the strongest possible way. The appellate court also granted Association its right to appellate attorneys' fees and costs. The appellate court also authorized the trial court to impose additional sanctions.

In **Postegna vs. Tanner**, 30 Fla. L. Weekly D845 (Fla. 2<sup>nd</sup> DCA March 30, 2005), Buyer sued Seller of a luxury condominium for the return of a \$350,000.00 security deposit for the sale and purchase of the luxury condominium unit. After entering into the contract, Buyer discovered defects in the residence related to massive water intrusion into the unit and mold growth which resulted in poor air quality. Seller failed to disclose these defects to Buyer prior to execution of the contract. Seller was aware of the defects and had in fact sued the developer of the condominium for construction defects related to the water intrusion. In its final judgment, the trial court resolved numerous factual disputes, including a finding that the condominium unit sustained significant water damages and suffered from mold and poor air quality. As such, the trial court ruled in favor of Buyer and ordered the return of the security deposit to Buyer. On appeal, the Second District Court of Appeal noted that pursuant to well-established law Seller was obligated to disclose all known facts materially affecting the value of the property which facts are not readily observable and are not known to Buyer. As such, the appellate court affirmed the trial court and ordered the return of the security deposit to Buyer.