COMMUNITY COUNSEL

October, 2006 | A Publication of Wean & Malchow, P.A. | Volume 10, Issue 10

Recent Cases

- **There was no evidence to support overturning trial court's denial of a new trial when jury awarded Owner medical expenses but no pain and suffering damages.**
- **Failure by condo association to respond to certified mail inquiry prevents it from recovering attorneys fees in later suit.**

Bill of Rights for Community Associations

In July, 2006 AARP, the influential private lobby and multi-faceted business entity catering to persons over 50 years of age, published a report written for it by a Houston-based attorney who is an advocate for owners against community associations. The report includes a report, a ten point "bill of rights" and a model statute. While the report claims a desire to balance the rights of individuals and associations, and asserts that the bill of rights is based a standard of reasonableness, the effort is one-sided and simplistic, and therefore fails in both regards.

The report consistently treats the association as a separate amorphous abstraction and fails to recognize that the association IS the owners. It neglects to discuss the direct and adverse impact that the unreasonable exercise of individual rights often has on neighbors and other lot or unit owners. While it allows that owners violate covenants by mistake because they are sometimes ill-informed, it holds board members to a standard close to perfection, not reasonableness. The report also fails to realistically deliver a resolution to the tension and difficulty of its own stated *raison d'etre* for associations: "[u]ltimately homeowners expect their association to maintain the common areas and preserve property values without infringing on their basic rights. "

The AARP effort is biased and simplistic.

For example, in framing the principal that lien foreclosure should not be used until the delinquency is "significant" (i.e. over $2500) the report's rationale of protecting owners who fail to pay assessments does not address either the need for other owners to make up funding shortfalls or the inability of associations to meet their obligation to maintain and preserve with inadequate resources. This is the same blind spot that afflicts other owner-rights advocates and is a major deficiency with the AARP effort. The lack of realism of the proposal even extends to mandating unanimous approval of any after-the-fact declaration amendment that adopts the remedy of foreclosure. This proposal neatly shows the bias of the report – on the one hand diminishing the role of developer's counsel in drafting long and complex documents, while making it impossible to correct them after the fact.

In contrast, an earlier effort by the Community Association Institute (CAI) to draft a bill of rights is more successful. For one thing, it includes four separate parts: two each for the "community leaders" and two for the members. One section of each part addresses the **rights** of the parties, and one addresses the **responsibilities** of each. The idea that individual owners owe a duty to the other owners in the community is an concept that the AARP report fails to consider. Individuals do not have rights in a vacuum, nor can the association owe duties separate and apart from the collective role of the members who compose it.

Judge for yourself: AARP's report is found at **http://assets.aarp.org/rgcenter/consume/2006_15_homeowner.pdf** .

CAI's is found at **http://www.caionline.org/rightsandresponsibilities/index.cfm?ad=rights.**

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM

RECENT CASE SUMMARIES

In **Gebis vs. The Oaks Condominium Association, Inc.**, 31 Fla. L. W. D2471b (Fla. 4th DCA, 10/4/2006) Owner brought a personal injury action against Association arising out of fall while Owner was walking to a barbecue at the condominium on July 4, 1999. According to Owner, although she was in pain and unable to walk, she did not seek immediate medical care because the injury occurred on a Sunday, during a holiday, and Owner did not "want to bother anybody." When Owner went to the emergency room the next day her leg was swollen and discolored. Owner was diagnosed with a non-displaced fracture near her left little toe and received therapy until March 2000. Owner testified that she stopped receiving medical care because she did not want to complain, did not want to take time off from work, and had financial constraints. The parties presented conflicting evidence regarding Owner's contribution to, and the permanence of, the injury. At trial, the jury found Association solely liable for Owner's injuries and awarded her the exact amount of her past medical expenses. The jury awarded nothing for past non-economic damages, future medical expenses, and past or future economic damages. Owner sought a new trial, contending that the jury's verdict was inadequate given its finding of liability and award of damages for past medical expenses and that a new trial on non-economic damages was warranted. The trial court denied owner's motion for a new trial. On appeal, the Fourth District Court of Appeal noted that the trial court has broad discretion to grant or deny such a motion. In making its ruling, the appellate court noted that under Florida Law when a jury awards damages for past medical expenses, and when it finds that those expenses were incurred as a result of the accident, then there is **generally** something wrong when it awards nothing for past pain and suffering. The appellate court noted however, that simply because there is "generally" something wrong, does not mean that there is always something wrong. As such, the appellate court affirmed the trial court's decision to deny Owner's motion for a new trial.

In **Seagull Townhomes Condominium Association, Inc., vs. Edlund**, 31 Fla. L. W. D2674d (Fla. 3rd DCA, 10/25/2006) Association appealed an order of the trial court denying Association's motion for award of attorneys' fees. The trial court denied Association's motion based upon a finding that Association failed to respond to a unit owner inquiry submitted by Owner. Association and Owner have a long history of litigation. Owner purchased his unit in 1993. In 2001 Owner transferred the unit by quit-claim deed to his parents. Owner did not seek Association's approval for this transfer as required by the governing documents. Association informed Owner of the violation of the declaration. Ultimately, Association filed suit against Owner to set aside the transfer to Owner's parents. During the pendency of the lawsuit, Owner's parents deeded the property back to Owner in order to cure the initial lack of notice, but again failed to obtain Association's approval for the transfer. Association ultimately acknowledged and approved the transfer to Owner's parents, but argued that the second transfer back to Owner was not approved and remained unauthorized. Association argued that since the transfer was unauthorized, Association had the right of first refusal to acquire the property for fair market value. In this earlier litigation, the trial court entered judgment in favor of Association and found that the initial transfer from Owner to his parents was authorized because it was approved by Association. However, the second transfer from parents back to Owner was invalid because it was not approved by Association. The trial court ordered parents to sell the unit to Association for fair market value. Owner appealed this first decision of the trial court to the Third District Court of Appeal. The appellate court affirmed the trial court's findings that the initial transfer was approved and that the parents owned the unit. However, the appellate court reversed the order requiring parents to sell the unit to Association and held that parents should be given the option of keeping the unit. On remand, Association moved for an award of its attorney's fees. The trial court found that neither party prevailed in the litigation and that Association was barred from recovering its attorney's fees because Association failed to respond to a statutory certified mail unit owner inquiry which addressed various issues raised in the litigation. In this second appeal, the Third District Court affirmed the denial of Association's fees and found that there was competent substantial evidence to support the denial of Association's attorneys' fees.

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM