COMMUNITY COUNSEL

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RECENT CASES

- **Association members who blockaded street to prevent delivery of a modular home are jointly and severally liable with Association to prevailing party.**
- **Association members are not intended beneficiaries of Management contract and could not recover attorneys fees from manager under Ch. 720.**

Opening the Brand New 2006 Legislation – Part 2

We continue with our annual review of new legislation. Note that some of the bills we are reviewing may not become law – if vetoed by the Governor. Since the session ended the Legislature has been slow to send bills to the Governor for consideration.

HB 1089 / SB 1940 - This bill is – simply – a gift to the construction industry. It changes Section 95.11(3)(c) - the statute of limitations by reducing the statute of repose, i.e. the maximum time that is available under any circumstances to bring a suit based on the design, planning, or construction of an improvement to real property from 15 to 10 years. Any claim that could become barred as a result of the passage of this amendment must be filed before July 1, 2007. Also, this bill makes the Condominium Act's statutory warranties inapplicable to condominium conversions if construction began before the structure becomes a condominium by the recording of a declaration of condominium. It may be possible for well-funded developers to build improvements and, even before they are occupied, convert them to condominium use. By manipulating the timing of the "conversion," a developer can completely avoid all but the most rudimentary warranties.

HB 1089 is a gift to builders. HB 543 could make it easier for developers to force termination of older condos

HB 543 / SB 1556 - Completely rewrites the termination provisions of Section 718.117 of the Condominium Act, providing a detailed method of terminating a condominium (and its association) in instances where the 80% of the members approve a plan of termination, or where less than 20% of the members fail to vote against such a plan; where the cumulative fair market value of all units (prior to damage) is exceeded by the cost of repairing or restoring the condominium; where a natural disaster makes it in the best interest of the unit owners to terminate the condominium - as when changed land use restrictions make it impossible to rebuild what was previously there. The bill deals with court jurisdiction, the rights of mortgage holders, the powers of the association and of receivers to conclude the affairs of the condominium. It sets out the required and optional provisions that must be in a plan of termination and gives several bases for the division of the proceeds of sale of the former condominium property. It creates the position of "termination trustee" and vests title to all of the condominium property in the trustee, which may be the association. A unit owner is given only 90 days to contest the fairness of a plan of termination, after which it becomes binding, and the owner has the burden of naming and serving the Association and all unit owners in that action. When the funds are distributed, the statute establishes an order of priority for payment of various obligations. This bill is very likely to become law.

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RECENT CASE SUMMARIES

In **Parton vs. Palomino Lakes Property Owners Association, Inc., et al.** 31 FLW D1202 (Fla. 2nd DCA 4/29/2006) Owners brought suit against Association and some of its directors and other owners for damages and injunctive relief. Owners purchased a "modular" home to place on their property. The other owners, three of whom were officers and directors of Association, blockaded the entrance to the subdivision on three occasions to prevent delivery of Owner's modular home. Other owners blockaded access to the subdivision because they believed the home to be a mobile home, which the deed restrictions prohibited. However, they continued to block access even after they were informed that the home was a modular home that would be permanently attached to a concrete slab. By obstructing the common roadway, the other owners violated the deed restrictions. After a trial, a jury awarded compensatory damages in the amount of $5000. Additionally, the jury awarded punitive damages against the other owners which damages ranged from $40,000 to $60,000. The trial court also determined that Owners were the prevailing party entitled to an award of attorneys' fees. Owners sought an award of attorneys' fees in excess of $336,000. Ultimately, the trial court awarded Owner $9,900 on the breach of contract claim. The trial court awarded fees to Owner only up to the entry of the temporary injunction, and not through the trial. This amount was to be paid pro rata by the other owners. The trial court also awarded $240,000 in fees arising out of an offer of judgment. On appeal, the Second District Court of Appeal reversed the fee awards. First, it held that the trial court lacked discretion to limit owner's fees only up to and including the temporary injunction. Owner prevailed and was therefore entitled to fees for the entire litigation. Second, the appellate court ruled that the fees should not be ordered to be paid "pro rata" and instead should be subject to joint and several liability.

In **Greenacre Properties, Inc., vs. Rao**, 31 FLW D1223 (Fla. 2nd DCA 5/3/2006) Owner brought suit against Manager for an alleged breach of contract. Owner resided in a community called Van Dyke Farms and is a member of the Van Dyke Farms Homeowners Association, Inc. Manager contracted with Association to provide management of the corporation and the community facilities. Owner and Association had been engaged in litigation since approximately 1999 over the construction of a small pond in Owner's yard. In 1999 Association filed suit against Owner seeking injunctive relief and the removal of the pond. Owner responded to the complaint and alleged that Association was selectively enforcing its governing documents. In October 2000, while the first lawsuit was pending between Owner and Association, Owner contacted Manager and requested to review the official records of Association. This request to inspect records was apparently made as an indirect method to obtain discovery in the pending lawsuit between Owner and Association. In November, Owner was permitted to review all of the "official records" but not all of the records in possession of Manager. Issues involved in the production of the official records were never presented the trial court in the lawsuit between Owner and Association. The lawsuit between Owner and Association finally went to trial in September 2002. As the conclusion of the trial, the judge dismissed Association's complaint for injunctive relief and also rejected Owner's claim of selective enforcement. The trial judge determined that the long case was the result of a misunderstanding the parties should have resolved between themselves without the necessity of protracted litigation. The trial judge concluded that Owner was the prevailing party and was therefore entitled to an award of attorneys fees. However, the trial judge awarded Owner only a portion of the fees he requested. While the first lawsuit was still pending, Owner sued Manager, alleging breach of the contract between Manager and Association. As this second lawsuit progressed, it became clear that the damages Owner sought was the approximately $30,000 in attorneys' fees and costs Owner paid in the first lawsuit. In the second lawsuit, the court awarded Owner $9300. On appeal to the Second District Court of Appeal, Manager claimed that Owner was not an intended third party beneficiary under the contract between Association and Manager. As a general rule, a person who is not a party to a contract cannot sue for breach of the contract even if the person receives some incidental benefits under the contract. In this case, while Owner may receive some incidental benefit from Manager's record keeping, there is little doubt that Manager is performing the task for the primary benefit of Association. Additionally, to the extent that Association directed Manager to withhold certain documents, Manager had little discretion to disobey such a request. Therefore, the appellate court reversed the trial court and held that Manager had no contractual duty to Owner. Additionally, the appellate court noted that an award of damages against Manager was not permitted under the terms Section 720.303(5), Fla. Stat. Owner may recover statutory damages and attorneys' fees only against an "association" by the specific terms of this statute. As such, Manager cannot be liable for statutory damages because Manager is not an "association" as defined in Ch 720.

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