COMMUNITY COUNSEL

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A Call for Public Input

When Jeb Bush vetoed HB 391, he directed the Division to take public input on issues related to that bill.

You can give that input from the privacy of your own home.

Navigate to http://www.myflorida.com/dbpr/lsc/condominiums/index.shtml and click on the "public input" button. A copy of the bill can be accessed at that site.

More Problems for HOA Insurance Policies?

In our January, 2006 issue we briefed the important *condominium* declaratory statement called Plaza East. What bears closer examination, however, is the potential impact of this ruling on some *homeowner* associations, specifically on townhome communities where the Association has either the right or the duty to carry a master hazard insurance policy on the dwelling units.

For the first time the boundaries of coverage have been set from outside the policy and operate largely independent of the requirements of the community's governing documents. The Plaza East decision found that the current provisions of Sec. 718.111(11), Fla. Stat. apply to all condominiums, regardless of when created or what their documents require. It also determined that large deductibles are part of the insurance contract and must be paid by the Association as a common expense.

The impact of the case on homeowners association arises from the absence of master hazard insurance polices written specifically for non-condominiums. If an HOA obtains a master condominium policy, it is very possible that portions of the dwellings which the community's declaration requires be covered by the policy will be left uninsured. Currently, Sec. 718.111(11)(b)(3), Fla. Stat. mandates the exclusion of the following from the master policy:

... all floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing…

In addition , coverage extends only to the original configuration of the dwelling, and excludes improvements and upgrades made by the owners.

If an HOA accepts this limed coverage where the documents require more inclusive coverage, the Association runs the risk of being under-insured and, in the event of a loss, of facing a claim for breach of fiduciary duty – a claim that would not be covered by the typical D & O policy that protects board members. The board needs to examine the policy *in advance* and be sure that the policy's coverage matches what the HOA documents require be insured. Unlike condo boards, which are protected when obtaining the statutory coverage, HOA boards are not protected by anything in the Condominium Act. HOAs may wish to amend their documents to remove the obligation to carry a master hazard policy, and in stead require owners to insure their own dwellings, naming the association as an additional insured.

HOAs -- Read your insurance Policies !!!

In addition, the HOA documents will probably not address the issue of who must pay the deductible, and to avoid the possibility that a court will follow the reasoning of the Plaza East ruling and apply it to HOAs, the HOA declaration needs to be amended to state who pays the deductible. This is a real issue that needs to be addressed before a major loss occurs.

Finally, we see many HOA documents with caps on annual increases in assessments and limits on the use of special assessments that, absent an amendment, prevent the board from assessing to cover the real costs of the master policy.

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RECENT CASE SUMMARIES

In **Kenley vs. Inwood Property Investments, Inc.,** 31 Fla. L. Weekly D1739a (Fla. 4th DCA June 28, 2006) plaintiff Father sought money damages for a child who fell from a dock on a seawall into an open body of water covering sharp rocks. Among other things, Father alleged that Property Owner was negligent in failing to erect safety barriers and warnings. By summary judgment, the trial court determined that Property Owner could not legally be held liable in money damages. In affirming the trial court, the Fourth District Court of Appeal rejected Father's contention that the "open and obvious" doctrine as applied to bodies of water is not applicable when the victim is a young child. The appellate court noted that the outcome of this case is yet another result of the rule applied in the line of cases represented by *Saga Bay Property Owners Ass'n vs. Askew.* There, the parents of a six year old child who drowned in an artificial lake near their home brought an action against the owners of the residential development in which the lake was located, alleging that the owners were negligent in failing to fence the area. The Third District held that the owners could not be held liable because "an owner of a natural or artificial body of water has no duty to fence it." The court reasoned:

The fundamental proposition that drowning is a risk inherent in any body of water leads to some equally fundamental legal principles. The owner of a body of water is not liable merely because a child may be too young or of insufficient intelligence to understand the open and obvious danger of the water; the responsibility for the care of such children remains with their parents and caretakers. To shift the responsibility to the lake owner – by virtue of ownership alone – is to unreasonably require the owner to fill the lake or fence it in order to guard against being held liable.

The appellate court also followed many other cases following this well-established principle of law, including *Nararro vs. County Village Homeowners Ass's*, which held that a deep water drop-off did not constitute concealed dangerous condition and thus, association could not be held liable for negligence in connection with a resident's death. Finally, the appellate court cited to the case of *Kaweblum vs Thornhill Estates Homeowners Ass'n,* where the victim fell into a drainage canal and struck her head on a rock and drowned. In *Kaweblum* the court rejected the plaintiff's asserted exception to the rule - for bodies of water with a very steep drop off from the bank and stated the *". . . . rule supported by the decided weight of authority is that the owners of artificial lakes, fish ponds, mill ponds, gin ponds and other pools, streams and bodies of water are not guilty of actionable negligence on account of drownings therein unless they are constructed so as to constitute a trap or a raft or unless there is some unusual element of danger lurking about them not existent in ponds generally*." The Fourth District noted that Florida is thick with masses of water, large and small, many touching towns, cities and residential developments from the western tip of the Panhandle to the island of the Keys. Though one might advocate a rule protecting young children who fall or walk into such bodies, it is up to the Legislature, not the courts, to create such protection.

In **Boca Club Association, Inc., vs. De Lima**, Case No.: 2005-04-3401 (Grubbs / Summary Final Order / December 7, 2005) Association brought an action against Unit Owners alleging that Unit Owners had permitted a dog weighing in excess of twenty pounds to be in their condominium unit and on the condominium property in violation of the condominium documents. Unit Owners filed an answer that admitted that the dog weighed in excess of twenty pounds, but stating that the dog traveled throughout the country with Mr. De Lima who was a truck driver. Unit Owners owned a Standard Poodle that weighs more than twenty pounds. The dog lived at the condominium, but his permanent home is now with the Unit Owners in another city. However, Unit Owners return to the condominium for regular visits with their relatives who live in the condominium unit and with other friends who live at the condominium. Unit owners bring the dog with them when they visit. The arbitrator noted that although a tenant or guest visiting or living in a condominium unit is required to comply with the restrictions imposed by the condominium documents, the Unit Owner is always responsible for ensuring that his or her unit is in compliance. In this case, the Unit Owners had been advised on more than one occasion that the presence of the dog on the condominium property violated the declaration and the rules and regulations of the condominium. In one of their pleadings, Unit Owners complained *". . . . we can't go to visit my loved ones because this owner ass. [sic] feel [sic] like they have a right to tell me what I can and can't do? Do they won [sic] to pay my mortgage to [sic]? I [thought] we live [sic] in a free country. What happened to that?"* The arbitrator noted that by choosing to purchase a unit in a condominium, Unit Owners had chosen to submit themselves to the restrictions that accompany any purchase of property in a highly regulated residential community. Unit Owners have the responsibility to read and comply with the restrictions imposed by the condominium documents; Association has the right and responsibility to enforce the restrictions imposed by the condominium documents. In this free country, people have the freedom to choose to live in a highly restricted community, like a condominium, or to live elsewhere. People who choose to buy property in a community that is highly regulated should not be surprised when they are expected to comply with the regulations.

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