COMMUNITY COUNSEL

January, 2008 | A Publication of Wean & Malchow, P.A. | Volume 12, Issue 1

Recent Cases

- **Contractor's commercial liability insurance held to cover damage caused by defective work performed by a subcontractor as an accident.**
- **Defects found during a visual inspection and reported on by Association's engineer are not necessarily patent defects just because they were observed without destructive testing. Suit allowed to proceed against architect.**

Time to Get Very Serious

If you live in a homeowners or condominium association in Florida, it is time to get serious and come to the table to defend your home against those who would damage or destroy the way it is run.

In the absence of a state income tax, Florida's counties and municipalities have long off-loaded some of their traditional functions onto private corporations. The effect of this is to make the purchase of a home in most communities the simultaneous enrollment of the purchaser in a common business enterprise – the serious business of running the corporation that operating the community.

How that business runs and by whom it is run have been the subject of back and forth power struggles for years, some internal to a particular community, and some the fodder for legislative policy initiatives.

Save your well-run community. Come and testify on 2/16/08!

This year those who would act to cripple community associations and thus allow some property owners to prevail in the use of their property to the detriment and cost of their neighbors have assembled a frontal assault on associations. On January 11, 2008 the Speaker of Florida's House of Representatives empanelled a Select Committee on Condominium and Homeowner Association Governance, chaired by Representative Julio Robaina of Miami-Dade. The committee has already met in Broward County and is scheduled to meet in **Orlando from 10 am to 6 pm on Saturday, February 16, 2008 at Florida Real Estate Commission Meeting Room, 9th Floor of North Tower of the Hurston Building, 400 West Robinson Street, Orlando.** The official charge of the committee is to investigate , "... accounting, budgeting, audits, theft by officers and directors, elections, and access to records, the state regulation of condominiums and cooperatives by the Department of Business and Professional Regulation."

In point of fact, however, the track record of the committee's members and especially its chair is decidedly anti-association, and eyewitness reports from the first hearing indicate that pro-association speakers were given little time or attention. Rep. Robaina has already proposed a bill for 2008 directed at associations. Among its poorly drafted and ill-conceived provisions are these:

1. Any officer, director, or manager who knowingly or intentionally defaces, destroys, or fails to create or maintain accounting records is personally subject to a civil penalty pursuant to s. 718.501(1)(d) and appropriate criminal sanctions.

2. Votes allocated to units owned by the association may not be cast by proxy, ballot, or otherwise for any purpose..

3. All ballot envelopes must be placed in a locked or sealed ballot drop box immediately upon receipt, and the box shall not be opened in advance of the election meeting.

4. The board of administration may not adopt any rule or regulation impairing any rights guaranteed by the First Amendment to the Constitution of the United States or s. 3, Art. I of the Florida Constitution, ….

Such onerous provisions are designed to discourage volunteers from serving our communities and in the long term will lead to greater government involvement in private business.

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

RECENT CASE SUMMARIES

In **U.S. v. J.S.U.B. No. SC05-1295** (Fla. Sup. Ct. 12-20-2007), Contractor built several small homes that developed foundation and drywall damage caused by a subcontractors' use of poor soil and improper soil compaction. Homeowners demanded that Contractor repair or remedy the damages, asserting breach of contract, breach of warranty, negligence, strict liability, and violation of the Florida Building Code. Contractor was insured by Insurer under a commercial general liability policy that provided coverage for "property damage" caused by an "occurrence." An "occurrence" included the term "accident" resulting in injury to tangible property. The policy also contained a "products-completed operations hazard coverage" that included all property damage occurring away from premises owned by insured and arising out of insured's product or work, except work that has not yet been completed or abandoned. However, the policy excluded coverage from "property damage" for work performed by contractors or subcontractors working on behalf of the insured or work incorrectly performed by the insured. This last exclusion, however, "for work incorrectly performed by the insured"; did not apply to "property damage" included in the "products-completed operations hazard coverage." In resolving the conflict between the policy definitions and exclusion provisions, the Florida Supreme Court concluded that faulty workmanship that is neither intended nor expected from the standpoint of Contractor can constitute an "accident" and thus an "occurrence" under a post-1986 standard form CGL policy. Accordingly, the Court held that a post-1986 standard form commercial general liability policy with "products completed-operations hazard coverage," issued to Contractor provides coverage for a claim made against Contractor for damage to the completed project caused by a subcontractor's defective work, provided that there is no specific exclusion that otherwise excludes coverage.

In **Saltpond Condominium Association, Inc., vs. McCoy**, 33 Fla. L. Weekly D26a (Fla. 3rd DCA December 19, 2007) Association brought suit seeking damages for alleged construction defects in its condominium buildings. Defendant was the architect of the buildings. The amended complaint alleged that turnover of control from the developer to Association occurred on August 1, 2002. Association attached to its complaint a 2005 report from an engineering firm identifying various defects in the condominium buildings. The amended complaint asserted that the building defects "are not readily recognizable by persons who lack special knowledge or training, or are hidden by components or finishes, and are latent." Association said that it had complied with Chapter 558, Florida Statutes, by serving all defendants with the report and giving them an opportunity to inspect and correct the defects. Architect moved to dismiss, arguing that the lawsuit was barred by the statute of limitations. Architect maintained that this could be determined from the fact of the report attached to the amended complaint. Architect acknowledged that the amended complaint alleged the defects to be latent, but maintained that the engineering report showed the defects to be patent, not latent. Architect contended that since the report was attached to the amended complaint, it negated Association's allegations that the defects were latent. Based upon the premise that the defects were patent, Architect then argued that the limitation period began to run on the date of turnover of the condominium to Association. The parties agreed that the applicable limitation period was four (4) years. Since, as argued by Architect, the lawsuit was filed more than four years after the turnover date of August 1, 2002, Architect contended that the suit was time-barred. The trial judge agreed and dismissed the amended complaint. On appeal to the Third District Court of Appeal, the appellate court concluded that the amended complaint should not have been dismissed. The face of the complaint does not establish conclusively that the action is time–barred, nor does it establish conclusively that Association will be unable to allege facts in avoidance of the applicable statute of limitation. Architect argued that the defects were patent and not latent because the engineering report stated that the engineers based their work on a visual inspection of the buildings without engaging in destructive testing. According to Architect, this meant that as a matter of law the defects were patent, not latent. The appellate court disagreed, noting that the engineers could not reach a conclusion on several issues and recommended further destructive testing. A visual inspection was insufficient and further work would be needed to ascertain the existence or nonexistence of the suspected defects. The engineering report does not conclusively establish that the defects are patent. As such, dismissal of the amended complaint was improper.

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646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM