

COMMUNITY COUNSEL

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Recent Cases

- ◆ In Florida HOA and Condo Assessments are "consumer debts" under state and federal law that regulates how debts are collected, and there maybe liability under state law for improper collection activity by an association.
- ◆ Community Association Managers are held by Florida court to be members of a profession who have liability for acts of professional negligence.

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THE 2008 HARVEST OF NEW LAWS - PART I

The 2008 legislative session had many surprises, including a last minute veto and many strange bills being approved. All of these new laws will in some way or other impact your community, and hence you need to be aware of them. Space does not permit more than a quick summary, which will be given in several parts over the next few months.

We start with Representative Robaina's HB 995, which became effective on July 1, 2008. It deals with condominiums. Here are the "highlights."

1. Management companies can now be licensed, as well as managers and the Regulatory Council's powers and duties changed.
2. Condominium directors can now abstain without their vote being presumed to have assented to the action. Conflicts of interest are no longer the only permissible basis for abstention.
3. Condominium directors now have a specific statement of the business judgment rule which applies to them, and which may no longer be consistent with the provisions of Chapter 617, Fla. Stat. New bases for personal liability of directors are stated, some of which won't be covered by insurance, but they are for very egregious conduct.
4. The Condominium Act now contains this vague and unclear language:

Any person who knowingly or intentionally defaces or destroys required accounting records

or fails to create or maintain accounting records required to be maintained by this chapter, is personally subject to a civil penalty pursuant to s. 718.501(1)(d).



5. A condominium's official records must be kept either within the county where the condo is located or within 45 miles of its location, or they may be made available electronically.

6. Official condominium records exclude social security, credit card and driver's license numbers, and other "**personally identifying information.**" What this phrase means is very unclear. Could it include names and addresses, or would expunging this information be an intentional defacing of financial records?

There may be a lot of new Association legislation in 2008, but there few good ideas included in these new laws.

7. Condominiums now must give new disclosure forms to owners related to reserve funding.

8. Condominium members may waive financial reporting for the next year as well as the current year in a single vote, but an audit or review can not be waived for more than three consecutive years.

9. Condominium associations can't vote any units they own, nor use them to establish a quorum at a membership meetings.

10. In Condominiums 20% of the members can put a matter on the Board's agenda by a written petition.

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RECENT CASE SUMMARIES

In **Wright vs. Bush Ross, P.A.**, No. 8:07-CV-1885-T-23MAP, U.S.D.C., Middle Dist. of Florida, January 18, 2008, the Lake Padgette Estates East Property Owners Association, Inc. ("Association"), sent Owner a letter to collect assessments on Owner's property. Owner's property was subject to recorded restrictions that included the obligation of property owners to pay assessments to Association. After receipt of the demand letter, Owner sued Association and its legal counsel in federal court for violating the Florida Consumer Collection Practices Act ("State Act"). Association asked the court to dismiss the case for failure to state a claim on which relief may be granted. The court denied Association's motion, stating that, contrary to Association's argument, the assessments qualified as a form of consumer debt as defined by the State Act as well as by the federal Fair Debt Collection Practices Act ("Federal Act"). Association also argued that the State Act did not apply because the Association was not a "debt collector" under the purview of the State Act. However, the court noted that the State Act, unlike the Federal Act, does not require that the wrongdoer be a "debt collector" but rather it applies to any person who performs certain prohibited acts while collecting consumer debts. Finally, Association argued that the assessments charged to Owner were not consumer debts under the State Act. To support this contention, Association cited *Bryan v. Clayton*, 698 So. 2d 1236 (Fla. 5th DCA 1997), a Florida state court case which held that assessments were not included in the definition of "consumer debt" under both the Florida Act and the Federal Act. The trial court noted that the federal decisions cited in *Bryan* declared that only transactions involving the offer or extension of credit to a consumer created a "debt" under the Federal Act and stated that such analysis had been thoroughly discredited. Federal courts now consistently rule that condominium assessments and homeowners' association fees are indeed "debts" under the Federal Act. The trial court rejected the decisions upon which *Bryan* was based and noted that, if the Florida Supreme Court ruled today in that case, it would disapprove *Bryan*, would determine that homeowner association and condominium association assessments are debts under the Act, and would conclude that, under the State Act, debt is created by a consumer's obligation to pay money "as a result of a transaction whose subject is primarily for personal, family or household purposes." Based upon its rejection of *Bryan*, the trial court denied Association's motion to dismiss and permitted the case to proceed on the merits.

In **Cypress Club of Kendale Association, Inc., vs. Empress Property Management, Inc.**, 16 Fla. L. Weekly Supp. ___ (Circuit Court, 11th Judicial Circuit (Appellate), April 29, 2008), Association had a contract with Management Company to manage a condominium community. As a result of violation citations issued by Miami-Dade County for work done on the roof vent system, Association sued Management Company and its manager individually for negligent performance of their duties. The trial court granted the individual property manager's motion to dismiss and Association appealed. On appeal, the appellate court noted that Section 468.431, Fla. Stat., defines the duties of community association managers. A manager is described as a person with ". . . substantial specialized knowledge, judgment and managerial skill when done for remuneration. . . ." Further, Section 621.07, Fla. Stat., contemplates that professionals may be personally liable for their negligent acts, as well as their corporation. Based upon the foregoing, the appellate court concluded that community association managers fall within the category of professional service providers which Florida Law deems potentially liable for negligent acts. As such, the appellate court reversed the dismissal and reinstated the action against the property manager individually.