# COMMUNITY COUNSEL

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**Recent Cases**

- **A bulk cable service contract is a contract for operation of a condominium and can be terminated by vote of 75% of unit owners within 18 months of turnover.**
- **Owner wrongfully painted her home after denial of her ARC application, of which she was made aware.**

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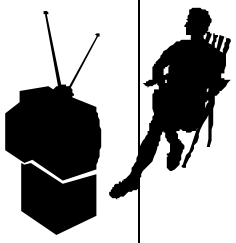
## NO ASSESSMENTS, NO CABLE, RIGHT?

Increasingly cash-strapped associations are looking for better ways to force owners to pay assessments. Many are looking at their ability to deny basic services to delinquent owners. While the collections rights of community associations differ from condo to coop to HOA, there is absolutely no statutory support to allow any form of community association to deny or terminate cable service to delinquent owners. We are aware of one Orlando law firm that has given a condo association a written opinion to the contrary, but we feel that the opinion is wrong and that most knowledgeable Florida association law practitioners are in agreement. The law continues to say that the collection rights and remedies available to a community association are those set forth in the relevant collections statute, and in the case of HOAs, those set forth in the community's governing documents, so long as they are not inconsistent with Section 720.3085, Fla. Stat.



**Do Not Shut Off Cable Service to Collect Assessments.**

Thus, condominium and other communities that turn off cable service risk assertion of a claim against them by the delinquent unit owner for damages, and such a claim may operate as a set-off against any unpaid assessments and collection costs due. Such claims will, at minimum, impede the progress of a lien foreclosure action and could also adversely impact the association's future insurance position.

Rather than risk these consequences, we encourage all associations to make full use of all of the legal tools already available to them.

For example, condos that have a right to approve unit rentals may deny the right to rent to any delinquent owner, or may condition approval on the parties agreeing (in a formal writing, properly drafted) to an assignment of the owner's rental income to the Association at any time upon the owner becoming delinquent Of course, condos, HOAs and coops all have the right to seek sequestration of tenant rents (with the court's registry, for example) at any time after commencement of a lien foreclosure suit, and recent orders out of local courts indicate that judges are increasingly willing to assist associations in this task. Condos also have the right to consider some delinquent officers and directors as having resigned, and may proceed to fill their vacated seats.

HOAs may have the right to deny delinquent owners the right to use certain community amenities, so long as the denial was the subject of a proper hearing and as long as the denial doesn't impair the owner's right to access to the owner's property.

There are ample strategies to assist in recovering unpaid assessments. However, in the rush to act aggressively to collect from delinquent owners community leaders must take care not to trample delinquent owners' rights, as doing so may be penny wise and pound foolish. In addition, the exercise of legitimate rights and remedies must be efficient, or the association risks squandering rental income on potentially unnecessary middlemen, such as receivers.

**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 **Comcast of Florida, L.P., vs. L'Ambiance Beach Condominium Association, Inc.,** 34 Fla. L. Weekly D 1741a (Fla. 4th DCA, 8/26/2009) a conflict arose between cable television Provider and Association. Association sought to terminate the contract pursuant to the provisions of Section 718.302, Fla. Stat. In 2002, prior to incorporating Association, the developer entered into an MDU Broadband Services Agreement that granted an easement to Provider to install its cables in the condominium development. The parties also entered into a bulk rate addendum that permitted for all residents to receive provider's cable television services at a discounted monthly rate. Association received cable television services at a discounted rate, a character generator, and a security camera. Provider paid for the easement and for material and labor for its distribution system and facilities. Every unit owner received and paid for the cable service as part of the monthly maintenance fee. In turn, Association made payments to Provider. The agreement's termination provision provided that the "*Agreement may be terminated prior to expiration of its term subject to conditions and regulations required under 718 of Florida Statutes. . . .*" The evidence established that developer's representative specifically requested that the agreement refer to Chapter 718 because he intended to insure that after turnover to the unit owners, Association would have the right to terminate the contract upon a timely 75% vote of the unit owners. Following incorporation of Association and the developer's hand over, the unit owners voted to terminate the agreement. Association's counsel sent Provider written notice of termination in accordance with Section 718.302. Provider brought an action for declaratory relief, breach of the agreement and addenda, trespass, and permanent injunctive relief. Before a hearing could be held on Provider's emergency motion for temporary injunction, Association hired a locksmith to drill holes in Provider's distribution lock boxes to allow another provider access to Provider's cables. As a result, all of the units were switched from Provider to another provider. Provider's wires remained in place in the event a unit owner desired to maintain service with Provider. At trial, Provider argued that the television service contract was not an agreement *". . . . that provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium*." The trial court granted summary judgment in favor of Association. On appeal to the Fourth District Court of Appeal, Provider argued that the legislature differentiated between "*contracts for services*" and those contracts "*that provide for operation, maintenance, and management of a condominium*." On appeal, the appellate court noted that the agreement provided for cable television service to all unit owners, the cost was part of the monthly maintenance fee, and the service Provider was required to service and maintain the cable television system. As such, the appellate court concluded that the agreement was one for the "*operation, maintenance, or management*" of the cable television service and was properly terminated pursuant to the provisions of Section 718.302, Fla. Stat.

In **Lake Charleston Maintenance Association, Inc., vs. Farrell**, 34 Fla. L. Weekly D 1565c (Fla. 4th DCA, 8/5/2009), Association appealed the trial court's order granting Owners motion for involuntary dismissal in a non-jury trial. Owner was a homeowner in Association. Association consists of approximately 2,366 single-family homes. Association was a "master" association over 27 other sub-associations located in the community. The governing documents provided that *". . . . no building, fence, wall, or other structure or improvement. . . shall be commenced, altered, removed,* ***painted****. . . . unless approved by association*." On May 26, 2005, Owner submitted an application requesting permission to repaint her home in "Sage Green/ Halcyon Green." This application was reviewed and denied on June 1, 2005. However, on June 3, 2005, Owner was sent a letter advising her that her application was "pending" and that she should submit pictures of the home and color swatches for the body and trim. On June 8, 2005, Owner attended a meeting of the architectural committee where she was informed that her application was denied. Owner then left "very angry" from the meeting. A couple of weeks later, she painted her house in the color she originally submitted in her application. Approximately 6 months after Owner painted her home, Association's attorney sent Owner a demand to participate in pre-suit mediation. Owner failed to participate in the mediation, and Association filed suit. Association argued that Owner painted her home without first obtaining the written consent of the architectural committee or Association. Owner argued affirmative defenses of waiver and estoppel. After the conclusion of the trial, Owner moved for involuntary dismissal arguing that there was no evidence that the committee took action on the application within thirty days because the committee was not properly formed. Association responded that there was evidence establishing the committee was properly formed and that this was an affirmative defense Owner failed to raise. On appeal, the Fourth District Court of Appeal reversed the trial court, finding that there was unimpeachable evidence that the application was denied, Owner was informed of this denial, and that Owner proceeded to paint her home without prior approval.

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**WWW.WMLO.COM**