COMMUNITY COUNSEL

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SB 1196 – SWEATING SOME DETAILS

Last month we gave a quick summary of this 57 page statute that became law on July 1st. Since then the howls of anger and confusion have reached a crescendo as people wrestle to determine the meaning and usefulness of some of the new laws. So let's see what we have learned.

1. **Demands for rent** – Like it or not, the statutes are written to only permit tenants to be held responsible for the future monetary obligations of the unit or lot owner. Despite confusing language, there is nothing that indicates that the rental monies demanded can be applied to a property owner's arrearages. Also, this statute is not easily applied to short-term rental situations because each new tenant has to be given advance notice of the demand for rent and because the tenant Is not liable for payments where rent has been pre-paid, a common occurrence in short-term rental arrangements.

Also, we believe there may be constitutional issues related to use of the courts to enforce this law when applied to leases and tenancies created before this law became effective. Indeed, although the tenant is expressly held not liable for acts undertaken in good faith, there is no such immunity for the Association. Therefore a risk exists that an Association which acts wrongfully under this confusing and ill-fitting statute could be sued for damages by an owner. When a tenant vacates and there is a loss in rental income which causes a property owner to default on a mortgage obligation, liability could be substantial. As we said last month, this law presents a trap for the unwary and caution is needed when trying to use it.

2. **Suspension of rights** – This new remedy may be easier to use, although the HOA version requires a 14 day notice and a hearing before suspending rights, while the Condo version does not. And to make matters more confusing, there is no such suspension right afforded to Coops.

The problem with this remedy is how it works in reality. In order to be effective an association with substantial amenities needs to have a way to preclude use by one person or household without the need to either physically bar them or to change the locks every few days. So a sophisticated locking system seems to be an necessary prerequisite, as is the cooperation of other residents, so that suspended residents are not simply admitted to the amenities.

Once again, prior to suspension, at least some notice needs to be provided, so application of the suspension remedy to short-term rentals is again problematic.

The statute prohibits suspension of utilities, but it is unclear what is meant by "utilities" and whether cable TV service is a utility. One way to determine this is to look in the community's governing documents to see if the term is defined therein. Often documents will define what "utilities" means, and since the statute doesn't define the term, the documents will apply. If in doubt it is best to leave cable alone, since a suspension may also impact other services, such as phone service.

3. **Official Records** – So are email addresses available or not to inquiring owners. Again the statute is unclear as to what is meant by information given to meet "association notice requirements." One thing that is certain, however, is that current law continues to provide that "… the association is not liable for an erroneous disclosure of the electronic mail address or the number for receiving electronic transmission of notices." On the other hand, the failure to provide an opportunity to inspect and copy official records upon request, could subject an association to damages of up to $500 and attorney's fees. So it appropriate for an association to err on the side of providing contact information.

We recommend that associations seek to determine the members' intentions regarding contact information. If the owners indicate in writing that certain contact information is not provided to the association for notice purposes, then the association may withhold this information from an inspecting owner. On the other hand, the association probably should not use that information for future contacts with the member either.

Recent Cases

- **Condo association can use its business judgment to determine how to best handle necessary repairs. And contrary opinions by owners are not actionable absent evidence of fraud illegality or self-dealing.**
- **Court refuses to award attorneys' fees to either side where case was moot and each bore some fault in causing the suit to be filed.**

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RECENT CASE SUMMARIES

In **Hollywood Towers Condominium Association, Inc., vs. Hampton**, 35 Fla. L. Weekly D1424a (Fla. 4th DCA, June 23, 2010) Association sought a permanent injunction requiring Owner to allow Association access to her condominium unit to perform repair work on her balcony. The trial court conducted an evidentiary hearing on Association's request. At the hearing, the following facts were adduced and established. Association is a condominium association responsible for maintaining the common elements of Hollywood Towers. Owner owns a unit in Hollywood Towers. Association became concerned about the structural integrity of the concrete balconies on each unit, so it hired an engineer to inspect each balcony. Owner's balcony was inspected and was found to have suffered moderate corrosion, requiring repair. Engineer's report concluded that demolition should continue from inside Owner's unit because industry standard is to remove the concrete four inches beyond the point at which the corrosion stops. When necessary to work from inside the unit, a dust wall is installed to separate the work area from the rest of the unit. Owner hired her own engineer to inspect owner's unit. Owner's engineer concluded that there was no reason to do any interior demolition in Owner's unit. It was Owner's engineer's opinion that the restoration work that had been done on Owner's balcony from the exterior was sufficient to make the balcony structurally sound. Association presented evidence that Owner's unit was not the only unit whose balcony needed to be repaired from inside the unit. Additionally, Association offered evidence that refuted Owner's claim that Association allowed other unit owners to opt out of the concrete repair work. Under the terms of the declaration, the concrete floor of each balcony was a common element, which Association was responsible to maintain. At the conclusion of the hearing, the trial court found that Association did not meet its burden of showing irreparable harm because there was a clear question not only as to whether the excavation and rebar work is necessary, but whether the failure to perform it will cause immediate harm. Thereafter, the trial court denied Association's request for injunctive relief and issued a partial final judgment in favor of Owner. Association appealed this decision to the Fourth District Court of Appeal. On appeal, the appellate court noted that to obtain a permanent injunction, the petition must "... establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief." The dispute on appeal was over the standard by which a trial court should review the decision of a condominium association's board of directors. Association asserted that, under the business judgment rule, a trial court is required to defer to Association unless there is proof of fraud, self-dealing, dishonesty or incompetency in arriving at the decision. Owner argued that the business judgment rule applies only in suits against directors for personal liability, and that the trial court was required to determine whether the repair work on the interior of her unit was necessary. The appellate court noted that the business judgment rule has traditionally been applied to protect corporate directors from personal liability. In applying the business judgment rule to condominium association decisions, courts have generally limited their review to two issues: (1) whether the association has the contractual or statutory authority to perform the relevant act, and (2) if the authority exists, whether the board's actions are reasonable. The appellate court adopted a test and held that courts must give deference to a condominium association's decision if that decision is within the scope of the association's authority and is reasonable – that is not arbitrary, capricious, or in bad faith. In the instant case, there was no dispute that Association had the authority to repair the concrete on Owner's balcony. Association may repair and maintain common elements as long as its decision to do so is reasonable. Thus, the trial court's focus was misplaced when it denied the injunction because there was a question as to whether the excavation and rebar work was necessary. However, in order to access Owner's unit, Association was required to show that such access was necessary. The appellate court thus remanded the case to the trial court to determine whether Association acted reasonably in ordering the work in Owner's unit.

In **Hidden Hills Country Club Estates Homeowners Association, Inc., vs. Bray**, 35 Fla. L. Weekly D861b (Fla. 1st DCA, April 20, 2010), Association filed a lawsuit against Owners wherein Association sought injunctive relief from alleged violations of certain restrictive covenants. In the lawsuit, Association sought an award of attorneys' fees and costs. Owners also sought an award of attorneys' fees and costs. The lawsuit was resolved without the necessity of an injunction, and the court entered an order making the parties responsible for their own fees and costs. The trial court determined that Association had not acted reasonably in pursing legal action without making an adequate attempt to resolve the matter privately. The trial court further observed that the dispute on the merits had become moot before the lawsuit was filed, and that the parties each bore some fault in the case having proceeded to trial. Based upon those findings, the trial court denied fees to both parties. This decision was affirmed on appeal.

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