

COMMUNITY COUNSEL

SEPTEMBER, 2010

A PUBLICATION OF WEAN & MALCHOW, P.A.

VOLUME 14, ISSUE 9

RECENT CASES

- ◆ **COURT COULD NOT ORDER RETURN OF FUNDS HELD IN ESCROW WHILE THE CASE WAS STILL OPEN AND CLAIMS REMAINED TO BE ADJUDICATED.**
- ◆ **CONDO'S INSURANCE POLICY PERMITTED EACH OF SEVEN BUILDINGS TO RECOVER SEPARATELY, AND NOT MERELY SPLIT THE POT OF AVAILABLE FUNDS.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

FIDUCIARY DUTY – WHAT IS IT AND WHERE CAN I GET SOME?

There is little that is more demoralizing to an association attorney than fielding call after call from communities who have had projects go awry. Consider this typical scenario: the client calls to complain that some important structural component installed several years ago has failed. The client volunteers information that in the intervening time the material supplier had gone bankrupt and the contractor had restarted his business several times. Further, it is unclear whether the problem is the materials used, the workmanship, the design or some combination.

When I look at the file I what I find is also pretty typical: specifications supplied by the contractor, with no independent engineering support in sight. The client's Board relied entirely on the contractor to spec the work and to select both the materials used and the manufacturer. The workmanship warranty has long since expired, and the lengthy materials warranty is of questionable value.

Without going much further I already know that the contractor and manufacturer – if they respond at all – will deny liability and point fingers at each other.

My frustration arises from knowing that the entire problem could have been avoided rather easily if the Board that entered into this contract had first complied with its fiduciary duty. Every community association statute in Florida imposes a fiduciary duty on the board. So what is it and why would observing this duty have saved this client a lot of money?

A fiduciary relationship is one in which the fiduciary stands in a special relationship of trust, confidence or responsibility to others. This special relationship means that the fidu-

ciary is responsible for exercising the utmost care in carrying out their duties, something that is normally associated with highly trained and paid professionals rather than with unpaid volunteer board members.

Nevertheless, the law makes board members responsible for using the utmost care in the performance of their duties. How would acting like a proper fiduciary have helped this community? A fiduciary uses the very best information and advice in its deliberations and decision making. Relying on advice of a contractor without independent verification is akin to buying a house



based solely on the advice of the seller. What is needed in each case is independent advice, to best evaluate how to proceed. A fiduciary director will seek out advice from an independent expert such as an architect or engineer and rely on that advice, both as to appropriate specifications and design, as well as to who is qualified by experience and reputation to perform the work and stand by it. Board members who regularly take it upon themselves to evaluate the qualifications of contractors as well as the methods and means of performance are not acting in a manner that is consistent with a fiduciary duty. That carelessness may be fine when buying a house, as you only have yourself to blame, but it does not work when spending the money of others.

When projects go bad, nine times out of ten it is because the board failed to properly evaluate all aspects of the project at the outset, and that failure comes from a fundamental lack of knowledge and perspective. So do yourself a favor: drop a dime and call an expert to assist you. You'll get a better product from start to finish.

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 **Palm Beach Polo and Country Club Property Owners Association vs. Bagattelle Condominium Association, Inc.**, 35 Fla. L. Weekly D2121a (Fla. 4th DCA, 9/22/2010) property owners association ("POA") is a master association in a large development. Condominium association is one of a group of Smaller Associations within the development. Smaller Associations were responsible for collecting monies from their members to pay the assessments of POA. At a special meeting of POA, the board voted to impose a special assessment of \$35 per month/per unit for 2007, to be held in escrow until the annual meeting. POA held a meeting in April, 2007, where the board amended the bylaws to give POA the unconditional right to alter, modify, change, revoke, rescind, or cancel restrictive covenants and amend the bylaws. Smaller Associations collected \$477,000 and paid POA. Smaller Associations filed a complaint seeking declaratory relief against POA on three grounds, and sought damages for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, conversion, and equitable accounting. Smaller Associations filed a motion for summary judgment on two counts for declaratory relief, which was granted by the trial court, finding that the meeting at which the special assessment was levied was unlawfully convened without proper notice. As a result of this ruling, Smaller Associations moved to compel return of the monies paid to POA. The trial court granted the motion and ordered POA to refund the money to Smaller Associations. On appeal to the Fourth District Court of Appeal, POA argued that the trial court erred in compelling the return of the assessment monies, primarily on the basis that the trial court could not award ultimate monetary relief before a final judgment was entered. The appellate court found that the trial court properly granted summary judgment in favor of Smaller Associations. However, the trial court was without authority to compel return of the assessment funds while the remaining counts of the complaint remained pending

In **Florida Insurance Guaranty Association, Inc., vs. B.T. of Sunrise Condominium Association, Inc.**, 35 Fla. L. Weekly D2124b (Fla. 4th DCA, 9/22/2010) Association had an insurance policy with Insurer covering the period from February 3, 2005, to February 3, 2006. The declaration page indicated that the policy covers seven buildings, the total limits were for \$2,906,719, and the total premium was \$17,518. The policy further indicated a deductible of \$2,500 for each building. On October 24, 2005, all seven buildings were damaged by Hurricane Wilma. Association filed a claim with Insurer for each of the seven buildings. Insurer issued seven separate checks totaling \$268,994.54, and divided the policy limit between the seven buildings, depending on the valuation of each building and the damage attributable to each building. When Insurer became insolvent, Florida Guaranty took over its obligations pursuant to Sec. 631.57, Fla. Stat. Association was not satisfied with the amount paid by Insurer and requested supplemental payments from Florida Guaranty, which tendered \$299,900, which represented the statutory cap of \$300,000 that Florida Guaranty was required to pay on each covered claim, less the \$100 deductible. Florida Guaranty took the position that the claims constituted a lump sum obligation for only one claim under the policy and that Florida Guaranty had only one \$300,000 limit of liability under the applicable statutes. Association filed suit for declaratory judgment seeking a determination by the trial court that Association was entitled to \$300,000 on each of the seven properties pursuant to the insurance policy. The trial court granted summary judgment in favor of Association. On appeal, the Fourth District Court of Appeal noted that there was a difference between a policy which contains an "aggregate" value for several insured buildings, and Association's policy which had separate schedules for each of the seven buildings. Under Association's policy, it could not apply nor transfer the limit of insurance coverage from one building to another building which might have been under-valued and, thus, underinsured. The appellate court concluded that the trial court properly read the applicable statutory language in determining that Association was not limited to one lump sum aggregate claim payment of \$300,000 for the total damages caused to the seven individually scheduled buildings and is entitled to the policy's mandated appraisal process.

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