COMMUNITY COUNSEL

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PROGRAM NOTE

Firm partner Paul L. Wean will be appearing on WDBO - AM 580 in Orlando on Sunday, June 12, 2011 from 12:00 p.m. to 1:00 p.m. to discuss current issues in community association law. Please tune in and call in with your best questions.

CAN THINGS GET WORSE IN THE HOUSING MARKET? YES!

(**Note**: Next month we fully expect to be discussing new 2011 legislation, but to do so now is premature since the principal bill, HB 1195, has not yet been sent to the Governor. Given Mr. Scott's lack of a track record with new legislation, we prefer to wait until the bill becomes law before discussing it, so as not to cause unnecessary confusion should he ultimately veto the bill.)

Yes, indeed. Things can always get worse in the ongoing saga that is Florida's residential mortgage crisis. Among other funding cuts made by the Legislature and the Governor this past session, approximately $6 million dollars that had been used to pay so-called senior judges (that is retired judges called back to service) was eliminated. These judges had been handling the bulk of the massive backlog in residential mortgage foreclosures under a system that was – at least in theory – expedited. In fact the docket of these cases was known as the "rocket docket."

With the termination of this program, a backlog of hundreds of thousands of mortgage foreclosure case filed in circuit courts across Florida are being dumped back into the mix of other cases pending before the "regular" sitting judges. Attorneys all across the state are now seeing hearings that were set for after July 1, 2011 being cancelled, with the time to reschedule them yet to be determined. This will mean a further delay in resolving mortgage foreclosures, on top of the current two to three year time frame that is now common.

How does this affect community associations? In terms of impact on the time needed to complete an association's lien foreclosure action, there should be little impact, since most of those cases are filed in county court, where the rocket docket was not in place. But it does mean that the time between when an association (acting promptly and diligently) can acquire title, and the time when it can expect to lose title to a foreclosing lender will lengthen further.

Associations that refrain from taking vigorous action to collect their debts will only see their frustration and their losses grow. Associations that act properly should be able to leverage the further delay into additional recoveries via rental of lien foreclosed properties.

Even if HB1195 becomes law, we predict that associations that do not lien and foreclose, but instead choose to rely on demands to tenants of delinquent owners for payment of rent, will be disappointed. As we speculated last year, we are now aware of ongoing court challenges to the constitutionality of the law that authorizes pre-suit seizure of rents. In our judgment, these challenges have a good chance of success.

So the message to community associations remains the same, only more so. Do not just wait for a bank foreclosure and accept the nominal amount (if any) that they offer toward your growing arrearage. Instead, act quickly and smartly to collect your debt. Make sure that foreclosed properties are left intact and once the association acquires title, insure and rent the property, or sell your interest in it to recover your money. Doing so will illustrate the time-proven adage that in adversity there is also opportunity for those willing to act on it.

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RECENT CASE SUMMARIES

EDITOR'S NOTE: This following case was first reported in the February, 2011 *Community Counsel* as an appellate decision rendered by the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida (Appellate). The following is the decision of the Fifth District Court of Appeal on *certiorari* review.

In **Wekiva Springs Reserve Homeowners' Association, Inc. vs. Binns**, 36 Fla. L. Weekly D064c (Fla. 5th DCA, May 6, 2011) Owner filed suit in county court alleging that Association failed to timely permit the inspection and copying of Association's official records. The trial court found that Association failed to timely permit the inspection and copying of the official records because the treasurer failed to regularly and timely pick up the mail at Association's post office box. However, the trial court further found that Association's failure to timely allow the inspection was not "willful" under the statute, and therefore refused to award damages to Owner. Owner appealed the trial court's verdict to the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida (Appellate). The circuit court reversed, finding that Association failed to overcome the presumption of willfulness. On second-tier certiorari review to the Fifth District Court of Appeal, Association argued that the circuit court's decision departed from the essential requirements of law. The appellate court agreed, and found that the circuit court improperly re-weighed the evidence and substituted its judgment for that of the trial court.

In **Cali vs. Meadowbrook Lakes View Condominium Association "B", Inc.**, 36 Fla. L. Weekly D942a (Fla. 4th DCA, May 4, 2011) Owner filed a lawsuit for negligence and sought damages, alleging that two severe water leaks from plumbing pipes located within the **interior** boundary walls of units 201 and 501 caused damages to Owner's unit 201. Owner alleged that Association owed him a duty pursuant to the declaration of condominium and the Florida Statutes. Association denied any duty owed to Owner because the pipes were not part of the common elements, nor was the damage caused by a leak in the common elements, either under the declaration or under the Florida Statutes. The trial court found that there was no material issue of fact that created a duty on the part of Association as the trial court determined that the pipes were not part of the common elements and granted a summary judgment in favor of Association. On appeal to the Fourth District Court of Appeal, the appellate court noted that to determine whether the leaking pipes, located within the **interior** boundary walls, were common elements which Association had a duty to repair, the trial court was presented with a number of statutes and certain portions of the declaration of condominium. The appellate court also noted that the statutory definition of "common elements" is those portions of the condominium property not included in the units. The appellate court also reviewed the extensive provisions of the declaration and Florida Statutes related to the boundaries of the unit and the respective maintenance responsibilities of Owner and Association. In particular, the appellate court noted that the declaration excluded from the "unit" "… *all spaces and improvements* ***lying beneath walls****, and/or bearing partitions*… " and further excluded *"… all pipes, ducts, wires, conduits and other facilities running through any* ***interior*** *wall or partition* ***for the furnishing of utility services to apartment dwelling units and common elements***." The declaration required Owner to maintain "pipes" located "in his apartment dwelling." Owner argued that the trial court erred in finding that the pipes inside the **interior** boundary walls **and which only brought water to the individual unit were not common elements**. On appeal, the Fourth District Court of Appeal noted that the declaration's definition of a dwelling unit excludes ".. *all improvements beneath the undecorated and/or unfinished inner surfaces of the perimeter walls and floors…* " and further excludes "… *all pipes . . . and other facilities running through any interior wall or partition for the furnishing of utility services to apartment dwelling units and common elements*." These two exclusions to a "unit" refer to improvements which are, first, located behind perimeter walls and second, behind interior walls but providing service to other portions of the property. A reading of this definition indicates that the "unit" excludes everything outside the perimeter walls as well as the pipes within the interior walls **which furnish service to multiple units**. The appellate court reversed the trial court and found that the declaration and statutes created a factual dispute as to whether all the pipes within the **interior** boundary wall could be common elements.

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