COMMUNITY COUNSEL

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RECENT CASES

- LENDER WHO HELD A SHORT SALE OF A LOT WAS NOT LIABLE FOR ASSOCIATION'S LEGAL FEES IN A DECLARATORY JUDGMENT ACTION WHICH DETERMINED THAT ASSESSMENTS WERE DUE TO THE ASSOCIATION.
- IN RECALLS ONLY SUBSTANTIAL COMPLIANCE IS NEEDED, AND UNDISPUTED NOTICE OF RECALL EFFORT IS VALID REGARDLESS OF HOW SERVED. ABSENT BOARD NOT EXCUSED FROM ATTENDING MEETING BY PHONE.

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.

PROTECTING YOUR INVESTMENT**

There have been an increasing number of lawsuits arising out of condo construction that occurred during the early-to-mid-2000s, including lawsuits regarding condominiums that were converted from apartment buildings built during that same period. These structures were built quickly to take advantage of peak market conditions and to maximize profits and developers and contractors used new or different construction methods and materials, many of which are not suitable in our climate.

For example, developers and contractors began using "thin coat" (or "one coat") stucco systems installed over wood framing--a common practice in the dry southwestern US--in place of the traditional three-coat stucco system installed over concrete masonry unit ("CMU block") framing. Unfortunately, on many projects where developers and contractors installed thin coat stucco systems, they did not also use appropriate weather-proofing details at windows, balconies, roofs, and other locations susceptible to water intrusion. As a result of these and other deficient construction practices, many Central Florida condominium associations have been plagued by failing thin coat stucco systems, including extensive damage to wood framing and other building components concealed behind the stucco. Even diligent maintenance (for example, regular painting and sealing) does little to prevent or slow the rate of property damage. A community may appear pristine on the outside, but extensive wood rot and other damage could be hidden just behind a thin layer of brightly painted stucco. For such condominium associations, the harsh reality is that deficient construction practices will mean millions of dollars in potentially unfunded repair costs.

The good news is that Florida law permits developers and contractors can be held accountable. Several condominium associations have achieved multi-million dollar recoveries to use to repair construction deficiencies and property damage through use of experienced construction litigation counsel. In the Metrowest area, one condominium conversion from 2005, recently recovered over $21 million and is pursuing additional claims.

It is also important that clients be aware of the pitfalls associated with deficient construction practices, and therefore you need to consider the following:
Construction defects are often hidden ("latent"). That means an ordinary owner may not be able to tell that there is a deficiency behind the thin coat stucco system or other siding. There may be no visible damage or evidence of leaks, and there may be no record of complaints from unit owners. Determining whether construction defects are present often requires a professional engineer or architect.

Florida law recognizes several different claims arising from construction deficiencies. For example, condominium associations may have claims for building code violations or claims for breach of statutory warranties. In some cases, it may even be possible to recover attorney's fees and costs incurred during litigation, though this is generally the exception.

The statute of limitation varies for each type of claim. However, **ten** (10) years from substantial completion of a project is typically a very hard deadline, after which it can be difficult or impossible to assert claims arising from deficient construction. Breach of warranty claims must typically be filed sooner. To protect your rights, it is important to know whether your condominium association has legal claims and when those claims may expire.

Statutory warranty claims arising from a condo ***conversion*** are subject to different time limits. General, the association must assert claims for breach of warranty against the developer within **five** (5) years after the creation of the condominium association, the notice of conversion, or the date of turnover, whichever occurs last.

Any community that is **ten** (10) years old or younger, or any conversion that was turned over within **five** (5) years, should consult with a qualified attorney and a professional engineer or architect. It will cost a condominium association relatively little to determine whether it is affected by construction deficiencies, and it has viable legal claims against the developer or contractor. It could cost a condominium association millions of dollars for repairs if construction deficiencies and property damage are discovered after legal rights have expired. An association that has retained a professional engineer or architect and receives a "clean bill of health," can feel confident about its budgeting and reserve processes knowing that it has met its fiduciary duty to its members and is unlikely to face extensive and costly repairs in the near future.

We work with both attorneys and professional engineers and architects who can help your association, and of course we can give you an analysis of the time frame in which you need to act. We can provide necessary recommendations and answer your questions.

**** Guest author - Dan Webert, Esq. - Ball Janik, LLP**

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 **Valhalla of Brandon Pointe Homeowners Association, Inc., vs. Schonbrun**, 19 Fla. L. Weekly Supp. 322b (Fla. 13th Cir. Ct., January 11, 2012) Association appealed a county court decision denying it an award of attorneys' fees. Association contended it was entitled to an award of fees pursuant to its declaration of covenants and restrictions, as well as pursuant to Section 720.305, Fla. Stat. Schonbrun held in trust a mortgage on a home located in Association. Schonbrun initiated a foreclosure action on the mortgage when the homeowner defaulted on the mortgage. After Schonbrun filed his lis pendens in the foreclosure action, Association recorded a claim of lien for unpaid assessments. While the mortgage foreclosure action was still pending, Schonbrun found a purchaser for the property, and the property was sold. Shortly before the sale, Schonbrun became aware of Association's claim for unpaid assessments. Schonbrun did not believe he was responsible to pay the money, but to affect the sale as quickly as possible, he paid the monies claimed "under protest." After the sale, Schonbrun filed an action for declaratory judgment to seek a judicial determination of whether he owed the money. The county court concluded that Schonbrun owed the money to Association and entered a non-final order to that effect, and reserving on the issue of attorneys' fees owed to Association. At a later hearing, the county court determined that Schonbrun did not owe attorneys' fees to Association because the declaratory judgment action was not filed specifically to enforce any provision of Association's declaration. Moreover, the county court determined that Section 720.305, Fla. Stat., did not apply for the same reason. On appeal to the circuit court, the court, sitting as an appellate court, noted that fee-shifting statutes are in derogation of common law, and therefore must be strictly construed. The court further noted that the declaration provided fees to the "Declarant, Association or any owner" who prevails in an action to enforce the declaration. The trial judge did not consider the action to be one of enforcement of the declaration but instead simply sought a determination as to Schonbrun's rights and responsibilities under the declaration as it pertained to the lien on the property. The appellate court agreed with the trial court. The appellate court further found that Schonbrun was neither the declarant, Association, nor an owner nor "any person" who has violated the declaration. Schonbrun was therefore not in privity with Association and thus had no obligation for the payment of attorneys' fees to Association under the statute or the declaration.

In **In Re: Petition for Binding Arbitration– Caribbean Villas Condominium Homeowners Association, Inc., vs. Unit Owners Voting for Recall** (Summary Final Order, Case No.: 2012-01-8638, June 12, 2012) Association filed a recall petition naming the unit owner Representative as the respondent. There are 218 votes in Association, thus 110 votes in favor of recall were required to have a valid recall. There are a total of seven members on the board. By written agreement, the unit owners sought to remove 5 of the 7 board members. On March 5, 2012, a written recall agreement was delivered to Association's bookkeeper at Association's mailing address. The recall ballots were in a form approved by the Division. A total of 112 votes were cast to recall each of the 5 board members. In the recall arbitration, Association argued that the written recall agreements were not properly delivered because it was delivered "by a van driver" to Association's bookkeeper and was not delivered by "certified mail or personal service." The arbitrator noted that the purpose of requiring unit owners to serve Association with the written recall agreements is to officially place the board on notice that a recall has been attempted by the unit owners. Arbitration case law has consistently held that where there is no dispute as to when Association received the recall agreement, the method of delivery is on no significance. Where it was clear that Association received the recall ballots, the board could not avoid holding a meeting to consider the recall on the basis that service of the agreement was, in the board's view, flawed. Association also argued that it could not timely hold the meeting because 3 members of the board were out of the country when the recall agreements were delivered. The arbitrator held that this was not a justification for not holding the recall board meeting, as these members could have attended by telephone. Thus, where a board fails to hold a meeting on whether to certify a recall, and the recall agreement is facially valid and has been approved by a majority of the voting interest, the recall shall be certified.

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646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM