COMMUNITY COUNSEL

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AN INTERESTING LITTLE TUG O' WAR

On June 22, 2012 a hearing will be held in Orlando at a convention of the Florida Bar. The hearing is on a petition being put forth by the Bar's Real Property, Probate and Trust Section, seeking an updated advisory opinion from the Florida courts on a question last addressed by the Florida Supreme Court in 1996. The question seeks further clarification on when and if actions by Florida licensed community association managers can constitute the unauthorized practice of law.

This is a very sensitive issue and a source of friction between managers and community association law practitioners, as each group seeks to protect or expand – depending on one's perspective – its turf in providing services (for a fee) to community associations. Such services usually, but not always, center on collection matters.

Since managers tend to refer more business to attorneys then visa versa, attorneys are very reluctant to be seen as being out-front in opposing any enlargement of what managers can do that might be considered to be the practice of law, fearing retaliation in the form of a cut-off of referrals. On the other hand, managers also seem to be desirous of having the best of all worlds: being able to render services or prepare documents that can affect significant legal rights of associations and their members, while charging fees that are not subject to court oversight and approval, while also contractually avoiding any liability for errors they may make when doing so – both things that lawyers cannot ethically do.

This tug o' war has been raging for years, with each year seeing new legislative proposals aimed at expanding what collection-related activities managers can perform. Most recently, in 2011, the entirety of the main community association bill, HB 319, was killed for what it contained related to proposed new manager authority, among other things.

It has always seemed to me that there is a simple solution to many of these problems. Since managers tend to be the generalists of the various specialists that community associations rely upon, they have information in many areas that is useful to communities. However, just as a manager's knowledge is not a substitute for that of an engineer or architect, it is also not a substitute for that of a lawyer. If a manager wants to draft a lien, or an amendment, or a meeting notice and proxy, that's fine with me – as long as I have a chance to review it before it is used. As they say, two heads are better than one , and a cross-disciplined approach may result in both better and cheaper work product for our mutual clients. There is no particular magic in original authorship.

But until managers are willing to be held liable for the consequences of their professional errors, they need a second pair of eyes to protect themselves as well as their clients, and they need to recognize this fact of life. Also, they must realize that they are not free to set charges to be imposed on third parties absent either an agreement by the third party, a statute, or judicial oversight of the charges.

There is enough business to go around and the issue is and always should be what is in the public's interest, not who should be permitted to make money from rendering various services.

If the public's interest can be protected by permitting managers to undertake various tasks while regulating their fees and denying them the right to contractually avoid liability for errors they make, then the public's interest would be protected and the playing field leveled. Lawyers would have no further reason to continue to resist some minor competition from competent community managers. Such competition would be healthy and welcome.

RECENT CASES

- **DEVELOPER ENTITLED TO RECOVER ALL OF ITS ATTORNEYS' FEES FOR LITIGATING A COMMON CORE OF FACTUAL CLAIMS, INCLUDING ENTITLEMENT TO FEES.**
- **FAILURE TO LITIGATE COST OF REPAIRING WATER DAMAGED UNIT LED OWNER TO LOSE CASE SEEKING DAMAGES FOR PERMANENT LOST VALUE OF UNIT WHEN JURY FOUND LOSS IN VALUE WAS ONLY TEMPORARY.**

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.

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RECENT CASE SUMMARIES

In **The Waverly at Las Olas Condominium Association, Inc. vs. Waverly Las Olas, LLC**, 37 Fla. L. Weekly D1178b (Fla. 4th DCA, May 16, 2012) Association appealed an order awarding Developer attorneys' fees and costs in an underlying dispute. Initially, a tenant sued Association in a dispute over parking spaces. Association filed a nine-count third-party complaint against Developer. The trial court dismissed the initial third-party complaint. Association made two more unsuccessful attempts to state a cause of action against Developer. In both amended third-party complaints, Association claimed an entitlement to attorneys' fees pursuant to paragraph 16 of the unit owners' purchase agreements which provided that in the event of litigation between the parties, the prevailing party would be entitled to reasonable attorneys' fees and court costs at all trial and appellate levels. Ultimately, the trial court dismissed the second amended third-party complaint with prejudice, finding Association had no standing; the claims were not ripe; and Association had not suffered any damage. Developer then moved to recover its attorneys' fees and costs. Developer argued entitlement to attorneys' fees for the entire litigation, including the proceedings to determine the amount of fees. Association requested that the court deny Developer's request for fees. The trial judge determined that Association's various contractual, common law, and statutory third-party claims were all inextricably intertwined with one set of core facts and had no separable damages. The trial court awarded all fees incurred in the litigation to Developer, including time spent litigating the amount of fees. Thus, the trial court awarded a total of $105,841.29 to Developer. On appeal to the Fourth District Court of Appeal, Association argued that the various claims were not based upon common facts or related legal theories, and that each amended complaint pursued an entirely different legal theory than its predecessor. Developer alleged that all of the complaints alleged alternative theories of liability arising out of a common core of facts – the assignment of parking spaces. Developer further argued that Association's continued claim for fees throughout its third-party complaints reinforced its position that the claims were part of a single dispute that were inextricably intertwined. On appeal, the Fourth District affirmed the trial court and found that the claims were all the subject of a common core of facts and thus Developer was entitled to an award of fees. Additionally, Developer was entitled to an award of fees for litigating the amount of fees because the contract was broad enough to include "any litigation" which would include litigating the amount of fees.

In **Feldman vs. Villa Regina Association, Inc.**, 37 Fla. L. Weekly D1065a (Fla. 3d DCA, May 2, 2012) Owner sued Association for a number of claims, all arising from alleged water intrusion, and damage therefrom, into Owner's condominium unit. Owner chose to proceed solely on the theory that the injury to his unit was permanent and sought to recover only the substantial diminution in the value of the condominium and loss of use of the unit. At trial Owner made no effort to prove the cost of restoring the unit but sought to establish only how much the value of the unit had been diminished by virtue of the alleged water intrusion. At the close of the testimony, the jury was asked whether the damage suffered, if any, was permanent, as opposed to temporary. The jury returned a verdict finding that the damage suffered by Owner was temporary, with no diminished value attributable to a permanent injury. However because the verdict form additionally asked the dollar amount of damages due for a temporary injury, which the jury pegged at $1,453,000, and because there was no evidentiary support for this award, the court below granted a motion for a new trial on damages. On appeal, the Third District Court of Appeal noted that under the general principles of tort law, where the injury to real property is merely temporary, or where the property can be restored to its original condition at reasonable expense, the measure of damages should include the cost of repairs or restoration. Where the cost of repair exceeds the value of the property in its original condition, or where restoration is impracticable, the measure of damages is diminution of value. Because Owner sought only diminution value for a permanent loss, a claim rejected by the jury, no basis existed for determining restoration damages – damages that Owner repeatedly renounced. The appellate court therefore reversed the trial court's orders and remanded the case for entry of judgment in favor of Association.

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