COMMUNITY COUNSEL

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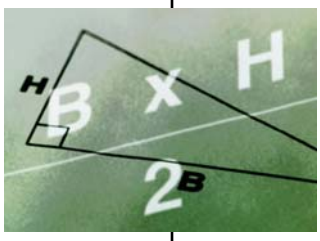
THE LAW OF UNINTENDED CONSEQUENCES

Each year the Florida Legislature considers thousands of bills representing many new and some not-so-new ideas for ordering our collective social affairs. Of those many ideas, hundreds make it into the form of bills, and of those bills, dozens ultimately get enacted. Then, come July 1st, October 1st or January 1st, the various new laws become effective.



But throughout each year, every year, one immutable law always reappears along with all the rest, even though no one has actually enacted it: it is the law of unintended consequences. As each new law comes into play the unforeseen, the unanticipated and even the unthinkable come to the fore, leading legal practitioners who deal with new laws on the front lines to start chirping the annual bird call heard throughout the state—indeed it is becoming the state bird call of Florida — and it sounds something like this - "glitch, glitch."

One new glitch of which we have become aware arises from the well-meaning desire of lawmakers to allow community associations to better enforce their documents while protecting certain basic needs of residents. This has lead to changes to the laws governing all types of Florida community associations, allowing the association to suspend the right to use common amenities for both delinquencies in payment of financial obligations and for violations of covenants and restrictions. However, to protect owners and residents, the laws exempt certain rights from suspension, including the right to access the property, the right to park and the right to obtain utilities. In that last point lies a potential sleeping consequence that was unintended. Suppose the association owns or desires to own a common well or wastewater facility, which it uses to supply and service the members. In the case of existing communities, if the ownership and documents are set up so that the payments for water or sewer charges are separate and distinct from the assessment for common expenses, has the Florida Legislature just prohibited the association from turning off service due to non-payment of the bill? Since the statute is remedial in nature and can apply retroactively, it would appear so.

Now also suppose a developer wants to create a new community in which the association will own a utility service such as water or sewer. Can it do so while still billing the owners separately? Yes, but not if it wishes to be able to cut off service for non-payment. It would appear that the statutory changes have made this act "ultra vires" for community associations, i.e. beyond the scope of their lawful powers.

Some may argue that this result was exactly what was intended. We disagree. What was intended was to prevent associations from disrupting the provision of utility service by third parties to a person delinquent in payment of an obligation not directly related to the services provided, such as denying bulk cable television as a means of collecting unpaid assessments. We do not think that the Legislature contemplated situations where the utility service is owned and provided by the association separate and apart from the common expenses.

Is there a fix? Perhaps. Setting up a separate entity to have ownership would probably work. Otherwise, "glitch bill, glitch bill."

RECENT CASES

- TWO OWNERS COMPETED TO SEE WHO OBTAINED TITLE TO A BOAT AND DOCK SLIP FROM THEIR COMMON SELLER. THE WINNER WAS DETERMINED BY THE PLAIN LANGUAGE OF THE GOVERNING DOCUMENTS.
- OWNER DETERMINED TO BE A MEMBER OF A MASTER ASSOCIATION NOTWITHSTANDING THE GOVERNING DOCUMENTS BECAUSE OF COURT'S INTERPRETATION OF CHAPTER 720.

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 **Sinatra vs. Bussel, Balog, et al.,** 38 Fla. L. Weekly D1501b (Fla. 2nd DCA, July 10, 2013) both Sinatra and Balog purchased separate condominium units from Bussel. Based upon the deeds involved in the transactions, both the Sinatras and Balog believed that they had purchased a dock and boat slip as part of their individual transactions with Bussel. Bussel owned a condominium unit in a development phase known as The Sterling. As the owners of the unit, Bussel also owned an interest in a dock and boat slip that are described in The Sterling's recorded declaration of condominium as limited common elements. This dock and boat slip was designated as appurtenant to the Bussels' unit for its exclusive use. The declaration of condominium provided that ownership of individual docks and boat slips could be transferred without having to transfer ownership of the condominium unit, but only to an owner of another unit in The Sterling. Several years after the development of The Sterling, a second "phase" of the development was constructed and named Sunset Watch. The Bussels purchased a second condominium unit in Sunset Watch. As a part of the development of Sunset Watch, the declaration of condominium was amended to allow for the ***leasing*** of docks and boat slips assigned to units in The Sterling to owners of units in Sunset Watch. Bussel later sold their unit in Sunset Watch to the Sinatras. As part of that transaction, the Bussels gave to the Sinatras a quit claim deed purportedly transferring their ownership interest in the dock and boat slip assigned to their unit in The Sterling to the Sinatras. Subsequently, the Bussels sold their unit in The Sterling to the Balogs. The deed in that transaction included a description of the limited common element dock and boat slip. Mr. Balog then sought to exclude the Sinatras from the use of the dock and boat slip. The Sinatras filed a complaint for declaratory judgment against the Balogs, seeking to establish that title to the dock and boat slip vested in the Sinatras pursuant to the quit claim deed executed in their favor prior to the deed of conveyance given to Mr. Balog. Both the Sinatras and the Balogs filed competing motions for summary judgment, agreeing on the facts and requesting that the issue be decided as a matter of law. At the hearing, the Balogs argued that Bussel was without authority to transfer the interest in the limited common element to anyone other than another owner of a unit in The Sterling. The Balogs argued that there was no authority to "strip" the ownership of the dock and boat slip from The Sterling unit and transfer it to a person who was not an owner of another unit in The Sterling. The trial court determined that as a matter of law Bussel did not have authority to convey their interest in the dock and boat slip to the Sinatras and that title vested in Mr. Balog. On appeal to the Second District Court of Appeal, the Sinatras argued that the dock and boat slip do not fit the definition of a limited common element. They argued that 718.401(1), Fla. Stat., provides that for a declaration of condominium to be effective on leased land, the lease must be for a minimum of fifty years. They argued that the submerged land lease was only for five years, and thus the dock and boat slip thereon did not meet the definition of limited common elements. However, because this issue was not raised at the trial court level, it could not be considered on appeal. The appellate court therefore reviewed the issues presented in the appeal solely by reference to the declarations of condominium. Based upon its review of the declarations of condominium, the appellate court affirmed the judgment of the trial court and held that Bussel was without authority to transfer the dock and boat slip to the Sinatras .

In **Rosenberg vs. Metrowest Master Association, Inc.,** 38 Fla. L. Weekly D1476a (Fla. 5th DCA, July 5, 2013) Owner appealed from a final judgment awarding attorney's fees to Master Association. On appeal, Owner argued that the trial court erred in finding that he was a "member" of Master Association within the meaning of Sections 720.301(10) and 720.305(1), Fla. Stat. Master Association is a "master association" in a mixed use development comprised of several subdivisions, each having a separate community association. Master Association's governing documents provide that the various community associations are "members" of master association, while owners of property subject to the jurisdiction of a community association are not "members" of master association. In 2009, Owner filed suit against Master Association alleging various violations of Chapter 720, Fla. Stat., related to turnover of Master Association. After a hearing, the trial court entered judgment in favor of Master Association on Owner's turnover claims. Master Association thereafter sought and was awarded prevailing party attorneys' fees. On appeal, Owner argued that he was not liable for the Master's attorney's fees because he does not fall within the statutory definition of "member" as he pays assessments to his community association. The Fifth District Court of Appeal disagreed, finding that the trial court properly concluded that Owner is a "member" within the meaning of the Florida Statutes. The appellate court further found that Owner was estopped from denying liability for attorneys' fees because, by bringing suit, he held himself out to be a "member" of Master Association with standing to sue. Owner could not change his position in order to avoid liability for attorney's fees.

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