COMMUNITY COUNSEL

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UP NEXT– THE 2018 LEGISLATIVE SESSION

I have a reoccurring image, one that was shown during the Rocky and Bullwinkle cartoon program that I watched growing up. It was of a ragtag parade of historical notables marching by, invariably followed by a small mustachioed man with a broom, sweeping up after them.

So far there are two bills to comment on early the upcoming session. One of them is HB 841 (Moraitis). This is CAI-FLA's effort for 2018. Increasingly CAI-FLA's annual bill is like that little mustachioed man, conscientiously following last year's procession, attempting to sweep up all the detritus left behind. And that's a shame because it forces CAI-FLA to make a constant shuffle, two steps back and one forward—maybe.

As usual, the CAI-FLA bill attempts to right some of the egregious wrongs that were tossed on the heap last year. It fixes mistakes in conflict of interest, recall and official records provisions created in the near past. It also includes provisions recognizing the need for giving electronic notice as a regular means of notice and addresses how such notice should be given. The bill also has, a priority, making the Condominium, Cooperative and Homeowner Association Acts consistent with each other, and so carries from one Act to another key provisions that have not yet been carried forward from one law to another. While there is very little in the way of innovation, there is order and neatness to the actions being proposed, and this is a welcome relief from the chaos of last year

Very recently the Real Property, Probate and Trust Law Section of the Florida Bar released the redline version of what it terms a glitch bill— i.e. its own version of the small mustachioed man. The Bar has sought to clean up other messes from last year. Among other things, it is seeking to revise the newly adopted criminal acts provision applicable to condominium board members. One such provision would decriminalize "kickbacks" if there is " fair market value given" for the kickback. I find this concept ludicrous.

It would also remove forgery of a ballot envelope and denial of access to official records as separate criminal offenses, although they could operate as obstruction of justice in appropriate circumstances.

This bill also addresses some of the same subjects as the CAI-FLA bill, including conflicts of interest, access to official records (including access to official records by tenants), availability to those records by Internet, and use of Internet websites by associations.

Again, the Bar finds itself unable to innovate because it is too busy fixing problems created in the past. There are real issues that cry out for attention but the people with expertise and solutions to those problems find themselves playing defense, taking the broom and sweeping up behind the people who create the problems to begin with. It has been this way for several years and it is a shame that it continues to be this way.

RECENT CASES

- ACTION FOR MISREPRESENTATION BROUGHT BY ASSOCIATION AGAINST A CONDO CONVERSION DEVELOPER FAILED BECAUSE ASSOCIATION COULD NOT SHOW IT RELIED ON THE FALSE REPRESENTATIONS.
- ASSIGNMENT OF INSURANCE BENEFITS UPHELD BY COURT. ANY ACTION TO RESTRICT THEM MUST BE TAKEN BY THE LEGISLATURE. THE POLICY ISSUES ARE NOT THE PROVINCE OF THE COURTS.

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 **Arlington Pebble Creek, LLC v Campus Edge Condominium Assn**, Case 1D16-1347, (Fla. 1st DCA, 11/6/2017), Association filed a claim for fraud and misrepresentation against Developer who converted apartments into condominiums. The units were the subject of two different conversion reports. The one which was provided to the buyers indicated that there were relatively minor repairs required to the property, in the approximate amount of $10,000. However Association later discovered a different, undisclosed report which indicated problems with water intrusion and required repairs in the approximate amount of $300,000. Association brought suit against Developer alleging both fraudulent and negligent misrepresentations on the part of Developer *to Association* and sought damages from Developer. At trial the Developer moved for a directed verdict, which was denied and a jury verdict was entered in favor of Association. On appeal, the First District Court of Appeals reversed and directed entry of a verdict for Developer. The court reasoned that in the case of a misrepresentation there must be evidence of reliance, and Association could not show that it relied to its detriment on any misrepresentation made by Developer. In other words, the Association could not show it had been damaged by any misrepresentation. Although not specifically discussed in the opinion, the general rule is that even if Association had brought this action on behalf of individual buyers as a matter of common interest, the issue of reliance upon a fraudulent misrepresentation is not amenable to class-action status and such reliance must be shown separately for each individual buyer. In the absence of such evidence Association failed to meet its burden of proof.

In **Security First Insurance Company v. Florida Office of Insurance Regulation**, Case No 5D16-3425 (Fla. 5th DCA, 12/1/2017), Insurance Company appealed a ruling from the Department adopting a report of an Administrative Hearing Officer. The report rejected an attempt by Insurance Company to change the terms of its policy to restrict the ability of policyholders to assign the benefits of its policy after casualty losses. The Fifth District Court of Appeals affirmed the ruling. The proposed policy change by Insurance Company would have required the consent of all insureds, additional insured and mortgagees before an assignment of post-loss benefits could be effective. State law requires that changes to policy language be approved by the Department. In upholding the Administrative Hearing Officer's ruling the appellate court reviewed over 100 years of court decisions addressing the issue of assignment of benefits. It distinguished between prohibitions on the assignment of the policy itself, which are regularly upheld, and post-loss assignment of benefits, which have been regularly upheld. The courts have indicated that benefits available under insurance policies post-loss are freely assignable, and any attempt by the Insurance Company to change that by the introduction of new policy language is inconsistent with both current statutory law and the great weight of Florida court decisions. It referred to recent decisions where insurance companies have attempted to argue public policy considerations as a basis for restricting the ability to assign post-loss benefits, and the court articulated competing public policy considerations; on the one hand a substantial increase in the cost of repairs by what was termed a "cottage industry" of contractors and others that make a living boosting the cost of repairs over what otherwise would be charged for similar loss repairs, and on the other hand consumers who experience losses but who do not have the financial wherewithal to engage contractors and make payments upfront to expedite necessary repair of casualty losses. The court indicated that it was not in a position to evaluate and weigh the relative merits of these competing public interests and that it is left to the Florida Legislature to act to resolve this issue as a matter of legislative policy. The courts have declined in the past and will continue to decline to act on this matter of public policy.

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