COMMUNITY COUNSEL

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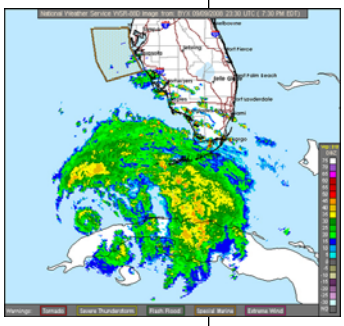
HURRICANE IRMA – ONE PIECE OF SOUND ADVICE

As this is written the largest Atlantic hurricane in recorded history is bearing down on Puerto Rico, the British and US Virgin Islands and the Florida peninsula. It is a category five hurricane with sustained winds of over 180 miles an hour. It is likely that individual homes and commonly owned dwellings will sustain substantial damage in the coming days. Some time in the next week, as recently happened in Houston, people will begin to collect their wits and their possessions, assess the damage, and begin to rebuild. Insurance claims are part of that process. Navigating the ins and outs of coverage exclusions, deductibles and the adjustment process are almost as unpleasant as the storm itself. But what can be even more injurious is the sloppy handling of a claim of ownership to insurance benefits. Take one piece of advice: under no circumstances should you assign ownership of your insurance claim (AOC) or your insurance benefits (AOB) to anyone else.



In the aftermath of a natural disaster you may find yourself casting about for assistance. You are vulnerable and there will be people willing to help. These people may be public adjusters— people who specialize in acting as go-betweens between you and your insurance company. There are also other people who say they are experienced in helping victims of disasters recover. They may come armed with blue tarps or other items of temporary reconstruction aid, and they may offer what sounds like the ability to repair your property on a contingency basis, i.e. to make the repairs without cost you. All you have to do is assign to them your insurance claim or benefits and let them deal with your insurance company. They will do the work for what they can recover from your insurer. Sounds ideal doesn't it? Well it isn't and don't do it. Even the Florida House passed a bill this last session that would have severely limited the practice—a move applauded by both the Florida Insurance Commissioner and the *Orlando Sentinel*, only to have the bill die in the Florida Senate.

Why is the practice so bad that even the progressive State of Texas prohibits it? Like a check or promissory note, once signed over, an insurance claim is gone forever, never to be reclaimed. The property owner loses all control over how the property is repaired, and the claim owner can no longer fire the claim holder, even if the repairs made are substandard. Further, the claim holder has ample incentive to jack up the claim amount to maximize the benefit recovery, even if this means finding damage that may be of questionable origin or validity. Also, the time to complete repairs may be extended indefinitely if litigation ensues between the claim holder and the insurer over the nature and extent of the damage, while the property owner sits by powerless, unable to regain use of the property.

According to Florida's chief financial officer::

….in 2006, there were 405 AOB lawsuits across all 67 counties in Florida and in 2016, that number had risen to 28,200.

This alone should be an ample red flag. Your insurance claim is a very valuable asset. Don't give it away for the price of a blue tarp.

RECENT CASES

- GOLF COURSE COULD NOT VOID A RESTRICTIVE COVENANT BASED ON LACK OF PROFITABILITY WHERE THE COVENANT FAILED TO INCLUDE CONTINUED FINANCIAL VIABILITY AS A FACTOR TO BE CONSIDERED AS PART OF ITS RAISON D'ÊTRE.
- PARTY TO HOA LITIGATION OVER THE CONDITION OF A LAWN WHO MADE GOOD FAITH EFFORTS TO COMPLY WAS NOT AWARDED PREVAILING PARTY ATTORNEY'S FEES WHEN IT FAILED TO PARTICIPATE IN MANDATORY PRE-SUIT MEDIATION.

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 **Victorville West Limited Partnership vs. The Inverrary Association, Inc.**, 42 Fla. L. Weekly D1860 (Fla. 4th DCA, August 23, 2017) Owner purchased a golf course with a restrictive covenant and sought to cancel the covenant because the golf course was no longer profitable. Owner contended that there was a substantial change in circumstance such that the covenant's purpose could no longer be carried out and that the covenant constituted an unlawful restraint on alienation. The appellate court was faced with the issue of whether a property owner may cancel a restrictive covenant when that covenant has become financially onerous. The Inverrary Golf Course and Clubhouse within Association was encumbered by a restrictive covenant that restricted the use of the "Golf Course" for "...recreational purposes including golf, tennis, horseback riding, swimming and all such other recreational activities as may be appropriate and in keeping with the overall development of Inverrary..." Owner filed suit against Association in 2012, arguing the covenant was an economic hardship and sought to cancel the covenant. The trial court held that Owner was not entitled to vacate the restrictive covenant, stating the covenant remained beneficial to the surrounding community. On appeal to the Fourth District Court of Appeal, Owner argued that the trial court should have cancelled the restrictive covenant because a substantial change in circumstances prevented the covenant's original purpose from being carried out and the covenant was an unlawful restraint on alienation. In affirming the trial court, the appellate court noted that the golf course continues to benefit the "dominate estates", meaning the surrounding residential properties. The golf course preserves the character of the community and provides residents with a pleasant view. Thus, even if the golf course is failing financially, the covenant must be enforced because it remains a "substantial value to" the surrounding residences.

In **Northton Grove Homeowner's Association, Inc., vs. Shelton,** 25 Fla. L. Weekly Supp. 377b (Final Judgment in favor of Defendant and Order Denying Attorney's Fees, April 21, 2016) (Aff'd on appeal, 16-CA-4834) Association filed suit against Owner over the condition of Owner's yard. Association's complaint was filed on July 17, 2014. On August 12, 2015 Association filed its amended complaint. Association demanded that Owner restore his lawn and maintain the Property so as to bring it into compliance with the requirements of the Declaration; and to grant a judgment against Owner for the costs incurred by Association in bringing the action. At the outset of the trial in January 2016, Association conceded Owner's lawn was then in compliance and had been in compliance since the spring of 2015. The judge acknowledged that Association was in a "frustrating" situation. From at least January, 2013 the yard sat in disrepair by the prior owners. Management company sent at least 11 letters to the prior owners regarding the condition of the lawn and landscaping. Owner purchased the property in June, 2013. Owner received the first demand letter from management company in March, 2014. Owner attempted to make efforts to clear up the lawn by spreading seed, placing pieces of sod on the lawn and conducting other efforts in an attempt to bring the yard into compliance. However, Association was not impressed with the efforts made by Owner. The Declaration required owners to maintain the landscaping "in condition and appearance as constructed" and in a "reasonably attractive condition." Finally, the Declaration defined "maintenance" as the "*exercise of reasonable care to keep... landscaping... in a condition comparable to their original condition...*" and that "landscaping" shall further mean "*the exercise of generally accepted garden-management practices necessary to promote a healthy, weed-free environment for optimum plant growth...*" The court found these terms to be "not exactly clear." The court found that Owner was trying to comply with the demands of Association. The letters sent in May and June of 2014 prompted Owner to expedite his efforts on the lawn and lay new sod as well as seed. Owner's efforts were in place when suit was filed on July 17, 2014. Association was not willing to wait for the progress of Owner's efforts and suit was filed. However, the court held that a lawsuit cannot be filed simply for the purpose of achieving prevailing party status. The Owner's compliance was in the works. The court thus found that Owner was the prevailing party and denied fees to Association. However, the court denied Owner an award of prevailing party attorneys' fees and costs. Owner received a certified presuit demand for mediation and failed to respond. The court concluded it could not rewrite a clear and unambiguous statute which denies attorneys' fees to a party who fails to comply with the presuit mediation statute.

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