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Daniel Rosenbaum

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President's Message:

Collections and Foreclosures – Why Doing the Work "In-House" is Critical to Your Association

I decided to write this article because of an alarming trend that we are seeing with some law firms and collection services in their handling of association collections and foreclosures. The core of the problem comes down to whether the collection and foreclosure matters are being handled "in-house" as opposed to the law firms and collection servicers who have the work done by others or done within the same firm but at a collection and foreclosure center separately located from the attorneys who service the associations on a daily basis.

Collecting assessments is the lifeblood of an association. When collections and foreclosures are not handled correctly and efficiently, unit owners who are paying their assessments subsidize the delinquents, association operations are interrupted and property values are negatively affected due to increased assessments and the damage to the reputation of the community.

There is a major difference between how collections and foreclosures are handled when they are serviced internally and externally. While the problems associated with handling collections and foreclosures externally will eventually become apparent to the client, by that time, much of the damage is usually done. An inside view can explain just how important "in-house" services are to clients.

Using RM as an example, several highly-experienced collection and foreclosure paralegals are intimately involved in the collection and foreclosure process along with several senior attorneys. Everyone works together in the same office, and the collections and foreclosure staff is not in an off-site location or a satellite office where they are separated. These individuals have worked together for many years. When a client asks our Association attorneys the status of a collection or foreclosure matter, asks a question or expresses a concern, these attorneys have immediate access to each of the attorneys, paralegals and staff in our Collection and Foreclosure Department to obtain all of the information about the matter. The face to face contact and exchange of information, which is without cost to the association, is critical to conveying the information needed by the association or its manager quickly, accurately and with a full understanding. The "right hand knows what the left hand is doing" and there is immediate access to, and effective transmission of the information that the client needs. It is a "hands on" process in which multiple professionals are paying direct attention to what the

client needs and to the client's matter. The result is that the legal services are performed efficiently, there is expedited responsiveness, there is a full understanding of the client's matter and priorities, a full explanation of the issues and all of these services are performed at reasonable rates. Not only does RM accomplish these goals, RM is a "one stop shop" for almost any legal need that our clients have. When it comes to collections and foreclosures, RM also provides deferred billing and advancement of case costs, so our clients do not come out of pocket at all in most instances. It is very difficult to accomplish these high standards and goals when collection and foreclosure matters are shipped to an off-site location or to another servicer entirely. When this occurs, the access to the necessary attorneys and staff is reduced, communication lags occur, responsiveness is significantly reduced, and the client's matter is not closely supervised and attended to as it should. The adverse effects that result from off-site operations and non-attorney servicers are becoming more apparent and problematic as time goes on and all too often the collections and foreclosures languish without resolution.

The greatest differences between "on-site" and "off-site" collections and foreclosure operations, and servicers, comes down to quality control and responsiveness in communications. When collections and foreclosures are integrated "on-site", the quality of the services are enhanced by the higher level of both the attention and supervision that the work receives. These added layers of service implement client goals, such as expediting a specific matter, creating better responsiveness when special circumstances arise and avoiding the "off-site" run-around, which typically results in transferring the client calls from person to person. In addition, very few (if any) "off-site" collection and foreclosure operations provide the "24/7" client and manager electronic access RM has to actually see the work-in-progress and status of any matter at any time of the day or night.

Also, RM, unlike many other firms and servicers, does not have financial relationships with vendors, collection companies, receivers, or the like. This avoids conflicts of interest and avoids the appearance of impropriety. We are free from these constraints so our clients receive the best advice and service possible for their matter, without consideration of anything other than what is in the best interests of our client and their matter. We have found in our experience that this is not always the case with servicers and "off-site" collection and foreclosure providers.

In the end, understanding how this process really works and knowing the substantial advantages associated with "in-house" collection and foreclosure departments, the correct path is clear and the results naturally follow. While we sincerely believe that RM has the best collections and foreclosure department around, if your current situation finds you otherwise, your association should at least be aware of the many pitfalls associated with collection services and "off-site" operations.

Peter Mollengarden

Electronic Voting, Imposing Fines/Suspensions and Notice of Meetings by Electronic Transmission

Electronic Voting, Imposing Fines/ Suspensions and Notice of Meetings by Electronic Transmission
By Peter Mollengarden, Esquire

Chapters 718, 719 and 720, Florida Statutes, were amended this year with respect to several issues affecting condominium, cooperative and homeowners associations. The changes which potentially will impact the operation of associations the most concern electronic voting by unit owners, the role of the Board and the fining/suspension committee in imposing fines and suspensions and providing notice of meetings to owners by electronic transmission.

The law now provides that condominium, homeowners and cooperative associations may conduct elections and other unit owner votes through an internet-based online voting system if a unit owner consents, in writing, to online voting and the board adopts a resolution authorizing the online voting system. The online voting system for condominium and cooperative associations must meet the following requirements:

(1) A method to authenticate the owner's identity to the online voting system.

(2) For board elections, a method to transmit an electronic ballot that ensures the secrecy and integrity of each ballot.

(3) A method to confirm, at least 14 days before the voting deadline, that the owner's device can successfully communicate with the online voting system.

(4) Able to authenticate the owner's identity and validity of each electronic vote to ensure the vote is not altered in transit.

(5) Able to transmit a receipt to each owner who casts an electronic vote.

(6) For board elections, able to permanently separate any authentication or identification information from the electronic election ballot, rendering it impossible to tie an election ballot to a specific owner.

(7) Able to store and keep electronic votes accessible to election officials for recount, inspection and review purposes.

Unit owners voting electronically shall be counted towards a quorum. A substantive vote of the unit owners may not be taken on any issue other than the issues specifically identified in the electronic vote, when a quorum is established based upon owners voting electronically. The board resolution authorizing an online voting system must provide that owners receive notice of the opportunity to vote through an online voting system, must establish reasonable procedures and deadlines for owners to consent, in writing, to electronic online voting, and must establish reasonable procedures and deadlines for unit owners to opt out of online voting after giving consent. Written notice of a meeting at which the resolution will be considered must be mailed, delivered or electronically transmitted to the owners and posted conspicuously on the condominium, cooperative or association property at least 14 days before the meeting. Evidence of compliance with the 14 day notice requirement shall be made by affidavit executed by the person providing the notice and filed with the official records of the association.

"The role of the committee has been limited to determining whether to confirm or reject the fine or suspension levied by the Board."

Peter Mollengarden

With respect to homeowners associations, the electronic voting procedure is substantially similar to condominium and cooperative associations except as follows:

- The electronic voting process shall be consistent with the election and voting procedures of the association's bylaws.
- If the bylaws provide for secret ballots in the election of directors, the procedure must ensure the secrecy of the election ballots.

The amendments to Chapters 718, 719 and 720 have also clarified the roles of the fining/suspension committee and Board of Directors in imposing fines and suspensions. The role of the committee has been limited to determining whether to confirm or reject the fine or suspension levied by the Board. However, if the committee, by majority vote, does not approve the fine or suspension it may not be imposed.

Finally, the law previously provided that providing notice of board and unit owner meetings to owners by electronic transmission must be authorized by the bylaws. That requirement has been deleted and associations may provide notice of such meetings (not including meetings to recall directors) by electronic transmission to owners who consent, in writing, to receiving notice in that manner whether or not the bylaws address the issue. Please note that a summary of all the pertinent amendments to the laws affecting community associations may be viewed online at r-mlaw.com or you may contact Peter Mollengarden or Allison Hertz at: pmollengarden@r-mlaw.com or ahertz@r-mlaw.com, or call (561) 653-2900.

Mark Keegan
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Director Liability: Separating Myth vs. Fact

Director Liability: Separating Myth vs. Fact
By Mark G. Keegan, Esquire

One of the more frequent questions we receive from individual board members is: "Can I be sued for my actions as a director?" Fortunately, Florida's public policy protects individual board members in most cases, even for bad decisions, absent fraud, self-dealing, criminal activity, or betrayal of trust. The Corporations Not For Profit Act, Chapter 617 of the Florida Statutes, provides authoritative guidance on this issue. Section 617.0830(1) of the Florida Statutes, titled "General standards for directors", provides:

(1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner he or she reasonably believes to be in the best interests of the corporation.

(2) In discharging his or her duties, a director may rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or

(c) A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.

(3) A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.

(4) A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

One of the more frequent questions we receive from individual board members is: "Can I be sued for my actions as a director?"

Mark Keegan

Similarly, section 617.0834 of the Florida Statutes, titled "Officers and directors of certain corporations and associations not for profit; immunity from civil liability", provides that an association must indemnify directors who uphold the above-mentioned standards. The case law is similarly protective of individual directors absent fraud, self-dealing, criminal activity, or betrayal of trust. Sonny Boy, L.L.C. v. Asnani, 879 So. 2d 25, 27 (Fla. 5th DCA 2004) ("It is well established in Florida that absent fraud, self-dealing and betrayal of trust, directors of condominium associations are not personally liable for the decisions they make in their capacity as directors of condominium associations."); Perlow v. Goldberg, 700 So. 2d 148, 150 (Fla. 3d DCA 1997) (affirming dismissal of complaint against individual directors of condominium association where "[t]here was no allegation in the owners' complaint of criminal activity, fraud, willful misconduct or self-dealing"). However, directors appointed by the developer of a community association are not likewise protected or entitled to indemnification under these statutes and principles, and if developer appointed directors act negligently, or make bad decisions, they can be held individually liable.

In conclusion, as long as an individual board member (who is not appointed by the developer) is not engaged in any fraud, self-dealing, criminal activity, or betrayal of trust, that board member should not fear being held personally liable for their acts undertaken on behalf of the board.

Allison Hertz

What Happens to a Tenant After Foreclosure?

By Allison Hertz, Esquire

In 2009, the Federal government enacted the Protecting Tenants at Foreclosure Act (the "Act"). The Act was set to expire on December 31, 2012, but it was extended to December 31, 2014. It was not extended again. The Act generally provided that any person who acquired a home by foreclosure, or any immediate successor, had to honor an existing lease of the home for its duration, unless the home was sold to a person who would use it as his/her primary residence in which case the tenant was entitled to 90 days' notice to acate the home. On June 2, 2015, a new Florida law concerning the termination of a lease after foreclosure went into effect in Section 83.561, Florida Statutes. The new Florida law significantly limits the rights of tenants in the event of foreclosure. Now, a person who acquires a home by foreclosure does not have to honor an existing lease under any circumstance, and the tenant must vacate the home within 30 days after notice is delivered to the tenant. This is important to know in the event your association is renting units or lots subject to foreclosure.

Dangerously Close to the Edge: Don't Forget to Preserve your Covenants and Restrictions Before they Expire!

By Allison Hertz, Esquire

"Did you know that your community's covenants and restrictions will expire after 30 years by operation of law? Yes, it's true."

Allison Hertz

Did you know that your community's covenants and restrictions will expire after 30 years by operation of law? Yes, it's true.

Chapter 712, Florida Statutes, Florida's Marketable Record Title Act (MRTA), provides that covenants and restrictions expire after 30 years of the root of title to each parcel. There are very few exceptions to this and, as a general rule of thumb, it means that your homeowners association needs to record a Notice of Preservation in the County in which your community is located, within 30 years of the original recording date of your covenants and restrictions. Contrary to popular belief, recording amendments to your covenants and restrictions or recording entirely new amended and restated restrictions within the 30 year period does not preserve your covenants and restrictions. The good thing is that an association can preserve its covenants and restrictions and record a notice of preservation with the approval of two-thirds (2/3rds) of the entire board of directors, without membership approval, after sending the parcel owners a specific notice required by the statute. This is a quite serious matter because if you allow your covenants and restrictions to expire, the association will lose its right to enforce them, along with the right to preserve them with a vote of the board. Then they must be revitalized or brought back to life through a burdensome process which entails obtaining the approval of a majority of the entire membership of the association, and complying with other technical requirements.

If you have inadvertently allowed your covenants and restrictions to expire, you can revitalize; is not impossible and we have successfully assisted in revitalizing covenants and restrictions for a number of community associations, large and small. However, preserving your covenants and restrictions under MRTA is something that you should place at the top of your list to discuss with your attorney, and you should act quickly to avoid any complications that may occur down the road close to the date of expiration. MRTA can also affect non-traditional associations, such as master condominium associations that operate pursuant to documents other than a declaration of condominium, and you should explore the application of MRTA to your association in such circumstances to ensure that you are in compliance. The clock is ticking, so get moving!

Liz Herman

Are Your Construction Defects Covered by The Contractor's Commercial General Liability Policy?

By Liz Herman, Esquire

A frequent question that comes up in litigating defective construction cases is whether a contractor's commercial general liability (CGL) policy applies and thus, whether the insurance policy is a potential compensation source. The short answer is that it depends on numerous complicating factors, most importantly, the specific language in the CGL policy and the specific facts regarding the construction defects of each case.

Generally, a CGL policy outlines certain coverages, followed by exclusions to these coverages, and then contains exceptions to the exclusions, which limit the exclusions and give back some coverage. In understanding these complexities, it is helpful to know the principle behind a CGL policy – this type of insurance is not meant to be a bond or guarantee of the contractor's work. Therefore, a CGL policy usually does not cover faulty workmanship. Rather, the insurance generally provides coverage for faulty workmanship that causes an accident, as further explained below.

Most policies begin by stating that coverage is afforded to bodily injury or property damage that is caused by an occurrence during the policy period. Thus, one of the first issues is determining whether the facts of a construction defects case amount to an occurrence. Although certain terms are expressly defined in a policy, some terms may be left undefined. For example, the term "occurrence" is usually defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," yet the term "accident" is not defined. As a

result, courts have had to step in and the term "accident" has been ruled to include accidental events, as well as unexpected and unintended injuries or damage, from the contractor's perspective. Another important coverage is what is termed "products-completed operation hazard," which generally applies to defective workmanship that causes damage after the completion of the construction project. However, as a result of certain exclusions and exceptions to exclusions, coverage under the "products-completed operation hazard" may or may not apply if the damaged work was done by a subcontractor.

If the defects appear to fall within the coverage part of the policy, then the coverage exclusions and exceptions to the exclusions must also be carefully examined. Some common exclusions include contract liability exclusion, "your product" and "your work" exclusions, among many others. Each exclusion again requires a detailed and thorough analysis of the policy provisions, the definitions, and the facts of the case. Further complicating the analysis is that in most cases, all of the facts regarding the defective construction may not be fully developed and may come out later in the discovery process.

"Each exclusion . . . requires a detailed and thorough analysis of the policy provisions, the definitions, and the facts of the case."

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In sum, a CGL policy is not intended to afford coverage for the faulty workmanship itself, and all of its provisions must be diligently traced and the relevant case law carefully analyzed to properly opine on whether a given insurance policy may potentially cover the defective construction at issue. At Rosenbaum Mollengarden, our construction litigation attorneys are experienced in all of these intricate and nuanced issues and can assist you in understanding and working through the complexities of your specific case.

Lauren B. Feffer

A Reminder on the Importance of Titling Your Property Correctly...

By Lauren B. Feffer, Esquire

People often overlook the importance of how they own their property. This can lead to mistakes that are costly both to you and your loved ones. We were recently reminded of the importance of title in a probate matter. In that particular case, a mother co-signed a loan and mortgage for her son so that the son could purchase a home. The property was titled to the mother and son as "tenants in common". The mother did not live at the home during her lifetime and the son, who did reside at the home, made all of the mortgage payments. Sadly, the mother passed away. The son, being the only heir, carried the heavy burden of winding up his mother's affairs. The son came to us to handle the probate of his mother's estate and advised that his mother's name was on the title to his home, and that this was done only to help him qualify for the loan to purchase the house. He also advised that his mother never made any payments toward the mortgage. Of course, it came as quite a shock to the son when we advised that his mother's one-half ownership interest in the son's home could be subject to the claims of creditors of his mother's estate. Why? For the simple reason that the deed to the property transferred title to the mother and son as "tenants in common" instead of "joint tenants with right of survivorship". Had the property been titled to the mother and son as "joint tenants with right of survivorship," then the mother's one-half ownership interest in the property would have automatically passed to the son upon his mother's death. Instead, because the mother and son owned the property as "tenants in common," the mother's interest in the property became part of the probate estate. In this instance, the mistake subjected the son's home to the claims of many creditors. This unfortunate situation serves as a reminder to us that the paperwork matters. You should always consult with an attorney when purchasing or selling a home, because mistakes like these can easily be avoided.

Hi, I'm Rhonda

As some of you may already know, I frequently attend mini-trade shows the firm co-sponsors. At these shows, each sponsor gets an opportunity to speak about their company as we go around the room. My introduction is always the same, "Hi, I'm Rhonda with Rosenbaum Mollengarden PLLC. We are a full service law firm with a primary focus on all aspects of Community Association representation." I continue with my usual spiel of "I personally have been with Mr. Rosenbaum for almost 28 years now and am one of the firm's collection/foreclosure/real estate paralegals. We have an amazing delinquent account collection process, where the fees and costs are passed on to the delinquent owner in almost all cases, and we *advance all* attorney's fees and costs, all the way through the foreclosure process. Our rates are very reasonable and there is no billing until the conclusion of the matter. Plus, *we are very good at what we do*!" I conclude with my typical

Rhonda Ugowski

"If your association is in need of any collection help, document rewrite, covenant enforcement, day to day operations, please contact us. We would love to meet with your board of directors at *no charge*, to discuss how we can best serve your association's legal needs." At the end of a recent event, one of the property managers came up to me and asked, "What makes you guys different from all the rest?" I thought for a moment and then replied, "We are a team! The association attorneys, the foreclosure attorneys, the bankruptcy attorneys, along with the paralegals, all work together and discuss the client's situation and needs. We take a personal interest in each and every one of our clients and treat them the way we would want to be treated. *That's* what makes us different!" He smiled and nodded his head approvingly and asked me to send him information on our firm and, presently I'm waiting to schedule a meeting with his board of directors.

But, that is truly *how it is* here at *Rosenbaum Mollengarden PLLC*. Under the direction of Daniel Rosenbaum, we have established a team model to follow. When it comes to the legal needs of each one of our associations, attorneys Peter Mollengarden, Allison Hertz, Mark Keegan and Elizabeth Hertz, together with all the paralegals, work collectively as *one team* to provide our clients the attention they require and the very best service available! I'm so proud to be a part of *Team Rosenbaum Mollengarden!!!!*

ROSENBAUM MOLLENGARDEN PLLC – Upcoming Courses

Tuesday, October 6, 2015, 5:00 pm – 6:00 pm: *How NOT to Conduct a Board Meeting* – 1 Hour CEU Class presented during the **2015 EMA Business Expo**, at the Marriott North Fort Lauderdale, 6650 N. Andrews Avenue, Ft. Lauderdale, FL.

Wednesday, October 7, 2015, 8:00 am – 10:00 am: *2016 Legal Update* – 2 hours CEU Class for **The Alliance** at the Sherbrooke Golf & Country Club, 6151 Lyons Road, Lake Worth, FL.

Thursday, October 8, 2015, 12:00 pm – 2:00 pm: *2016 Legal Update* – 2 hours CEU Class for the **Coastal CAMS** at the Asian Buffet & Grill, 240 South Federal Highway, Deerfield Beach, FL.

Thursday, October 22, 2015, 4:00 pm - 6:00 pm: *2016 Legal Update* – 2 hours CEU Class in the **Rosenbaum Mollengarden Classroom**, 250 South Australian Avenue, 5th Floor, West Palm Beach, FL.

Tuesday, October 27, 2015, 8:30 am – 10:30 am: *2016 Legal Update* – 2 hours CEU Class for the **North County Property Managers** at the North Palm Beach Country Club, 951 U.S. Highway One, North Palm Beach, FL.

Tuesday, October 27, 2015, 4:30 pm – 6:30 pm: *2016 Legal Update* – 2 hours CEU Class for **Building Managers International (BMI) Palm Beach Chapter**, at the Embassy Suites, 4350 PGA Boulevard, Palm Beach Gardens, FL.

Thursday, October 29, 2015, 3:00 pm - 6:00 pm: *Board Member Certification* – 3 Hour CEU Class in the **Rosenbaum Mollengarden Classroom**, 250 South Australian Avenue, 5th Floor, West Palm Beach, FL.

Thursday, November 5, 2015, 4:30 pm - 5:30 pm: *How NOT to Conduct a Board Meeting* – 1 Hour CEU Class in the **Rosenbaum Mollengarden Classroom**, 250 South Australian Avenue, 5th Floor, West Palm Beach, FL.

Wednesday, November 18, 2015, 9:30 am – 11:30 am: *2016 Legal Update* – 2 hours CEU Class in the **Rosenbaum Mollengarden Classroom**, 250 South Australian Avenue, 5th Floor, West Palm Beach, FL.

To register for any of the above-listed classes or, to obtain additional information, please contact Rhonda at rugowski@r-mlaw.com or 561-653-2918.

For upcoming events visit our events calendar at http://www.r-mlaw.com/events_calendar.cfm

For Legislative updates visit: http://www.r-mlaw.com/rm_news.cfm

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