

## Mediation Favored Over Litigation

FORT MYERS THE NEWS-PRESS, NOVEMBER 11, 2004



By Joe Adams

[jadams@becker-poliakoff.com](mailto:jadams@becker-poliakoff.com)

TEL (239) 433-7707

FAX (239) 433-5933

Notwithstanding constant attempts by a few to paint a contrary picture, few lawyers who handle community association matters are eager to take neighborhood disputes into court. While it is true that court cases generate legal fees, most community association attorneys I know look at litigation as a last resort in resolving disputes. Setting aside ethical and altruistic reasons why association lawyers try to avoid litigation, there are also some practical reasons to do so:

- Lawyers, by their nature, are competitive and do not like to lose cases. Unless an association case is a “slam dunk” (and few which reach the trial stage are), some judges feel that association disputes are petty, not worthy of valuable judicial resources, and may look for a way to rule for the owner. Although this attitude is indeed a minority, every association lawyer can name a judge or two who “hates association cases.”
- Many cases, particularly those involving tenants, become “moot” during the pendency of the case. Although there is a provision in the law to get back attorney’s fees if the association’s lawsuit causes compliance, some cases simply “solve themselves,” without the ability for the association to get back its lawyer’s fees.
- Very few association cases go to trial, and most are settled in mediation. Even when the association is in the right, it will typically have to “give something” to settle in mediation, which often involves giving up some or all of the attorney’s fees it could have recovered against the violator.

- Litigation takes time. Some cases outlast two or three boards, which often have very differing views about rule enforcement and lawsuits.
- Most attorneys who represent community associations for a living rely on ongoing relationships with the association. Assisting clients in resolving cases as quickly and inexpensively as possible usually leads to more work in the long run than leading a client through a case that never seems to end.

For these reasons, and because it is the right thing to do, Florida association lawyers have been leaders in implementing alternative dispute resolution, commonly called “ADR” to address some of the battles that erupt when human beings decide to live together under a man-made set of rules.

ADR was implemented for condominiums over a decade ago. Run of the mill disputes involving pets, parking, document amendments, elections and a variety of other issues are now handled through a state-sponsored arbitration program. As compared to a court case which often takes two years or more to resolve, many arbitration matters are settled in six months or less.

For homeowners’ associations, efforts at ADR have taken longer to bring about.

Nonetheless, the new laws effective October 1, 2004, offer great promise for repeating the condominium success story for HOAs. Under the new law, prior to any HOA dispute heading to court, the parties must first submit to mediation, through a trained mediator. Although a slightly

different approach than the arbitration procedure for condominiums, both programs are intended to bring the parties face-to-face more quickly, in the hopes of exploring whether disputes can be settled before the alleged violation is no longer the centerpiece of the case, but rather the parties' egos, or the attorney's fees incurred.

Of course, as a nation of laws which values the separation of powers between branches of government, there will always be need for an independent judiciary, and for some cases to be resolved by a judge or jury. The ADR procedures for both condos and HOAs recognize our constitutional right of access to the courts, but try to cut down on the courts' case-load by providing an alternative forum for the problem to be solved. I recently had the opportunity to participate in a national panel involving the role of government in resolving association disputes. I had the opportunity to learn how these challenges are addressed in places like Nevada, Hawaii, California, Canada, England, and Australia. In my opinion, Florida has, by far, the most

advanced ADR requirements in seeking to resolve community association disputes.

As they say, the proof is in the pudding.

So far, the condominium ADR program is perceived as doing its job. The HOA mediation program is too new to be battle tested, but will hopefully serve the same role as the condo program. According to Susan Wilkinson, the Chief Attorney for HOA Mediation and Arbitration, more than thirty-five petitions for mediation have already been filed, even though the law is barely a month old. Wilkinson also reports that the State has certified more than forty mediators, and stands ready to serve its constituents.

For those interested in following the development of the new HOA mediation program, check out the website of the Division of Florida Land Sales, Condominiums, and Mobile Homes at [www.state.fl.us/dbpr](http://www.state.fl.us/dbpr). Click on the tab called "Homeowners Associations" and stay in the know. ☺



**Question:** Our condominium association had major damage from Hurricane Charley. We filed a claim with FEMA and a loan application with SBA. We are not sure what percentage of the unit owners we need to approve the loan. We plan to use the common property for collateral. In addition, we found out that one of the buildings was not built properly (the roof was not strapped down at all). Do we have any recourse with the developer, general contractor, or subcontractors?  
**S.S. (via e-mail)**

**Answer:** Regarding whether a vote of the owners needs to be taken to approve the loan, you need to review the condominium documents (declaration of condominium, articles of incorporation, bylaws, and amendments thereto). Some documents do require a unit owner vote. Some condominium documents are silent with respect to the association's authority to borrow money. Some

specifically give this authority to the board of directors. If the documents do not specifically require a vote of the owners, it is my opinion that the association would have the authority to borrow money, by a resolution of its board of directors, pursuant to Florida's corporation statutes, which state that a corporation has the authority to borrow money.

It is unclear what you mean by "common property" for collateral. In my opinion, an association may pledge certain assessment rights as security for the loan. However, in my opinion, the association may not pledge "statutory reserves" as security for a loan, without prior approval of a majority of the voting interests of the association. Further, the association does not have the authority to mortgage real property as security for a loan, as the association owns no real property (all common elements of the condominium are owned by the unit owners in undivided shares, operated and administered by the association).

Regarding the building defects, you should discuss with an attorney what recourses you have against

the developers and contractors. In general, the Condominium Act provides that the developer of a condominium shall be deemed to have granted certain warranties. Likewise, the contractor, and all subcontractors and suppliers, are deemed to grant to the developer and to the purchaser of each unit certain warranties. The warranty periods vary in the statute but in general run three years from the completion of the building. The statute of limitations for pursuing warranty claims is typically considered four years from the date of transition of control of the association (commonly called “turnover”). However, this statute can be extended in the case of certain “latent” defects, which are defects not readily observable in the exercise of due diligence. In no case may one party take action against another party for a building that has been certified for occupancy more than fifteen years ago.

If there are latent defects which have been discovered, your best bet is to consult with an attorney who is familiar with construction law. The attorney will typically recommend that you have an engineer review the situation to determine if codes have been violated or if there is a deviation from industry standards of good design or workmanship. The attorney will also assist in review of potential statutes of limitations issues, and also search to determine whether potentially responsible parties are still in business.

**Question:** Our condominium documents specifically state that the unit owners are responsible for the maintenance, repair and replacement of all exterior doors, including garage doors and gates leading to their specific unit. Our insurance company has advised that the association must insure these items, which we understand. Is it legal for the association to require the owner to maintain, repair or place these doors as stated in our condominium documents? **M.L. (via e-mail)**

**Answer:** It sounds like the doors and gates you have described are limited common elements. This means that they are part of the common elements, but the maintenance responsibility of the unit owners.

Although the condominium documents may require the unit owners to maintain these items, your condominium documents may have different requirements if those items are damaged as a result of a casualty. It is important to look at the provisions in your condominium documents that are generally referred to as “repair after casualty.” If there is any inconsistency between these provisions and the general maintenance provisions in the condominium documents, it is my opinion that the repair after casualty provisions would control over the general maintenance requirements. To answer your question specifically, it is legal for the association to require the owners to maintain, repair, or replace the doors, and repair those items after a casualty, if so provided in your condominium documents.

**Question:** You recently ran an article involving the “Q&A sheet” that a condominium must keep by law. We are told that this sheet must be prepared by an attorney. I can find no such requirement in the Florida Condominium Act. Is what we have heard true?

**Answer:** Yes. In response to a petition filed by a Sarasota community association manager, Florida’s Supreme Court issued a landmark ruling on whether the preparation of certain documents by community association managers (commonly called CAMs) constituted the unlicensed practice of law (commonly referred to as UPL).

The high court ruled that preparation of documents such as claims of lien, notices of commencement, and limited proxy forms constituted UPL. The court specifically found that preparing a Q&A sheet, which is a disclosure-oriented legal document, constituted the practice of law. The court did note that CAMs could update Q&A sheets with administrative information, such as when the assessment amount changes.

UPL is now a felony in Florida. The law is intended to protect consumers against harm arising from the preparation of documents with legal consequences by persons who are not trained nor licensed in the practice of law. ⚖️

---

*Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners’ associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm’s Naples and Ft. Myers offices.*

*Send questions to Joe Adams by e-mail to [jadams@becker-poliakoff.com](mailto:jadams@becker-poliakoff.com) This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at [www.becker-poliakoff.com](http://www.becker-poliakoff.com).*