



Association Laws Ought to be Alike

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Today's column is the tenth installment of a comparative study of Florida's laws applicable to community associations, with an emphasis on the difference between the laws for condominiums and homeowners' associations. As previously reported, Governor Bush has recommended that the powers-that-be study whether there should be a unified law for all of Florida's community associations.

So far, we have looked at the historical and legal development of both condominiums and non-condo deed restricted communities (generically referred to as homeowners' associations), the differences between the two laws in the areas of government regulation and consumer protection, and the procedural differences in the two laws, focusing so far on the election process, "sunshine" regulations, and access to books and records.

Today, we will continue our comparison of procedural similarities and dissimilarities between the laws in the area of sanctions against members for alleged misconduct:

- **Suspension of Common Area Use Rights:** Pursuant to Section 720.305(2) of the law for homeowners' associations, if the governing documents so provide, the association may suspend a member's rights to use the common areas and facilities. The suspension may only be for a "reasonable period of time", and may also be applied to the member's tenants, guests, or invitees. No suspension may

be imposed without at least 14 days' notice to the person sought to be suspended and an opportunity for a hearing. Conversely, the condominium law does not permit an association to suspend use of common elements, and the state agency which regulates condominiums has taken the position that suspension of use rights is impermissible, even if contained in the condominium documents.

- **Suspension of Voting Rights:** Like the area of suspension of use rights, suspension of voting rights is prohibited for condominiums. Conversely, Section 720.305(3) of the law for HOAs provides that if permitted by the governing documents, an association may suspend the voting rights of a member for the nonpayment of regular annual assessments that are delinquent in excess of ninety days.
- **Fines:** Both statutes permit the levy of fines, if provided by the governing documents. Both laws also prohibit an unpaid fine from becoming a lien against a unit. The Condominium Act has always prohibited filing liens to secure fines, while Chapter 720 was amended to that effect in 2004 (and the constitutionality of retroactive application of the 2004 law to HOAs with the right to lien for fines has not been tested by the courts). However, the similarities in the two laws stop there. Here are some of the differences, some subtle, some more obvious:

Maximum Permissible Fine: The condominium law stipulates that no fine may

exceed one hundred dollars per violation, although a fine may be levied on the basis of each day of a continuing violation, provided that no such fine shall in the aggregate exceed one thousand dollars. The law for homeowners' associations also specifies a maximum per-violation fine of one hundred dollars, and also sets forth an aggregate limit of one thousand dollars for fines, but allows the association to establish a higher or lower aggregate maximum fine in the governing documents, which is not permitted for condominiums.

Required Notice For Fining Hearings: Both statutes require that prior to the levy of a fine, an opportunity for a hearing must be provided. The HOA law requires that fourteen days' notice of the hearing be given, the condominium simply calls for "reasonable notice." The Division's condo rules used to require fourteen days' notice as "reasonable" notice in the condominium context, although that rule was repealed.

Composition of the Fining Committee: Chapter 720.305(2)(a) of the Florida Statutes states that the fining committee must be composed "of at least three members appointed by the board, who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director or employee." Conversely, the condominium law simply requires a committee of "other owners", which would appear to mean simply a committee of people other than board members, with no

prohibition on spouses or relatives of board members serving on the committee.

Application To Unoccupied Units: The condominium law states that the fining provisions do not apply to "unoccupied units", while there is no similar proviso in the HOA law.

- **Suspension of Use Rights For Non-Payment of Assessments:** Chapter 720.305(2)(b) of the law for HOAs states that the requirements for a hearing do not apply to the imposition of suspensions or fines because of the non-payment of assessments, if such actions are authorized by the governing documents. Stated otherwise, the law for homeowners' associations permits suspension of use rights for non-payment of assessments, if authorized by the governing documents. Conversely, suspension of use rights for non-payment is prohibited in condominiums.

In my opinion, there is no reason for these differences in the two laws. Depending upon whether you are of the "law and order", or "unit owners' rights" ilk, the availability of remedies such as suspension of use rights and voting rights is certainly a political question for the Legislature. In my book, no matter which side you come down on, this is another area where the laws for the two types of associations ought to be the same.

Next week, we will continue exploring procedural differences between the two laws, with an emphasis on differences in the area of collecting delinquent assessments. ■

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 This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.

Insurance Rules Based on Number of Employees

Question: We are a homeowners association. Do we have to have workers' compensation insurance for our common area? The area is very small and the only contracted workers are a landscaper, the fountains service contractor, and the janitorial service man. I believe that each of these workers have, or could show, proof of insurance. A.K. (via e-mail)

Answer: The requirement to maintain workers' compensation insurance is not based upon the size of the common areas in your community. Rather, this insurance requirement is based on the number of employees the association has. The Florida Workers' Compensation Law requires workers' compensation insurance for all private employment where four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

In your case, it sounds as if the workers are not actually employees of the association, but rather are independent contractors. If this is the case, your association would not be required to carry workers' compensation insurance for these people, but the contractor you have should carry workers' compensation coverage.

Further, just because an association designates workers as independent contractors does not necessarily mean they are. Whether such workers are legally considered independent contractors or employees of the association depends on a number of factors including the amount of control the association has over the work, whether the individuals perform work for other individuals or companies or associations, and other similar factors. This is an issue that associations should be careful with so that they do not unknowingly fall under the scope of the insurance requirements of the Workers' Compensation Law.

I recommend that any independent contractor engaged by an association has, and provides proof of, his or her own workers' compensation insurance, as well as proof of such insurance for any of its subcontractors. It is also wise for an association to consult with its insurance advisors regarding actuarial and risk management issues when determining whether or not to obtain additional workers' compensation insurance, even when it is not required by law.

Question: Our condominium association does not do a very good job of enforcing the documents. I asked why, and one reason that the board cites is that the cost of bringing a legal action is too high. It is my understanding that the association will get its costs back from the person who violated the documents as part of the legal action, so there is no cost to the association in the end. Can you explain this so I can take it to the board and get the documents enforced? O.M. (via e-mail)

Answer: The Florida Condominium Act states that in a legal action to enforce the Act or the condominium documents of the association, the prevailing party in the action may be awarded costs and reasonable attorneys' fees incurred in bringing the legal action. A similar provision is found in the Homeowners' Association Act.

In many cases, where a unit owner is knowingly violating the rules, the possibility of being responsible to reimburse the association's attorney's fees is all it takes to motivate the unit owner to comply.

However, this statute also works to keep the association in check, because the rule works both ways. A unit owner who prevails in an action against the association may also recover his costs and reasonable attorneys' fees, so the association should be sure about its claim before starting a

legal action. In addition to recovering reasonable attorney's fees, a prevailing unit owner may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his share of any assessments levied by the association to fund its litigation expenses in connection with the action.

Question: My unit was completely destroyed by Hurricane Wilma and it is under renovation now. Do I still have to pay the assessments even though I do not live there and do not use the facilities? D.S. (via e-mail)

Answer: Yes, you must still pay the assessments due to the association. The assessments are not only for maintaining items such as the pool and the recreational facilities. It is important for the owners to continue

to pay their assessments because the association will need the money to pay for things such as the insurance premium, management fees, if applicable, and other items in the budget. Also, the money from assessments will be needed to make repairs to the property, including the damaged items that were not covered by the association's insurance policy or to pay the deductible under the policy. If owners stop paying their dues, the association will not be able to function, it will take longer to finish the reconstruction, and it will take longer for people to move back into their units. Also, the Condominium Act states that an owner may not avoid paying assessments by waiving the use or enjoyment of any common element or by abandoning the unit for which the assessments are made. Ultimately, even though you cannot live in the unit because of the repairs, you must continue to pay your assessments. ■

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