NEWS LETTER

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Case Law and Rule Update

Lakeview Reserve Homeowners v. Maronda Homes, Inc.

Last fall, Florida's Fifth District Court of Appeal issued an opinion that provides community associations with a new tool to repair defectively constructed common areas. The case grants associations greater leverage to collect against the developer for construction defects. For the first time, implied warranties of fitness for a particular purpose, merchantability, and habitability have been extended to cover latent defects of the common areas. More specifically, implied warranties now cover roadways, retention ponds and underground pipes throughout a community.

Historically, Florida followed a "caveat emptor" (buyer beware) model. However, over time, Florida has transitioned towards a standard that places buyers and sellers on a more equal playing field. In a continued effort to protect consumers, *Lakeview Reserve Homeowners v. Maronda Homes*, expands the buyer's remedy of implied warranties of habitability, merchantability and fitness for particular purpose to include common areas within a community.

Previously, warranties of habitability, merchantability and fitness for particular purpose were limited to the structure of the home, and those aspects that "immediately support" the home. "Immediately support" was defined as those instruments that are literally attached to a home, i.e. water wells and septic tanks. However, Florida's Fifth District Court of Appeal disagreed with the historical interpretation, and expanded the scope of the definition. The Court reasoned that "immediately supporting" the residence has two meanings: those that actually hold the structure up, and those that support the home and make it habitable and fit for its intended purpose. Under the new interpretation, roadways, retention ponds and underground pipes are considered common areas that immediately support the home.

This case has far reaching effects for community associations dealing with defectively constructed common areas. Previously, the cost to repair defective common areas fell to the association. However, under this holding, the developer is responsible for repairs. Furthermore, the court empowered community associations to seek contribution for repairs from the developer directly. Historically, only individual owners had the ability to sue the developer for breaches of implied warranties. By expanding the right to include associations, the Court seeks to limit multiplicity of suits, and align with current public policy.

While this case has the potential to afford associations with a powerful tool against construction defects, it is important to note that this decision is in conflict with a case from Florida's Fourth District Court of Appeal, *Port Seawall Harbor & Tennis Club Owners Association. v. First Federal Savings & Loan*. The Florida Supreme Court has agreed to resolve the discrepancy, and Oral Arguments were held December 6, 2011. The Homeowners Association in *Lakeview*

Reserve Homeowners v. Maronda Homes faces the difficult challenge of seeking to overturn 30 years of precedent in Florida. Additionally, to date, the Florida Legislature has refused to extend implied warranties beyond the structure of the home. However, there is a chance that the Florida Supreme Court may be persuaded to extend implied warranties to common areas just as Florida's Fifth District Court of Appeal was.

To Enforce or Not To Enforce – Does the Board have discretion?

Recently, the Fourth District Court of Appeal, in Heath v. Bear Island Homeowners Association, Inc., held that at least in some cases, the Board cannot be required to take enforcement action against an owner who is violating the Association's rules and restrictions.

In Heath, one owner sought an injunction against the Association to require the Association to enforce the Declaration against other owners who allegedly made changes, modifications and improvements to their properties without Association approval, as was required by the Declaration. With respect to enforcement, the Declaration provided:

> The enforcement of this Declaration may be by proceeding at law for damages or in equity to compel compliance with its terms or to prevent violation or breach of any of the covenants or terms herein. The Developer, the Association, or any individual may, but shall not be required to, seek enforcement of the Declaration.

In this case, the plain language of the Declaration explicitly makes enforcement of violations by the Association discretionary. Likewise, the Declaration provided that the Association or any individual could bring an action for a violation. Therefore, the complaining owner could have brought his claim directly against the owners he believed to be violating the governing documents, rather than filing suit against the Association to compel the Association to do so.

The court held that, based on the language in the Declaration, the Association had no legal obligation to take legal action to enforce the Declaration.

Whether or not your particular association's governing document contain similar language, or place an affirmative obligation on the Board of Directors to enforce the rules and restrictions, impacts how this case will apply to your particular situation. Furthermore, it should be noted that the exercise of any discretion the Board may have in enforcing the Declaration may impact the Association's ability to later enforce the same rules and restrictions against other owners under the defense of selective enforcement. Whether or not the Association is required to enforce violations of the Declaration, the Association is required to treat all owners equally, and the Board cannot arbitrarily enforce rules against some owners and not others.

Amendment to Florida Rule of Civil Procedure 1.720- Court Ordered Mediations

Effective January 1, 2012, Florida Rule of Civil Procedure 1.720 now requires that all parties, including community associations, file a Certificate of Authority ten days prior to any mediation containing the names of the individuals attending the mediation and to certify that those individuals have full settlement authority.

The significance of this amendment for community associations is that it is no longer acceptable for an association to send a single representative of the Board of Directors to attend mediation and to have the Board of Directors later ratify any agreement that was made in principle at the mediation. Effective January 1, 2012, an association will either need to have a quorum of the Board of Directors in attendance at any mediation or take action in advance of a mediation to provide an officer will full settlement authority without the need of later ratification of the Board of Directors.

Collection of Unpaid Assessments in lieu of Foreclosure

Many community associations have recently been asking what options they have to the collect unpaid assessments from previous and current owners when a lender has taken title by a deed in lieu of foreclosure, at a foreclosure sale, and when the amount of the mortgage(s) encumbering the property exceeds the value of fair market value of the property making a lien foreclosure less appealing.

While most community associations are aware of the safe harbor provided to foreclosing first mortgagees under Florida Statutes sections 718.116 and 720.3085, not all community associations are aware that they can pursue a claim of damages and obtain a money judgment against the previous owners of a property when an unpaid balance remains on the previous owner's account after the foreclosing first mortgagee pays the amount it is liable for.

Additionally, an Association can also decide to pursue a money judgment against a current owner of a property in lieu of proceeding with a lien foreclosure and potentially taking title to a property that is encumbered by a mortgage that likely exceeds the fair market value of the property. A judgment is valid up to twenty (20) years from the date it is entered and can be enforced against the non-exempt assets of the previous or current owner. In some circumstances, the owner may not have significant assets at the time the judgment is entered but may have accumulated additional assets in five or ten years after a judgment is entered and the Association could enforce the judgment at that time.

Each file should be evaluated on a case by case basis to determine if it appears that it would be in the best interest of the community association to pursue a claim against a previous or current owner. Factors that may assist an association from determining if it will be able to obtain and collect on a judgment include, but are not limited to, the following:

- Whether the owner owns any additional non-homestead property in Florida.
- Whether the association has knowledge that the owner may have non-exempt assets in Florida or in another state. If necessary, a judgment can be domesticated and enforced in another state.
- Whether the owner is employed in Florida.
- Whether the owner has filed, or intends to file, a bankruptcy petition.
- Whether a current address can be found for the owner.

Please contact us you are interested in discussing the possibility of pursing a money judgment for any delinquent accounts in your community association.

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This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also specializes in Labor/Employment Law. Stacy L. Bennings (stacybennings@paveselaw.com) is an Associate with the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is an Associate with the Pavese Law Firm. Andrew Hoek, Esq. (andrewhoek@paveselaw.com) is an Associate with the Pavese Law Firm. Ms. Bennings, Mr. Capps and Mr. Hoek handle all aspects of Community Association law for the Firm. Neysa Borkert (neysaborkert@paveselaw.com) is an Associate with the Pavese Law Firm. Ms. Borkert specializes in land use and community association law, Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is an Associate with the Pavese Law Firm. Mr. Hagman and Mrs. Marintez handle collections, lien foreclosures, and covenant enforcement and general litigation. Each attorney practices in the area of Real Estate Development and Community Association Law. Please feel free to contact them via the e-mail addresses listed above.

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