



LAW OFFICES

BECKER & POLIAKOFF, P.A.

# Community Up-Date™

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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

## Buyer BEWARE!

By: Alex Chris Costopoulos, Esq.

For many years, real estate transactions in the State of Florida were governed by the doctrine of *Caveat Emptor*, Latin for "Let the buyer beware". Unscrupulous sellers who knew of leaky roofs, flooding basements, cracked foundations and other defects in residential housing had no duty at all to disclose those problems to a potential purchaser. In Florida, that all changed in 1985.

It began in May of 1982 when the Davis family entered into a contract to buy the Johnson family home for \$310,000.00. Shortly after deposit payments of \$5,000.00 and \$26,000.00 were made, the Davis family realized that the Johnson home had a leaky roof. A subsequent inspection revealed that the roof was inherently defective and would have to be replaced. The Davis family wanted their deposits back, and a lawsuit ensued. The case was appealed

all the way to the Florida Supreme Court, which changed the law of the State of Florida in the now famous case of *Johnson v. Davis*, 480 So.2d 625 (Fla.S.Ct. 1985). In this case, the Florida Supreme Court ruled that, **if the seller of a house knows of facts materially affecting the value of the property, which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.**

This became a watershed decision which extended protections to buyers of new and used houses, but the decision was never understood to include commercial transactions. The ruling in *Johnson v. Davis* was designed to protect the average unsophisticated, residential homebuyer from unscrupulous sellers.

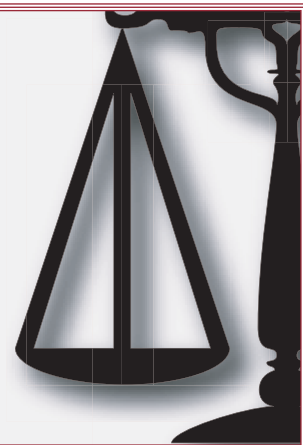
It was never intended, and does not apply, to sophisticated purchasers of commercial property, such as stores, factories, strip malls, hotels, etc. Purchasers of commercial properties

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## URGENT ALERT!!!

### Adelphia Cable Files for Bankruptcy

Adelphia Cable has filed for bankruptcy. If you have a bulk contract with Adelphia, the bankruptcy could have a significant, and in some cases, an adverse impact on your community. Many of you may be receiving notice in the mail from the Bankruptcy Court with a Proof of Claim form. It is very important that you respond in a timely manner to the Proof of Claim and any other notices from the Bankruptcy Court that deal with your contract. **The Proof of Claim deadline is January 9, 2004.**



cont. on page 2

**Beware cont.**

are still expected to look out for themselves.

This brings us to a situation faced by many community associations throughout the State of Florida. What about units or lots purchased specifically to be used as rental properties? Many times, investors, or groups of investors (often acting as partnerships or corporations), will choose to purchase properties in Florida for rental purposes. These include both long term and short term rentals of any residential community association property (so long as the governing documents allow rentals). Do the protections of *Johnson v. Davis* apply to residential property purchased for commercial purposes?

The Third District Court of Appeal recently addressed this very issue in the case of *Agrobin v. Botanica*, 28 FLW D1868 (Fla. 3rd DCA 2003). In this case, an investor created a corporation (Agrobin) for the purpose of purchasing a condominium unit on Key Biscayne from another corporation (Botanica). Subsequently, it was discovered that the unit had a leakage problem; Agrobin sued Botanica for failing to disclose the leakage problem (which Botanica knew about) based on *Johnson v. Davis*. Agrobin claimed that the condominium was bought as a vacation home **but did not dispute that it was renting out the condominium**. The lower Court ruled that the condominium unit was purchased by a corporation for a commercial venture and, therefore, *Johnson v. Davis* did **not** apply and the seller did **not** have a duty to disclose the defect. The Appellate Court affirmed this decision.

Based on both *Johnson and Agrobin*, an owner seeking to sell his or her residential property has two different



disclosure requirements, depending on what type of use the potential purchaser intends. For example, an owner of a house in a subdivision near Disney would be required to

disclose any latent (meaning hidden) but known defects in that house to a potential purchaser who is interested in purchasing the house as his or her residence. However, if the potential purchaser intended to rent the house to tourists, then, under *Agrobin v. Botanica*, there would be no duty to disclose such defects. Likewise, an owner of a high-rise condominium unit would **have a duty** to disclose defects to a purchaser who intended to have her son live in the condominium rent-free, but potentially would **have no duty** to disclose if that same purchaser was to rent the condominium unit to her sister-law-for three years.

Because the *Agrobin v. Botanica* case is so new, a body of case law which establishes the exact parameters of the Court's decision does not yet exist. Many questions remain unresolved. For example, what if a purchaser buys a condominium unit near the university for her daughter to occupy for four years, but then after graduation, intends to utilize it as a rental property? Or, what if, while the daughter is attending college, she has a roommate who pays rent? Over the course of the next few years, Courts will have ample opportunity to decide numerous cases and provide greater guidance as to exactly what type of purchase constitutes a "commercial venture" and what type does not. In the meantime, it is always wiser to err on the side of caution. Sellers should disclose any known latent defects and buyers should **always** have a licensed and bonded home inspector do a thorough examination of the residence.

**Urgent cont.**

Adelphia is rejecting some of the bulk contracts, with permission from the Bankruptcy Court, because the rates are simply not high enough. If you receive a motion to terminate your contract, it is important that you have counsel to protect you and to make sure that any damage claims that result from the termination of the contract are pursued in the bankruptcy proceeding. In many cases, Adelphia may terminate the existing contract and follow up with a proposal for new service at a rate that is more advantageous to Adelphia. In other cases, the community may not receive an offer from Adelphia or may be forced to consider the alternative, which would be satellite. Converting to satellite will require you to evaluate your documents to determine whether or not a membership vote is required to install the equipment and could involve significant start-up costs, if Adelphia is not willing to relinquish its rights to use the wiring, which is likely.

If you are interested in taking steps to protect your rights in the Adelphia bankruptcy, please contact your Association attorney immediately. While different communities may have different objectives, whether to stay with Adelphia or to go to satellite, you may still have claims against the Bankruptcy estate which should be protected and pursued to the extent feasible.



*When hiring a contractor to perform any type of construction work on association property, the association may require payment and/or performance bonds to protect the association's interest.*

- A payment bond protects association property from liens by unpaid subcontractors and suppliers, by requiring the lienors to seek payment directly from the contractor and its bond surety.
- A performance bond guarantees the contractor will properly perform all its work under the contract and, if the contractor fails to do so, an authorized insurance company will step in and complete the work or pay for somebody else to complete it.
- If the performance bond incorporates the entire construction contract by reference, then it is possible the bond surety may be liable for warranty items the contractor does not repair itself.
- If a bond surety notifies an association that the contractor is experiencing financial problems on the project, the association should refrain from making further payments to the contractor without the surety's consent. Payments made without the surety's consent, under these circumstances, may waive any rights the association has under the bond.
- If the contractor fails to fully perform all work on the project, the association must serve all notices and follow all procedures required by the bond documents or else the association may waive its rights under the performance bond. Additionally, the association may not undertake any corrective or completion work itself or retain another contractor to do so without first giving the bond surety the opportunity to do the work or pay for same.
- When an association properly makes a claim against a performance bond, the performance bond surety usually has one of the following options: hire a contractor to complete the work at the surety's expense, pay for the association to hire a contractor of their choosing to complete the work, or pay the association an agreed upon sum of money and let the association decide whether to retain a replacement contractor or not. However, some bonds provide for different forms of relief, so the bond document should be read carefully.
- A payment bond provided by the contractor will not insulate the association's property from liens unless the bond is recorded in the public records together with a Notice of Commencement.
- A payment bond does not protect the association property from a lien if the contractor hired by the association is unpaid. It prevents liens from subcontractors and suppliers, but the general contractor contracting directly with the association still has rights to file a lien against the association property if payment is not made.

## INSURANCE ALERT!

All condominium associations are reminded that the amendment to Section 718.111(11), Florida Statutes, pertaining to insurance for condominium associations and unit owners, goes into effect on January 1, 2004.

Check with your association attorney about the possibility of amending your documents to reduce your coverage requirements and with your insurance agent about amending your coverage to conform to the Statute.

For those expecting premium rebates because of the new ability to curtail association coverage, please be advised that the insurance industry treats these amendments as revenue neutral.

**Accordingly, there will not be premium rebates for policies already in effect.**

## You've got MY VOTE

In a recent Arbitration case, *Cecchi v. Key Colony No. 2 Condominium Association, Inc.*, Case No. 02-5678, the Arbitrator ruled that the corporate owner of a condominium unit cannot designate a person unrelated to the Corporation as "voting representative" on a voting certificate. Section 718.103 (29) of the Florida Condominium Act defines a voting certificate as "a document which designates... the corporate... representative who is authorized to vote on behalf of a condominium unit that is owned by any [corporate] entity." In the *Key Colony* case, a number of corporations owning units at the condominium completed voting certificates identifying the Association's Manager as the "voting representative," entitling him to vote on behalf of these corporate unit owners at condominium membership meetings and, in particular, for the election of directors. An arbitration action was brought challenging this practice on the ground that allowing a corporate unit owner to select a voting representative who was neither a director,

officer, nor employee, of the corporation was tantamount to allowing a corporate unit owner to utilize a prohibited "general proxy" in the election of directors.

A "general proxy" gives the proxy holder unfettered ability to vote in whatever manner the **proxy holder** desires. One reason the Condominium Act prohibits the use of general proxies in the election of directors (with certain exceptions, such as timeshare condominiums and condominiums which have "opted out" of the statutory election of directors procedure) is to prevent individuals with no direct ownership connection to the units from collecting proxies from unit owners and thereby controlling the outcome of elections. Although a voting certificate is different from a proxy, the selection of an individual as "Voting Representative" **with no direct connection to the Corporation owning the unit** can arguably have the same effect as a prohibited general proxy, since such "unaffiliated Voting Representative" will be able to vote for whichever directors he or she

may want without oversight by the corporate unit owner.

The Arbitrator found such a result particularly troubling, if the unaffiliated Voting Representative also happened to be a director on the condominium board, or an association employee such as the manager. This increased the concern that such an unaffiliated voting representative, by being named on numerous corporate voting certificates, could control the election of condominium directors in favor of perpetuating the terms of incumbent directors. Hence, the Arbitrator held that, in a non-timeshare condominium which has not "opted out," the Voting Representative selected by a corporate unit owner to vote in the condominium's election of directors must either be a director, officer, employee or stockholder of the particular corporation, or must have an affiliation formally recognized in the corporation's documents (such as in the articles of incorporation, bylaws, or a corporate resolution).

The issue presented in the case of *Neuman v. Grandview at Emerald Hills, Inc.*, 2003 Fla. App. LEXIS 18388 (Fla. 4th DCA, 2003), is whether a condominium rule banning the holding of religious services in the auditorium of a condominium constitutes a violation of Section 718.123, Florida Statutes, which prohibits boards from passing rules that would unreasonably restrict a unit owner's right to peaceably assemble on the common elements.

The Grandview at Emerald Hills, Inc. is a condominium association with 442 members. The common elements of Grandview include an auditorium that members can reserve for social gatherings and meetings. In 1982, the Grandview Board passed a rule which provided that the auditorium could be used for meetings or functions of groups, including religious groups, when at least eighty (80%) percent of the members of said groups were Grandview residents. For many years, the only reservations made for the use of the auditorium were for the purpose of birthday or anniversary celebrations.

In January 2001, however, approximately forty (40) unit owners reserved the auditorium regularly on Saturday mornings for the stated purpose of holding a party, but they actually were conducting religious services. When it was discovered that the auditorium was being reserved to conduct religious services, other Grandview members complained that this should be an improper use of the common elements. After holding a meeting and soliciting unit owner input (70% of the owners voted in favor of prohibiting the holding of religious services in the auditorium), the Board voted unanimously to amend the auditorium rule to prohibit religious services. The Board's reasoning was that it did not want to have a common element tied up for exclusive use on a regular basis and to avoid conflicts between different religious groups competing for the space.

Appellants in this case argued that the Board's rule violated their Constitutional rights and violated Section 718.123, F.S., since, in their minds, religious services fell within the category of a "peaceable assembly." The lower court found

that since there was no state action involved, the unit owners' Constitutional rights of freedom of speech and religion were not breached by Grandview's rule. Moreover, the lower court also ruled that Grandview's rule was a reasonable restriction on the use of the common elements and, thus, did not violate Section 718.123 of the Condominium Act.

The Appellate Court affirmed the lower court's ruling, basing its decision on the statutory test of reasonableness for rules regarding the operation of common elements. The rule preventing the use of the auditorium for religious services was reasonable in light of the Board's concern for a serious potential for conflict of use, which could arise among competing religious groups. Having polled the members and determined that a majority of the members approved of the ban, the Board's rule assured that the auditorium was "available to unit owners in the condominium or condominiums served thereby and their invited guests."

## Rites DENIED