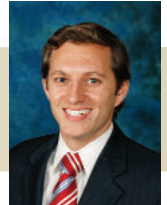


A Few Bad Apples ...



Common Sense Tips to Avoid Financial Loss

By **Brian Willis, Esq.**
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When a new member of the Association is elected to the Board of Directors, they can bring a fresh perspective to the Association's operations. In one recent lawsuit I was involved in, it took a new Board member asking the right questions to uncover years of financial mismanagement by the Association's manager.

The manager had a long standing relationship with the Association and had earned the trust of the Board of Directors. The Association allowed the manager to sign its checks. The manager received the Association's bills and bank statements. The manager was even allowed to open a credit card account, in the Association's name. The manager would provide regular financial reports and a CPA would audit the Association's records at the end of every year. Everything seemed fine, because the Association was not looking at the right records, its monthly bills and checks.

Everything changed when a new board member came along and started asking to see the Association's monthly bills. Once he saw the bills, he wanted to know why so many charges were being made to the Association's credit card. Like an unraveling sweater, the Association's financial picture came undone. The Association learned that the manager had used the Association's credit card to make over \$50,000 in purchases and the manager could not account for how the money had been spent.

That's when the Association came to us. I filed a lawsuit on behalf of the Association and began the discovery process, through which I obtained documents and information from the opposing

party, the manager. What we learned was astounding. The property manager managed multiple associations and was using the credit cards to purchase supplies and items for other Associations. We reviewed the bills as far back as we could obtain, and found regular charges that were made for other associations. Sometimes the charges were only a few dollars for a light bulb or air filter, sometimes they went into the thousands. Over almost a decade those small charges added up to big losses for my client.

The manager claimed that every dollar had been properly accounted for and paid back, but was never able to account for all of the lost money. We uncovered hundreds of checks from many of the manager's other associations. Thousands of dollars was apparently being shuffled back and forth between associations and the property manager was signing all the checks, for all the associations.

While this was an extreme case, simple misappropriation of association funds happens far too often. Association's want to trust the professionals they work with to do what is right. But, to protect the association, and prevent fraud and abuse, the Board of Directors has a fiduciary duty to ensure that someone is independently reviewing all income and expenses. If only one person, whether it be an accountant, board member, or property manager controls all of the bills and all of the payments, it is simply too easy for that individual member to misuse Association funds and cover up his or her actions.

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Owner Won't Leave?

Then Enforce Your Lien Foreclosure Judgment Through a Writ of Possession

By Jay Roberts, Esq.
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Your association has filed a lien foreclosure action and the court has issued a final judgment of foreclosure and taken title following the foreclosure sale. ***What happens if the owner still refuses to leave the property?*** This is where writs of possession come into play.

A final judgment of foreclosure entitles the successful bidder at the foreclosure sale to have possession of the subject property exclusive of all those named as defendants in the foreclosure action. A writ of possession is simply a direction from the court to the sheriff's department to place the successful bidder at a foreclosure sale in actual possession of the property that was the subject of the foreclosure action once the Clerk of Court has issued a Certificate to the bidder. Since the successful bidder is entitled to the writ of possession, the issuance of the writ is actually considered a ministerial function and it is issued by the Clerk of Court. However, the Clerk will not issue a writ of possession without

(1) a final judgment that includes language directing the Clerk of Court, to issue the writ of possession; or (2) a post-judgment order from the court directing the court to issue the writ of possession.

Once issued by the Clerk of Court, the writ of possession will be served on the property by a deputy sheriff. The sheriff's department will charge an administrative fee for service of the writ of possession. Depending on the local procedures of your sheriff's department, the deputy sheriff may post the writ of possession on the door giving the defendants until the end of the day to vacate the premises, or the deputy may stay at the subject property until the defendants and personal items are removed. If the deputy sheriff serves the writ of possession by posting it on the door, he/she will tell you to contact the sheriff's department to arrange a time for another deputy to return if the defendants do not leave of their own accord. We often hear the following questions from community leaders:

What if the lender forecloses?

Q: If a lender gets a final judgment of mortgage foreclosure, but does not follow up with taking possession of the property, can the association get a writ of possession and force the lender to take actual possession of the property?

A: *No. Only the person/entity which takes title to the property following the foreclosure sale is entitled to request a writ of possession. However, once a certificate of title is issued following a mortgage foreclosure action, the person/entity on the certificate of title is liable for assessments regardless of whether the person/entity takes actual control/possession of the property.*

What does it cost?

Q: Is the administrative fee standard across the state?

A: *No. The fee is set by the individual counties. Some counties charge a flat fee, whereas other counties have fees that vary depending on how many occupants are to be removed. You can contact your local sheriff's office to inquire about these fees.*

Does it take a long time?

Q: How long does the process take?

A: *It depends on the individual county. It can take a few weeks in some instances as one must rely on the Clerk of Court to issue the writ of possession to the sheriff.*

What if the owner leaves on his or her own – do we still have to take this extra step?

Q: Is a writ of possession always required even if the property was abandoned?

A: *Obtaining a writ of possessions is the safest course of action to ensure the Association has legally taken possession, even when the property appears abandoned.*

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Based on the firm's years of experience with community Associations, we suggest that an association institute the following practices, to minimize the opportunity for fraud to occur:

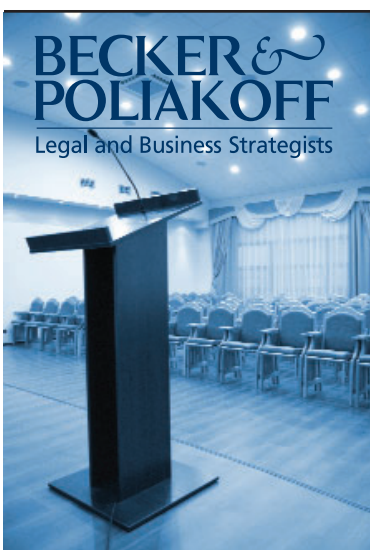
- ✓ Two signatures should be required on every check, one signature being an Officer or Director.
- ✓ The Board should personally verify that the signature cards for the bank accounts are accurate, and that no additional signatures have been added.
- ✓ The Board should insist on reviewing original bank statements in conjunction with reconciliation of the accounts.
- ✓ Use on-line banking, or other banking services where the Association can verify that received checks are consistent with checks signed by the Association.
- ✓ The bank records should be reconciled by a person or entity other than the person writing the checks (and, the person reconciling the bank records should have the authority to report directly to the Board).
- ✓ Never pre-sign checks.
- ✓ The annual year-end financial report (Audit, review or compilation) should be prepared by an independent CPA, who is not affiliated with the person or entity handling the Association's day-to-day financial and accounting operations.
- ✓ Require that a photocopy of the check be attached to each invoice for which the check is payment.
- ✓ Require bank transfers to be made only by written authorization of the Board, with a copy sent to the President or other authorized officer.

The Association should also protect itself from losses by obtaining fidelity or dishonesty coverage, a type of insurance policy that pays money to the Association when one of its board members steals association funds. These policies are required by statute for condominium associations and strongly recommended for homeowners' associations. The coverage must include damages from 'wrongful acts' of the manager or any agents, employees, directors and officers.

Watch Out for Broad Indemnification Clauses:

Finally, a quick point about contracts with managers and other vendors, these contracts frequently contain "indemnification clauses." An indemnification clause provides that when a manager is sued in the course of his work for the association, the association will cover the costs of the manager's defense and, ultimately, pay any damages from association funds. In the case I discuss above, the manager claimed that the association was required to pay his attorneys' fees even though the lawsuit involved his own wrongful actions. We successfully fought the manager's attempts to use the indemnification clause against the association, but the entire issue could have been avoided if the management contract expressly stated that the indemnification clause did not apply to lawsuits between the association and the property manager.

It is a sad fact of the Association business that unscrupulous individuals will try to take advantage of Associations. The Association's board has a fiduciary duty to the Association and must act to protect the Association's finances. For one client, it took a new board member, asking the right questions, to unravel years of financial mishandling. Taking the above steps to ensure independent oversight of the association's finances will help protect your association.



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WHO SHOULD ATTEND?

Board Members of:

- Condominium Associations
- Cooperative Associations
- Timeshare Associations
- Homeowners' Associations
- Mobile Home Associations

Owners of:

- Condominiums
- Cooperatives
- Timeshares
- Single Family Homes
- Mobile Homes

Property Managers:

- CAMs
- Other Community Association Professionals

Control Over Owners/Residents

Is the Association Going Too Far?

By Joseph E. Adams, Esq.
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In 2002, the Florida Supreme Court issued an opinion which concluded that, with limited exceptions, every unit owner purchases a condominium unit with notice that his or her property rights can be altered through an amendment to the declaration of condominium. The case of *Woodside Village Condominium Association, Inc. v. Jahren*, 806 So. 2d 452 (Fla. 2002) is considered by some to be the most significant condominium governance decision issued by the Florida Supreme Court in the near half-century during which Florida has had a condominium statute (the first Florida Condominium Act was adopted in 1963).

At issue in *Woodside* was an amendment to a declaration of condominium which severely limited (nearly banned) a unit owner's right to lease. The court ruled that the right to lease was conferred by the declaration of condominium, that the declaration of condominium is itself an amendable contract, and thus the rights conferred by the declaration are likewise amendable through amendment of the declaration.

The application of the *Woodside* ruling to homeowners' associations is perhaps a subject that could be debated. The *Woodside* Court held that condominiums are strictly a "creature of statute" and seemed to place some emphasis on that point in its decision. Homeowners' associations are not necessarily a "creature of statute", but are increasingly becoming subject to a statutory regime very similar to that which is applicable to condominiums. In my view, the courts would be likely to apply the *Woodside* doctrine to HOAs. The basic underlying theory is that your rights are subject to an amendable contract; the declaration of condominium in the condominium context, the declaration of covenants in the HOA context.

However, the laws themselves set forth certain rights which cannot be changed without every owner's approval. For example, the Homeowners' Association Act provides that no amendment may materially and adversely alter the proportionate voting interests of a parcel, or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless unanimously approved by all owners and lienholders, such as mortgagees.

In addition, somewhat unique to the homeowners' association context, there is a line of cases (mostly from trial courts, whose pronouncements are not technically binding as "the law") that hold that declaration amendments cannot change the "general scheme of development" without unanimous approval of all of

the owners. The most common application of this doctrine involves attempts to impose mandatory golf club membership upon homeowners who originally bought their homes in communities where golf club membership was voluntary. In response to the mandatory golf club membership cases, the Homeowners' Association Act was amended last year to provide the ability to create mandatory club membership on less than unanimous approval, if authorized by the declaration.

A wholly separate, equally interesting and somewhat even more complicated legal discussion, involves the extent to which statutory amendments can be retroactively applied to affect vested property rights. This issue has also been the subject of a recent Florida Supreme Court case. In *Cohn v. The Grande Condominium Association, Inc.*, published March 31, 2011, the high court held that 2007 changes to the condominium statute which adjusted proportionate voting rights between residential and commercial units in mixed-use developments could not be retroactively applied, based on constitutional grounds.

Like the U.S. Constitution, Article I, Section 10, of the Florida Constitution prohibits the legislature from passing a law "impairing the obligation of contracts". Declarations of community associations are considered, for most purposes, to be contract. So, the general rule is new laws cannot change the specific rights and obligations set forth in community association Declarations. The *Cohn* decision follows long-standing precedent in Florida regarding the applicability of statutory amendments to condominium or community association operations. If the governing documents of the association contain "magic language" incorporating statutes (in this case, the Condominium Act) as amended from time to time, statutory changes impact operations, rights and obligations of owners, the association governing the owners and, in some cases, third party vendors or service providers. There are other exceptions and as mentioned in the previous Community Update, there is a specific analysis required to determine whether a statute will control over an existing provision in the documents.

**EVERY UNIT OWNER PURCHASES A
CONDOMINIUM UNIT WITH NOTICE THAT
HIS OR HER PROPERTY RIGHTS CAN BE
ALTERED THROUGH AN AMENDMENT TO
THE DECLARATION OF CONDOMINIUM**