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CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

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Effectiveness of Suit Limitations in Community Association Governing Documents

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Construction defects plague many buildings in Florida, leading to lawsuits against developers and contractors. Seasoned developers have tried placing limits on their liability in a variety of ways, including inserting provisions in associations' governing documents to limit associations' and owners' ability to bring a lawsuit against the developer. While developers have been creative in coming up with ways to limit liability exposure, this article focuses on what developers may not include in the governing documents that govern homeowner and condominium associations.

Governing Documents

To form a condominium or homeowners association, among other things, one must record a declaration in the respective county public records. Fla. Stat. § 718.104. "The declaration of condominium, which is the condominium's 'constitution,' creates the condominium and 'strictly governs the relationships among the condominium unit owners and the condominium association.'" *Neuman*, 861 So. 2d at 496–97 (quoting *Woodside Vill. Condo. Ass'n v. Jahren*, 806 So. 2d 452, 456 (Fla.2002)). The same applies to declarations for a homeowners association.

These declarations are

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: tbench@rumberger.com or tderr@rumberger.com

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binding documents and contain covenants, conditions, and restrictions for the community. Such covenants, conditions, and restrictions pertain to a range of topics including, but not limited to, whether pets are allowed; where to store garbage cans; regulation of TV antennas; and the operation of home businesses. The developer drafts these declarations and, while ambiguities are construed against the drafters,[1] developers are still given wide latitude in drafting declarations. Further, restrictions which may be found in a declaration of condominium are clothed with a very strong presumption of validity when challenged. *See, e.g., Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1091 (Fla. Dist. Ct. App. 2014) (citing *Woodside Vill. Condo. Ass'n,*, 806 So.2d at 457).

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Developers across the country have used declarations in a number of different ways in an attempt to limit their exposure. In Florida, developers have attempted to define themselves as non-developer entities with less liability exposure; to make unit owners responsible for all aspects of the maintenance and repair of the common areas; and to prevent assignment of certain claims, to name a few. *Castellanos v. Citizens Prop. Ins. Corp.*, 98 So. 3d 1180, 1182 (Fla. Dist. Ct. App. 2012); *Cedar Cove Efficiency Condominium Ass'n, Inc. v. Cedar Cove Properties, Inc.*, 558 So.2d 475 (1990)). These cases are illustrative of the efforts developers have gone through to limit their liability exposure. A case from Massachusetts is especially illustrative of the concerns that arise when developers seek to cut off claims through the governing documents.

In *Trustees of Cambridge Point Condominium Trust v. Cambridge Point, LLC*, No. MICV-2014-03136, 2016 WL 9753783 (Mass. Super. Nov. 18, 2016), appeal argued, SJC No. 2017-P-0113 (Mass. 2017) a developer attempted to limit its liability under the governing documents by incorporating prerequisites to filing suit in the bylaws for the plaintiff condominium association. *Cambridge Point*, No. MICV-2014-03136, 2016 WL 9753783. The bylaws incorporated into the condominium declaration required the trustees, before initiating any litigation against anyone who is not a unit owner, 1) to deliver a copy of the proposed complaint to all unit owners; 2) to specify a monetary limit of the amount to be paid as legal fees and costs in the proposed litigation; 3) to inform all unit owners that, if they consent to the initiation of the litigation, they will forthwith be separately and immediately assessed this amount of legal fees and costs as a special assessment; and 4) within sixty days after a copy of the proposed complaint had been delivered to the unit owners, to receive the written consent of not less than eighty percent of all unity owners to bring the litigation. *Id*.

The final requirement, that there be at least eighty percent approval, was especially troubling since the developer seeking to limit liability owned over twenty percent of the condominiums. *Id*. Effectively, this meant that the developer could simply withhold consent for filing suit and the community would never reach the

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required eighty percent. *Id*. The Court in Cambridge Point found that while Massachusetts' Condominium Act allowed for such provisions, public policy prohibited such a limitation on the Association's right to initiate litigation. *Id*.

The developers in *Cambridge Point* tried extreme measures in limiting liability through the declaration. While the case was in Massachusetts, the behavior of this developer begs the question as to what is keeping developers in Florida from doing the same thing? The answer is clear for homeowners associations, but not as clear for condominium associations.

Homeowners Associations

Declarations for homeowners associations are governed by Fla. Stat. § 720.3075, titled: Prohibited Clauses in Association Documents. This statute spells out which clauses are null and void as a matter of public policy. Fla. Stat. § 720.3075 explicitly proscribes provisions which restrict, or have the effect of restricting the filing of a lawsuit against the developer. This statute also prohibits the inclusion of clauses that allow the developer to unilaterally make changes to association documents after the association obtains control over the property, as well as clauses that allow for the developer to have more than one vote per residential lot.

Accordingly, Florida law is very friendly for homeowners, by explicitly prohibiting any clauses in declarations that limit a homeowners association from filing a lawsuit against the developer. Thus, the answer as to what keeps developers from incorporating clauses that prevent suit by a homeowners association is Fla. Stat. § 720.3075.[2] The answer is not as clear for condominium associations.

Condominium Associations

Florida Statutes Chapter 718 applies to condominiums. As to declarations, Fla. Stat. § 718.104 requires that a declaration contain a wide variety of governing provisions including, but not limited to, the name of the condominium, a survey of the land, the percentage of fractional shares of liability for common expenses of the condominium, a copy of the bylaws, and "other desired provisions not inconsistent with this chapter." *Id*. Additionally, Fla. Stat. § 718.112 lists required and optional provisions to be contained in the bylaws. Fla. Stat. § 718.112 provides that bylaws must provide for a number of association matters, including, but not limited to, administration of the association, voting requirements, meetings, budgets, and amendments to bylaws. The optional provisions in Fla. Stat. § 718.112 provide that bylaws may provide for methods of adopting or amending administrative rules and regulations, restrictions and requirements for use, maintenance, and appearance of the units and common elements, as well as "other provisions which are not inconsistent with this chapter or with the decla-

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ration, as may be desired."

Where Fla. Stat. § 720.3075 expressly limits what can be included in a homeowners association declaration, Fla. Stat. §§ 718.104 and 718.112 list provisions that must or may be in the declaration. Both Fla. Stat. §§ 718.104 and 718.112 allow for the inclusion of "other desired provisions not inconsistent with this chapter," but neither statute contains any guidance as to what provisions might be inconsistent with the chapter. This language gives developers broad discretion in drafting declarations of condominium when compared to homeowner's association declarations.

A full reading of Florida Statutes Chapter 718 reveals that there is no condominium equivalent to Fla. Stat. § 720.3075. Fla. Stat. § 95.03 prevents the inclusion of contractual provisions that abridge the time period for bringing suit to a period shorter than provided for in the statute of limitations, but does not place any other limitations on provisions that can be included in a declaration. Thus, developers drafting declarations for condominium(s) appear to have much more control when it comes to limiting liability exposure.[3] However, in cases where the declaration has liability-limiting provisions that are overly aggressive, courts will likely follow the rationale from *Cambridge Point* and hold that such provisions are null and void as a matter of public policy.

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Conclusion

By statute, homeowners associations in Florida are better protected from restrictive declarations than condominium associations. While there are inherent differences in living in a townhome when compared to a condominium with more common elements, these differences do not seem to justify the statutory disparity in owner protection. Although public policy can certainly void overly aggressive claim restrictions in governing documents, buyers of homes in associations should read the governing documents of their communities before making a purchase.

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[1] *Kaufman v. Shere, App.*, 347 So.2d 627 (Fla. Dist. Ct. App. 1977); *Santa Rosa BBFH, Inc. v. Island Echos Condominium Ass'n, App.*, 421 So.2d 534 (Fla. Dist. Ct. App 1982) dismissed 426 So.2d 28. (Any ambiguity in declaration of condominium is to be construed against author of the declaration.)

[2] Additionally, conditions to all homeowner association covenants must be reasonable. *See Holiday Pines POA, Inc. v. Wetherington*, 596 So. 2d 84 (Fla. 4th DCA 1992); *Bay Island Towers, Inc. v. Bay Island-Siesta Association*, 316 So. 2d 574 (Fla. 2d DCA 1975); *Richardson v. Deerwood Club, Inc.*, 589 So. 2d 937 (Fla. 1st DCA 1991); *Klinow v. Island Court at Boca West Property Owners' Ass'n, Inc.*, 64 So. 3d 177 (Fla. 4th DCA 2011).

[3] Illustrative case law on the subject is lacking.

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Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming Events

October 4-5, 2018
ABA Forum on Construction Law
Fall Meeting
It's Lonely At The Top: Building a Successful Team with the Owner
Le Centre Sheraton Montreal Hotel
Montreal, Quebec, Canada

March 7-9, 2019
Construction Law Institute
JW Marriott Grande Lakes Hotel
Orlando, Florida