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COMMUNITY ASSOCIATION NEWSLETTER

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SPECIAL ALERT

FLORIDA CONDOMINIUMS AND HOAs GIVEN NEW LIABILITY PROTECTIONS FOR COVID-19-RELATED CLAIMS

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On Monday, March 29, 2021, Governor Ron DeSantis signed a bill into law that among other things, establishes liability protections for COVID-19-related claims against Florida businesses (including charitable organizations and corporations not for profit), municipalities, educational institutions, religious institutions, and certain healthcare providers from coronavirus-related lawsuits if they made a good faith effort to follow the guidelines to prevent the spread of COVID-19.[1] The legislation establishes Sections 768.38 and 768.381 of the Florida Statutes.[2] The new Section 768.381 addresses heightened standards for claims brought against healthcare providers. This article focuses more on the new Section 768.38 which relates to business entities such as community associations. The full text of the legislation may be found in Chapter 2021-001 of the Laws of Florida on the Florida Department of State's website under the State Library and Archives of Florida (laws.flrules.org).

The new legislation, although not a blanket protection for community associations, should bring comfort to many community associations throughout the State that were concerned with exposure to liability for closing or reopening community amenities. The law was signed very early in the 2021 legislative session and has an unusually early effective date of March 29, 2021. It is clear that the legislature wanted to bring some peace to businesses, municipalities, educational institutions, religious institutions, and certain healthcare providers over the heavily debated reopening of businesses, government offices, schools, and churches throughout the State knowing that many of these entities were balancing coronavirus health and safety concerns with economic and employment concerns. Accordingly, community associations can begin to evaluate decisions made during the pandemic and decisions to be

[1] Ch. 2021-001, Laws of Fla.

[2] For the purposes of this article, internal citations will be made to Section 768.38 and Section 768.381 as opposed to the legal citations to the various sections of Chapter 2021-001, Laws of Florida.

made in the near future as concerning COVID-19 precautions. The key takeaway from this new law is to continue following the guidance from health officials to the fullest extent possible and to refrain from willfully and recklessly endangering the health and safety of your community.

Throughout the pandemic, many of our community association clients have been reaching out to our office about concerns with closing and reopening community amenities and recreational facilities. Among those concerns were questions of liability, insurance coverage, and exposure for individual Board members. Many of our association clients were advised by insurance carriers that their policies would not extend coverage for coronavirus-related claims against the association. Reopening facilities, particularly indoor facilities, became a large concern for associations whose members were pressuring the Board to grant access to facilities like pools, tennis courts, fitness rooms, and community clubhouses, among many others. As restaurants and fitness centers started to reopen across the State, many of our community associations began reopening their facilities subject to guidance published by the United States Centers for Disease Control and Prevention ("CDC"). The general consensus was that at varying levels of capacity and cleaning schedules, the community facilities could reopen so long as residents and guests wore facemasks, maintained six feet of social distance between unrelated parties, and limited large gatherings. Of course each community had specific needs that were taken into consideration by their Board members in the process of shutting down and reopening the community amenities. Members were, or should have been, encouraged to take personal precautions, use hand sanitizer, and wear facemasks that would prevent the spread of COVID-19 in the community.

The new legislation serves to protect those entities and establishments that have made a good faith effort to comply with the CDC guidance or with other authoritative guidance throughout the pandemic. Community associations that have followed the guidance can rest assured that it will be very difficult for individuals to file frivolous lawsuits against the association for COVID-19-related claims. The new Section 768.38(2)(b) defines COVID-19-related claim as follows:

> "COVID-19-related claim" means a civil liability claim against a person, including a natural person, a business entity, an educational institution, a governmental entity, or a religious institution, which arises from or is related to COVID-19, otherwise known as the novel coronavirus. The term includes any such claim for damages, injury, or death. Any such claim, no matter how denominated, is a COVID-19-related claim for purposes of this section. The term includes a claim against a health care provider only if the claim is excluded from the definition of COVID-19-related claim under s. 768.381, regardless of whether the health care provider also meets one or more of the definitions in this subsection.

The law requires complaints in COVID-19-related claims to be pled with particularity which means that general allegations or conclusory statements will not suffice to meet the pleading requirement. The complaint must include specific details about the circumstances surrounding the claim. Along with the complaint, the plaintiff must file an affidavit signed by a physician actively licensed in Florida which attests to the physician's belief, within a reasonable degree of medical certainty, that the plaintiff's COVID-19-related damages, injury, or death occurred as a result of the defendant's acts or omissions. Whether these sorts of affidavits from physicians will be simple or difficult to come by remains to be seen. If the plaintiff does not comply with the requirement to plead with particularity and attach an affidavit from a physician as to the physician's belief, within a reasonable degree of medical certainty, that the plaintiff's COVID-19-related claim is the result of the defendant's acts or omissions, then the

court must dismiss the action without prejudice as a matter of law—which means the case is dismissed but the plaintiff may make corrections and re-file the lawsuit.

The court must also determine as a matter of law whether the defendant made a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued. A cause of action generally accrues when the facts giving rise to the cause of action occur, for example the date of damages, injury, or death. In this context, the date of infection and health concerns subsequent to infection will play a major role. What all of this means for community associations more generally is that the court will determine whether the association made a good faith effort to comply with authoritative or government-issued health standards such as the guidelines published by the CDC or the Florida Department of Health ("FDOH") to name a few. Local ordinances may also play a role in this stage of the proceeding.

If the court determines that the defendant made a good faith effort to comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued, then the defendant will be immune from civil liability. If more than one source or set of standards or guidance was authoritative or controlling at the time the cause of action accrued, the defendant's good faith effort to substantially comply with any one of those sources or sets of standards or guidance confers such immunity from civil liability. What this should mean for community associations is that if you have been properly following the CDC or FDOH guidelines throughout this pandemic, the community association should be immune from civil liability for COVID-19-related claims by members, guests, vendors, contractors, etc.

If the court determines that the defendant did not make a good faith effort to comply with authoritative or government-issued health standards at the time the cause of action accrued, the plaintiff may proceed with the action so long as the plaintiff can demonstrate the defendant's gross negligence by clear and convincing evidence—otherwise the defendant is not liable for any act or omission relating to a COVID-19-related claim. Clear and convincing evidence generally means that the evidence is highly and substantially more likely to be true than untrue (or that it has substantially greater than a 50% likelihood of being true). The gross negligence standard requires the plaintiff to show that the defendant exercised a conscious and voluntary (willful) disregard for the need to use reasonable care, which was likely to cause foreseeable grave injury or harm to persons, property, or both.

Ordinary negligence by contrast constitutes the failure to exercise reasonable care. Gross negligence adds another layer to ordinary negligence in that it is willful behavior exercised with extreme disregard for the health and safety of others which is likely to cause foreseeable harm. The burden of proof is on the plaintiff to demonstrate that the defendant did not make a good faith effort to comply with the health standards at the time the cause of action accrued and to show that the defendant acted with gross negligence as it concerns the health and safety of others at the time the cause of action accrued. The requirement to demonstrate, by clear and convincing evidence, that the defendant was acting with gross negligence as to the health standards will protect many community associations throughout the State of Florida that were making a good faith effort to follow the CDC guidelines (or other controlling authority) or requiring their members to do so.

Keep in mind, the law establishes a limitations period within which COVID-19-related claims must be brought. The new Section 768.38(4) states, "A plaintiff must commence a civil action for a COVID-19-related claim within 1 year after the cause of action accrues or within 1 year after the effective date of this act if the cause of action accrued before the effective date of this act." Therefore any COVID-19-related claims that accrued before March 29, 2021 must be filed by March 29, 2022. Any claims that accrue after the effective date of the act may be brought within a year of accrual. The law does not apply in civil actions commenced before the effective date.

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 Board Certified by The Florida Bar in both Real Estate Law as well as in Condominium and Planned Development Law. He is a 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 and also practices in the field of Labor/Employment Law. Charles Mann (charlesmann@paveselaw.com) is Board Certified by The Florida Bar in both Real Estate Law as well as in Condominium and Planned Development Law and a Partner in the Pavese Law Firm. Steven C. Hartsell (stevehartsell@paveselaw.com) is Board Certified by The Florida Bar in Condominium and Planned Development Law and a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is Board Certified by The Florida Bar in both Real Estate Law as well as in Condominium and Planned Development Law and a Partner in the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner in the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is Board Certified by The Florida Bar in both Condominium and Planned Development Law as well as in Construction Law and a Partner in the Pavese Law Firm. Alexander J. Menendez (ajm@paveselaw.com) is an Associate in the Pavese Law Firm. Amy S. Thibaut (amythibaut@paveselaw.com) is an Associate in the Pavese Law Firm. Alton Kuhn (altonkuhn@paveselaw.com) is an Associate in the Pavese Law Firm. Vanessa Fernandez (vanessafernandez@paveselaw.com) is an Associate in the Pavese Law Firm. Ryan N. Swick (ryanswick@paveselaw.com) is an Associate in the Pavese Law Firm. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is Of Counsel in the Pavese Law Firm.

With the exception of 2 other law firms, no other law firm within the entire State of Florida has more lawyers who are board certified in Condominium and Planned Development Law.

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