

Easy to Stumble into Second Disaster

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Although this column runs every Thursday, I have agreed with the News-Press editors to have it submitted for layout by Monday of each week, three days before it is published. In the world of community association law and operations, there is little in the way of late-breaking news that changes in a span of three days. However, I have learned that hurricane news can change drastically in the span of three hours, not to mention three days.

The last several issues of this column have focused on challenges and issues faced by associations arising from catastrophic events such as Hurricane Charley and Hurricane Frances. As I pen this week's piece, we will apparently need to add Ivan to that list, although hopefully not for the primary benefit of Southwest Florida readers.

Today is Day 34 for Charley's victims. Although most associations have made good progress in making temporary repairs to damaged communities, I have yet to see one association with significant damage that has received an offer from their insurance company to adjust the loss.

That is not to say that insurance companies and adjusters are dragging their feet. The magnitude of many of these claims, combined with the tax on resources attributable to Frances and Ivan, have made this a slow-going process.

Nerves are beginning to fray as residents in damaged communities wonder how long they will be displaced from their homes. Owners of investor

and rental units are getting nervous about whether they will be able to make mortgage payments if the units cannot be made ready for tenant occupancy during the upcoming tourist season.

Hopefully, notwithstanding the additional strains on the system from Frances and Ivan, heavily damaged communities will soon reach the phase where rebuilding may begin. Part of the rebuilding process includes selecting the contractor to do the work, and making sure that the association's interests are protected.

The following are a few tips for associations in moving forward in this process:

Thoroughly Review Proposed Contracts: Asking your lawyer to take a look at a contract after you have signed it is usually of limited or no value. Many contractors entice associations with "simple" forms, often one or two pages in length. You can bet that these were prepared by the contractor's lawyer, and will offer little in the way of protection to the association. Be wary of forms generated by trade industry groups, such as engineers and architects. These forms tend to protect the design professional, the contractor, and the owner (association), in that order.

Be Prepared For Disputes: Disputes, particularly in large construction projects, are not uncommon. There should be procedure for informal resolution of discrepancies in the field, and also a procedure

for formal dispute resolution. The party who prevails in the dispute should be entitled to be made whole, including any attorney's fees they might incur in resolving the dispute.

Contact Your Insurer: Many policies require that a representative of the insurance company make inspections before the work begins. Further, don't sign a contract and expect the insurance company to pay for the work if they have not been involved in that process as part of adjusting the claim.

Select Only Licensed and Qualified Contractors: General contractors and many specialty contractors must be registered with the state. Licensure and complaints against licenses can be checked on-line. Many cities and counties also require specific licensure and registration. Check references. Discuss bonding with your design professional and counsel. A bondable contractor is usually preferable to a non-bondable contractor.

Verify Contractor's Insurance: Insurance coverage may differ widely for items such as premises liability and the liability for the acts of employees. An association would typically want to be an "additional insured" under the policy. Both your insurance agent and legal counsel should assist in making sure that adequate insurance protections exist.

Use a Design Professional: Accepting the contractor's specifications at face value is probably the largest source of construction contract disputes, and a fertile source for both disappointment and legal entanglement. Every significant construction contract should include specifications that are either prepared or approved by an independent qualified party, who is beholden only to the association. This is especially important when new work must be tied in with pre-existing building components, or when new codes must be adhered to.

Review Warranties: Many manufacturer's warranties are nearly worthless. For example, a warranty that is only good as long as the contractor/applicator is in business may be of no value if your contractor goes out of business.

Have Your Attorney Participate in the Contract Process: There are many issues commonly found in construction contracts that will not be addressed in the "simple form" your contractor provides. You will want to look at areas such as indemnification (hold harmless), time of completion and liquidated damages, bonding, compliance with lien laws, and other important items.

Unfortunately, experiences from past hurricanes such as Andrew and Opal have shown us that entering into an ill-advised construction contract, which may involve millions of dollars, can be a bigger disaster than the storm itself. ⚖️



Question: Hurricane Charley caused roof damage to my home. The roofer who came to my house after the hurricane to give me an estimate told me that the roof company that installed a new roof two years ago put on the new roof over several layers of rotten wood. Is there any legal action I can take against the roof company? L.F. (via e-mail)

Answer: It depends on the scope of your re-roofing contract from two years ago. You should have an independent roofing consultant (there are several in this area) review the findings of your new contractor. If the previous re-roofing job violated industry standards of good workmanship, you may have a claim against the roofer, for damages you suffered but would not have suffered if the roof was installed correctly.

The statute of limitations for most claims of this nature is four years from when the work was completed. There may also be exceptions for

“latent defects,” where the limitations period is typically four years from the date you discovered or should have discovered the defect.

If you are going to pursue a claim, you should also engage an attorney. Florida recently enacted a fairly complicated pre-suit statute involving construction deficiencies, which is found at Chapter 558 of Florida’s laws.

Finally, your insurance company should immediately be brought into the picture. If they pay for the damage caused by the originally-shoddy construction, assuming that such occurred, they may have legal rights called “subrogation,” where they could also seek recovery against the original roofer.

Question: I own a condominium that was recently damaged by Hurricane Charley. The condo association has sent me a letter indicating that a vote will be taken to either rebuild the units and to approve a special assessment or to terminate the condominium. I think the option to rebuild and assess is pretty straight forward but I do not understand the reason termination is being considered and what effect it will have on my property. R.K. (via e-mail)

Answer: Your condominium documents probably contain a clause similar to that found in the documents for the majority of local condominiums. These clauses, often called “Repair After Casualty,” provide that if a certain number of the units are rendered “uninhabitable,” or “untenantable,” the condominium will not be rebuilt, and the condominium will be “terminated”, unless the owners vote to rebuild. Termination means that the property will either be sold off, or divided for use among the unit owners as “tenants in common” (with no association, no agreement for operating common property, and the like).

In my view, there are few situations where damage from Hurricane Charley will be substantial enough to make termination of the condominium

a sensible potential option. It is very important to understand that under most insurance policies, the settlement the association will receive may be much different in a termination scenario (where you do not rebuild) than in a rebuilding scenario. Most insurance policies will provide replacement cost value if you rebuild. Conversely, if the structures are not to be rebuilt, many policies provide for “actual cash value,” which is known in the insurance industry as ACV. ACV is usually a much lower number than replacement cost, since ACV factors depreciation in reaching the settlement amount.

Unfortunately, the law does not define “habitability” or “tenantability,” and I have yet to see a set of condominium documents that does so either. Apparently, your board feels that the damage is significant enough to invoke the issue and trigger the provisions for a unit owner vote.

Question: Our condominium community sustained fairly significant damage as a result of Hurricane Charley. Although there is much work to be done, our board feels that things can be put back together in the next couple of months. At a recent board meeting I attended, there was mention of the need for a possible special assessment due to our deductible and co-insurance penalty. I understand what the deductible is, but do not understand what a “co-insurance penalty” is. Could you elaborate? J.B. (via e-mail)

Answer: As explained to me by my acquaintances in the insurance industry, co-insurance is a formula that is applied when a property owner elects to procure less than full insurance. Let’s say that a condominium building has a one million dollar replacement cost value. The association decides to only insure the building for eight hundred thousand dollars, or eighty percent of its insurable value. Let’s further assume that a one hundred thousand dollar casualty loss occurs, for example from a hurricane.

The association would only receive eighty thousand dollars for the one hundred thousand dollar loss, because the “co-insurance clause” provides that every loss will be factored by the percentage of insured amount to insurable value (in our example, eighty percent). Then, the deductible would be subtracted as well. In most named-hurricane policies I have seen arising from Charley, that is three percent. You would therefore deduct

three percent of the building’s eight hundred thousand dollar insured value, for another deduction of twenty-four thousand dollars.

When subtracted from the eighty thousand dollar amount because of co-insurance, the total pay-out on the one hundred thousand dollar loss would be fifty-six thousand dollars, or slightly more than half of the actual cost to fix the problem. ⚖️

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners’ associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm’s Naples and Ft. Myers offices.

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