



## Bill Looks to Change Rules for Condos

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On March 7, 2006, the Florida Legislature convened for its regular, annual 60 day Session. In what has become an annual tradition, a dozen or so bills, amendments, and proposals affecting the operation of community associations are floating around the legislative hopper. In the next several editions of this column, we will review some of the more significant proposals being debated in our state's capitol.

One piece of proposed legislation sure to generate heated debate is House Bill 1227/Senate Bill 2570. This Bill, forty-eight pages in length, is primarily aimed at condominium associations, and would impose some fairly fundamental changes in the status quo. Here's a look at some of the highlights of HB 1227/SB 2570:

- **Certified Mail Notice of Proposed Amendments:** Section 718.110(1)(d) would be added to the Florida Condominium Act to provide that notice of proposed amendments to the declaration of condominium must be sent to unit owners by certified mail. Setting aside cost factors, the apparent intent is to make sure that every unit owner receives notice of proposed amendments, a laudable goal. In reality, requiring associations to use certified mail as a means of notice will likely result in less people actually receiving notice than under the current method, regular U.S. Mail or hand-delivery with written receipt. The postal service will not forward certified mail, even if a forwarding address is on file. Further, people who

are not at home during regular business hours, such as those who work during the day, have a decidedly difficult time in receiving certified mail, since it usually requires a trip to the post office to pick it up, and the post office is only open while they work.

- **Financial Reporting Waiver:** Section 718.111 (13)(d) of the Condominium Act would be amended to provide that under no circumstances may an association or board waive the financial reporting requirements of the law for more than two consecutive years. Since the law does not empower the board to waive these requirements anyway, it is unclear why this provision is in the proposed new law. Prohibiting unit owners from voting to waive financial reports, such as audits, will likely increase operational costs for many associations, which may be a bitter pill for some to swallow during a time of runaway insurance costs. The current law provides every condominium association with self-determination, where a majority of the owners must decide whether to waive the financial reporting requirements.
- **Reconstruction After Casualty:** A new Section 718.115(a) would be added to the law by this proposal, which is an apparent reaction to the 2004 and 2005 hurricanes. While there is a definite need to address post-catastrophe issues for condominiums, this proposal appears to incorporate outdated requirements from

boilerplate condominium documents used twenty years ago, which are no longer in favor. For example, the proposal would require the association to generate repair specifications and obtain rebuilding bids within sixty days of the casualty. While this sounds nice in theory, many remember the dark days of the summer of 2004, when many devastated properties had not even seen their first insurance adjuster after sixty days. The proposed change to the law would require termination of a condominium with more than fifty percent damage, unless seventy-five percent of the owners agree to reconstruction within ninety days of the casualty. Unfortunately, there is absolutely no way a condominium which has suffered major catastrophic damage will have any idea within ninety days of the casualty whether the loss exceeds fifty percent of value. The change to the law would also require the engagement of an architect or post-disaster consulting, which may be appropriate in some cases, although a structural engineer is often more in need.

- **Certified Mail Inquiries From Unit Owners:** HB 1227/SB 2570 would significantly amend Section 718.112(2)(a)2 of the condominium statute. Under current law, if a unit owner files an “inquiry” with the board by certified mail, the board must give a “substantive response” within thirty days (the deadline can be extended to sixty days under

certain circumstances). To prevent harassment of boards, and the undue consumption of association resources for the benefit of one owner, the current law permits boards to adopt a rule limiting such inquiries to one per 30 day period. This proposal would eliminate the board’s right to limit the number of a unit owner’s “inquiries”, meaning that an owner could file one virtually every day.

- **Board Meetings:** Section 718.112(2)(c) of the Florida Condominium Act would be amended in two significant ways. First, the new law would provide that “no action [of the association] shall be taken” without an open meeting of the board. It is unclear how this would apply to the execution of the numerous day-to-day routine actions of an association, which in all other corporations, are administered by the officers of the corporation and/or their duly appointed agents, such as the community association manager. The second proposed change to this segment of the law would require the board to address agenda items proposed by a petition of twenty percent of the unit owners, which is currently the law for homeowners’ associations.

Next week, we will continue with a review of HB 1227/SB 2570, including a review of proposals for term limits, expanded powers for the Ombudsman, and other items of interest. ■

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*Send questions to Joe Adams by e-mail to [jadams@becker-poliakoff.com](mailto:jadams@becker-poliakoff.com) This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at [www.becker-poliakoff.com](http://www.becker-poliakoff.com).*

## Insurance Claim Denial Likely to Result in Litigation

**Question:** Our two condominium buildings sustained roof damage from Hurricane Charley. Our insurance company denied our claim but never sent anything in writing. We sustained more damage during Hurricane Wilma. Once again our claim was denied. Finally, two days ago we received the rejection in writing. We feel we have a very strong case for arbitration, but do not know how to proceed. Could you give us some information that might help us to get started? Thanks. M.C. (via e-mail)

**Answer:** Unfortunately, your question has become more common after the hurricanes of the last two years. Although you mention arbitration, these types of cases are much more likely to result in court litigation than in arbitration, unless the insurance policy itself requires arbitration. Given this fact, the Legislature enacted a condominium pre-suit mediation program within the Department of Financial Services.

This mediation program is available to associations which have buildings which suffered damage in any of the hurricanes of 2004 or 2005, and the association is unable to resolve the claim with the insurer. In those cases mediation is available at no cost to the association. Mediation is a negotiated settlement where the parties meet with an independent third-party who tries to get both parties to settle the claims.

The case only settles if both parties can agree on the settlement, the mediator cannot make the parties settle the case. This is different than arbitration where the parties present their case to the arbitrator who enters a ruling on the matter. If the pre-suit mediation is unsuccessful then the parties may proceed to court litigation.

Of particular note to associations is that the statute of limitations on these type of cases run five years after denial of the claim, so it is important to determine if there was a denial and when the denial occurred for each hurricane.

**Question:** The covenants for our homeowner's association state that renters (tenants) cannot have dogs, although

owners are allowed to keep pets. I want to rent my property to a person who has a small dog. I was under the impression that renters have the same rights as owners except for the fact that they cannot vote or attend board meetings. Is this correct? R.K. (via e-mail)

**Answer:** The state agency which administers condominiums has ruled that condominium documents may impose different requirements on tenants than exist for unit owners with respect to use of units. Accordingly, in the condominium setting, it is relatively clear that an association can prohibit tenants from keeping pets, through proper enactment of an amendment to the condominium documents. A condominium association cannot, however, discriminate against tenants in the use of common elements. For example, a condominium association could not declare that the swimming pool would only be open to tenants during certain hours, while open to unit owners at all times.

For HOA's, there is no state agency which makes similar pronouncements. The issue has not been addressed by the Florida courts. In my opinion, a properly enacted clause in the governing documents for a homeowner's association that prohibited tenants from keeping pets, while permitting pets for parcel owners, would be upheld as valid.

**Question:** Our condominium consists of thirty units. We have a two percent deductible for hurricane damage, which means that we will be out-of-pocket for the first \$54,000.00 of hurricane damage. Is it advisable and/or legal for a condominium association to set up a reserve to pay deductibles? M.R. (via e-mail)

**Answer:** Interesting question. This exact topic was subject to extensive debate in 2005 by the Florida Advisory Council on Condominiums.

Currently, Chapter 718 of the Florida Statutes (commonly referred to as the Florida Condominium Act) does not address "deductible reserves." In my opinion, however,

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there is no prohibition in the law against establishing such a reserve as part of the association's annual budget process.

However, a couple of caveats are in order. First, an association desiring to establish a hurricane deductible reserve should consult with its certified public accountant. Under certain tax reporting scenarios, it is possible that the I.R.S. would consider these funds to be retained earnings, and subject to tax. Your C.P.A. will be able to assist in determining whether there is a tax avoidance strategy in setting up the hurricane deductible reserve.

Second, keep in mind that many unit owners in your condominium have (and they should all have) personal insurance for their condo unit which is commonly

known as "HO-6" coverage. HO-6 coverage takes care of personal property, those portions of the building not insured by the association, and other items. Many HO-6 policies contain a feature called "loss assessment coverage" which will provide insurance proceeds to the individual unit owner to cover a portion of special assessments levied by the association for certain aspects of hurricane damage. If a reserve fund exists to cover a deductible loss, there would be no need for a special assessment, and hence no insurance proceeds available to the individual unit owners under their loss assessment policy.

In summary, this is certainly a "cutting edge" idea, and one which your board would be well advised to discuss further with its accounting and insurance advisors. ■

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