



Condo Act Requires Insurance

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As Floridians brace for another hurricane season, which officially starts June 1, federal weather forecasters predict another active season. According to recent reports from the National Oceanic and Atmospheric Administration, 13 to 16 storm events are expected to occur over the next several months, with up to 10 of those becoming named hurricanes. According to NOAA, up to 6 of those events could become Category 3 or higher hurricanes.

Today's column is the third in a series of tips for community associations in the areas of both pre-disaster and post-disaster planning, with an emphasis on helpful provisions to include in the community's governing documents.

In the first two installments, we looked at the effect of astronomical insurance premium increases on the association's budgetary process, and the desirability of removing impediments found in the documents which might limit the board's ability to procure necessary coverage. Today, we will shift gears, and focus on requirements for condominium unit owners to obtain individual insurance, for those items not covered under the association's master policy.

The much-ballyhooed changes to Section 718.111(11) of the Florida Condominium Act, which became effective January 1, 2004, come into play. The "new insurance law", now well over two years old, has been the subject of much interpretation, misinterpretation, and even urban legend. The 2004 law does contain

a list of items typically found in condominium units, which are not to be insured under the association's master policy. These exclusions apply regardless of what the condominium documents provide, or the legal framework which existed when the condominium was created.

The following list of items, effective January 1, 2004, are not covered under the condominium association's master policy:

[A]ll floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of a unit and serve only one unit and all air conditioning compressors that service only an individual unit, whether or not located within the unit boundaries. ...

These items cannot be insured by an association. While most understand this point, a subtle change in the 2004 law, which has not yet received much attention, reads as follows:

[A]ll real or personal property located within the boundaries of the unit owner's unit which is excluded from the coverage to be provided

by the association as set forth in paragraph (b) shall be insured by the individual unit owner.

While I have heard compelling debates about the “intent” of the Legislature in the enactment of this part of the law, a basic rule of statutory construction is that words must be given their plain and ordinary meaning. Following this simple rule, it seems clear that the Legislature intended that unit owners “shall insure” these items, since that is what the law says.

In the view of most practitioners, the new law obligates unit owners to procure insurance coverage to provide coverage for items the association does not insure. Unfortunately, there are a number of gaps and potential loopholes in the law, including the following questions:

- 1) Does the law permit unit owners to “self-insure” against losses to items on the list?
- 2) How much insurance is the unit owner required to carry?
- 3) Does an association have the right to enforce the requirement of the new law? If so, how can the association do so?
- 4) What are the remedies, penalties, or consequences of non-compliance with the law?

These questions defy simple answers, and the statute certainly offers little in the way of guidance. In my opinion, requiring unit owners to carry insurance for those items which the association cannot insure serves a valid public purpose. As a result of the 2004 and 2005 hurricanes, we have seen cases where uninsured unit owners, without sufficient financial means to “self-insure”, simply cannot bring their units back to habitable condition, since a certificate of occupancy will typically not be issued if the unit does not have functional electrical and plumbing fixtures, cabinetry, and other essentials necessary for functional living quarters. This can result in owners “walking away” from their property, which means they will likely stop paying assessments. Also, units in this condition are often sold at distress-sale prices, which can impact overall property values in the community.

Accordingly, I believe that an association can, and probably should, legislate individual insurance requirements through appropriate provisions in the declaration of condominium. In my opinion, the declaration can be amended to specify unit owners’ insurance obligations, and include the consequences for non-compliance. While some might legitimately argue that they should have the right to “go bare”, it seems that the Florida Legislature feels otherwise.

Next week, we will take a look at a new law that requires certain condominiums to retrofit generators for the operation of elevators, and a related requirement to develop a disaster response plan. ■

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.

Send questions to Joe Adams by e-mail to 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.

Submit Water Damage Claim to Determine Coverage

Question: I live in a condominium and recently sustained a significant leak that resulted in water coming through my walls. I lost all of my carpet, and some walls and ceilings had to be removed to dry the place out. My association says that under Section 718.111, Florida Statutes, the word “coverings” pertains to drywall and they do not have the responsibility to repair it. My personal unit insurance policy says that it will pay for coverings such as paint and wallpaper, but not drywall. The way I read the statute, the Association is responsible for drywall. Can you enlighten me on this? L.G. (via e-mail)

Answer: When analyzing this issue, it is important to distinguish between the obligation to repair (actually fix the problem or hire contractors to do so), and the obligation to insure. Section 718.111(11)(b) of the Florida Condominium Act requires that all Association hazard insurance policies issued after January 1, 2004 must provide primary coverage for all property outside of the units, and all property located inside the units as such property was initially installed, or replacements thereof of like kind and quality.

The statute goes on to exempt certain items from the association’s required coverage and those exceptions include floor, wall, and ceiling coverings. Most often, drywall within a unit constitutes property that was initially installed by the builder at the time of construction, and therefore is primarily insured by the association.

It is the common understanding of most everyone in the community association field that “wall coverings” includes paint, wallpaper and other decorative coverings, but does not include the drywall. However, I am not aware of any court cases that confirm this position.

The Association should submit your damage claim to its insurance company for the appropriate determination of coverage. There is often a deductible that will leave some or all of your damage unpaid. Your condominium documents should be consulted to determine the actual repair obligations, as distinguished from the insurance obligations.

Under any circumstances, unless you can show negligence by the association, you will be required to pay for the replacement of your carpeting.

Question: If a mortgage holder buys a condominium unit in lieu of foreclosure, are they responsible for the past due assessments or only for assessments starting from the purchase date? S.A. (via e-mail)

Answer: Assuming the mortgage holder is a first mortgagee, prior assessment liability is limited pursuant to Section 718.116 of the Florida Condominium Act to the lesser of (1) the unit’s unpaid common expenses and regular periodic assessments which accrued or came due during the 6 months immediately preceding the acquisition of title and for which payment in full has not been received by the Association, or (2) one percent of the original mortgage debt.

However, the first mortgagee must have joined the Association as a defendant in the foreclosure action for this limitation to be applicable. If a third party outbids a mortgagee at a foreclosure sale, that party is typically liable for all unpaid assessments, without regard to the preferential position of a foreclosing mortgage holder.

Question: Can or will police enforce violations of condo rules? Say a pet is harbored when no pets are allowed? Do authorities have the right to remove it? E.B. (via e-mail)

Answer: The only way that police, or any law enforcement agency, will enforce a violation of your condominium rules and regulations would be if the condominium violation is also a violation of the laws of either the city, state, or municipality where the condo is located. Most “garden variety” violations in the association setting (pets, parking, unruly tenants, etc.) do not implicate criminal laws nor invoke the authority of law enforcement agencies.

Question: Our association is considering an amendment to our documents to prohibit rentals. We currently have two units rented. How would such action impact existing rentals and what happens to unit owners that do not agree. I am assuming that we can get sufficient votes to approve the amendment. S.K (via e-mail)

Answer: Section 718.110(13) of the Florida Condominium Act was amended effective October 1,

2004 to provide that any amendment restricting unit owners’ rights relating to the rental of units applies only to unit owners who consent to the amendment, and unit owners who purchased their units after the effective date of that amendment.

Accordingly, if the two unit owners who rent (or anyone else for that matter) do not vote in favor of the amendment (either by voting against it, or not voting at all), they are “grandfathered” and the rental restrictions will not apply to them, but will apply to their successors in title.

Many associations, when confronted with the potential unfairness of the application of this law, have opted to “grandfather” all existing unit owners when enacting new rental restrictions. This needs to be addressed through appropriate drafting in the proposed amendment itself. ■

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