



Ensuring Adequate Insurance

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Today marks Day 15 of Hurricane Season. Already, we have been paid a visit by Tropical Storm Alberto, which will only be remembered in Southwest Florida for bringing much needed rain to the region. However, Alberto reminds us that what was once second page local weather news now grabs national headlines as the nation fixates on whether Florida is going to be targeted for a third straight devastating hurricane season. Let's hope not.

Today's column is the sixth installment in a series on how community associations can weather the storms, both in pre-disaster planning and post-disaster response, with an emphasis on insurance requirements and related legal documentation.

Today, we will focus on appropriate provisions in the constituent legal documentation, aimed to ensure that the association carries adequate insurance.

For homeowners' associations, the governing statute (Chapter 720 of the Florida Statutes) offers no guidance in terms of requirements for hazard insurance. That is probably because, unlike the condo counterpart, HOA's simply do not lend themselves to a one-size-fits-all prescription. For example, a single family subdivision, where each owner maintains their own home, and where there are no common area buildings (such as clubhouses, entry gates, pool-houses, etc.) probably has little need for hazard insurance. Conversely, a townhouse-type community, where the association maintains significant portions

of the buildings' structures, may need specific guidance in the community's governing documents, particularly in spelling out which structural elements the association insures, and which elements need to be covered by the individual homeowner.

Even for subdivisions comprised solely of single-family homes, some associations have mandated, by deed restriction, that the homeowners carry hazard insurance for their homes, and provide proof of such insurance to the association. While this is far from the norm, it is becoming increasingly common, to avoid situations where uninsured homeowners simply "walk away" from the problem, leaving blight (with a corresponding negative affect on surrounding property values) in the neighborhood.

For condominium associations, the governing statute (Chapter 718 of the Florida Statutes) contains detailed mandates regarding required hazard insurance. By law, the condominium association is obligated to insure, under its master policy, the following:

- All portions of the condominium property located outside the units;
- The condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality and in accordance with the original plans and specifications or, if the original plans and specifications are not available, as they existed at

the time the unit was initially conveyed; and

- All portions of the condominium property for which the declaration of condominium requires coverage by the association.

Stated otherwise, the association must insure everything that is affixed to the condominium property, whether part of the unit or common elements, except the following items, which the law requires to be insured by the individual unit owner:

- All floor, wall, and ceiling coverings,
- Electrical fixtures,
- Appliances,
- Air conditioner or heating equipment,
- Water heaters, water filters,
- Built-in cabinets and countertops,
- 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.

The Condominium Act also requires that the association's required insurance be "adequate", which most construe to mean full replacement value. Keep in mind that during these times of escalating construction costs, a three year old replacement cost survey may be well outdated. Also keep in mind that many post-casualty repair scenarios will require compliance with new building codes, so "law and ordinance" coverage may also be subsumed by the legal mandate for "adequate" insurance.

The law further provides that notwithstanding any requirement for replacement cost insurance, the association may buy insurance that includes reasonable deductibles, which is one of the ways that insurance companies have managed their risks. For example, it is nearly impossible (or at least extremely difficult) to purchase insurance for named hurricanes that does not include a deductible in the range of two percent to five percent of the building's value.

While the law is said to override any contrary provisions in the condominium documents, there are still plenty of areas for interpretation and disagreement. Next week, we will take a look at some of these topics, and delve into the increasingly controversial issue as to how repair costs are to be spread out (whether to the individual unit owner, or the association as a whole) when a shortfall in insurance proceeds arises due to the existence of a deductible, or otherwise. ■

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.

Responsibility for Roof Replacement in Question

Question: The roof of the building where I own a unit is beyond repair and must be replaced. I am worried that it will not withstand another hurricane season. My unit is in a building with three other units, with the four units sharing the same roof system. My unit is not a condominium unit, but there is a homeowners' association. What are my rights as a homeowner and what is the association's responsibility for repairing the roof? D.V. (via e-mail)

Answer: The Homeowners' Association Act (Chapter 720, Florida Statutes) does not address the maintenance responsibility of the association, and therefore, the association's responsibility for maintaining the roof will be set forth in the governing documents for your association. I have seen some homeowners' association documents that require the owners to maintain their portion of the roof and that require the owners in a building to work together if the entire roof system needs replacing. In other homeowners' associations, the association may be responsible for maintenance, repair, and replacement of the roofs. You will need to review your documents to see who is responsible (the association or the homeowners) for the roofs. Regarding your rights as a homeowner, the Homeowners' Act requires the Board to address an item of business if 20% of the total voting interests petition the board. After receiving the petition, the board shall at its next regular meeting or at a special meeting held not later than 60 days after the receipt of the petition, take the petitioned item up on an agenda. The board must give all members fourteen days notice by mail and posting of the meeting at which the petitioned item will be addressed. The board is not obligated to take any action requested by the petition, but must address the petitioned item at the meeting.

Therefore, if you are having trouble getting the board to respond to your concerns, you can petition the board to address your concerns (but the petition must be signed by 20% of the total voting interests). You can also try mediating the dispute with the board. The Homeowners' Association Act includes a process for mandatory mediation for certain types of disputes, including "covenant enforcement disputes." You can find information regarding the mandatory mediation process on the website for the Department of Business and Professional Regulations, Division of Florida Land Sales, Condominiums, and Mobile Homes.

Question: I am on the board of a condominium association. We were notified last year that our insurance was not going to be renewed. We scrambled to replace the insurance, and it was very costly, forcing us to raise our monthly maintenance fees. Our condominium only has ten units. Three of our condominium owners have not been paying their monthly maintenance fees and we have been informed that our current insurance company will not be renewing our insurance effective July, 2006. Obviously, our maintenance fees will once again be forced to be increased. What can be done to force these three members to pay their maintenance fees? E.M. (via e-mail)

Answer: The Florida Condominium Act and well-written governing documents of an association contain several provisions to guide and assist condominium associations with collecting assessments from members. It is my opinion that the best collection method is a process that begins with a written notice being promptly sent to non-paying members, then, if necessary, involves recording a lien with the County Clerk against the unit. Such a lien secures the right of the association to receive payment by claiming an interest in the unit.

Finally, the Condominium Act permits an association to foreclose upon the lien after giving thirty (30) days notice of the intent to obtain a foreclosure judgment. If a foreclosure judgment is obtained, a public sale of the unit may take place and the association will either be paid from the proceeds of that sale or may become the title holder to the unit, subject to superior interests such as first mortgages and tax liens.

While this process may seem burdensome and somewhat costly to the association, it provides an effective way to collect assessments as the continuing non-payment of assessments puts the member's ownership interest in jeopardy. Moreover, the Condominium Act permits an association to collect costs and reasonable attorney fees incurred in the collection process.

Therefore, in most collection actions, associations will recover all, or substantially all, of the attorney fees and costs incurred in the collection process. An association may also charge interest on unpaid assessments up to eighteen percent per annum, and may provide in the bylaws for a late fee of five percent of the installment due or \$25.00, whichever is greater. These additional amounts may serve as incentive for timely payment.

The Association may also pursue a civil lawsuit seeking a money judgment against the owner and thereby potentially collect the amounts owed directly from the unit owner. As you might imagine, the process of notifying a member, placing a lien on the

member's unit, and foreclosing that lien can take several months or longer. Therefore, it is essential that the association be diligent in commencing the process to collect unpaid assessments no later than 30 days after a payment is late.

Question: I am one of five board members on our condominium association board. We have one board member who is continuously negative, and almost always in opposition to everything discussed at meetings. His latest act is to criticize our manager as to his accounting practices. The rest of the board is not in agreement with his statement as we have had complete audits the past two years. The other board members are preparing a disclaimer to be read at our next meeting regarding his actions and speech. Is there anything illegal regarding such a disclaimer? B.W. (via e-mail)

Answer: There is no reason why the board cannot affirm, on the record at a board meeting, that the board acts and speaks only by majority vote of a quorum of the board. The statements or actions of any one board member, absent the specific delegation of authority from the board, do not constitute the action or position of the board.

“Difficult” people also tend to be most willing to file lawsuits. Therefore, I recommend that any statements made by other board members concerning this board member's actions or statements be factual and easily proven. Otherwise, the other board members may find themselves defending a defamation claim. ■

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