



Post-Storm Costs can be Complex Problem

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Today marks Day 22 of the official hurricane season. Today's column is the seventh and final installment in our series of tips for community associations in planning for catastrophic events through the constituent legal documents. Thus far, we have looked at insurance issues, the exercise of emergency powers in the face of calamities, provisions pertaining to the board's assessment authority, and a new law which requires high-rise condominium buildings to ensure that at least one elevator per building is operated by emergency generator service. The new law (H.B. 7121) also mandates that condominium associations which operate high-rise buildings (defined as buildings over 75 feet) adopt an emergency preparedness and disaster response plan (see *Legislation Would Affect High-Rises*, June 1, 2006). By way of update, that law was approved by the Governor and became law on June 1, 2006.

Today's column focuses on what has undoubtedly become the most contentious issue in post-hurricane repairs, the allocation of costs between the association and the individual unit owner when there are insufficient insurance proceeds to repair the condominium property. As we have already discussed, there are portions of the condominium property which a unit owner might generally be responsible to maintain, repair, and replace, but which state law requires to be insured by the association. Let's look

at a common source of friction. In many condominiums, the sliding glass doors which lead from the living area out onto the lanai may be described in the declaration of condominium as part of the unit, or alternatively as part of the common elements. If the sliding glass doors are designated as common elements, they might also be described in the declaration as "limited common elements", meaning that their use is reserved exclusively for one unit, which is obvious in most instances.

In most cases where sliding glass doors are described as either part of the unit or a limited common element, the declaration of condominium will often make the individual unit owner, at his or her sole expense, responsible for the maintenance, repair, and replacement of the sliders. However, assuming that the doors were originally installed by the developer in connection with original construction of the building, the Florida Condominium Act requires them to be insured by the association. Thus, we are left with an incongruous circumstance where one party (the unit owner) is responsible to maintain, repair, and replace the item while another party (the association) is responsible to insure it.

A common source of friction arises when hurricane damage occurs, but the total damage to the building does not reach the association's deductible under

the master policy. Most named-hurricane policies providing coverage for the 2004 and 2005 hurricanes, especially those written through Citizens, contains a two percent per-building deductible for hurricane loss. As we move forward in a market of shrinking insurance coverage (adding insult to injury, at substantially higher costs), many deductibles for named-hurricanes are moving to three percent and five percent of a building's value.

Let us assume that a high-rise condominium building is insured for hurricane loss at 35 million dollars. Two percent of the building's value is \$700,000.00. Let us further assume that the building sustains moderate hurricane damage from a named hurricane, totaling \$500,000.00. Let us further assume that half of the total dollar damage involves sliding glass doors being blown out in some, but not all of the units.

In these situations, the unit owner will often come to the association and ask the association to pay for new sliding glass doors, because the association insures the items. This request is often accompanied by an argument from the owner that not only should the association replace their glass, the association must also purchase state-of-the-art hurricane impact resistant glass for them. The association argues, in response, that since the unit owner is responsible for repair and replacement of the glass, it is the unit owner (and not the association) who must bear the burden of the deductible.

The Florida Condominium Act does not address this issue. In a recent ruling, the state agency which regulates condominiums in Florida, held that the party responsible for insuring the element must bear the burden of the deductible. However, that ruling applied only to the specific association

involved in that case, and is not "the law", only the agency's interpretation of it. Conversely, most experienced legal practitioners believe that the declaration of condominium controls in this instance. For example, the Florida Advisory Council on Condominiums recently adopted a motion, by unanimous vote, requesting that the Division of Florida Land Sales, Condominiums, and Mobile Homes revisit its position on this issue, as being inconsistent with the law.

Legal no-man's land is not a good place to be when sorting out highly emotional and financially significant issues in the wake of a hurricane.

Hopefully, the Florida Legislature will take this issue up in the near future, although the past several years of public policy debate in the community association arena have been punctuated by bickering over silly things like board term limits, fining, and the general search for solutions to problems that do not exist. In the mean time, associations are left to their own devices, and can best help themselves through clear protocol in the declaration of condominium regarding the allocation of post-casualty costs not paid by the insurance company.

In addition to the provisions of the declaration regarding maintenance and repair, an often-overlooked clause in the documents usually called "repair after casualty" must also be closely reviewed. In general, this clause will address who is physically responsible to do repair work after a loss, to whom insurance proceeds are paid, and how insurance shortfalls are dealt with. This is an area where each association should carefully consider the policy issues involved in cost allocation, and there is no one-size-fits-all remedy, nor "boilerplate" language that will suit everyone.

Some argue that since unit owners cannot insure elements that the association also insures, the financial burden should be spread amongst all of the unit owners. Others argue that damage is less likely to occur for those owners who have already protected their property (through upgrading to hurricane glass or installing hurricane shutters), so why should they pay for the negligence of their neighbor.

Solomon himself would probably pull out his hair in trying to forge a just resolution of this conundrum. Your association can try to shed some light on the issue through well-crafted legal documents.

Twenty-two days down, only one hundred sixty-one to go. Let's keep our fingers crossed! ■

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.

Restrictions on Generators Must be Reasonable

Question: I live in a two-story condominium. After Hurricane Wilma, we were without electric power. During this time, I ran my generator in a responsible manner, turning it off at night and on in the morning. A few days ago, the owners received a notice stating that generators were no longer allowed. Is this proper? F.L. (via e-mail)

Answer: As with most things in the law, there is no one-size-fits-all or easy answer. The issue is not addressed in the condominium statutes, nor has it been adjudicated by the courts. The use of generators can pose potential fume problems and/or issues related to the use of flammable liquids. It is well known that the use of generators after a hurricane can be responsible for more deaths than the hurricane itself.

If a Board adopts a rule prohibiting post-hurricane generators, it would be subject to a “reasonableness” test. A blanket prohibition against the use of generators, through a Board-made rule, might be suspect. If, however, you reside in a condominium with a layout which would not safely permit for the escape of carbon monoxide, or the safe storage of fuel for generators, a board-made rule prohibiting the use of generators would likely be upheld.

In contrast, if the ban is enacted through an amendment to the declaration of condominium, the courts have held that the restriction is not subject to a reasonableness test, it simply cannot be arbitrary or contrary to law.

Question: What can an association do to a vacation/management company that violates the governing documents? M.O. (via e-mail)

Answer: The general principles of agency law provide that the principal (in this case the unit

owner) is liable for the acts of their agent (the vacation/management company). As such, if the vacation/management company is in violation of the governing documents, the association is entitled to the same enforcement measures it would otherwise have against the unit owner, as if the unit owner had violated the documents. This is due to the fact that the content of your governing documents is presumed to be known by all unit owners, and that knowledge is imputed to the vacation/management company that acts on the unit owner’s behalf. Therefore, a violation by the vacation/management company is the legal equivalent of a violation by the unit owner themselves and can be enforced as such, against the owner. However, the association has no “privity of contract” (direct legal relationship) with the vacation/management company, and would not have standing to take action directly against the agent.

Question: I was reading one of your articles on the internet related to a condominium’s right to ask for financial information as part of an application for the sale or rental of a unit. I believe you stated that this violated privacy law. I would appreciate it if you would direct me to the page where I can find your article, as I have been asked to fill out an application for purchase of a condominium unit. The application requires that I provide various financial and personal information. Is this legal? C.R. (via e-mail)

Answer: I believe that the article you are referencing is my June 16, 2005 column entitled Records Access Set by Statute. This column, as well as past editions of the column, are available on the Internet at www.becker-poliakoff.com. In that particular article, I noted that information obtained by the association in connection with the

review of a lease or transfer application is exempted from the “official records” of the condominium, and as such, is not available to unit owners as part of a records review request.

I am not aware of any laws that would prevent the association from requesting financial information as part of the application process. While the association’s request for this information is intrusive in the minds of some, the courts have held that an association has the right to conduct a background check prior to approving a transfer. Because of the personal and private nature of this type of information, the law shields it from review by members of the association other than the board of directors.

Question: How does a condominium association convert to a no rental policy? S.S. (via e-mail)

Answer: A condominium association may prohibit future rentals through amending the declaration of condominium. If the declaration of condominium

does not include an amendment procedure setting forth the number of votes required to approve an amendment, Chapter 718, the Condominium Act, requires the affirmative vote of the owners of not less than two thirds of the units.

As of October 1, 2004, the Florida Condominium Act provides that all amendments restricting unit owners’ rights relating to the rental of units apply only to unit owners who consent to the amendment, and unit owners who purchase their units after the effective date of that amendment.

It is often times administratively cumbersome for a condominium association to keep track of different classes of owners based on date of purchase and their individual vote on rental amendments. For this reason, many condominium associations now pursue declaration amendments that “grandfather” all units owners who purchased their units before the effective date of the amendment, regardless of whether or not the unit owner voted for the amendment. ■

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