Warranty Obligations Different

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Today's column is the fifth installment of a comparative study of Florida's laws applicable to community associations, with an emphasis on the difference between the laws applicable to condominiums and homeowners' associations. As previously reported, Governor Bush has recommended that the powers-that-be study whether there should be a unified law for all of Florida's community associations.

The first three installments looked at the historical development of both condominiums and non-condo deed restricted communities (generically referred to as homeowners' associations) and the development of the laws applicable to the different types of entities. Succinctly stated, condominiums got a thirty year head start on homeowners' associations, although HOA legislation has become markedly condo-like over the past decade.

Last week, we kicked off our analysis of the actual differences between the two laws with a look at the topic of government regulation, specifically the fact that condominiums are subject to direct oversight by a state agency with enforcement and penalty authority, while homeowners' associations are not.

Today's discussion about warranties and purchaser rights will continue our study of the main differences between the laws, hopefully with the result of providing affected parties with a bit more information than they had previously, so that they can judge for themselves whether a unified law is the way to go.

Section 718.203 of the Florida Condominium Act provides that a developer grants to each purchaser of a condominium unit, a warranty for the buildings and the structural components of the condominium, including the common elements. These warranties run for a period of 3 years for each building from the date a certificate of occupancy (commonly called C.O.) is issued for the building, or one year from the date that unit owners other than the developer elect a majority of the board of directors (commonly called transition of control, or turnover), whichever occurs latest but no longer than 5 years from turnover. The general contractor and all subcontractors and material suppliers are required to grant the same warranties, which are good for 3 years from the C.O. date, without regard to the turnover date. These warranties, often called statutory warranties, cannot be waived.

Conversely, there are no statutory warranties for new home purchaser in a community operated by a homeowners' association. While this may make sense for the home purchase (since the builder (or builders) in a particular community may have no affiliation with the developer, the common areas arguably deserve statutory treatment since the association cannot bargain for warranties before purchase, as the developer drafts the governing documents and also is the creator of the association.

While many attorneys would argue that "common law implied warranties" exist for HOA common areas, the Florida appellate courts have not specifically

addressed this topic. Further, the concept of waiver has not been addressed for homeowners' associations. For example, many governing documents created by the developer state the association will accept the common areas, "as is". While some argue that such clauses are void as against public policy, some believe otherwise, and the law remains in flux.

Interestingly, the Homeowners' Association Task Force, mentioned earlier in this series, recommended that the 2004 amendments to Chapter 720 include statutory warranties for common areas. While the initial versions of the Bill contained warranties, they were stripped out of the final version, in the waning days of the legislative session, at the behest of special interests.

Another consumer protection area where homeowners' associations take a back seat to their condo counterpart is in the area of the developer's obligation to account for the handling of the association's finances for the time-frame during which the developer controlled the association's operations. The Florida Condominium Act requires the developer, at its expense, to provide the association with an audit of the association's financial records within 90 days of the turnover. The main purpose of the audit is ensure that the developer met its required financial obligations to the association, such as paying assessments or subsidizing deficits, during developer control.

By contrast, HOA developers have no post-turnover obligations to the association. Interestingly, HB 391 which was unanimously approved by the 2006 Florida Legislature, but vetoed by the Governor, would have required post-turnover audit in homeowners' associations. Bush's veto message suggested that the Governor supported the audit requirement, but vetoed the Bill based on other concerns.

As you can see, when it comes to warranty obligations and fiscal accountability, purchasers in homeowners' communities are definitely second class citizens compared to condominium purchasers. Next week, we will continue review of the differences between the two laws in consumer protection, including pre-turnover contracts and disclosure to prospective purchasers. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representingcondominium, 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****.*

Declaration Holds Answers About Damage Repairs

Question: I live on the first floor of a condominium building. I noticed water dripping from the upstairs unit through my ceiling fan. I notified the association and they called the plumbing company. The problem was a leak in my neighbor's plumbing. The only access to the pipes was through my bathroom ceiling so they removed a portion of the ceiling. I submitted a request to have it repaired. Finally, I contracted someone to repair it and sent the bill to my neighbor asking that he contact his insurance company. He is an elderly gentleman, and took it to the association. They informed him to tell me to call my insurance company. Who is legally responsible for these repairs - my neighbor, his insurance, my insurance, the association or me? S.M. (via e-mail)

Answer: The answer depends on the language in your declaration of condominium. In order to answer your question, a number of provisions in your declaration have to be reviewed including the unit boundaries and the maintenance provisions. I do not believe that the damage you described (a hole in the ceiling from repairs to plumbing) would be covered under your homeowner's insurance policy (typically referred to as an "HO-6" policy). The HO-6 policy covers items such as wallpaper, paint, floor covering, appliances, etc. The association's insurance policy covers damage to items such as ceilings and walls. However, it sounds as if the damage to your ceiling was not caused by the leak itself, but rather the repair of the leak. In that case, the association's insurance policy may or may not cover it depending on whether the pipe's leak constituted an insurable event. If the pipes are the association's maintenance responsibility, then the association might be responsible if the ceiling is also the association's maintenance responsibility or if there is some incidental damage language in the declaration making the association responsible. Ultimately, a thorough review of your condominium documents will be required.

Question: I currently serve on my condominium's board of directors. Our vice president does not always vote on every agenda item, because he feels that it is not necessary if the action will pass anyway. At our last meeting, our president insisted that the vice president vote on a resolution to hire our new management company, but he refused. The president informed the secretary that the minutes should reflect that the vice president voted "No" on the resolution. That does not seem right. I think the minutes should record that the vice president abstained from voting. Who is right? J.S. (via e-mail)

Answer: The Condominium Act states that a director who is present at a meeting of the board when an action is taken is presumed to have assented to the action, unless he or she votes against the action or abstains from voting because of a stated conflict of interest. Florida law also requires that the minutes of the meeting record each vote or abstention for each director present at the meeting for each action taken at the meeting. Presuming that the vice president did not state a conflict of interest and abstain from the vote, then the minutes of the meeting should reflect that the vice president voted "yes."

Question: The board of directors of my condominium association needs to hire a new property manager. I am part of a committee of owners who are interviewing the potential candidates for the job. We really like a particular candidate, but when we asked him how long he had been licensed he said that he did not need a license. It would seem to me that if a property manager is going to be helping with the association's financial affairs, then he would need a license. What should we do? M.W.

Answer: The Department of Business and Professional Regulation is the state agency that regulates community association managers. A community association

manager is someone who, for compensation, utilizes specialized knowledge, judgment and managerial skills to perform various day-to-day services involved in the operation of a community that contains more than 50 units or has an annual budget in excess of $100,00.00. Those activities can include, but are not limited to, controlling or disbursing the funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of the association's meetings, or coordinating the maintenance of the community. If your community has more than 50 units or a budget in excess of $100,000.00, then you will need to employ a licensed manager. If you wish to check whether potential managers have a community association manager's license, you can do that on-line at www.myfloridalicense.com. ■

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