



After the Storm, Condominium Damage Payouts Can Get Muddy

Fort Myers The News-Press, January 11, 2007

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For the past few years, hurricanes and their resulting catastrophic damage have been big news in Florida, and indeed around the world. In the condominium context, one of the biggest challenges for associations in dealing with the aftermath of the 2004-2005 storms was the question of how to allocate repair costs not covered by insurance.

For example, many high rise condominiums in the Naples area sustained noteworthy damage from Hurricane Wilma in October of 2005. However, many of those communities were insured through Citizens, the state-run insurer of "last resort", which typically writes windstorm insurance policies with deductibles ranging from two percent to five percent of the building's insured value. If a condominium building is insured for 20 million dollars, and carries a five percent hurricane deductible, one million dollars of damage must be sustained before the first penny of insurance money is paid.

Particularly in the post-Wilma environment, but also for "lucky" communities visited by Hurricane Charley, total damage did not reach the deductible. Nonetheless, that which was damaged needed to be fixed, and someone has to pay. There are only two choices. First, the association can assess all unit owners (in which case assessments are passed on pursuant to the formula set forth in the declaration of condominium, most often equally, but sometimes based on apartment square footage). The second alternative is that some pay, and some don't.

In today's column, and over the next few weeks, we will look at the pending political firestorm that surrounds the issue of post-casualty cost allocation.

When the damaged element is a common element that benefits all, the answer is easy. For example, few would argue against the proposition that the expenses of repairing roof damage, not covered by the deductible, should be passed on to all unit owners, pursuant to the formula by which all other expenses are shared.

However, the equation becomes substantially more murky, perhaps clear as mud, when the damaged element is something which the individual unit owner is generally obligated to maintain, repair, and replace outside of the casualty damage context.

Let's look at a hypothetical example, and you will see how things get confusing.

Green Flash Condominium is a single condominium building in the Town of Fort Myers Beach, situated directly on the Gulf of Mexico. Green Flash was built in 1974. The building is ten stories high, and has four apartments (units) on each floor for a total of 40 units. Common expenses at Green Flash are shared on a 1/40 basis.

Green Flash is insured for hurricane damage with Citizens, at a rebuilding cost of 20 million dollars. The deductible for named storms is four percent of the insured value, or \$800,000.00.

In August of 2007, Green Flash is struck by Hurricane Christi, a Category 3 storm that makes landfall south, in the Everglades. However, Christi does bring sustained winds of 100 miles per hour to Fort Myers Beach, for about an hour. The rain from the storm is constant for nearly two days. Fortunately, there are no flood waters or tidal surge affiliated with the storm.

The apartments at Green Flash are traditional 70's-era high rise construction, with 900 square foot apartments, accented by a ten foot by twenty foot screened-in lanai, which overlooks the Gulf of Mexico.

The Declaration of Condominium for Green Flash describes the lanais as part of the unit, and includes the original screen installation (framing and screening) within the boundaries of the unit. The sliding glass door leading out to the lanai are also part of the unit, and are described in the declaration as a unit owner maintenance, repair, and replacement responsibility.

To say the least, Green Flash is a hodge-podge. About half the units have installed hurricane shutters,

which the association requires be mounted flush to the sliding glass doors. Many of those shutters were installed more than a decade ago, and do not meet current code. Some shutters have been installed more recently, and meet current code.

The association has also permitted (or at least has not objected to) unit owners enclosing their lanais with a standard glass enclosure, which the residents call "window-walls." The window-walls are basically three panel sliding glass doors, which can be opened to let in air, or can be closed to keep the lanai protected. One or two of the owners recently installed state-of-the-art impact glass for their window-walls, but most are older versions which are not rated for hurricane protection.

Each unit also has two "bedroom windows" and one "kitchen window." None of the windows at Green Flash have hurricane shutters installed over them.

Next week, the saga continues with an assessment of Christi's damage, exploration of who is responsible to insure what, and depending on how significant the damage was, who is going to have to pay. ■

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.

In What Ways Can a Homeowners' Association Use Funds?

Question: I live in a gated community administered by a homeowners' association. Our budget includes reserves for deferred replacement maintenance, as provided in the bylaws. The bylaws also state "all sums collected from assessments may be mingled in a single fund, and shall be credited to accounts from which shall be paid the expenses for which the respective assessments are made". Does our board have the authority to spend funds set aside for deferred replacement maintenance on unrelated, non-emergency projects? All of our reserves are segregated and identified by specific projects (ie. replacement of roadways, etc.). S.L. (via e-mail)

Answer: Unlike the Florida Condominium Act, Chapter 720 of the Florida Statutes, which is unofficially referred to as the Florida Homeowners' Association Act, does not contain any rules regarding reserves. In the condominium setting, reserve funds can only be used for the purpose for which they were set aside unless their use for other purposes is approved in advance by a majority membership vote at a duly called meeting of the association. In a homeowners' association setting, you must look to your governing documents to determine how reserve funds may be used.

If your governing documents contain specific restrictions as to how reserve funds may be used, those restrictions must be followed. If there is nothing in the governing documents stating that reserve funds can only be spent on identified reserve items, or if there is no requirement for a membership vote to spend reserves on non-designated items, then they can probably be spent by the board to cover other association expenses.

Question: I live in a small condominium community. I am a board member and until recently, served as vice president. At our last meeting, all of the other board members resigned and told me I was now president

of the association. I cannot locate another unit owner that wishes to serve on the board. I cannot conduct a meeting without additional directors, because the board needs a quorum to do business. What do I do? D.P. (via e-mail)

Answer: Unless otherwise specified in your bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the majority of the remaining directors, even if less than a quorum, or by the sole remaining director. As the sole remaining director, you are entitled to fill all of the vacancies on the board, unless your bylaws state otherwise.

It is sometimes difficult to locate owners who are willing to serve on a board of directors. If you cannot twist enough arms to find enough volunteers to fill the vacancies on your board, any unit owner in the condominium may apply to the local circuit court for the appointment of a receiver to manager the affairs of the association. At least thirty days prior to applying to the circuit court, the owner must mail to the association a notice, which must also be posted in a conspicuous place on the condominium property, that describes the unit owner's intended action. If the association is unable to fill the vacancies before thirty days expires, then the unit owner may proceed with the application for a receiver. A receiver is a professional conservator, usually a Certified Public Accountant, who operates under the jurisdiction of the court. If a receiver is appointed, the association will be responsible for the receiver's salary, court costs, and attorney's fees. These costs will be staggering. Once appointed, the receiver will serve until the association fills the vacancies on the board sufficient to constitute a quorum.

You should examine why no one will serve on your board. In many cases, hiring a management company to handle the day-to-day work, leaving the board to set policy, will make service more palatable.

Question: As owners of a condominium unit, are we entitled to know when other owners in our association lag behind in their monthly maintenance assessment payments? B.W. (via e-mail)

Answer: The official records of a condominium association include all of the financial records of the association, including unit owner assessment payment histories. These records are available for member inspection and copying. Any member who makes a written request to inspect such records must be given the opportunity to do so within five working days after the association receives the written request. Therefore, all members may learn the identity of any member who is delinquent in payment of assessments, as well as determine the amount of the arrearage.

However, if your question relates to whether or not the association should publicize the identity and arrearage of members, I advise against such a practice. The Florida Consumer Collection Practices Act (FCCPA) prohibits the disclosure to third parties of any information that would affect a debtor's reputation when such disclosure is made in connection with collecting consumer debts. At least arguably, this provision would prohibit the association from publicizing information concerning the identity of persons who are behind in the payment of their assessments, sometimes called a "deadbeat list", and even possibly prohibits the board from discussing specific delinquencies in an open meeting. The better practice is for the association to implement a collection policy and procedure and to diligently follow that procedure. ■

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