



Condos' Costs in Storm Laid Out

Fort Myers The News-Press, January 25 2007

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Today's column continues our case study of hypothetical Hurricane Christi, with the goal of trying to sort out how condominium associations allocate post-hurricane costs.

The following are excerpts of Attorney John Justice's opinion letter to Green Flash Condominium Association:

Dear Mr. Dooright:

You have inquired about the allocation of insuring responsibilities between individual unit owners and the association. Your question is governed by two sources, Chapter 718 of the Florida Statutes (the Florida Condominium Act) and your Declaration of Condominium.

Section 718.111(11) of the Florida Condominium Act provides, in relevant part:

"(11) INSURANCE.—[P]aragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration of condominium. ...

(a) A[n]... association shall use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property required to be insured by the association pursuant to paragraph (b). ... Adequate insurance, regardless of any requirement in the declaration of condominium for coverage by the association

for "full insurable value," "replacement cost," or the like, may include reasonable deductibles as determined by the board.

(b) Every hazard insurance policy issued or renewed on or after January 1, 2004, to protect the condominium shall provide primary coverage for:

- 1. All portions of the condominium property located outside the units;*
- 2. 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*
- 3. All portions of the condominium property for which the declaration of condominium requires coverage by the association.*

Anything to the contrary notwithstanding, the terms "condominium property," "building," "improvements," "insurable improvements," "common elements," "association property," or any other term found in the declaration of condominium which defines the scope of property or casualty insurance that a condominium association must obtain shall exclude all 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. ...

(c) [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. ..."

The second source which must be reviewed is your Declaration of Condominium. In today's letter, I will limit my comments to the insurance provisions of your Declaration. At a later time, as repair efforts proceed, we will also need to look at other sections. Relevant to this inquiry, Article 14 of the Declaration provides:

"The association shall insure the insurable improvements of the condominium property, at one hundred percent full insurable value, excluding excavation and foundation costs."

Although your Declaration of Condominium requires insurance of "improvements", it appears that the intent of the Florida Legislature was to exempt certain "improvements" from coverage under the association's master policy. Among the

"excluded items" are carpeting, other coverings, cabinetry, and various fixtures/appliances, as quoted above. In my experience, virtually all condominium associations follow this law (which has existed in some form since the 1970's, and has been amended numerous times, most recently in 2003), notwithstanding the fact that there may be constitutional arguments that the Legislature cannot change the insuring requirements in your Declaration of Condominium, as it is a contract.

You will also note that your current insurance policy does not comply with your Declaration, since your Declaration requires coverage for "full insurable value", while your policy with Citizens contains an \$800,000.00 (four percent) deductible. However, as you can see, the law specifically states that insuring any requirement for "full insurable value" would permit a reasonable deductible, and accordingly it is my opinion that the association has complied with applicable legal requirements.

As you will also note, the law requires (and this change was added effective January 1, 2004) that unit owners shall insure the various internal fixtures (floor coverings, cabinetry, etc.), not covered under the master policy. I understand that the Green Flash Association does not know whether all owners have placed this insurance.

Next week, we will see the rest of Justice's opinion on the matter, and see how Green Flash is progressing with responding to the disaster. ■

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.

Amendment Not Effective Until it's in County Records

Question: Our new president refuses to recognize a change made to our condominium association's by-laws. Owners approved a change at the annual meeting, however this has yet to be certified as an amendment. The president refuses to recognize the change because it has not been certified. Is the president obligated to follow this change? E.A. (via e-mail)

Answer: Even if amendments to your bylaws were passed by the required vote of the owners, that does not mean that the amendments are "effective." According to the Florida Condominium Act, the bylaw amendments are not effective until they are recorded in the county public records. Amendments to a condominium association's declaration or articles of incorporation are also not effective until recorded in the county's public records, and amendments to the articles of incorporation must also be filed with the Secretary of State.

I do not believe that your president can refuse to execute the necessary documentation to have the bylaws recorded, and then fail to recognize the validity of the amendments because they are not yet effective. On the contrary, I believe an association's president has a fiduciary obligation to ensure that properly passed amendments become effective by having them recorded in the public records.

Any officer or director who fails to carry out his duties of office is potentially liable for a breach of fiduciary duty. An officer or director, including the president, is only one member of the governing body of the association and does not have the authority to refuse to sign documentation or to take other properly required action. However, in order to establish liability for breach of a fiduciary duty, it would be necessary to prove fraud, self-dealing or unjust enrichment on the part of the director, as well as to establish some

element of damages. Any member might also elect to file a complaint with the Florida Division of Land Sales, Condominiums and Mobile Homes to seek assistance with having an officer or director perform his duties. A more practical solution for this type of situation is for the other board members to call a meeting and, if necessary, remove the president from that office and elect a president who will carry out the will of the board and the members. In extreme cases, the membership may institute recall proceedings against any or all board members who fail to carry out their duties.

Question: I was recently asked to be on an insurance committee for my condominium association, and we are trying to come up with solutions to deal with the high cost of insurance. One of the committee members said he heard that one possibility was for our association to insure itself. Can you shed any light on this? R.J. (via e-mail)

Answer: The Florida Condominium Act contemplates the ability of a condominium association to self-insure, and requires compliance with the "Commercial Self-Insurance Fund Act". Under this insurance Act, a commercial self-insurance fund can be established by a not-for-profit group comprised of no less than 10 condominium associations, which is incorporated under the laws of Florida and which restricts its membership to condominium associations. That corporation must be organized and maintained in good faith for a continuous period of one year for purposes other than obtaining or providing insurance.

Additionally, the Association must apply for and receive a Certificate of Authority from the Department of Insurance, and you should note that there are a number of potentially difficult requirements to do so.

The law also states that a single association may self-insure, but must still comply with the state insurance laws. Unfortunately, organizational, administrative and financial hurdles of the current law are generally too high for any condominium association that wants to attempt the process of self-insuring. Even though the self-insurance option is technically available in the law, it is probably not a viable one the way the law is currently drafted.

For more information on this topic, I refer your attention to my July 26, 2006 publication titled "Self-Insure Option has Challenges." Past editions of my column are available on the website of the law firm where I practice, Becker & Poliakoff, P.A. Go to www.becker-poliakoff.com. Please also note that, at press-time, the pending Special Session of the Florida Legislature may address self-insurance. If so, I will report on the changes in a future edition of this column.

Question: Several members of my condominium board of directors have served for more than a decade. Does Florida law limit the amount of time an individual may serve as a member of the board?
J.C. (via e-mail)

Answer: Despite efforts by some to impose a limitation on the amount of time a unit owner may serve on the board of directors of a condominium association, there are currently no "term limits" required under Florida law.

The Department of Business and Professional regulation, through its arbitration program, has upheld term limits if established through an association's bylaws, even though the Condominium Act states that "any unit owner" may run for the board. If your bylaws do not currently provide for term limits, they could be amended to do so, at least if the State's interpretation is correct.

At first glance, term limits appear to promote a broad range of voices in the management of the community. However, it is my experience that, particularly in the small associations which predominate the Southwest Florida communities, many associations suffer from too few owners willing to take on the responsibility to serve on the board. Under those circumstances, term limits can make it difficult to find a sufficient number of eligible candidates to serve on the board. ■

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