Unit Owner, Not Tenant, Responsible For Insurance

New Law Still Causes Confusion

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By Joe Adams
jadams@becker-poliakoff.com
TEL (239) 433-7707
FAX (239) 433-5933

Q: I read your recent article regarding the requirement for condominium unit owners to purchase insurance. We own a unit, in common with another, which we purchased for investment purposes and rent out. Does the new law require the unit owner or tenant to purchase the insurance? It is my understanding that prior to this time, there was no such requirement in the law. **O.S. (via e-mail)**

A: For a thorough discussion of this aspect of the new law, see my column of November 2, 2008 entitled "Part of Insurance Law Generates Confusion." This column can be accessed on the internet at www.becker-poliakoff.com.

First, your understanding is not entirely correct as to the previous law. The Florida Condominium Act was amended in 2003 to provide that unit owners "shall insure" those portions of the condominium property that are not insured by the association. However, the old law contained no mechanism to enforce that requirement.

The new law permits (but does not require) a condominium to "force place" individual unit insurance, if the unit owner fails to provide proof of insurance, thirty days after the association's request. The association's expenses in procuring this insurance are secured by a right of lien against the unit.

There is considerable confusion as to which parts of the new law became effective on July 1, 2008, and which parts become effective January 1, 2009. I have seen position papers from the Florida Association of Insurance Agents (FAIA) and the Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) on the topic. The FAIA and the Division appear to reach opposite conclusions. I suppose that will become a moot point in a couple of weeks, when the new year arrives.

It is my understanding that there is also resistance in the insurance industry to writing individual unit owner policies (commonly referred to as "HO-6" policies) in compliance with the new law. Among the hesitations of the insurers are the new requirements that the association be specified as a named, additional insured under the unit owner's HO-6 policy, and the requirement for $2,000.00 in "special assessment coverage", a term that is apparently not used in insurance jargon.

Based upon communications I have seen from various quarters, it seems very likely that the Florida Legislature will address this issue in the near future. There is a Special Session of the

Legislature (called for early January), but I have no knowledge that this issue will be taken up at that time. Rather, it would seem that the issue will most likely be addressed during the regular session, which begins in March and ends in May. Therefore, any change to the law (if there is one) would likely be six months down the road. There seems to be a move afoot to repeal this provision, in its entirety. Of course, it is always a risky proposition to plan your affairs on what a state legislature may or may not do in the future.

Accordingly, unless and until the law is changed, it is my view that associations should use their best efforts to comply with it.
In response to your question regarding who is responsible for purchasing the insurance, it is the unit owner, not the tenant.

Q: Can someone who votes by a limited proxy change their mind, revoke their proxy, and vote differently on the voting item in question? **B.B. (via e-mail)**

A: A proxy is generally considered revocable until it has been registered at the meeting for which the proxy is given.

Therefore, if someone in an association votes a certain way on a proxy question, and changes their mind, they have the right to revoke their proxy and cast their absentee vote in a different manner.

In the event of conflicting proxies, the later-dated proxy is usually considered the controlling instrument.

Q: Our condominium association is experiencing financial difficulties, with a high number of unit owners in default in the payment of their assessments to the association. Most of these unit owners are also in default of their mortgage, and many foreclosures are pending.

We are told that if the bank forecloses, they will only be liable for six months of unpaid assessments or one percent of the original mortgage debt, whichever is less.

Our proposed annual budget for 2009 has a line item for "bad debt." The board says that this item is intended to estimate the shortfalls we will experience due to these delinquencies. Isn't it illegal to excuse these owners from payment of their assessment under the condominium statute? When someone buys from the banks aren't liable for the previous owner's unpaid assessments? **H.B. (via e-mail)**

A: Condominium associations are required to prepare budgets in accordance with "generally accepted accounting principles ("GAAP"). It is my understanding that GAAP recognizes "bad debt" as an appropriate expense item for budgeting purposes. Your CPA could confirm this. I can tell you that budgeting for "bad debt", or "doubtful accounts" is not uncommon, particularly in this economic climate. The fact that the association budgets for "bad debt" or "doubtful accounts" does not mean that the association is waiving the right to collect unpaid assessments. Rather, the board is attempting to paint a realistic picture of the cash flow situation the association may expect to experience in the upcoming year, so that there are sufficient funds on hand to meet the operating needs of the association, which is a legal requirement.

You are correct that Section 718.116(9) of the Florida Condominium Act, in general, prohibits an association from excusing one member from paying their share of assessments unless all other unit owners are likewise excused. However, this law does not apply to the issue of the mortgagee's liability, which is set by law, and which you have stated.

An association whose interests are foreclosed by a superior mortgage may have recourse against the former unit owner. For example, if there is equity in the unit, the association can claim an entitlement to excess proceeds at the foreclosure sale. Unfortunately, these days, many owners are "upside down" in their units (their outstanding mortgage amount is more than the value of the property), and in such cases, there would not likely

be excess proceeds available at the foreclosure sale for the association to claim.

There are also procedures in the law for pursuing money judgments (instead of foreclosure) and "deficiency judgments" against the former unit owner. In many cases, particularly with out-of-state debtors, or people who may not be able to pay off a personal money judgment, many associations consider pursuing such claims as spending good money after bad. These issues can be discussed on a case-by-case basis with the association's attorney.

As to your other question, if a bank (or other mortgagee) forecloses its mortgage and wipes out the association's assessment lien, the party who later buys the unit from the bank is likewise not liable for the previous owner's unpaid assessments.

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.