



Association Probably Not Liable for Dry-Out

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By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Q: Recently, a common area water heater burst and the water leaked into my unit. The water heater is located outside, under a stairway. I had to call a carpet company to pull up my carpet and pad. Fortunately, they were able to dry it out and reinstall it. Is the association responsible for my dry-out costs, since a common element failure caused damage? **A.H. (via e-mail)**

A: Probably not.

You should understand that there are two distinct issues which come into play in these situations. First is the application of property insurance, sometimes also called casualty insurance, or hazard insurance. Property insurance is a “first party” policy, and provides coverage for a loss caused by a casualty, regardless of fault.

Under Florida law, the condominium association must carry a first party policy (commonly called a condominium master policy) on all of the structural components of the condominium property, including interior unit structural components such as drywall and doors.

Conversely, first party insurance responsibility for various interior portions of the premises, including carpeting, is the responsibility of the unit owner. Accordingly, if the water discharge event was a covered “casualty” (generally, a sudden, fortuitous

event), your individual insurance policy, called the HO6 policy, should cover your dry-out costs. Of course, most HO6 policies carry a deductible, I believe \$500.00 is common.

A second issue that arises in these cases is the concept of negligence. If the negligence of the association causes damage to the interior of a unit, the unit owner may have a claim against the association. However, one (or perhaps even two or three) water intrusion incidents from the same source does not necessarily constitute negligence. Rather, the party claiming negligence (here, you as the unit owner) would bear the burden of proving that the association did not exercise reasonable care in maintaining the common elements, thus causing you damage.

Negligence claims made against an association are usually covered by insurance known as liability insurance. Liability insurance differs from the insurance coverage discussed above, in that it is considered a “third party” type of insurance, meaning that it provides the insured with coverage when a third party makes a claim of wrongful conduct against them. In my experience, if the unit owner carries adequate insurance, their only “real” damage is their deductible, which rarely justifies making a claim against the condominium association. Further, if a unit owner does make a claim against a condominium association, they also

need to involve their insurer to ensure that the insurer's "subrogation" rights, to the extent they may exist, are not compromised by a settlement with the association.

In summary, the HO6 policy typically provides you with protection against events over which you have no control, including most sudden water discharge incidents. Your deductible is basically the portion of loss which you "self-insure."

Q: In response to your recent column regarding opting out of the rule that requires condominium associations to pay for casualty repairs to items such as air conditioner compressors, what is the procedure for "opting out." **M.L. (via e-mail)**

A: Section 718.111(11)(j) of the Florida Condominium Act provides that any portion of the condominium property insured by the association which is damaged by casualty shall be reconstructed, repaired, or replaced as necessary by the association, as a common expense.

As discussed in several previous columns, this is what most refer to as the "Plaza East Rule" (although that is not a formal legal term), because this issue arises from a ruling known as the Plaza East case. The Plaza East holding was later codified in the statute.

The new law probably has the most impact with respect to interior drywall repair cases. Many declarations of condominium require unit owners to repair interior walls, especially non-load bearing interior partitions. However, because the association insures these items, the new law would require repair by the association after a casualty, such as a bursting water pipe from an upstairs unit.

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.

This would include payment of deductibles by the association, as a common expense.

Section 718.111(11)(k) of the statute states that an association may, upon approval of a majority of the total voting interests in the association, "opt out" of the law and allocate repair or reconstruction expenses in the manner provided in the declaration as originally recorded, or as amended. Therefore, it is important to have your "opt out vote" prepared by your association's attorney, if it is in fact the association's desire to "opt out." Before making the decision on "opting out", you should ask your legal counsel for the pros and cons.

If your association then decides to take an opt out vote, your attorney should prepare the voting documents. Most attorneys will draft a resolution for consideration by the membership. As noted above, the association may "opt out" of the law and may allocate expenses as provided in the declaration as originally recorded, or as amended. Therefore, one question will be whether the declaration provisions that you previously had are sufficient, or whether further amendments are advisable or desirable. This can only be properly analyzed and explained by an attorney. Further, pursuant to a 1996 ruling from the Florida Supreme Court, the preparation of limited proxy forms (with certain ministerial exemptions) constitutes the "practice of law", and therefore must be performed by a licensed attorney.

This is a routine matter for attorneys conversant in this area of the law, but involves significant policy issues, with potentially gigantic financial consequences in the event of a major calamity, such as a hurricane. It is neither legally appropriate nor a good idea for board members or managers to prepare such documentation.

