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HURRICANE CHRISTI – A CASE STUDY

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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 sustained noteworthy damage from Hurricane Wilma in October of 2005. Typically windstorm insurance policies include 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 Hurricanes Katrina or Charley, Jeanne and Frances the year before, total damage did not reach the deductible. Nonetheless, the damages 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.

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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 case study over the next few issues, and you will see how things get confusing.

Green Flash Condominium is a single condominium building situated directly on the beach. 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.

Suddenly, 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 the beach area, 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 ten foot by twenty foot screened-in balconies overlooking the water.

The Declaration of Condominium for Green Flash describes the balconies 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 balcony is also

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part of the unit, and is 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 balconies 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 area 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.

Christi blew in from the west, and most of the damage was to the west side of the building. Part of the roof lifted up, and was saturated by wind-driven rain. Christi’s winds blew out about ten window-walls; the two new impact glass window-walls held up wonderfully. No water entered through sliding glass doors where hurricane shutters were in place, nor where the window-walls held up, although every balcony with exposed screen had the screens blown out. About six sliding glass doors that were not protected by hurricane shutters or window-walls (or where window-walls failed) blew in. Two of the bedroom windows failed. Water leaked around some windows which did not fail. It was a mess.

Green Flash Condominium Association was fortunate to have an experienced manager in Godfrey Goodfellow, who had extensive training in disaster preparedness and response.

Following the mantra he had learned to “shore-up”, “dry-in” and “dry-out”, Goodfellow first made sure that there were no safety hazards on the property, such as broken glass, jagged metal, or exposed electrical lines.

Having completed the shore-up stage, which fortunately required little work (clearing some landscaping debris), Goodfellow proceeded to the dry-in stage. Being a prepared sort, Goodfellow had the Association’s roof registered with a local roofing company, Randy’s Roofing, which inspected the Green Flash roof at least once per year, recommended required maintenance, and assisted in planning for the roof’s ultimate replacement. Being an existing client of Randy’s, Green Flash got first-priority treatment from the roofing contractor. As soon as the torrential rains had stopped, the contractor placed temporary patches on all of the areas where the roof had lifted.

Randy also referred the association to another contractor, Storm Chasers, who were quickly able to temporarily board up the areas where the windows and sliders had blown out, preventing further water intrusion.

Having shored up and dried in, it was time for Goodfellow to arrange for the dry-out of the building. Fortunately, Goodfellow had a key to each of the apartments (which was a requirement contained in the original Green Flash condominium documents) and he was able to inspect each apartment after the storm had passed. Goodfellow determined that 22 of the 40 units had some form of water intrusion, some severe, some minor. Because of the volume of rain that came with Christi, a few apartments that had no direct water entry showed signs of water intrusion as well.

Although it would be a week before power was restored, Goodfellow also had a pre-existing relationship with a dry-out contractor, Walt’s Water Extraction. Walt brought generators, fans, de-humidifiers, and a large crew of workers to dry-out Green Flash. The dry-out contractor ran the fans and de-humidifiers for five days, and declared the building to be moisture-free.

Green Flash, at Goodfellow’s insistence, also had a pre-existing arrangement with an independent consultant, Tom Techno, a professional engineer. Techno agreed after the five day period that it was okay to remove the water extraction equipment, and opined that there was a low probability of significant mold infestation.

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ERRATA: VOLUME XII, 2006, FUNDING RESERVES

This is a clarification of comments in the referenced article regarding the developer’s rights in connection with the waiver or reduced funding of reserves for a condominium association during its first two years of operation. The developer may exercise its voting rights in the Association to waive or reduce reserves, but the vote on reserves must

occur at a properly noticed meeting of the members of the association. After two years, reserves may be waived or reduced only with consent of a majority of the non-developer unit owners present and voting at a properly noticed meeting.



Effective disaster preparation, such as establishing relationships with local contractors and service providers, as well as engaging in a proactive maintenance program, is crucial to secure priority service in the aftermath of a storm.

To this point, the association has spent \$200,000.00 in post-hurricane remediation. Walt, the dry-out contractor, charged \$100,000.00. The cost to Randy's Roofing amounted to about \$50,000.00, but just for the immediate, temporary patch-work. The contractor who cleaned up the property and boarded the windows, Storm Chasers, charged \$25,000.00. The engineering consultant fees for Tom Techno, along with miscellaneous other expenses, ran another \$25,000.00. Remember, Green Flash has an \$800,000.00 deductible.

So far, so good. But, now, it is time to put things back together again. Questions abound about who is authorized (or obligated) to contract for the necessary repair work, and who is going to have to pay for it.

Of course, the association also immediately contacted its insurance agent, Risk, Reward and Associates, who filed a claim and got a file number from Citizens. There was a promise to send an adjuster out to assess the situation, but the association is warned that the more significantly damaged areas to the south would get first attention.

Always wanting to do things the right way, Green Flash also calls its attorney, John Justice, a local lawyer well respected in the community association law field. The association's first question to Justice is whose insurance is supposed to cover what.

Justice looks at the Declaration of Condominium for Green Flash, and notes, with some chagrin, that the association has not amended its documents since 1974. Apparently, while Green Flash was well-prepared on many fronts, good legal documentation was not one of them. Justice notes that Article 14 of the Declaration of Condominium provides: "The association shall obtain one hundred percent replacement cost coverage for all insurable improvements within the condominium."

Don Dooright, the Green Flash President, asks Justice whether the association's insurance policy will cover the damage which has occurred. Damaged items include the carpeting (some is completely ruined), dry-wall and kitchen cabinets. Of course, the various windows, window-walls and sliding glass doors will also have to be addressed, which will be discussed in future volumes of the COMMUNITY UPDATE.



PARTICIPATION IN MEETINGS BY A POWER OF ATTORNEY OR BY A TRUSTEE OR BENEFICIARY OF A TRUST

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The condominium law is clear that unit owners have a right to attend meetings of the Board of Directors and meetings of the owners, and such right to attend includes the right to speak at such meetings. In addition, it is clear that owners may vote in person or by proxy at unit owner meetings. But what about the right of someone holding a power of attorney from a unit owner or a beneficiary or trustee of a living trust? What rights do these individuals have to attend, participate, and vote, on behalf of the unit owner?

Powers of Attorney

- Where the condominium documents are silent regarding the use of a power of attorney, a board must allow a person holding a power of attorney from the unit owner to attend, speak at, and participate in the association's board of administration meetings.
- A person holding a power of attorney may not vote in the election of directors because the Condominium Act specifically prohibits any person other than the unit owner to vote his or her ballot.
- An association may limit the attendance of a holder of a power of attorney, by amending its bylaws to prohibit third persons (for example, a power of attorney) from attending meetings.
- If the unit is owned by a corporation, the association could not prohibit a power of attorney to attend on behalf of a

corporation, because a corporation is an entity that cannot act except through a designated individual.

Units Owned in Trust

If the unit is owned in trust, it must be determined who is considered the "unit owner" entitled to participate in meetings and vote on behalf of the owner (i.e., the trust).

- The statute governing corporations not-for-profit states that a grantor of a trust or a beneficiary of a trust which owns a unit shall be considered a member of the association and eligible to serve as a director of the condominium association. The terms "grantor" and "beneficiary" are defined in the statute. In order for the beneficiary to be considered a member, the beneficiary must occupy the unit. Therefore, if the unit is owned by a trust, a grantor or a beneficiary who occupies a unit may attend meetings and participate and speak at meetings.
- In most cases, the "trustee" will also be either a grantor or a beneficiary. Even if the trustee is not a grantor or a beneficiary, there are arbitration decisions holding that a trustee may vote on behalf of a unit owned in trust, and therefore, the trustee should also be permitted to attend and speak at meetings.
- The governing documents may impose a requirement that a unit owned in trust designate a "voting member" through the use of a voting certificate. If that is the case, the person designated in the voting certificate is the person entitled to vote on behalf of the unit owner.



Can an Association sue an owner who fails to prevent a family member or guest from violating the governing documents?

THE MEADOWS COMMUNITY ASSOCIATION, INC. V. RUSSELL-TUTTY

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In the case of *The Meadows Community Association, Inc. v. Russell-Tutty*, 928 So.2d 1276 (Fla. 2d DCA 2006), the Court considered whether the trial court erred in granting a motion to dismiss a complaint, with prejudice, that had been filed against a unit owner. In *Meadows*, a homeowners' association had brought action against a unit owner for declaratory and injunctive relief arising out of alleged violations of the association's traffic regulations by the owner's adult son who was residing with her. The owner filed a motion to dismiss for failure to state a cause of action arguing that:

- a. the enforcement of traffic laws is within the sole province of law enforcement;
- b. courts cannot enjoin criminal behavior;
- c. the amended complaint fails to allege a factual nexus between the defendant and her son; and
- d. the defendant cannot be ordered to control the actions of another individual.

The Appellate Court found that the trial court erred in dismissing the complaint with prejudice. The Court found that dismissal of the case by the trial court was inappropriate because on a motion to dismiss for failure to state a cause of action the court should not speculate on whether the allegations in the complaint are true or whether the pleader has the ability to prove them. The question for the court to decide is simply whether or not, assuming all the allegations in the complaint are true, the plaintiff would be entitled to the relief requested.

It is important to note that the Court stated that the trial court focused on the merits of the association's case rather than on the sufficiency of the allegations found within the four corners of the complaint. The Court noted that the complaint may be subject to a motion for summary judgment or other arguments that may ultimately moot the complaint. "The availability of a remedy, however, is reached after, not before, the determination of a plaintiff's rights." The case was reversed and remanded for further proceedings.

CALL LEADERSHIP

Hopefully all of you know that David Muller and Yeline Goin have assumed responsibility for all day-to-day operations of the Community Association Leadership Lobby (CALL), which advocates on behalf of more than 4,000 member communities statewide and is the leading organization working to enhance the quality of life and protect property values for Florida's community association residents.

Mr. Muller is based in our Sarasota office and represents community associations located in Sarasota, Manatee, Charlotte, Lee, Polk, DeSoto, Brevard and Highlands counties.

Based in Tallahassee, Ms. Goin represents condominiums and homeowner associations in efforts to comply with various aspects of the Florida Condominium Act and Florida Homeowners Association Act.



"I'm honored to be given the opportunity as CALL co-director to help drive the expansion of CALL's successful grassroots lobby efforts to include more condo, homeowner and other community association involvement from different regions around the state." — David Muller



"I'm very pleased with the opportunity to provide a permanent presence for CALL in Tallahassee, where so many decisions are made that impact on the quality of life of community association residents across the state." — Yeline Goin

A WORD OF THANKS...

Our sincere appreciation is expressed to all the clients, community leaders, managers and colleagues that have complimented the Firm regarding the new look and content of the Community Update and the improvements to the Community Association Leadership Lobby (CALL) website.

*Thank you,
Lisa Magill, Editor.*



Community Update Gets a New Look and Goes Electronic

We hope you are enjoying the new “look” of the [Community Update](#). As editors, we wanted to provide an attractive, easy-to-read newsletter while maintaining the same high quality of information that you have relied upon for many years. Let us know what you think. Also, Becker & Poliakoff will begin sending your Community Update newsletter via e-mail in the next few months. Please take a moment to send the requested information below via e-mail to caforms@becker-poliakoff.com or you can go online to becker-poliakoff.com/forms/ca.html to complete this form.

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E-mail delivery of Community Update will ensure your community continues to receive this valuable information in the most timely manner possible.

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