



*"Generally, a board member is permitted to make a mistake and will be immune from a personal lawsuit, even if the mistake is unreasonable."*

## DIRECTORS DO YOUR DUTY, DON'T BE LED DOWN THE BRIDLE PATH

By: C. John Christensen, Esq.  
jchristensen@becker-poliakoff.com

Berg v. Wagner, Brodsky, Lloyd, Shipman & Bridle Path Homeowners Association, Inc., 935 So.2d 100 (Fla. 4th DCA 2006)

In Berg v. Wagner, Brodsky, Lloyd, Shipman & Bridle Path Homeowners Association, Inc., 935 So.2d 100 (Fla. 4th DCA 2006), Bridle Path Homeowners Association filed a foreclosure action against an owner (Berg) due to the owner's failure to pay assessments. The owner countersued the Association and, more critically, the board members personally and individually, claiming breach of fiduciary duty by the Board, and individual directors, in the establishment of the assessments, in violation of 617.303, Florida Statutes (now 720.303). The board members argued that the owner's claims against them personally and individually were invalid for two reasons: (1) the "statute of limitations" period (the time-frame in which a legal claim must be brought against another party) had expired; and (2) any claims against the board members in their individual capacities were prevented by the Not-for-Profit Corporation Act which, affords board members immunity under most circumstances (for example, for mistakes by directors).

In response, the owner argued that the statutory immunity for board members was not applicable, asserting that the board members deliberately ignored proper procedure when assessments were levied, and that the board members intentionally holding illegal and improper board meetings to adopt assessments, all in bad faith and with a malicious purpose. The board members then asked the Trial Court to dismiss the owner's countersuit by way of a legal procedure known as a "Motion for Summary Judgment"; if a "Motion for Summary Judgment" is granted against a party, it means the Court does not believe the party can come up with any legal

argument whatsoever to win the case. The Trial Court agreed with the board members and granted their Motion for Summary Judgment and dismissed the owner's countersuit. The owner appealed.

The Appellate Court held the Trial Court's granting of the Summary Judgment could not be justified by reliance on the immunity provided board members by the Not-for-Profit Corporation Act; the Not-for-Profit Corporation Act protections do not extend to immunity for actions taken by board members in bad faith, which the owner had claimed. Apparently, the Trial Court had not fully examined the issue as to whether the board members had indeed acted in bad faith. The Appellate Court then noted that Summary Judgment is proper only when there are no genuine issues of material fact shown from the record of the trial; if there is the slightest doubt about or conflict in the evidence, then Summary Judgment should not be granted. Nevertheless, the running of the statute of limitations period did prevent the Appellate Court from completely reversing the Trial Court's decision. The Appellate Court only reversed the Trial Court's decision with regard to those actions assertedly committed by board members before the statute of limitations had expired; the Trial Court was required to reconsider the issue of the owner's claim of bad faith on the part of the board members before the statute of limitations had expired.

The bottom line is that, while board members are typically afforded immunity under the Not-for-Profit Corporation Act, if a board member acts in bad faith and with a malicious purpose, the board member may not be entitled to rely on these immunity provisions. Generally, a board member is permitted to make a mistake and will be immune from a personal lawsuit, even if the mistake is unreasonable. However, if it can be demonstrated that the board member acted maliciously and in bad faith, the board member may be subject to personal liability.

# HURRICANE CHRISTI – THE SAGA CONTINUES



By: Joseph E. Adams, Esq.  
jadams@becker-poliakoff.com

To continue our case study of hypothetical Hurricane Christi, we start by 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.*

*The second source which must be reviewed is your Declaration of Condominium. 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.*

*Based upon my experience in representing condominium associations after Florida's 2004 and 2005 hurricanes, it appears that this "new law" has created as much confusion as it was intended to cure, and is certainly not applied consistently.*

*One of the largest sources of dispute is the responsibility for insuring drywall inside of the apartments, which is also sometimes referred to as "sheet-rock" or "gypsum-board." Although certain drywall installations may actually be within the unit owner's general ownership and maintenance spheres (for example, interior non-load bearing partitions almost always fall in this category), these walls are nonetheless part of the "condominium property" as originally constructed. Likewise, the drywall constitutes part of the "improvements" required to be insured by your declaration. Further, drywall is not found on the "excluded list" of items in the Condominium Act.*

*Therefore, the association is responsible for insuring all drywall in the building, including drywall contained solely within the unit. The association must also insure other original installations such as all exterior and interior doors (including hardware), windows, sliding glass doors, and screening, so long as these installations were originally installed by the developer, or are replacements of like kind and quality. The Association's insuring responsibility is without regard to the ownership of these items (whether they are part of the unit or common element), nor whether the Declaration of Condominium delegates their day-to-day responsibility for maintenance, repair, and replacement to the association, or to the individual unit owner.*

*Conversely, any damage to kitchen or bathroom cabinetry, appliances, carpeting, paint, lights, ceiling fans, and similar items (as detailed in the portion of the statute I quoted earlier in this letter) are to be insured by the individual unit owner. That is the case even if such items (for example, the air conditioner compressors) are located outside of the building, and are designated a common element. The Association is precluded by law from providing insurance coverage for these items, and the law mandates their insurance be carried by the individual unit owners.*

*It is my understanding that you have been in contact with your insurance agent, who has gotten a claim number open with Citizens. I would recommend that you take a pro-active approach in ensuring that an adjuster is appointed for your claim, that a prompt initial inspection by the adjuster takes place, and that you establish personal contact information with the adjuster.*

*I also recommend that you save detailed invoices for any work which has been done to this date, along with any information which would justify why the work was necessary to be performed on an emergency basis. In general, emergency mitigation work does not require prior approval of the insurer, so long as the work was reasonably necessary to mitigate damage and preserve the property, and the expenses were reasonable. However, in moving forward, I would recommend that you have the adjuster sign off on any significant charges the association intends to incur, at least if you are going to submit them as part of your insurance claim.*

*I would also recommend that you submit the complete dry-out invoice from Walt's Water Extraction, which I understand was one hundred thousand dollars, to the insurer. Based upon my previous experience, it may well be that the association's insurer will only agree to cover a fraction of that expense, and we will need to address, at the appropriate time, whether those shortfalls are shared by all unit owners, or just those whose apartments were dried out.*

*Very truly yours,*

*John Justice, Attorney at Law*

In the next issue of Community Update, we will fast forward our case study a few months, with a look at some contract challenges frequently faced by associations in post-disaster remediation, and working toward determining who will have to pay the piper.

## BECKER & POLIAKOFF'S HURRICANE PREPAREDNESS CHECKLIST

1. **Create a Disaster Plan** and establish off-site contact information and meeting points.
2. **Establish Evacuation Routes** and conduct building or community evacuation drills in the weeks leading up to hurricane season.
3. **Verify Emergency Generators & Supplies** operate and that fuel, flashlights, batteries, water and other necessities are available.
4. **Backup Computer Files** and store information offsite, in case computers crash or systems fail.
5. **Secure the Premises** – Make preparations for routine lockdown of the building or other facilities as a storm approaches, so the building is secure during the storm and safe from vandalism or looting if a hurricane strikes.
6. **List of Owners & Employees** – Have on hand a current, hard-copy reference list complete with the names of all property owners, emergency contact numbers and details of second residence addresses, as well as a list of all association employees, with full contact details.
7. **Photograph or Video Premises** – Keep a visual record through video or photographs of premises, facilities and buildings to facilitate damage assessment and speed damage claims in a storm aftermath.
8. **Building and Facilities Plans** – Make sure a complete set of building or community plans are readily available for consultation by first-responders, utilities workers and insurance adjusters following a storm.
9. **Insurance Policies & Agent Details** – Be sure all insurance policies are current and coverage is adequate for community property, facilities and common areas and compliant with State Law; full contact details for insurance companies and agents should be readily available in the event of a storm.
10. **Bank Account Details & Signatories** – Keep handy a list of all bank account numbers, branch locations and authorized association signatories, and make contingency plans for back-up signatories in case evacuation or relocation becomes necessary.
11. **Mitigation of Damages** – In the immediate aftermath of a storm, take the necessary steps to mitigate damages – this includes “Drying-In,” which is the placement of tarps on openings in the roof and plywood over blown out doors and windows, and “Drying-Out,” which is the removal of wet carpet and drywall to prevent the growth of mold.
12. **Debris Removal** – Have a plan for speedy removal of debris by maintenance staff, outside contractors or civic public works employees, should a hurricane topple trees and leave debris in its wake.

# DELINQUENCY PROTECTION – ASSESSMENT ESCROWS UPHELD BY DIVISION

Robert Rubinstein, Esq.  
rubinstein@becker-poliakoff.com.

Condominiums, cooperatives and homeowner associations can help protect themselves from an owner's failure to pay assessments.

An amendment to the governing documents can be adopted requiring new purchasers to deposit with the association a certain amount of assessment installments the association holds in escrow. This assessment escrow can serve as a source of funds to apply whenever an owner becomes delinquent in the payment of assessments.

In a couple of recent decisions, the Department of Business and Professional Regulation (DBPR) reviewed complaints about assessment escrow deposits for condominiums. In those complaints, it was alleged the assessment escrow deposit was an illegal acceleration of assessments or an illegal transfer fee. For condominiums and cooperatives, the statutes permit the balance of assessments for a fiscal year to be accelerated, so they are immediately due and payable, if the governing documents provide for this after an owner becomes delinquent. There is no statutory counterpart for homeowner associations, but they can still accelerate the balance of assessments for a fiscal year, if the governing documents so provide. For condominiums and cooperatives, only a fee of \$100 can be charged when the unit is being transferred, if the governing documents allow for such an approval fee. There is no such statutory restriction for homeowner associations, so homeowner associations can charge any reasonable transfer fee, if the governing documents authorize the fee.

After reviewing these complaints the DBPR determined that no condominium statutory violation occurred by reason of having and enforcing an assessment escrow deposit. The DBPR did

not give any reason or basis for why it found no violation, but it can be assumed the DBPR responded to the arguments made by the condominium associations. Those arguments were that the assessment escrow was a deposit, not a fee and not an acceleration of assessments. Because the money was returned to the owner after a certain period of time, it was argued that it could not be a fee, which, by definition, is earned and kept, not returned. Since the money was not commingled with the association's operating account and not used by the association except in the event of a default in the payment of assessments, it was argued that it could not be an acceleration of assessments. The argument was further supported by case law showing that, at the time the money is given to the association, there is a right to demand the return of that money, so it could not be deemed an advance payment for services.

For condominiums and cooperatives, the DBPR has decided that assessment escrow deposits are not a violation of Chapter 718, Florida Statutes. Therefore, condominiums and cooperatives can safely protect themselves from delinquent owners by amending their governing documents to require an assessment escrow deposit from all new purchasers. For homeowner associations, there are no statutes that restrict transfer fees or acceleration of assessments, so homeowner associations can also amend their governing documents to safely protect themselves against delinquent owners by requiring an assessment escrow deposit. However, to insure this type of amendment fits within those approved by the DBPR, all community associations should have the amendment prepared by their legal counsel.



Greg Marler and other Becker & Poliakoff attorneys have presented several educational programs for the Community Association Officers Forum in Southwest Florida. The Forum which is coordinated by Edison College, is a series of informational sessions for community association leaders in areas such as reserves, management, pooling reserves, collection of assessments and compliance with various legal and regulatory requirements. Greg and other industry professionals from the banking and financial industries that work with community association board members presented several sessions of "must know" information for the College. Greg is a regular speaker at the Forum and also presents seminars providing CAM credits for property managers in the Southwest Florida area.

*The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.*