



PRODUCTS - COMPLETED OPERATIONS COVERAGE – WHAT IS IT AND HOW DOES IT WORK?



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As often happens, an Association hires a general contractor to perform construction work at the condominium. As part of its due diligence, the Association confirms that the contractor has commercial general liability (CGL) insurance.¹ Typically, the general contractor provides the Association certificate(s) of insurance indicating the types of liability insurance in effect with the respective amounts of coverage for each type of insurance.

These types of CGL policies contain an insuring agreement clause, which usually provides that the insurance company “will pay those sums the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” A definitions section in the policy will define certain key terms in the policy. Endorsements to the policy may expand or narrow the scope of insurance coverage. Exclusions in the policy indicate what risks the insurance company will not cover. Exceptions to these exclusions indicate what otherwise covered risks remain covered, notwithstanding the applicability of a particular exclusion.

Among the types of insurance that general contractors have obtained as part of their liability insurance is what is known as **“products - completed operations”** coverage. In general and subject to certain exclusions, this type of insurance provides coverage for property damage caused by an occurrence arising from **completed operations** that occur away from premises owned or rented by the insured. The insurance policy will typically define the terms “property damage”² and “occurrence.”³ In addition, the insurance policy will usually define when operations are completed. As the condominium’s property is usually not premises that are “owned or rented by the insured” (i.e. the general contractor), this should generally not present a concern in regard to the applicability of completed operations coverage.

Why is this significant and how would this come into play in a real-life situation? For example, suppose that a general contractor performs construction work at the condominium. Several subcontractors are hired by the general contractor to perform various aspects of this work. All is well and good and the project is finished. Nevertheless, several months later, problems arise from this construction work. Unfortunately, the general contractor’s [through its subcontractors’] faulty workmanship has resulted in property damage to the condominium.

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¹ In 1986 the Comprehensive General Liability policy was renamed the Commercial General Liability policy.

² **“Property damage”** has been defined in these types of policies to include “physical injury to tangible property, including all resulting loss of use of that property.”

³ **“Occurrence”** has been defined in these types of policies as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

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The Association wants to avail itself of its legal rights against the general contractor (and others as applicable). Part of the Association's analysis in this regard will be to determine whether the general contractor has insurance coverage to cover this resultant property damage.

Florida's Supreme Court rendered an Opinion that may provide some relief to an aggrieved Association. In *United States Fire Insurance Company v. J.S. U.B., Inc.*, 979 So. 2d 871 (Fla. 2007), the subject insurance policy had an exclusion for "property damage" to "your work" (a defined term in that policy) included in completed operations coverage with an *exception to this exclusion* if "... the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." In *J.S. U.B.* the subcontractor's use of poor soil, improper soil compaction and testing **caused damage to** the foundations, drywall and other interior portions (e.g. wallpaper) of various homes (i.e. the completed project).

Based upon the foregoing and the court's analysis of the applicable facts and insurance provisions, the Supreme Court of Florida in *J.S. U.B.* held that insurance coverage exists for a claim made against a general contractor under a post-1986 CGL policy with completed operations coverage for damage to the completed project caused by a subcontractor's defective work (provided no exclusions apply).⁴

Consequently, in evaluating potential construction defect claims against general contractors, consideration should be given to whether the general contractor's CGL policy has completed operations coverage with a clause that is the same or similar to the post-1986 completed operations clause referenced in the *J.S. U.B.* decision. *Importantly*, this would include whether

such policy has the same type of "subcontractor" *exception* to the "your work" exclusion for completed operations. In addition, consideration should be given to the applicability of any other exclusion (e.g. breach of contract).

Consideration should also be given to whether there is a "property damage" caused by an "occurrence" that happened *after* the project's completion (assuming, of course, that there is completed operations coverage) and within the policy period. *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So. 2d 1072 (Fla. 1998) (Florida's Supreme Court observed (a) that these types of policies provide coverage not only for "accidental events," but also for injuries or damages neither expected nor intended from the standpoint of the insured, and (b) that defective construction can be an "occurrence" under Florida law)

Furthermore, consideration should be given to the issue of "property damage," including in particular whether such damage can be attributable to a subcontractor's defective work and how such defective work damaged the completed project (i.e. what damage was **caused by** or was **a result of**, and exists **beyond** the subcontractor's faulty workmanship). Florida's Supreme Court in *J.S. U.B.* discussed the differences between, (1) a claim for the cost of repairing or removing defective work, which is typically not a claim for property damage, and (2) the costs of repairing damage caused by such defective work, which is typically considered property damage.

In the end, it may well be that the Association will have a viable source of recovery available through the completed operations coverage provisions of the general contractor's commercial general liability policy. ■

⁴ For example, the *J.S. U.B.* policy did not contain a breach of contract exclusion.



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ALLOWING ACCESS TO OFFICIAL RECORDS – NEW REQUIREMENTS AND PENALTIES



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House Bill 995, which became effective on October 1, 2008, makes significant changes to Section 718.111(12), Florida Statutes, regarding the keeping of “official records” by a condominium association.

First, the official records of the association must be maintained within the state for at least 7 years. The only exception in the law is that ballots, sign-in sheets, voting proxies and all other papers relating to voting by unit owners only need to be retained for a period of 1 year from the date of the election, vote or meeting to which the document relates.

Next, Section 718.111(12) of the Florida Statutes now provides that official records of an association must be made available to a unit owner within 45 miles of the condominium property or within the county in which the condominium is located. This distance requirement does not apply to an association governing timeshare condominiums.

Another significant change is that associations may now offer the option of making the records available to the unit owner either electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. Since many associations already have their official records in electronic format, this option will allow associations to process a request for official records in a more expedited and efficient manner.

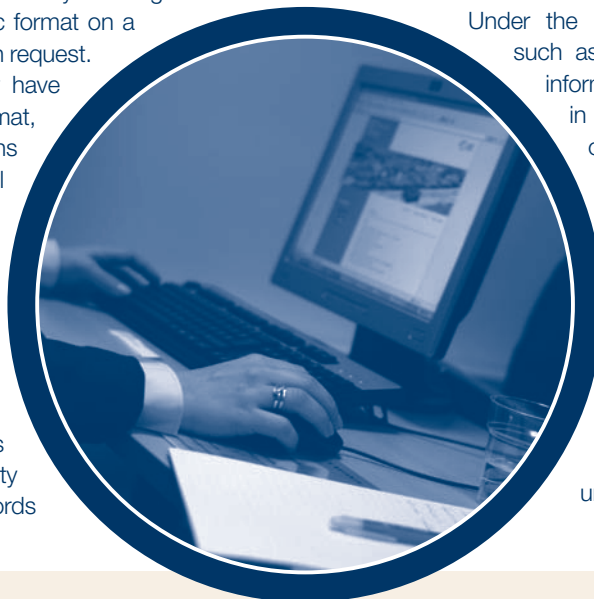
The new law also provides that any person who knowingly or intentionally defaces or destroys accounting records, or knowingly or intentionally fails to create or maintain accounting records, is personally subject to a civil penalty from the state. Accounting records

include all receipts and expenditures; a current account and a statement of monthly, bi-monthly or quarterly account for each unit designating the name of the unit owner, the due date, amount paid and the balance due; and all audits, reviews, accounting statements, and financial reports of the association. The statutes further require the Division of Florida Condominiums, Timeshares, and Mobile Homes (“Division”) to adopt additional rules regarding information to be included in a financial report, such as a summary of the reserves which includes information as to whether such reserves are being funded at a level sufficient to prevent the need for a special assessment and, if not, the amount of the assessments necessary to bring the reserves up to the level necessary to avoid a special assessment. The statutes also provide that financial reporting may not be waived for more than three consecutive years.

In addition to the potential for civil liability for destroying or failing to maintain accounting records, the Condominium Act creates an ongoing duty by association directors, officers, employees, developers and managers to reasonably cooperate with the Division in investigations. In the event Division believes that a person has altered, destroyed, concealed or removed association records, Division shall refer the matter to local law enforcement.

Under the previous law, certain information, such as a unit owner’s medical records, information obtained by an association in connection with the approval of sales or leases and attorney-client privileged information, were not available for unit owner inspection. The new law expands the exclusions by stating that Social Security numbers, driver’s license numbers, credit card numbers, and “other personal identifying information of any person” are not part of the official records and not accessible to other unit owners. Since the statutes do

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not specify what "other personal identifying information" may include, this provision will be open to interpretation until it is clarified by administrative rules or court decisions.

Although Legislature made significant changes to the Condominium Act in regards to the maintaining of official records, these changes are not applicable to homeowners associations, which are governed by Chapter 720, The Homeowners Act. First, Section 720.303(4) of the Florida Statutes sets forth a list of documents which are considered official records of the association. Unlike the Condominium Act which requires all official records, with the exception of ballots, proxies and like documents, to be maintained for 7 years, the Homeowners Act only requires the association to maintain the following documents for 7 years: minutes of all meetings of the board and of the members, copies of the association's insurance policies and all financial and accounting records of the association. The Homeowners Act does not otherwise prescribe the length of time an association must retain the remaining official records.

Unlike the Condominium Act which now requires the official records to be kept within 45 miles of the condominium property or within the county in which the condominium is located, the Homeowners Act requires that the official records must be maintained in the state. Next, although the Condominium Act now imposes civil liability against any person who destroys accounting records or fails to maintain accounting records, similar civil liability is not imposed upon persons in homeowners association setting.

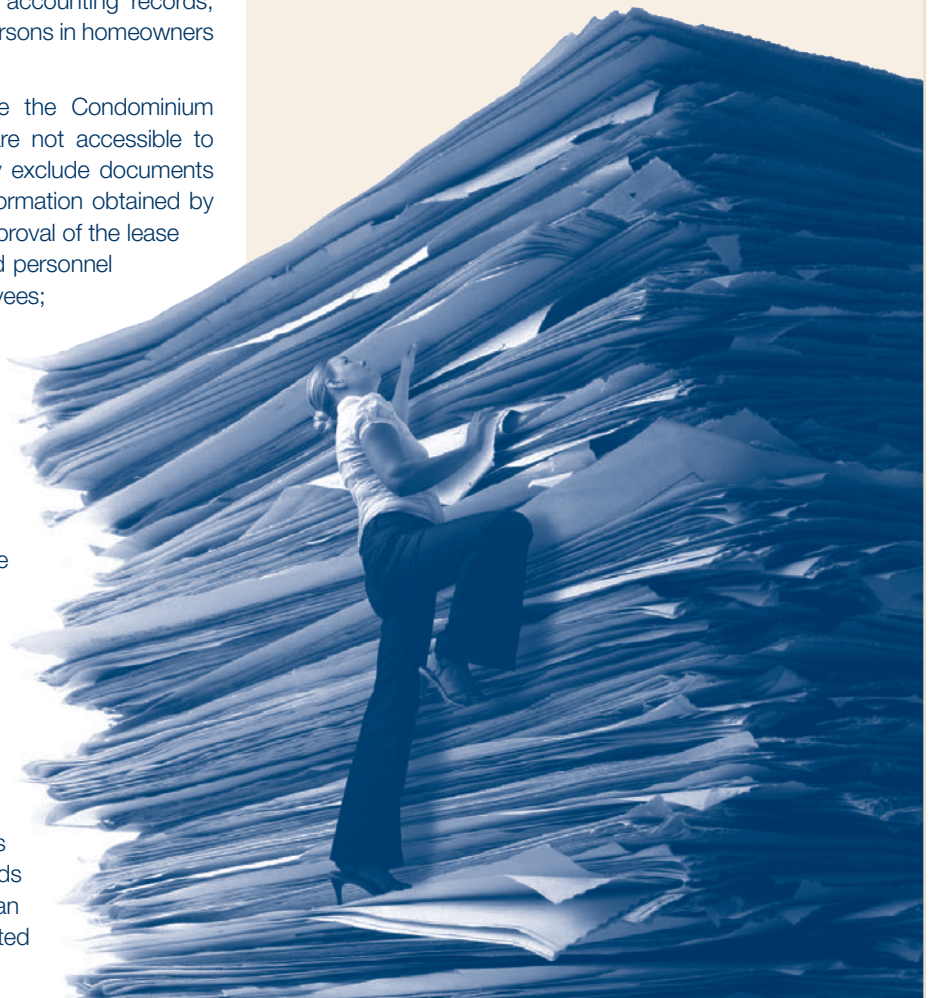
Next, the Homeowners Act, much like the Condominium Act, provides that certain documents are not accessible to other members. The statutes specifically exclude documents protected by attorney-client privilege; information obtained by the association in connection with the approval of the lease or sale; disciplinary, health, insurance and personnel records of the association's employees; and medical records of the owners or residents from inspection by other owners.

Both the Condominium Act and the Homeowners Act permit an association to adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections. However, the Homeowners Act further provides that the Association may not impose a requirement that the owner demonstrate a proper purpose for the inspection, state any reason for the inspection or limit a owner's right to inspect records to less than one 8 hour business day per month. Generally, rules which restrict access to the official records to 3 or 4 times per month, for no more than 4 hours per viewing, during enumerated

times of the day and at the offices of the association manager are considered reasonable.

This Article provided a general overview of recent changes in the Florida Statutes regarding the keeping of official records, as well as discussed certain differences between condominium and homeowners associations. Although an association may adopt reasonable rules governing the inspection of official records, it should seek competent legal advice and guidance prior to the adoption of such rules to ensure they comply with applicable Florida law. ■

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ASSOCIATIONS OWING ASSESSMENTS TO OTHER ASSOCIATIONS: SAY IT ISN'T SO!

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The only thing worse than associations not being able to collect assessments from their members is associations having to pay assessments to one another. Is it possible? Yes, it is possible in communities where multiple associations govern and each association is statutorily authorized to record a claim of lien for unpaid assessments. This article seeks to explain how associations find themselves in such a mess and what can be done to prevent it.

The backdrop is the Florida Condominium Act (Chapter 718) and the Florida Homeowners' Association Act (Chapter 720). Both Acts provide that an owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. The "joint and several liability" phrase in this content, simply means the next property owner will be equally liable for all of the unpaid assessments incurred by the original owner. Generally, this provision serves to benefit associations in their efforts to recover unpaid assessments from new property owners, regardless of how title is acquired (i.e., by foreclosure sale or deed in lieu of foreclosure, there are limitations on the liability for first mortgagees). However, this provision can also operate against associations in that it requires associations who acquire title to property to pay all past due and owing assessments on a subject property to the other association.

Consider the following hypothetical. A community has master association and a subassociation. Both associations are statutorily authorized to record a claim of lien against a property for failure to pay assessments. An owner fails to pay assessments to both associations and, as a result, both pursue collections, including recording their own claims of lien against the property. Assume there

are no other encumbrances (e.g. bank foreclosure, etc.) on the property. One association forecloses its claim of lien while the other association sits by and does nothing. Months later, the foreclosing association takes title to the property and, as a result, becomes jointly and severally liable for all unpaid assessments owed up to the time of transfer of title.

Most associations would be shocked to learn of their new financial obligation to pay assessments to another association, especially after having spent money to prosecute a foreclosure action, which seemed like a prudent decision at the time it was made. Come to find out, however, that decision may end up costing the foreclosing association more money than it was initially owed by the non-paying owner.

Some associations realize the implications of this situation and simply refuse to foreclose or hope the other association will foreclose first. Where both associations realize these implications and refuse to foreclose, a "standoff" may ensue where both associations are left wondering who will flinch first. Meanwhile, the non-paying owner is allowed to live in the community free of charge while other owners pay the non-paying owner's share of the assessments.

Some might think that this situation can be avoided by simply waiting for the owner's first mortgagee to foreclose its mortgage where a first mortgage exists on the property. However, simply because an owner is failing to pay assessments to the association does not necessarily mean that the owner is also in default of his or her mortgage obligation. Theoretically, an owner could be failing to pay the association but timely making mortgage payments. This places the association in the unenviable position of nearly being forced to foreclose no matter what the consequences. Accordingly, it behooves an association to promptly proceed with collection efforts, as doing so in most cases helps to minimize the association's potential exposure. ■



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ELEVATOR KEYS MUST BE UNIFORM

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Your Association is strapped for cash and you've heard a rumor that you need to spend **thousands of dollars** this year to retrofit your elevators with uniform elevator key boxes to accommodate uniform elevator keys.

It's true. Florida Statutes, §399.15 requires:

Every building in the State of Florida which is **six (6) or more stories in height**, including but not limited to, **hotels and condominiums, to change all keys for elevators that allow public access**, including but not limited to, service elevators and freight elevators, to allow elevators to operate in fire emergency situations with one (1) master elevator key (within each of the seven (7) State emergency response regions) **BEFORE OCTOBER 1, 2009**.

Uniform elevator keys must be applied for using Florida Department of Financial Services, Division of State Fire Marshal Form DFS-K3-1660 and must be mailed to an authorized vendor. Currently, there are only three (3) authorized vendors in the State of Florida. To obtain a master key, you must be either local fire department personnel, an elevator owner, an elevator owner's agent, an elevator contractor, a state-certified

inspector or a State agency representative. You must further certify that you will not duplicate the key and that you will return the key should you become ineligible to possess it.

Does every property need to comply with this requirement? Florida Statutes, §399.15(4) provides, "If it is technically, financially, or physically impossible to bring a building into compliance with this section, the local fire marshal may allow substitute emergency measures that will provide reasonable elevator access."

Administrative Rule, 69A-47.019(1) also provides, "If the local fire official determines that it is technically, financially, or physically impossible to bring a building's elevators into compliance... the local fire official may accept as an alternative the **installation of a keyed lock box** that accepts the uniform key for that specific region..."

If the local fire marshal rejects your plea for relief from this requirement, you can appeal to the State Fire Marshal.

If you don't comply, Florida Statutes, §399.15(5) provides for a \$1,000.00 fine, in addition to any other penalty provided by law.

Further information can be obtained by writing to the Division of State Fire Marshal, by visiting the Division of State Fire Marshal website located at <http://www.fldfs.com/SFM/index.htm>. or by calling your Community Association attorney. ■

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