

THE INSURANCE PREDICAMENT FOR CONDO OWNERS & ASSOCIATIONS



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On June 1, Governor Charlie Crist vetoed SB 714, which was the major bill impacting community association operations this year. While a full legislative report will appear next month, SB 714 would have

relieved Condominium Unit Owners from maintaining individual property insurance and likewise relieved Associations from the burden of requesting insurance certificates.

Governor Crist rejected the bill primarily as a result of the extension of time to comply with life safety improvements. High-rise communities throughout Florida will have to retrofit their buildings, or partially retrofit (if authorized by membership vote to opt-out of installing sprinklers in units) by December 31, 2014. We will include more information about the options available to high-rises in future publications and in the Firm's blog.

www.floridacondohoalawblog.com

With regard to condominium insurance, please remember:

1. Unit Owner contents (HO-6) coverage is mandatory.
2. Unit Owner insurance coverage must contain \$2,000 "special assessment" coverage. SB 714 would have corrected the language to "loss assessment" coverage.
3. The Association must be named an additional insured and loss payee on insurance policies issued to Unit Owners.
4. Condominium Associations are required to request insurance certificates from the owners. The Association is permitted, but not required, to force-place the coverage if the owner fails to furnish evidence of insurance.
5. Association boards must set the master policy insurance deductible at an open board meeting - the notice of the meeting must contain the amount of the proposed deductible, available funds and cite the assessment authority as well as estimate potential assessments against each unit for possible casualty costs that are not funded by insurance proceeds.

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LEGISLATIVE UPDATE - NEXT VOLUME. Find out what passed and what did not pass and how that impacts your community operations.

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6. Unit Owners are still required to insure "improvements and additions" that benefit fewer than all the owners. This is problematic from a number of perspectives, especially in light of the fact that the terms "improvements and additions" are not defined. This provision in Section 718.111(11)(g) (1), Florida Statutes may be interpreted to mean that Unit Owners bear responsibility for portions of the property traditionally insured by the master policy, such as balconies, vehicle enclosures such as carports (if the coverage is available), storage spaces and the like.
7. The master policy includes all HVAC equipment, regardless of whether the equipment is located in the units or elsewhere. The master policy is required to include coverage for heat pumps, air conditioning compressors and air handlers, duct work and the like. The insurance industry recommends consulting with an HVAC professional to determine the amount of additional coverage required.
8. Fidelity bonds (or director/employee dishonesty endorsements) must be in an amount that will cover the maximum amount of funds subject to association (or

management) control. At a minimum, coverage should be equal or exceed all reserve funds and operating accounts. However, if the association has a line of credit or a loan, coverage for that exposure is likewise important.

Compliance with all of these requirements is tricky and obtaining the insurance certificates may be a tremendous administrative burden upon the Association. Many Associations were confused by item 5, and did not know how to calculate potential assessments against the units for casualty losses. Association leaders and managers have to take uninsurable losses into consideration for items that are typically excluded from master policies such as awnings, perimeter fences, landscaping, accessory structures and the like. Moreover, if the Association does not have coverage for code and ordinance upgrades, these costs must be taken into account as well when calculating potential assessments against the members.

While changes to the Statute are likely in the future, for now all condominium owners and associations are governed by these provisions and there is potential liability for violating the statute. ■



HURRICANE PREPAREDNESS & INSURANCE CLAIMS RECOVERY WEBINAR SERIES

On June 11, 2009, Shareholders Herb Brock and Ken Direktor presented the first in a series of webinars regarding Hurricane Preparedness and Insurance Claims Recovery. The webinar, entitled "**Hurricane Season 2009: Are You Ready to Weather the Storm?**" covered disaster planning, insurance coverage review, building & facility hardening, financial planning, and rules relating to securing property, emergency powers and disaster plan activation. This webinar format allows you to participate from your home or office. Please join us for upcoming webinars:

June 30 - Noon - 1:15 PM (EST)

"Don't Let This Happen to You: Avoiding Pitfalls in Construction Contracts." The program addresses property damage and reconstruction issues, including contractor selection, engineer vs. public adjuster, contract forms & terms, and lien laws.

July 20 - 3:00 PM - 4:15 PM (EST)

"The Insurance Company is Not Your Friend – Preparing and Presenting an Insurance Claim for Maximum Recovery." Covers strategies for proper reporting and preparation of claim, appraiser selection, mediation & litigation options when insurer rejects claim, and strategies for reopening a claim for newly discovered damage.

Register for the webinars at: <http://www.becker-poliakoff.com/events/seminars.html>.

TO SECURE OR NOT TO SECURE



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With foreclosures on the rise, many associations are collecting only a portion of the maintenance assessments necessary to operate the association. These associations are struggling to prioritize payment of the necessary and discretionary bills and services. The association's inability to collect maintenance assessments has threatened the continuation of many associations' core services such as lawn care, pool maintenance and security services. Cutting back on lawn care services, while maybe not aesthetically pleasing, does not appear to cause a potential threat of harm. However, what about contractually required services, such as security, that could impact the safety of the owners? What is an association's potential liability for the failure to provide security services that the association is contractually required to provide – at a time when they simply cannot afford the service?

Years ago, the courts evaluated an association's liability for alleged security breaches or failures using a "notice" or "foreseeability" standard. For example, the courts would evaluate whether the association was aware of any criminal conduct on or near association property and/or whether or not the actual crime that occurred was similar in nature to past crimes. If the association was unaware of any prior criminal conduct or if the prior crimes and actual crimes differed, the court could determine the association was not liable for any damages because the crime was not "foreseeable" and/or the association did not have notice of similar criminal conduct. This standard is now limited to situations in which a duty to prevent harm from criminal conduct arises only as an aspect of the common law duty to exercise reasonable care to keep the premises safe as opposed to a contractual duty.

The standard used to evaluate an association's liability for security breaches or failures is much different for associations who have a contractual duty or who have undertaken the

responsibility to provide these security services. In the case of *Vasquez v. Lago Grande HOA*, 900 So.2d 587 (Fla. 3rd DCA 2005) the Court found a condominium association, the management company and the security company liable for the death of a visitor who was shot and killed by her ex-husband in a friend's unit. In holding the association liable for the death, the court explained that since the association advertised the complex on the basis of safety and collected a specific portion of the condominium maintenance for the safety and security services provided, the association had a duty to exercise reasonable care to prevent any criminal incident from occurring. The fact that this was the first crime of its kind was irrelevant.

Further, the association attempted to avoid liability arguing that by hiring a security company to provide security services, the security company assumed the duty and contractual obligation to provide the services and therefore, the association had fulfilled its contractual obligations. In holding the association liable to the estate of the deceased, the court explained that the association had a non-delegable contractual duty with its members. Additionally, in this case, the association was negligent in retaining the security company after notice of the security company's prior security deficiencies.

When an association is considering what cut-backs to make in these tough economic times, the association must determine if it has a contractual responsibility, or if it has

undertaken the obligation, to provide security services to its members. If the answer is no, the association could be liable for foreseeable crimes on the property. If the answer is yes, the association could be liable for security breaches if it fails to exercise reasonable care to prevent any criminal incident from occurring. A cut-back in security services may be deemed a breach of contract, despite the fact that the association is unable to pay for the services. If you are unsure of your association's obligations under your governing documents, contact your association attorney for advice. ■



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GOVERNMENT LAW & LOBBYING

TAXATION OF GOLF COURSES

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In the wake of the current economic crisis, some governmental entities have attempted to seek additional ad valorem revenue by taxing common elements. In Seminole County, the Tax Assessor sought to tax a golf course located within a platted residential subdivision of a condominium association. On May 14, 2009, the Attorney General reviewed this issue and found that under Florida Statute section 193.0235, "so long as the golf course, located within a platted subdivision and designated on the plat, approved site plan or otherwise as a common element for the exclusive benefit of lot owners, is not included within the lots that constitute inventory for the developer which inventory is intended to be privately owned or is currently privately owned, such property would appear to qualify as a common element for proration of taxes pursuant to section 193.0235, Florida Statutes." Accordingly, rather than being taxed independently, the value of such land designated as common element for the exclusive benefit of lot owners must be prorated by the Property Appraiser and added to the assessment of all the lots within the subdivision.

Under Florida Statute § 193.0235, ad valorem taxes or non-ad valorem assessments by a county, municipality, special district, or water management district may not be assessed separately against common elements utilized exclusively for the benefit of lot owners within the subdivision, regardless of ownership. Included within the meaning of the statute to be considered a common element is any subdivision property not already sold or that is intended to be sold into private ownership that is designated on the plat or plan as a common element. Therefore, in order to qualify as common element, and thus be exempt from additional ad valorem tax assessments by the municipality, the golf course must be actually and exclusively used by the lot owners, regardless of ownership, and designated as such on the plat, approved site plan, or otherwise as a common element for the exclusive benefit of lot owners. For example, a golf course that is open to the general public for play in exchange for a fee may not be classified as "common element." However, the use of a golf course by guests and relatives of lot owners, as a benefit thereof, will not likely jeopardize the exclusivity of such use. Accordingly, if you find that your common elements are being taxed improperly you may wish to determine if Florida Statute § 193.0235 is applicable. ■



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