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Picking Up the Pieces: Disaster Preparation and Recovery

The 2004 storm season, with three hurricanes crossing Central Florida was a freak occurrence, right? But then concern only increased in 2005, which has featured a record number of named storms. For those associations which incurred damage, it is still time to evaluate and repair that damage. But for all associations, including those spared damage, it is time to make plans for dealing with future hurricane seasons.

Probably the first priority after a hurricane is to take appropriate steps to secure the property. Temporary repairs may need to be made to roofs and other structures. It should be noted that Section 718.3026(1)(b), Florida Statutes (2005) for condominium associations and Section 720.3055(2)(b), Florida Statutes (2005) for homeowners' association provide exceptions to the normal bidding requirements when emergency repair work is necessary.

Last Year was the new norm, not just a freak occurrence. Are you ready?

Inevitably, an association will need to determine how to pay for the repairs necessitated by the hurricane. Probably the first step is to contact the insurance company and make a claim. One difficulty with insurance for associations is a high deductible for hurricane damage, usually stated as a percentage of the total coverage.

Another problem is that carriers may not pay what the Association believes is an appropriate amount for the damage. In this event, the Association has several alternatives. It can retain legal counsel and file suit against the insurance company. In a legal action against the insurance company, attorney fees are potentially recoverable under Section 627.428, Florida Statutes (2005) against the insurance company in addition to the amount of the underlying claim. The association can alternatively retain a public insurance adjuster who may be able to negotiate a higher payout from the insurance company without litigation. However, a public adjuster usually charges a fee equal to ten percent of the recovery which comes out of the association's recovery. Finally, the association can file a complaint with the Florida Department of Insurance. Condominiums , in particular may see disputes over coverage between the association's carrier and those of the unit owners.

If insurance is insufficient to pay for all the damage, **[Continued >>>>>]**

RECENT CASE

- **The 2004 amendment to the HOA Act requiring pre-suit mediation of disputes applies to all disputes not reduced to a lawsuit filed before October 1, 2004, even if the dispute actually existed before that date.**

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- and in this age of high hurricane deductibles that is a strong probability - the association will need to consider other alternatives to pay for repairs. One alternative is to impose a special assessment. This would shift the financial responsibility for the association's damage to the individual owners who will have to pay the special assessment out of their own savings or borrowing. Alternatively, the association can obtain a loan either from the federal government or a private bank. The federal government has been a popular source of loans for associations recently because of the extremely low interest rates for disaster loans. FEMA referred the responsibility for administering these loans to the Small Business Administration because of the SBA's general experience in making loans. The SBA or a private bank may want collateral for the loan and that collateral will likely consist of an assignment of the association's assessment power. Therefore, a loan will likely require the association to adopt a special assessment that is paid over time to fund the repayment of the loan.

To plan for future disasters, the association should take a look at its governing documents. Some associations have adopted a bylaw provision to deal with emergencies. Such a provision may grant the officers explicit authority to take certain actions in an emergency when it is not practical to convene the board. The emergency bylaw may also grant the board and the officers the authority to hold meetings without necessarily providing notice to the members if an emergency exists and notice is not practical. The provision should define what constitutes an emergency so that the emergency provision is used only for appropriate purposes. A similar emergency power's provision also may be considered by the Legislature in the near future.

Associations may not be able to stop the wrath of mother nature. However associations can take practical steps before and after natural disasters to lessen the impact.

RECENT CASE SUMMARY

In **Island Club at Corkscrew Woodlands Homeowners' Association, Inc., vs. Bishop**, 12 Fla. L. Weekly Supp. 954a (20th Judicial Circuit, Lee County, 7/8/2005) a dispute arose between Homeowner and a Chapter 720 Association in August, 2004, and a law suit was filed by Association on December 22, 2004. Section 720.311, Fla. Stat. was adopted by the 2004 legislature, and became effective on October 1, 2004. Subsection 2 of the statute requires pre-suit mediation of most disputes between homeowners and their associations. The Department of Business and Professional Regulation, which administers the pre-suit mediation program, adopted rule 61B-82–0001, F.A.C., which provides: "*Only disputes arising or existing on or after October 1, 2004 and not filed in the courts by October 1, 2004, are subject to mediation under section 720.311(2), F.S.*" Homeowner filed motions to dismiss and/or abate the lawsuit, alleging that it was subject to the new statute. Association argued that because the dispute existed before October 1, 2004, it was not subject to the new statute. The trial court found that the Department rule, though inartfully drawn, should be read to as though it says, "Disputes arising after October 1, 2004 or disputes existing on October 1, 2004 and not filed in the courts by October 1, 2004 are subject to mediation." Thus, it found that even though a dispute may have predated the October 1st deadline, it was subject to mediation if suit was not filed prior to that date. The court reasoned that because that statute is remedial and procedural in nature, and not substantive - in that it merely provides a means to resolve a dispute - remedial statutes may be given retroactive application. As a result the court ordered the lawsuit abated pending compliance with the obligation to mediate the dispute.

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