COMMUNITY COUNSEL

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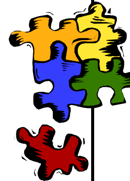
RECENT CASES

- ASSOCIATION IS NOT ENTITLED TO RECOVER INSURANCE DEPRECIATION PAYMENT UNDER REPLACEMENT COST POLICY UNTIL REPAIR WORK IS COMPLETED, EVEN WHEN INSURER FAILED TO PAY FUNDS TO MAKE REPAIRS.
- OWNER NOT ENTITLED TO INJUNCTION REQUIRING ENFORCEMENT OF DOCUMENTS BY ASSOCIATION WHERE DOCUMENTS MADE ENFORCEMENT DISCRETIONARY.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

CONDO INSURANCE ISSUES – THAT COMPLICATED ?

At least weekly we are called upon to explain how the maintenance provisions of condominium documents relate to responsibility for damage or repair of portions of the condominium property as well as to damage to the possessions of occupants. We have tried all manner of explanations and summaries, yet the problems understanding these issues persist.



Any analysis of responsibility for damage will be dependent on many specific facts that will differ from case-to-case. What broke or leaked, where it is located in the building and who is served by the component are all factors to be considered, as is – of course – the underlying cause of the problem. It greatly helps to understand these factors by knowing the way the declaration of condominium defines the boundaries between the units, the common (and limited common) elements and association-owned property. This allows you to understand the nature of the troubled component based on where it is located and what its function is.

With that understanding, the cause of the problem next must be ascertained. Often, expert advice is needed to assist in making this determination, but answering this question will tell you whether the issue is merely ordinary maintenance, repair or replacement of a troubled component. If that is the issue and no more (in other words no other part of the condominium property has been damaged) then the inquiry can stop and the answer will be found in the community's documentary maintenance provisions.

However, where damage has resulted from other than ordinary wear and tear, or where other portions of the condominium property have been damaged, it becomes necessary to understand the insurance provisions of Section 718.111(11), Fla. Stat. as they exist on the date of the loss. Once this statute comes in to play there are more inquiries.

First, is the cause of the loss one that is covered by the association's master policy? This is determined without regard to deductibles of dollar limits. It is strictly based on the nature of the casualty that occurred. Most, but not all casualties will be covered. If the nature of the loss is one that is covered under the master policy, then the association becomes responsible for repairs to all portions of the condominium except:

…. personal property within the unit or limited common elements, and floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of the unit and serve only such unit.

The items that are excluded will be the obligation of the unit owner or occupant.

Second, are the foregoing obligations shifted by the presence of negligence? If an owner or occupant is negligent in the operation or maintenance of a unit then the negligent owner will become responsible for the cost of repairing what would otherwise fall to the association. Similarly, if the association has failed in its duties after notice of a problem, it may become responsible for what otherwise would be borne by the unit owner or occupant. The presence or absence of negligence, then, is a key fact in assigning responsibility for damage and repairs.

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RECENT CASE SUMMARIES

In **Florida Insurance Guaranty Association, Inc. vs. Somerset Homeowners Association, Inc.**, 36 Fla. L. Weekly D2785a (Fla. 4th DCA, December 21, 2011), Association sustained extensive damages as a result of two hurricanes. Association was insured by an insurance policy, the obligations for which were assumed by FIGA after the original carrier was placed in receivership. Association submitted claims for coverage, and both the former carrier and FIGA made partial payments on the claims. However, believing that more was owed, Association instituted suit to enforce the appraisal process. While the suit was pending, the parties agreed to submit the dispute over the amount of the loss to the appraisal process set forth in the policy. Ultimately, the claim was submitted to an independent umpire who entered an award which set the replacement cost value ("RCV") at $12,581,471.43 and the actual cost value ("ACV") of the loss at $11,630,208.55. As replacement cost policies are intended to operate, following a loss, both the actual cash value and the full replacement cost are determined. The difference between those figures is withheld as depreciation until the insured actually repairs the damaged structure. FIGA neither timely paid nor disputed the award. Association moved to confirm the appraisal award, prompting FIGA to move to vacate it. The trial court entered final judgment in the amount of $6,262,339.83, which reflected a deduction of $5,026,539.25 in prior payments and a deductible of $1,292,592.35. On appeal to the Fourth District Court of Appeal, FIGA argued that contrary to the express terms of the policy, the appraisal award included $951,262.88 attributed to depreciation. Association argued that it was entitled to depreciation under the doctrine of prevention of performance because FIGA failed to timely pay the appraisal award. In reviewing the matter, the appellate court turned to the plain language of the policy. The policy provided that the carrier was not required to pay RCV for any loss or damage: 1) until the lost or damaged property is actually repaired or replaced; and 2) unless the repairs or replacement are made as soon as reasonably possible after the loss or damage. Therefore, under the terms of the policy, an insured must actually repair or replace the damage as a condition precedent to payment of replacement cost value. Association failed to do so in this case. Notwithstanding the policy's express terms, Association argues that under the doctrine of prevention of performance, it was excused from the contractual obligation to complete the repairs before receipt of payment because FIGA delayed payment of the appraisal award. The appellate court, following established precedent, held that it would be impermissible to rewrite the insurance contract. Thus, the case was remanded to the trial court to reduce the amount of the judgment by the cost of deprecation.

In **Heath vs. Bear Island Homeowners Association, Inc.**, 36 Fla. L. Weekly D2687a (Fla. 4th DCA, December 7, 2011) Owner filed a two-count complaint against Association. In count I of the complaint, Owner sought an injunction to compel Association to enforce the terms of its Declaration of Covenants and Conditions. Count II was an action against a board member for breach of fiduciary duty. In count I, Owner accused Association of failing to enforce the terms of the Declaration as to certain homeowners. Owner provided the trial court with a list of other residences in Association which he claimed had changes, modifications, or improvements that were made without first seeking Association's approval, in direct abrogation of the requirements of the Declaration. The trial court granted a summary judgment in favor of Association on both counts I and II. On appeal to the Fourth District Court of Appeal, the appellate court affirmed without comment the trial court's ruling on count II. As to count I, the appellate court affirmed the decision of the trial court, albeit on different grounds. The appellate court noted that pursuant to the language of the Declaration, Association had no legal obligation to take legal action to enforce the Declaration. The Declaration stated that Association "may" bring an action at law or in equity, "… but shall not be required to, seek enforcement. . . ." Thus, because the plain language explicitly makes enforcement of the Declaration a purely discretionary decision on the part of Association, Owner had no clear legal right to an injunction to compel Association to enforce the terms of the Declaration.

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