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Condominium Claims Below The Association Deductible

By David Thompson, CPCU

A condominium association suffers a property loss where there is damage to the common elements. The damage is confined to one or two units and totals $45,000. The association property policy deductible is $50,000. Can the association require those one or two unit owners to pay for the loss by way of submitting the claim to the unit owner's individual HO-6 policies? According to a recent Declaratory Statement issued by the Department of Business and Professional Regulation Division of Florida Land Sales, Condominiums and Mobile Homes (referred to hereafter as "The Division"), the answer is "no."

The regulatory authority for condominiums in Florida is The Division. One function of The Division is to resolve disputes between parties involved with condominium issues, and these disputed issues may include insurance matters. Once the parties involved enter into dispute resolution with The Division, the decision is binding on all parties. The Division dealt with the issue of a claim below the association deductible and issued Declaratory Statement #2005-055 on January 24, 2006. That Declaratory Statement, as well as a complete list going back to 1992, can be found here:

http://www.myflorida.com/dbpr/lsc/LSC-home-declaratory_statement_general.html

It's important to note that a Declaratory Statement is not a Florida Statute and does not "carry the same weight" as a statute. It is, however, a tool to be used in analyzing coverage issues for condominium insurance situations.

In the Declaratory Statement, the crux of the issue was whether the condominium association (known as Plaza East) could shift the cost of storm-damaged windows to a group of unit owners, as opposed to shifting the costs to all unit owners. The opening paragraph of the Declaratory Statement starts off as follows:

Plaza East Association, Inc. (Plaza East), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether Plaza East Association, Inc., which is required to insure the condominium property located outside the units, the property located inside the units as initially installed, and all portions of the condominium property requiring coverage by the association under section 718.111(11)(a), Florida Statutes (2003), may pass on to the unit

owner the cost of repairing those items that would have otherwise been paid for by the association's insurance policy but for the application of the deductible or amounts in excess of the coverage limits, notwithstanding provisions in the declaration defining the condominium property as part of a unit with the cost of repairs to be paid for by the unit owner.

While the entire Declaratory Statement is not reproduced here, some of the more significant statements are shown below. The end result of the Declaratory Statement was that when a condominium suffers damage to the common elements they may not pass that cost along to anything less than all unit owners. The association would be required to pay the damage from their reserves and if those were inadequate then all unit owners collectively would have to be assessed. It is not permitted to require just one unit owner (or anything less than all unit owners) to pay for damage to common elements. The paragraph numbers of the Declaratory Statement are shown for reference purposes.

> *23. Beginning January 1, 2004, all Florida condominium associations were responsible for adequately insuring for the replacement cost of the buildings, the components of the building structures, which includes the windows, doors, screens, and sliding glass doors that were initially installed when the building was built even where these are designated as inside the unit's boundaries.*
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> *25. Under the amendment, unit owner insurance is no longer an option, but an obligation.*
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> *28. Windows are not excluded from the association policy, so the association insures the windows.*
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> *29. The association asks whether in cases where the damage caused by an insurable event like a hurricane does not exceed the deductible under the association's insurance policy and it does not make a claim for insurance proceeds, if it or the individual unit owners under the terms of the declaration are responsible for the cost of the repairs.*
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> *30. The damage is caused by an insurable hazard covered by the insurance provisions of section 718.111(11), Florida Statutes, as to who is responsible for insuring for the replacement cost of the components. It is not atypical maintenance responsibility under article V of the declaration. The owner is obligated to maintain the windows and doors in good repair under the owner's usual wear and tear and general upkeep obligations. General maintenance is not an insurable property hazard. Therefore, article V of the declaration does not shift the burden of the cost of repairing the windows and doors to the unit owners when these components have been damaged by a hurricane. To do so, would conflict with the legislature's intent to clearly apportion the responsibility for the cost of insuring and replacing those components damaged by a hurricane.*
>
> *33. An association is not required to insure 100% of the replacement cost of the condominium property, but must have adequate insurance to replace the property destroyed by a hurricane. The board may include reasonable deductibles in replacement value insurance policies. 718.111(11)(a), Fla. Stat. A deductible amount is part of the cost of insurance and is a common expense for which reserves might be set aside. 718.111(11), 718.115, Fla. Stat. As such, an association may not shift the cost of an insurable common expense to an individual unit owner as common expenses must be assessed in the proportions or percentages required under sections 718.104(4)(f), 718.116(9), Florida Statutes.*

34. Plaza East may not shift the cost of the deductible, a common expense, to only those unit owners whose windows were damaged by the insurable event such as a hurricane. To the extent the declaration is inconsistent with the statute as amended in 2003, the statute controls.

35. Under article VIII and section 718.111(11), Florida Statutes, unit owners must rely on their association to insure for property damages to unit windows and doors regardless of what the declaration may have provided. If damage is caused by an insurable hazard, unit owners must look to the association to file a claim for insurance. If the repair cost exceeds the amount of the deductible, an association will file a claim for the insurance proceeds and assess all unit owners for the deductible amount in order to have enough funds to reconstruct the damaged structure. The same applies when the repair cost does not exceed the deductible amount and no claim is made. If the association did not have a deductible but had full replacement cost, it would have made a claim and repaired the damage. So, the deductible is a cost of association insurance, which cannot be passed on to only a few unit owners.

48. Even if an association was obligated under a declaration to insure the carpets within the units, it cannot do so under the present law. Carpets and other floor coverings are the responsibility of the unit owner under the present law. Unit owners can no longer insure the interior walls, sliding glass balcony doors and other parts of the structure as these were originally installed

VI. Conclusion.
52. The 2003 amendment to section 718.111 (11), Florida Statutes, permits associations to include a reasonable deductible, which is a common expense, in hazard insurance contracts. It does not permit associations to shift the cost of paying the deductible, even when no claim is made because the amount of insured damages is less than the deductible, or the cost of repairing the association's insurable damages up to the deductible amount, to individual unit owners.

ORDER
Based upon the findings of fact and conclusions of law, it is declared that under section 718.111(11), Florida Statutes (2003), Plaza East Association, Inc., which is required to insure the condominium property located outside the units, the property located inside the units as initially installed, and all portions of the condominium property requiring coverage by the association under section 718.111(11)(a), Florida Statutes (2003), may not pass on to a single owner or a group of owners or less than all unit owners the cost of repairing those items that would have otherwise been paid for by the association's insurance policy but for the application of the deductible or amounts in excess of the coverage limits, notwithstanding provisions in the declaration shifting this responsibility to a unit

On a somewhat related issue, the DBPR issued Declaratory Statement #2006-028 on September 7, 2006. The issue at hand involved Molokai Villas Condominium Association and fire damage that was sustained by two buildings during Hurricane Katrina. Molokai consisted of seven single-unit buildings, and seven two-unit buildings, for a total of 21 units in the association. After the master property policy paid for the damage caused by Katrina, there was a $200,000 shortfall. The bylaws of Molokai were very clear, stating that in the event of damage to a particular building if insurance proceeds were not sufficient to repair the building, then the unit owners (and them alone) in the damaged building would be assessed for the shortfall. Molokai therefore attempted to assess four-unit owners the $200,000 shortfall. The DBPR found this to be inconsistent with Florida Statute 718.111(11) and ordered that Molokai

not pass this assessment along to only the four unit owners who occupied the two damaged buildings. While not stated in the declaratory statement, it seems that the only logical course for Molokai to take would be assess all 21 unit owners their propionate share of the $200,000 shortfall. Basic math reveals that each unit owner (if ownership were truly in 21 equal shares, which may not be the case) would be subject to a loss assessment approaching $10,000. The complete 33 page declaratory statement may viewed here:

http://www.myflorida.com/dbpr/lsc/documents/2006/molokai_2006_028.pdf

In another declaratory statement involving Hillsboro Imperial Condominium Association of March 26, 2008, the DBPR reached the same conclusion again, that being that the association could not assess only the unit owners in one building for damage confined to that building. That declaratory statement is located here:

http://www.myflorida.com/dbpr/lsc/documents/HillsboroImperial.Dec.2007-050.pdf

The same conclusion was reached again in the DBPR declaratory statement of May 22, 2008 involving Royal Point Owners Association. That statement is here:

http://www.myflorida.com/dbpr/lsc/documents/PortRoyalOwnersAssn.Dec.2008-016.pdf

2008 Legislative Changes

During the 2008 legislative session House Bill 601 was passed. The language in the revised Florida Statute 718.111 (11)(j) states the following:

> (j) *Any portion of the condominium property required to be insured by the association against casualty loss pursuant to paragraph (f) which is damaged by casualty shall be reconstructed, repaired, or replaced as necessary by the association as a common expense. All hazard insurance deductibles, uninsured losses, and other damages in excess of hazard insurance coverage under the hazard insurance policies maintained by the association are a common expense of the condominium, except that:*
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> *1. A unit owner is responsible for the costs of repair or replacement of any portion of the condominium property not paid by insurance proceeds, if such damage is caused by intentional conduct, negligence, or failure to comply with the terms of the declaration or the rules of the association by a unit owner, the members of his or her family, unit occupants, tenants, guests, or invitees, without compromise of the subrogation rights of any insurer as set forth in paragraph (g).*
>
> *2. The provisions of subparagraph 1. regarding the financial responsibility of a unit owner for the costs of repairing or replacing other portions of the condominium property also applies to the costs of repair or replacement of personal property of other unit owners or the association, as well as other property, whether real or personal, which the unit owners are required to insure under paragraph (g).*
>
> *3. To the extent the cost of repair or reconstruction for which the unit owner is responsible under this paragraph is reimbursed to the association by insurance proceeds, and, to the extent the association has collected the cost of such repair or reconstruction from the unit owner, the association shall reimburse the unit owner without the waiver of any rights of subrogation.*
>
> *4. The association is not obligated to pay for repair or reconstruction or repairs of*

casualty losses as a common expense if the casualty losses were known or should have been known to a unit owner and were not reported to the association until after the insurance claim of the association for that casualty was settled or resolved with finality, or denied on the basis that it was untimely filed.

(k) An association may, upon the approval of a majority of the total voting interests in the association, opt out of the provisions of paragraph (j) for the allocation of repair or reconstruction expenses and allocate repair or reconstruction expenses in the manner provided in the declaration as originally recorded or as amended. Such vote may be approved by the voting interests of the association without regard to any mortgagee consent requirements.

The new language (effective 7/1/08) has the effect of "codifying" the Plaza East decision, but at the same time allowing the condominium association to "opt out" of the requirement that non-covered casualty losses or casualty losses below the deductible be a common expense. As long as paragraph (k) is complied with, it is possible (for example) for an association's bylaws to state that damage confined to a single unit would be the sole responsibility of that unit owner if the damage to the common elements fell below the association deductible. In the event of a loss, the adjuster for the unit owner's policy would have to have access to the bylaws to see if the particular situation was addressed there. It's possible (if not likely) now that claims will be adjusted differently for different associations. An example will help illustrate the point.

EXAMPLE: Joe lives in Condominium Association A (CAA) while Sue lives in Condominium Association B (CAB). Both association master policies have a $50,000 deductible. Joe and Sue are cooking a meal on the stove and a grease fire breaks causing damage to their respective units. Damage to their personal property is $5,000 each. Damage to cabinets, paint, and floor coverings is $20,000 each. Damage to the common elements in each unit is $35,000. The bylaws for CAA are silent about casualty losses confined to a single unit. The bylaws for CAB state that a casualty loss confined to a single unit is the sole responsibility of that unit owner. In such situation described here the $$35,000 damage at CAA is a common expense shared by all unit owners; Joe does not have to fund the loss. If CAA funds are inadequate to pay for the loss then a loss assessment may be in order, with all unit owners being assessed. The $35,000 damage at CAB, however, is the sole responsibility of Sue because of the bylaws. She would submit the claim to her HO-6 carrier for payment, less her deductible.

What does all of this mean for unit owners now? It means that it's more important than ever for unit owners to read the condominium bylaws to determine what their insurance responsibility is. It means that determining an amount of Coverage A under an HO-6 is even more complicated now. For example, refer to the earlier referenced Molokai Villas situation where four unit owners (not all unit owners) were assessed $50,000 each for damage to their respective units. How much Coverage A would be adequate in a major loss? To take it to the extreme, suppose a condominium association was composed of twenty two-unit buildings, each building having a replacement cost of $400,000. If the bylaws stipulated that a loss confined to a single two-unit was the responsibility of those two unit owners, then each unit owner would likely need to have $200,000 of Coverage A to be properly insured. It's important that unit owners be aware of this new statute when selecting a Coverage A amount. In-force HO-6 policies should be reviewed to determine if coverage is adequate.

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