

## Adequate Insurance a Moving Target

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Today's column continues a study of issues frequently encountered by associations when updating the community's governing documents. Today's subject, condominium insurance.

When discussing an association's insurance responsibility, it is important to understand the different types of insurance that a condominium association will usually need to consider.

**Casualty Insurance:** Often called "first-party coverage" in the industry, this is "no-fault" insurance that primarily covers casualties to structures, such as buildings. Covered losses typically include fire, storm damage, and bursting pipes. In today's market, windstorm or hurricane insurance (although a casualty policy) sometimes has to be purchased through a special pool set up by the State. Casualty insurance is intended to cover fortuitous events and will usually not cover maintenance-related problems. For example, damage caused by a pipe that suddenly bursts is normally covered by casualty insurance, while damage caused by seeping water due to a defect in the construction of the building may not be covered.

**General Liability Insurance:** This is the insurance primarily intended to provide protection to the association if a claim is made that the association has been negligent in doing its job. Liability insurance covers claims made against the association by third parties and is usually referred to in the industry as "third party coverage." A slip and fall claim, or a suit for an accident on common area roadways are the types of claims covered under third party coverage.

**Flood Insurance:** Although flood damage is a casualty, it is not covered under general casualty policies. Rather, flood insurance is available through

a federally-sponsored program, and involves a separate insurance policy. It covers damage from rising water.

**Fidelity Bonding:** Sometimes called crime coverage or employee theft, the fidelity bond is an insurance policy that is intended to protect the association against the theft of its funds, typically theft by an employee or director.

**Workers' Compensation:** This insurance is mandated by state law for any person or corporation who employs four or more individuals. This policy provides an injured worker with a set schedule of benefits while they are off the job due to injury. In exchange for receiving the benefits, the worker loses the right to sue the employer for personal injury.

**Directors & Officers Insurance:** Often called D&O or E&O (errors and omissions), this policy provides protection to the association and its board members individually. Typical D&O claims usually allege that the board has acted wrongfully in some matter. For example, unit owner claims for breach of fiduciary duty are often covered under the D&O policy.

**Umbrella Coverage:** As the name implies, this is a policy that overlaps the association's other insurance policies, and is intended to provide additional protection in the event of under-insurance. The umbrella policy is primarily aimed at providing additional protection to the general liability policy, and is typically considered a third-party policy. There are many nuances and details involved in purchasing a comprehensive insurance package for the association. There are endorsements, riders, and other add-ons to basic insurance that can help the association cover its assets.

The condominium law simply requires an association to obtain “adequate insurance,” with no embellishment of that concept. Because association insurance laws have changed so many times, many older documents specify insurance coverage that either no longer complies with the law, or is simply not up to current industry standards.

For example, the law used to require an association to maintain a minimum of \$50,000.00 in fidelity bonding. Today, the law requires that an association have theft coverage for up to the maximum amount of association funds that could be stolen. An association with an outdated set of bylaws requiring \$50,000.00 in fidelity bonding may be in violation of current law if it has several hundred thousand dollars of reserves that are theoretically susceptible to theft.

Many older condominium documents require general liability insurance of \$100,000.00 or \$300,000.00. These are typically not consid-

ered acceptable liability limits in this day and age. Most association liability policies provide at least one million dollars in coverage, and many associations buy several million dollars worth of coverage, or even more (depending upon the size of the community and the nature of its operations).

In general, it is my view that it is helpful to draw insurance clauses broadly, and allow the board to operate within the parameters of sound business judgment. For example, I do not typically recommend mandating through the documents that the association have workers’ compensation insurance, although many associations with fewer than four employees find such coverage to provide a valuable risk management tool. However, flexibility and giving the association the ability to change in a very dynamic insurance market will typically provide an adequate framework from which to operate. ☺

## Noninvestors can be Legally Excluded from Meetings

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**QUESTION:** I live in an RV park. The residents own their lots and mobile homes. We pay a monthly maintenance fee to the owner. The previous owner retired and sold the common areas to a group of park residents. They formed a homeowners association. They hold meetings to set maintenance fees and other charges. They refuse to allow lot owners to attend the meetings. A resident wrote the DBPR and they found the park isn’t operated as a condo or as a mobile home association but as a homeowners association. Do the lot owners that didn’t buy shares in the park have a right to attend the meetings of the common area owners? - D.P. (via e-mail)

**ANSWER:** Since each community has unique covenants and restrictions, I can only respond in general terms. It used to be quite common for developers to construct a mobile home community, sell the individual lots to homeowners, but retain ownership of the common areas. The developer (or some other subsequent operating entity) provides basic maintenance services and use of the recreational facilities to the homeowners. In return, the homeowners pay a recreation and maintenance fee to the operating entity.

The original operating entity has apparently sold the property and assigned the right to collect recreation and maintenance fees. The new operating entity is probably a corporation consisting of members who are homeowners within the community. However, it is likely that the new operating entity is not a “homeowners’ association” as defined by Chapter 720, Florida Statutes (“the HOA Act.”), because membership is not mandatory. Rather, the new operating entity is probably governed by Chapter 617, governing Not-For-Profit Corporations. This statute only gives rights to the actual members of the corporation. In this particular instance, this would be limited to the people who are members of the corporation. Therefore, you probably have no right to attend their meetings if you did not invest in the purchase of the common areas.

**QUESTION:** My condominium association had someone come in and work on my master bathroom shower to repair a leak. They had to cut a hole in the wall to repair the leak. Now they are refusing to pay for the repairs to the shower and they will not fix the hole in the wall. The association says

it is my responsibility. However, the condominium documents say that the vertical boundaries of my unit are the undecorated finished interior walls. The repair had to be made inside the walls. Furthermore, the condominium documents say that the association is responsible for “all conduits, ducts, plumbing, wiring and other facilities except heating and cooling units.” Your advice would be much appreciated. - M.G. (via e-mail.)

**ANSWER:** This is a common source of contention in condominiums and can only be solved by an interpretation of your documents by the association’s legal counsel. The boundary description concept you describe appears to be what is known as the “interior shell” concept. You own everything between the four outer walls, floor and ceiling of your unit and you are in all probability responsible for the maintenance, repair, and replacement of everything within those boundaries. Everything outside of that space is “common elements.” However, ownership and maintenance responsibility are two entirely different things in the condominium context.

The Condominium Act states that the association is responsible for maintenance, repair and replacement of the common elements, which is all the condominium property not included within the units. However, the law also states that the condominium declaration can assign maintenance, repair and replacement responsibility for the “limited common elements” to the unit owners. A “limited common element” is a common element, the exclusive use of which is assigned to a particular unit owner or group of unit owners.

The plumbing to your shower may be outside of your unit and be a common element. However, this common element services your unit only. Accordingly, it may be classified as a limited common element (if your condominium documents make such a distinction) and the maintenance, repair, and replacement of the plumbing to your shower could be assigned to you and not the association.

**QUESTION:** How can I determine if a community has been registered as a “55 and Over Community” in the State of Florida? Is there any way to obtain the documentation submitted to register or renew the community’s 55 and Over status? E.B. (via e-mail.)

**ANSWER:** The duties of the Florida Commission on Human Relations are set forth in Chapter 760, Florida Statutes. Generally speaking, the Commission’s purpose is to prevent unlawful discrimination by ensuring people in Florida are treated fairly and are given access to opportunities in employment, housing, and certain public accommodations. Included within the Commission’s oversight is enforcement of The Florida Fair Housing Act, which governs “55 and over” communities.

The Commission’s website, located at <http://fchr.state.fl.us>, allows users to view a listing of registered 55 and over communities by county. It sets forth the date of the community’s initial registration, as well as the deadline for renewal. (55 and over communities are required to renew their registration with the Commission every two years.) If you want a copy of the documentation submitted to register, or renew a community’s 55 and over status, you may call the Commission at (850) 488-7082. Choose option 5 for the records department. The records department will then mail or fax you a document request form.

**QUESTION:** What options are available to file a complaint against a builder in Lee County? Specifically, a builder who has promised completed construction and final closing for over three months and has yet to deliver. I cannot find any county or state agency that deals with this. Is there a consumer advocate that would be able to assist? Can you help? A.J. (via e-mail.)

**ANSWER:** The first place to start might be the Better Business Bureau (BBB). The BBB works to facilitate communication between companies and consumers to help both sides come to a satisfactory resolution of a complaint. Its website, located at [www.bbb.org](http://www.bbb.org), has lots of helpful information.

Another possibility, assuming your builder is a licensed contractor, is to file a complaint with the Florida Department of Business and Professional Regulation, Division of Professions, Construction Licensing Board. The Department’s website is located at [www.myflorida.com/dbpr](http://www.myflorida.com/dbpr) and has helpful information on filing complaints.

**QUESTION:** My condominium association has failed to enforce its “no pet” restriction for a number of years. However, the Association has now

resolved to begin enforcement of the restriction. I have two cats. The previous president of the association advised me over a year ago that several condominium residents have cats and that I would be permitted to keep my cats as well. Is there any defense I have against the Association's belated enforcement of the restriction. R.B. (via e-mail.)

**ANSWER:** There are several potential defenses you may have to the Association's belated enforcement of its "no pet" restriction. Restrictive covenants are unenforceable after their "abandonment." This defense, which may terminate a restrictive covenant, depends upon conduct by the owners of the land showing an intent to abandon the general scheme and relinquish the benefit of the covenant. Another possibility is "waiver." The defense of waiver requires proof of an intentional relinquish-

ment of a known right. By failing to enforce the restrictive covenants, an association leads others to believe that the covenants will not be enforced, and when an association fails to object to general and continuous violations of restrictions, the restrictive covenants will be waived. "Laches" may provide an equitable defense to enforcement of a restriction when the association delays enforcement for an excessive period of time, such that as a result of the delay, the owner suffers legal detriment. "Estoppel" may be invoked as a defense when the association has observed an owner's violation and approves or makes no objection, while the owner changes his position in reliance on the association's representation or silence. Lastly, "selective enforcement" is available when an association enforces a restriction against one or several owners, but not another owner. ⚖️

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