



Repair Issue Complicated

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Q: If there is drywall damage inside a condominium unit due to overflow from a faulty air-conditioning line, is it the responsibility of the condominium association to reimburse the owner for drywall repairs? J.C. (via e-mail)

A: That is a simple question with a complicated answer. The drywall in a unit is the association's insurance responsibility. Therefore, if an insurable casualty causes damage to drywall, the association's master insurance policy should cover it. There are, however, some other issues to consider in the situation you described.

First, the damage must be from a casualty covered by the association's insurance before the association's insurance company will cover the damage. You would need to discuss with the association's insurance agent whether damage caused by the faulty air conditioning equipment would be considered a casualty under the association's policy. Some policies exclude maintenance-related items, some are written a bit more liberally.

If there is insurance, the deductible must also be taken into consideration. Master policy (non-hurricane) deductibles will usually range from one thousand to ten thousand dollars. An issue that frequently arises in these types of cases is who is

responsible for the deductible. To answer this, you must look at the section in the declaration of condominium that addresses reconstruction after casualty. Depending on the way that your reconstruction after casualty provisions are written, the deductible may be the responsibility of the association or the unit owner, and may also depend on whether the drywall is part of the common elements (for example, a boundary wall) or interior drywall and thus part of the unit. To complicate things a bit further, some documents define all drywall as part of the unit.

To complicate things a bit further, the Division of Florida Land Sales, Condominiums and Mobile Homes, the state agency that regulates condominiums, has recently taken the position that if the association insures an element, the association repairs it and is responsible for the deductible as a common expense (i.e. everyone in the condominium will pay for the deductible) regardless of what the condominium documents say.

The Division has issued what are referred to as "declaratory statements" on this issue. Declaratory statements are intended to apply only to the party that has requested the declaratory statement, but the Division will typically follow its declaratory statements in any enforcement action or arbitration

case. I know that at least one of these declaratory statements has been appealed to the courts, and therefore, this issue has not yet been resolved fully. I am also told that the Division has kept this matter on hold, until the law develops further through a court decision or legislative action. You will need to stay tuned.

Another consideration involves whether there was negligence on the part of the person responsible for the maintenance of the air-conditioning equipment. If the unit owner was responsible for maintenance of the air-conditioning line and he or she was negligent in the maintenance thereof, the association and/or the association's insurance company may be able to recover the cost of the repairs, even if the association is otherwise liable for the repair work. However, negligence will have to be proven and it will depend on the facts of the case as to whether the owner was negligent. Just because the air-conditioning equipment leaked does not, in and of itself, prove negligence, as sometimes accidents just happen, with no fault involved.

The board should discuss these issues with the association's attorney who can review your particular declaration of condominium and provide an opinion.

Q: The Florida Condominium Act says that an association "shall use its best efforts to obtain and maintain adequate insurance." The absence of any required flood insurance suggests the association can choose not to have flood insurance, even though the condominium is located in a flood zone. I am a proponent of that school of thought. If there is a specific requirement for flood insurance in an association's bylaws, can that bylaw provision be repealed? We are aware that owners with mortgages are required to have flood insurance. B.B. (via e-mail)

A: You are correct that the Florida Condominium Act provisions which set forth the insurance requirements for a condominium

association do not expressly provide that flood insurance is required. Some commentators have argued that the requirement of "adequate insurance" would necessarily require flood insurance when the condominium is located in a flood zone. However, other provisions of the Florida Condominium Act regarding insurance suggest that flood insurance is discretionary, absent some specific requirement to maintain flood insurance in the governing documents of the association.

In order to be clear, I wish to point out that many non-lawyers use the term "bylaws" to refer to all of the condominium documents of the association. As you can see, I use the term "condominium documents" to refer to all of the documents affecting a condominium association (and "governing documents" in a homeowners' association setting). Condominium documents include the declaration of condominium, the articles of incorporation, the bylaws, and often, rules and regulations. The term "bylaws" technically refers to that document which contains organizational and administrative provisions that supplement the articles of incorporation and ensures the orderly administration of the corporation. Typically, a provision requiring that flood insurance be maintained by a condominium association is contained in the declaration of condominium.

Whether an amendment to your declaration of condominium is advisable, or even wise, will depend upon a number of factors. Of prime relevance is whether your condominium is located in a federally designated flood hazard area. Further, the number of unit owners who have mortgages may also come into play, as anyone who has a federally insured mortgage (which includes most institutional mortgages) will be required to carry flood insurance if the property is within a designated risk zone.

Q: Our board of directors just found out that one of our neighbors has two pets, even though our

rules only allow one pet per unit. The pets are very quiet and do not create a problem for anyone, but we know that if someone complains we will have to enforce the rule. Could you please tell us the different steps we could take if we have to enforce the pet rules?

A: Once the board becomes aware of a violation, it should move forward with enforcement. The board has a fiduciary obligation to uniformly and even-handedly enforce all of the restrictions. If the board knows the pet restrictions are being violated, it should move forward with enforcement, even though other owners have not yet complained. Failure to do so could compromise the ability to enforce the pet restrictions in the future. If the rule no longer reflects contemporary community standards, it should be amended or repealed.

The board should start by sending a letter to the owners notifying them of the violation and giving them a certain time to correct the violation. The board, or the association's manager, will usually send the initial demand, which is often times enough for an owner to correct a violation.

If not, a follow up demand letter from the association's attorney can be very effective.

If a written demand does not solve the problem, there are two basic mechanisms that a condominium association can use to enforce the use restrictions. The first is levying a fine. The

authority to fine a unit owner must be specifically granted to the association in either its bylaws or declaration of condominium. The Florida Condominium Act currently permits fines of up to \$100.00 per violation, and up to \$1,000.00 in the aggregate for any continuing violation. Before a fine can be levied the association must give reasonable notice and opportunity for a hearing to the owner. The hearing must be held before a fining committee which is made up of other unit owners, and if the committee does not agree with the fine it cannot be levied.

Levying fines does not always achieve the result of correcting a violation, and the board may need to file legal action to do so. There is no requirement that an association try to levy a fine before filing legal action. The association would be required to file a petition for arbitration with the Division of Florida Land Sales, Condominiums and Mobile Homes seeking an order to compel an owner's compliance with the use restrictions. The violation of a pet restriction is the type of dispute that is subject to mandatory non-binding arbitration. Most matters of this nature are resolved in the arbitration process (about ninety percent). However, there is also a mechanism that permits either party with the right to appeal to court, and prevailing party attorney's fees carries over to court proceedings as well. If the association is the prevailing party in the arbitration, it would be entitled to recover its reasonable costs and attorney's fees from the owner.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.