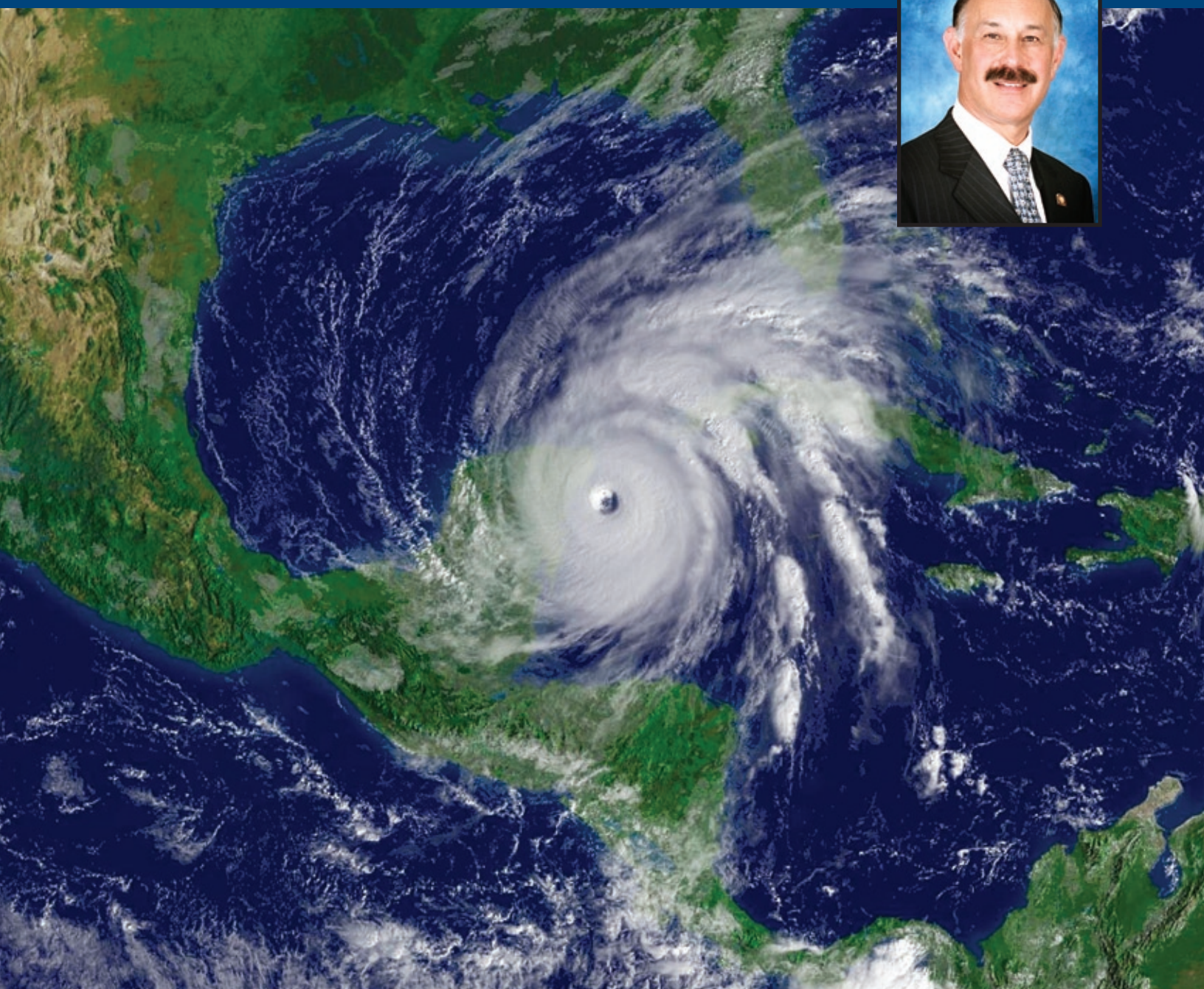
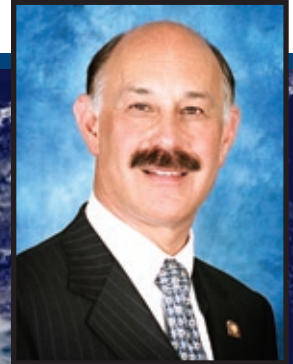


Disaster Recovery and Planning

by Gary A. Poliakoff, J.D.



**BECKER &
POLIAKOFF**

Legal and Business Strategists

www.hurricane-recovery.com

Disaster Planning and Recovery

by Gary A. Poliakoff, J.D.*

Hurricane Andrew, which devastated South Miami-Dade on August 24, 1992, opened our eyes to the vulnerability of common interest ownership housing communities (i.e., condominiums, cooperatives, and deed restricted communities governed by a mandatory membership homeowners association) to catastrophic events. The lessons learned from Andrew's 145 mph winds were accentuated by Hurricane Opal, which struck the Florida Panhandle with 20 foot storm surges. These lessons were reinforced by the events of 2004 when four major storm crises crossed the state of Florida leaving devastation in their paths.

In the aftermath of the storms, the importance of developing and implementing a disaster plan became self-evident. This article is based upon first hand experience gained in assisting the victims of Hurricanes Andrew, Opal, Charley, Frances, Ivan, Jeanne, Katrina and Wilma.



All Photography by: Gary A. Poliakoff, J.D.

*Gary A. Poliakoff, J.D., is the President and founding principal of Becker & Poliakoff, P.A., a law firm which for over 30 years, has provided legal counsel to more than 6,000 Condominium, Cooperative and Homeowners Associations. He is an adjunct professor at the Shepard Broad School of Law, Nova Southeastern University and the author of a national treatise, *The Law of Condominium Operations*, published by West Group, 1988.

IDENTIFYING THE POTENTIAL CONSEQUENCES OF A DISASTER

Prior to September 11, 2001, the term “disaster” was generally associated with naturally occurring events such as fire, hurricane, earthquake, mudslides or floods. Now, acts of terrorism need to be factored into the equation. The first step toward developing and implementing a disaster plan is identifying the potential consequences of a disaster. They include:



Destruction of Property

Improvements to Realty

- Buildings
- Landscaping
- Roads and Pathways

Personality

At risk are the furniture, fixtures and personality of the association and the unit owners. Those items of most concern to the association include:

- Furniture
- Fixtures
- Equipment, computers
- Historical records
- Data bases
- Accounting records
- Unit and personnel files

Loss of Life

In addition to the potential for permanent injury, all disasters bring with them the risk of loss of life. In addition to key members of the board and committee chairs, this potentially impacts management and staff, as well.

Dislocation Caused by the Total or Partial Destruction of the Premises

A properly prepared disaster plan will anticipate and plan not only for the possibility of a total casualty loss, but also the need to relocate, temporarily or permanently, due to the loss of both one’s residents and, potentially, one’s place of work. While many individuals are able to clean up their storm debris within a relatively short period of time and return to their normal

routines, for tens of thousands of others, life remained in turmoil for years after being impacted by a Hurricane. Opal's devastation caused a slightly different impact on the residents of Florida's Panhandle. Many residents owned condominium units, which were placed in rental pools and provided a source of revenue for them, which was temporarily disrupted.

Emotional

The psychological impact of disasters, even those on a much smaller scale than a category four hurricane or the events of 9/11, will linger for years. In the case of Hurricane Andrew, the fear of reliving another storm of similar magnitude caused some to move from Florida or to vow never again to remain in their homes when facing a similar threat. The events at the World Trade Center have caused some to rethink living or working in high rise structures.

Economic

The economic impact of a disaster is felt on many fronts. Unit owners displaced from work may be unable to meet their financial obligations to the association. Uninsured, underinsured or non-covered losses will necessitate special assessments, which could further stress the already overtaxed unit owners. The higher cost of goods and services resulting from shortages further compounds the problem.

Rippling Repercussions

No doubt all of us had empathy for the families who lost loved ones at the World Trade Center. But, as we watched the collapse of the Twin Towers in dismay, how many said, "I feel terrible for all those families whose livelihoods are dependent upon the ongoing viability of the World Trade Center." Community associations are no different. Surrounding every community are hundreds or thousands of businesses which are dependent upon the association and its

residents for their livelihood. Included are:

- restaurants
- hair salons
- dry cleaners
- daycare centers
- messenger services
- retail stores
- doctors
- attorneys

Then, of course, there are those who directly service the community association:

- management
- staff
- pool maintenance
- elevator maintenance
- lawn maintenance
- roofers
- painters
- air conditioning and heating contractors
- security services
- banks
- accountants
- attorneys
- roofing contractors
- pavement contractors
- bureaucrats
- courts
- process servers
- etc.



DEVELOPING A DISASTER PLAN

Designation of a Disaster Coordinator:

The ability of the community association to react quickly with a clear and decisive plan, thereby minimizing damages and speeding up recovery, to a large extent, will be dependent upon the association's ability to react quickly and decisively when a disaster strikes. The ability to do so is dependent upon having a pre-designated person or committee in place prior to the disaster with full power and authority to implement the Disaster Plan.

Designation of an Information Facilitator:

In times of crisis, people want to know – they need to know! A major hurdle to recovery is rumor and misinformation. Left unchecked, both can hamper the recovery efforts. This can be short-circuited through the use of an Information Facilitator. Today's computer technology provides the ideal vehicle for this purpose. Every association should have its own website. During normal times, it is the ideal resource for disseminating information and staying in touch with the unit owners. At times of a disaster, it is the vital link. The Information Facilitator works in concert with the Disaster Coordinator, as a type of "Press Secretary."



Disaster Preparedness:

Protecting the Premises

- Hurricane Shutters
- Central fire alarm and smoke detection system
- Walled Community

Relocation: "Where will I go?"

A properly prepared plan will include plans for temporary relocation of the residents in situations where the community must be evacuated during the crisis. This can include Red Cross or other emergency shelters, hotels, schools, or staying with family in other cities. Said relocation may require more extensive stays during periods of reconstruction or substantial emergency periods. The residents of Naranja Lakes were never able to return to their homes and, today, are dispersed throughout the world.

Photographic Imaging of Premises and Records

Regardless of how sharp one's memory might be, there are few with a photographic memory sufficient to withstand the challenge of cross examination as to one's "proof of loss" in any insurance dispute. A necessary prerequisite to disaster planning is video documentation of each unit owner's home, and the association's office and property. Keep in mind the old cliché: "a picture is worth a thousand words." With today's digital technology, photographic records can be conveniently and safely stored off premises and easily retrieved, if needed. In addition to photographic records or videotaping of the community, it is also recommended that the records reflect the date, place and cost of each item of personalty. What should be photographed? [For purposes of this article, the term "photograph" and all derivatives therefrom, includes all imaging, including scanning of documents onto disc.]

Specifically, include:

- Inside and outside of buildings and premises;
- furniture;
- fixtures;
- art work;
- equipment/computers;
- books;
- accounting records;
- files;
- insurance policies;
- bank accounts;
- personnel records;
- records of units/unit owners;
- as built plans and specifications.



Quick Reference List:

In addition to photographic records, quick reference lists might contain:

- **Record Title Owners:**
 - names
 - unit numbers
 - other residences
 - next of kin/emergency contacts
 - identifying features
 - social security numbers
 - medications
 - cell phone numbers
 - e-mail addresses (maintained in "groups")
- **Association Employees:**
 - names
 - addresses
 - phone numbers
 - cell phone numbers
 - e-mail addresses
 - social security numbers
 - next of kin/emergency contacts
 - medications
- **Bank Account(s)**
 - bank/location address
 - account numbers authorized signatures
 - certificates of deposits and/or other investment documents

■ **Insurance Policies**

nature and extent of coverage carrier
policy number
agents with pertinent information

■ **Vendor List** – listed by service provided; e.g.,
pool maintenance, security, landscape
maintenance, etc.

Professionals

CPA
insurance agent
attorney
management

■ **Inventory of Furniture and Equipment**

■ **Storage of Emergency Supplies:** Most casualties, such as fire, generally affect only the immediate residents, who can be evacuated to nearby hospitals, hotels or emergency facilities. Finding food, shelter and clothing is not an issue. However, in the case of a widespread disaster, such as a major hurricane, residents might be forced to stay in their damaged homes and neighborhoods for extended periods of time. A disaster plan should consider the need for emergency medical supplies, food, water, waterproof matches, a defibrillator, and an emergency generator; and an ample supply of fuel to power the generator for an extended period of time. In addition, tools, which might be required to excavate someone from a collapsed structure, such as shovels, crowbars and a power saw, might be considered.

■ **Building Plans:** A set of as-built plans and specifications is essential to both the immediate response and long term recovery. Knowing the whereabouts of shut-off valves and structural components can be the difference between life and death. The as-built drawing will greatly facilitate the reconstruction effort. Along with the building plans, should be the names, addresses, telephone numbers and e-mail addresses of the architects, engineers, contractors and sub-contractors who designed and built the structures. They can be an invaluable resource in disaster recovery.

■ **Emergency Planning:**

Evacuation Route. Every high rise structure should have emergency evacuation routes visibly posted.

Fire and Emergency Evacuation Drills. It is not childish to take a lesson from our youth and, on a periodic basis, rehearse evacuation of the building.

Buddy System. This is another positive lesson from our childhoods. Valuable time can be saved if your neighbors know your whereabouts at the time of an emergency. For example, if the Fire Department is informed that the Smiths are in Europe, by their neighbors, emergency response teams can focus their efforts on known victims. It is particularly important to be aware of special needs residents who might require medications or special assistance.

■ **Data Inventory:**

Separate and apart from the inventory of the “physical” resources of the association is the need to maintain a record of information maintained in data processing and information systems. Where appropriate, a list of source codes and/or vendor sources should be maintained.



RISK MANAGEMENT

A well-designed disaster plan will include hedges against risk which are designed to minimize economic and property loss, as well as the loss of human life. Options include:

Maintenance of Adequate Insurance:

Maintaining adequate insurance is easier said than done. Both the high cost of insurance and the unavailability of carriers willing to provide coverage often force Associations to acquire coverage from “non-admitted” carriers, or to maintain deductibles at levels higher than desirable.

When acquiring Condominium Insurance one must be conversant with the statutory mandated guidelines which impose upon the Board

the duty to maintain “adequate” insurance for “full insurable value”, “replacement cost” or the like. And, one must review statutory mandates along with provisions of the governing documents to determine whether the Association or the unit owner(s) is responsible for providing cover for unit improvements.

In addition to basic coverage, experience taught us that some major sources of economic loss, such as landscaping, exterior building paint, building foundations, walkways, pools, tennis courts, and satellite dishes, are not normally covered by insurance. While excluded from basic coverage, some areas of potential loss can be covered for a small additional premium. None are as important as “ordinance or law” exclusion.



Ordinance or law exclusion states that the insurer will not pay for loss or damage caused directly or indirectly by the enforcement of any ordinance or law: (1) regulating the construction, use or repair of the property; or (2) requiring the tearing down of any property, including the cost of removing its debris. This exclusion is aimed at the application of building codes that may require more expensive reconstruction material, installation, design or methods than those used in the existing building. It may also apply to environmental laws that require elaborate and expensive decontamination processes, or upgraded construction practices in hurricane and flood zones.

For example, following Hurricane Andrew, a Miami-Dade County Ordinance required that a number of partially damaged buildings [considered to be damaged by 50% or more] could be restored only if they were elevated to a specific height above sea level. Under such circumstances, the cost of elevation plus repair of the damage, generally would exceed the limit of building insurance, unless there was coverage afforded under the rider to the base policy.

Many communities were left waterlogged by Hurricanes Andrew and Opal, only to find that their basic policies did not cover water damage from flooding. Effective October 1, 1994, all condominiums in flood zones are required to purchase flood insurance equal to eighty (80%) percent of the value of the building, not to exceed a total limit of \$250,000 per unit. New flood policies include coverage for foundations. The entire building is covered under one policy, including both the common elements and the individual units.

For many owners and managers in the Florida Panhandle, the greatest loss wasn't property but, rather income from lost rentals. Business interruption insurance is essential for owners or managers who rely upon vacation rentals for their livelihood. Managers, particularly, need to ensure that their business interruption coverage is not just for the

premises where they maintain their offices, but also for the communities where they manage rental units.

Many homeowners failed to maintain coverage for their personal effects and building upgrades within their homes. It is recommended that homeowners residing in common interest ownership housing communities maintain homeowner coverage with at least the following endorsements:

■ **Loss Assessment Coverage:** Protects against special assessments levied by boards to cover losses from covered peril, when the primary coverage is inadequate.

■ **Water Seepage Coverage:** Covers water damage from wind-driven rain or water entering from a source other than an opening in the building (e.g., through stucco or around window frames).

■ **Additions, Alterations, Improvements and Betterments Coverage:** Covers upgrades, as well as real property added by the unit owner. This endorsement is often available with all risk coverage, without a water seepage exclusion.

■ **Even assuming that one maintains adequate coverage, there is a risk that not every insurer will survive extraordinary claims.** Andrew brought many insurance companies to their knees. Careful consideration must be given to the financial strength of the insurer. Keep in mind that the lowest quote is not always the most secure coverage.

It is imperative that a reserve fund be maintained for contingencies and to cover deductibles.

Specialty Services

These are pre-negotiated contracts specifically designed and written with disaster in mind. The services included are:

■ “Drying In” or “Shoring up” the premises.

■ “Drying Out”

■ Clean-up – the removal of debris.

■ Security. Although the National Guard was ultimately mobilized to prevent looting in the aftermath of Andrew, initially, many property owners had to resort to their own means to protect their property and their families.

REMOVE THE BARRIERS TO RECOVERY



■ Reconstruction.

State laws and document restrictions designed to insure owner access to information and input in the decision-making process often impede disaster recovery. For example, the use of reserve funds in an emergency is hampered by laws requiring prior approval by a majority of the voting interests present, in person or by proxy, at a meeting. If necessary, documents should be reviewed and amended to remove barriers to recovery and provide boards with emergency powers. Areas of concern include:

“Insurance Trustee” Provisions: Generally

found within the insurance section of the documents, these provisions require that the proceeds of insurance settlements be paid to a third party for disbursement at the instruction of the association’s engineer. When such a provision exists, insurers will not pay proceeds to the association until a trustee is designated. This can critically delay the receipt of funds necessary for disaster response. It is preferable for the board to act as a “trustee” with disbursements being authorized only when approved in advance by an independent engineer or construction manager employed by the association.

Access to Units: While the Condominium and

Cooperative Acts grant associations an irrevocable right of access when necessary for the maintenance, repair or replacement of the common elements or of any portion of a unit to be maintained by the association or as necessary to prevent damage to the common elements or to a unit or units, a gray area exists in relation to the repair or reconstruction of portions of the units maintained by the unit owners. To avoid conflicts, all common interest ownership housing documents should be amended to provide:

- Right of access to the units to repair or replace any portion of the property insured by the association.

- Association as agent: The association should be irrevocably appointed as agent for each unit owner, each owner of a mortgage or other lien upon a unit and each owner of any other interest in the property, in order to adjust all claims arising under insurance policies purchased by the association and to execute and deliver releases upon the payment of claims.

- It is of interest to note that in the aftermath of Hurricane Opal, Florida's Division of Florida Land Sales, Condominiums and Mobile Homes affirmed the right of an association to enter the unit to remove the carpet, cabinets, hot water heater, and other appliances damaged by the storm. [See *In Re Petition for Arbitration Higdin v. Seaspray Condominium Association, Inc.* Case No. 96-0430].

Powers of Board or Disaster Coordinator to Act in an Emergency:

Members of the board (though less than a quorum) and/or a designated disaster coordinator, who act in good faith without pecuniary gain, should be indemnified from actions by members of the association and should have emergency powers, including, but not limited to, the power to contract for: (1) emergency services; (2) security from vandalism; (3)

removal of debris; and (4) engineering and other professional services to assist in disaster recovery.

Reconstruction vs. Termination:

The unit owners at one South Miami-Dade County condominium destroyed by Hurricane Andrew were shocked to learn of a provision in their declaration of condominium which provided for automatic termination when damage exceeded fifty (50%) percent or more of the condominium, unless a majority of the total voting interests voted within sixty days to rebuild. Since the unit owners had scattered all across the country, the association had to seek court relief to prevent the activation of the provision. It is preferable for the documents to require a vote of the owners to terminate the condominium, not to rebuild it.

The "50% Rule":

Even if your condominium does not contain an "automatic termination" provision, a regulation of the National Flood Insurance Program, as adopted by most counties and cities, will significantly impact an association's ability to reconstruct based upon the adequacy of insurance proceeds and other funds. The "50% Rule" provides that if the condominium/home is below the 100-year flood elevation, and if the condominium is "substantially damaged" or "substantially improved," the condo-



ACTIVATING THE DISASTER PLAN

minium/home will be required to be rebuilt based upon current building codes, which might necessitate tearing it down, raising the elevation, and then reconstructing it.

A quick response in accordance with pre-conceived plan will minimize damage and promote a speedy recovery. After the disaster, associations should take steps to:

- **Account For Residents.** Knowing the whereabouts of all residents greatly enhances emergency response time following a disaster. In a situation such as a hurricane, in which there is advance warning, a committee should ascertain which residents are remaining in the community and which are evacuating. A temporary destination address and phone number should be obtained from those who are evacuating. Once disaster strikes, the board's first action should be to direct emergency medical assistance to any residents in need.
- Attending to the injured.
- Securing the community from acts of vandalism and looting.
- Removal of storm debris
- “Drying In”/“Shoring Up” the building structures in order to mitigate against further damage.

- “Drying Out”. This is the removal, where necessary, of wet carpet, wall board, cabinets, etc. when necessary to prevent the growth of mold.

- **Survey the Property and Identify Areas Needing Priority Attention:** Depending upon the nature and extent of the damage, it may be necessary to evacuate the premises or shore-up the structure. In some cases, it may be necessary to hire security personnel to protect against vandalism, theft and other criminal activities. In the case of widespread disaster, unit owners will not be able to depend upon local law enforcement agencies whose attention might be diverted to higher priority matters. Arrangements for security, debris cleanup and emergency repairs should be made as part of a disaster plan, not after the fact, when it will be difficult, if not impossible, to find help.

- **Activate the Plan:** Following a disaster, the disaster coordinator and information facilitator move into action. The information facilitator opens lines of communications with the unit owners. The disaster coordinator contacts emergency services and notifies the contractors and employees, advising of their duties and needs. In some cases, it may be necessary to suspend or cancel on-going contracts such as lawn and pool maintenance. Hopefully, provision was



HASTE MAKES WASTE IN RECONSTRUCTION

made in the contract for such right of suspension without penalty in situations such as a disaster when the contracted services are no longer needed.

Within hours of any disaster, the affected community will be besieged by companies and individuals looking for work and/or offering disaster recovery services. This group will consist of qualified professionals, ranging from public adjusters to companies specializing in disaster recovery. The larger of these companies will arrive decked out in color-coordinated uniforms, large debris removing equipment and even helicopters. Interspersed among the new arrivals will be the con men and profiteers who prey upon the misfortune of others. While it is very tempting to sign the first contract stuck in your face, when confronted with what initially will appear to be an insurmountable task of reconstruction, experience has shown that these quick solutions are formulas for disasters of greater magnitude than those already suffered. No greater application exists for the old adage that “haste makes waste” than in these situations. The best advice is to just say no and stick to your disaster plan which, hopefully, will include a plan that anticipates the five (5) phases of reconstruction:

- Project planning/scheduling;
- Construction bidding;
- Contract negotiations;
- Construction/rehabilitation; and
- Project completion/close out.

There are intervening steps you should take which may require contracts of short duration and for specific purposes. Even these contracts



should be reviewed to insure that proper precautions are taken.

AVOIDING THE PITFALLS OF DISASTER RECOVERY:

- Disputes between insurance carriers (flood, windstorm, hazard) and the Association over the nature and extent of damage, cost of repair or replacement, and/or whether appropriate mitigation was effectuated.
- Claims made by unit owners against their Boards over the mismanagement of insurance proceeds.

The Association owes a duty to the owners and their mortgages to exercise reasonable care in the management of the insurance proceeds and to hold the proceeds for the benefit of the owners and mortgages.

Gil of Surf Owners Association, Inc.

Case no. 97-0051

- Claims of contractors, sub-contractors, material men and suppliers, who were not paid by the general contractor, resulting in the Association’s having to pay double because of



its failure to comply with Florida’s Construction Lien Law.

- Suits against contractors and subcontractors over poor quality repairs.

RESTORATION OF THE PROPERTY:

Once conditions stabilize, the disaster recovery team will be in a position to meet with professionals trained in disaster recovery, such as:

- Architect/Engineer – Responsible for assessing the damage, preparing plans and specifications in accordance with new building codes, assisting in selection of construction manager and defining other reconstruction requirements.
- Construction Manager – Oversees selection of general contractor, competitive bidding and administrators; directs and coordinates pay requisitions, change orders and all other activities of the parties; and resolves disputes.
- General Contractor – Employs and supervises laborers, supplies materials and builds project in accordance with architect’s/engineer’s plans and specifications, under the direction of the construction manager.
- Attorney – Reviews construction contracts to insure adequate assurance of job performance and warranties, and compliance with applicable lien laws.
- Public Adjuster – In some instances, the assistance of an independent public adjuster may be beneficial when dealing with the nuances of an ambiguous insurance policy. While

most adjusters will work for a fee based upon a percentage of the insurance proceeds, when the scope of assistance required is limited to specific items, the fee should be adjusted accordingly.

Review your governing documents; particularly, the “repair after casualty” section of the insurance provision. It is common to find language such as the following:

- Estimates of Costs – Immediately after deciding to rebuild or repair damage to property for which the association is responsible, the association shall obtain reliable and detailed estimates of the cost to rebuild or repair.
- Construction Fund – The construction fund shall be disbursed in payment of such costs in the manner required by the board of directors of the association upon approval by an architect qualified to practice in Florida and employed by the association to supervise the work.

When the aforesaid provisions exist in your documents, contracting for reconstruction prior to obtaining a scope of work will be contrary to both the association’s best interest, and the obligations set forth in the documents.

In order to respond to an emergency, the association may need to obtain a short-term loan. Without a restriction in the documents,

SETTLING THE INSURANCE CLAIMS

not-for-profit community associations can borrow; however, they generally cannot pledge the condominium property as security. Most banks with which the association does business will approve a commercial line of credit secured by the association's accounts and/or assessment and lien rights. The association also may obtain a small business administration loan that is available to victims of disaster, generally, at lower interest rates. Of course, reserve funds can also be utilized if approved by a majority of the total voting interests.

On television, within minutes of a disaster, an insurance adjuster appears on the scene with checkbook in hand. In the space of a thirty second commercial, all claims are resolved, and the victims shower praise on the company's quick response and positive attitude. While it does occasionally happen, it is an unlikely scenario. In a major disaster, it is rare, if not impossible, to fully assess the damages within such a short timeframe. In fact, the association should not seriously entertain a settlement until the full scope of work is known and costs ascertained.

Immediately following the disaster, it will be necessary for the association to secure the property to mitigate against further damage and clean-up debris. Most insurers will offer advances for this purpose. As long as the association doesn't sign any releases or settlements, there is nothing wrong with accepting such advances.

Insurance policies need to be examined to ensure that "proof of loss" forms are filed



CONCLUSION:

Disasters do not respect geographic location or economic status and can occur at any time. Their effects can last for years; however, pre-disaster readiness coupled with a well-orchestrated and executed disaster plan will minimize damages and promote a speedy recovery.



BECKER & POLIAKOFF

Legal and Business Strategists

3111 Stirling Road
Fort Lauderdale, FL 33312-6525
bp@becker-poliakoff.com
www.becker-poliakoff.com
www.hurricane-recovery.com
954-987-7550 / 1-800-432-7712