

From: eLawyer
Sent: Tuesday, October 14, 2008
Subject: The Association e-Lawyer, Volume VII, Issue 2

RESIDENTIAL CONDOMINIUM INSURANCE SECTION 718.111(11) - CONDOMINIUMS ONLY

In 2008, the Florida Legislature amended Section 718.111(11), which regulates insurance. This amendment is a complete rewrite of the old section; therefore, the following summary will address the new law without reference to whether it is a new provision, or whether it is a carry-over from of the previous law.

1. What Condominiums Must Comply With This Law? [Addressed in the Preamble & Subsection (o) of the new law]

The preamble to this law provides that the following insurance requirements will apply to all Residential Condominiums in the state, regardless of when their Declarations were recorded. This means that commercial condominiums are not governed by this law.

Subsection (o) specifically provides that this law does not apply to time share condominiums. Instead, they are to rely on Section 721.165, F.S.

2. Obligation to Obtain Insurance During Developer Control Period: [Addressed in subsections (a)(1), (a)(2) & (b) of the new law]

A developer-controlled association must “exercise” its best efforts to obtain and maintain **adequate insurance** as defined below. Failure to obtain such insurance is considered a breach of fiduciary duty by the developer-appointed members of the Board unless it can be shown that they used their best efforts to maintain the required coverage.

3. Obligation to Obtain Insurance After Developer Control Period Ends: [Addressed in subsection (d) of the new law]

After the developer-control period ends, the board must “use” its best efforts to obtain and maintain **adequate insurance** as defined below. However, unlike the efforts required by a developer controlled board, the failure to obtain such insurance is not statutorily considered to be a breach of fiduciary duty.

4. How Is Adequate Insurance Defined/Appraisals Required? [Addressed in subsection (a) of the new law]

Regardless of the requirements in any Declaration, the term “**adequate insurance**” is now defined to be the replacement cost of the property, which must be determined by an independent insurance appraisal or update of a prior appraisal. This determination must be made at least once every 36 months. As addressed below, the deductible amounts are used in the calculation of whether adequate insurance is provided for a condominium.

5. Pooling Arrangements and Self Insurance Options: [Addressed in subsections (a)(1), (a)(2) of the new law]

Without specifically stating such, it is anticipated that the vast majority of the residential condominiums will utilize typical commercial insurance carriers to obtain the required insurance. That being said, the following two other alternatives are permitted:

- (a)(1) Subsection (a)(1) permits an association or a group of associations to provide for such coverage using a “self-insurance” fund as provided for in Chapter 624, F.S.; and,
- (a)(2) Subsection(a)(2) provides that an association may also join with other associations to obtain and maintain insurance coverage sufficient to cover an amount equal to the probable maximum loss for a 250 year windstorm event.

Based on the technical requirements imposed on condominiums by these laws, there is a real question as to how many communities will be benefitted by these sections.

6. How Are Deductibles To Be Set By the Board? [Addressed in subsections (a)(3) & (c) of the new law]

Subsection (a)(3) provides that, when determining the adequate amount of hazard insurance coverage, the association may consider the amount of deductibles which will be chosen. These deductible must be set as follows:

- (c)(1) Deductibles must be consistent with industry standards and prevailing practice for communities of a similar size and age with similar construction and facilities in the locale where the condominium is located.
- (c)(2) When establishing the amount of the deductible, the Association can take into account the funds available in reserve accounts or predetermined assessment authority at the time the insurance is obtained.
- (c)(3) Deductibles must be established at a Board Meeting, after giving proper notice, and the notice must state the proposed deductible, available funds and the assessment authority relied upon by the Board and must estimate any potential assessment amount against each unit if the deductible must be paid. The creation of this notice is more complicated than it first appears.

7. What Must Be Covered By The Association’s Policy? [Addressed in subsection (f) of the new law]

- (f) Every hazard insurance policy issued or renewed on or after January 1, 2009 must provide primary coverage for:
 - (f)(1) All portions of the condominium property as originally installed and replacements of like kind and quality in accordance with the original plans and specifications.
 - (f)(2) All alterations or additions made to the condominium property or association

property pursuant to Section 718.113(2) [the material alteration statute].

8. What is Not Covered By The Association's Policy? [Addressed in subsections (f)(3), (g)(1), (j)(1), (j)(2), (j)(3), (j)(4) & (n) of the new law]

A. Items Specifically Excluded From Policy Coverage:

The following two categories of items will not be included in the list of items to be covered by the Association's insurance policy:

- (f)(3) Subsection (f)(3) contains a specific list of items which are not to be covered by the Association's insurance, including floor, wall and ceiling coverings, countertops and window treatments. Importantly, the new law requires that air conditioner and heating equipment must now be insured by the association.
- (g)(1) In addition, subsection (g)(1) provides that, starting January 1, 2009, all improvements or additions to the condominium property that benefit fewer than all unit owners must be insured by the unit owner or owners having use thereof, or by the Association at the cost of unit owners having the use thereof.

B. Items Included In Policy Coverage, But Not Covered In Case of Casualty:

Even if items must be insured by the Association, the Association will not be obligated to pay for reconstruction or repair or expenses due to casualty losses of those improvements in the following circumstances:

- (n) Subsection (n) provides that Associations are not obligated to pay for reconstruction or repair or expenses due to casualty loss to any improvements installed by a current or former owner of the unit or by the developer if the improvement benefits only the unit for which it was installed and is not part of the standard improvements installed by the developer on all units as part of the original construction, whether or not the improvement is located within the unit. This section, however, states that "this provision does not relieve any party of its obligations regarding recovery due under any insurance implemented specifically for any such improvements".
- (j) Subsections (j)(1) & (j)(2) provide that any loss caused to the condominium property or to the personal property of others by the intentional conduct, negligence or failure to comply with the governing documents by a unit owner, his/her family members, guests, tenants, etc. must be paid by that owner. However, Subsection (j)(3) provides that, to the extent that the above losses are paid for by the association's insurance policy, the association must reimburse the owner; and
- (j)(4) Subsection (j)(4) provides that Associations are not obligated to pay for reconstruction or repair or expenses due to casualty losses as a common expense if the casualty losses were known or should have been known to the unit owner but 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.

9. Individual Unit Owners Must Obtain Insurance/Power to Enforce: [Addressed in subsections (g), (g)(2)&(4) of the new law]

- (g) Commencing January 1, 2009, all owners must have their own insurance policies to cover those items not covered by the association's policy, including those items addressed immediately above. These policies must provide special assessment coverage of no less than \$2,000.00 per occurrence and must provide that no rights of subrogation will exist against the condominium association. There is some question as to whether the special assessment coverage is actually available at this time.
- (g)(4) According to the last sentence of subsection (g)(4), the Association must be listed as an additional named insured and a loss payee under each of those policies. There is some question as to whether this requirement can be met based on existing policy requirements.
- (g)(2) In order to make sure that these policies are in effect, subsection (g)(2) provides that the Association shall require each owner to provide evidence of a currently effective policy, but the Association may not do so more than once per year. If the owner does not provide evidence of such insurance within thirty (30) days after the Association's annual request, the Association can purchase insurance on behalf of the Owner and charge the cost of the policy against the Owner as an assessment.

10. Associations Are Responsible For Performing The Actual Repairs: [Addressed in subsections (g)(2), (g)(3) & (g)(4) of the new law]

- (g)(3) Subsection (g)(3) provides that **ALL** reconstruction work after a casualty must be undertaken by the Association, unless the Association gives specific and conditioned approval to a unit owner to do so.
- (g)(2) & (4) However, subsection (g)(4) still provides that the unit owners are responsible for the **COST** of such reconstruction on the property for which he/she is required to carry casualty insurance. According to that subsection and the last sentence of subsection (g)(2), if the Association performs the work and the owner does not pay for that work, then the cost of that work is chargeable to the unit owner as an assessment.

11. Who Pays For Repair Expenses, Deductibles and Shortfalls In Insurance Proceeds? [Addressed in subsection (j) of the new law]

Subsection (j) provides that, unless the owners vote otherwise (see below discussed opt-out provisions), any portion of the condominium property required to be insured by the Association against casualty loss **pursuant to paragraph (f)** shall be reconstructed, repaired, or replaced as necessary by the associations as a common expense. This same subsection also provides that all hazard insurance deductibles and all insured losses and other damages in excess of hazard insurance coverage are to be paid by the Association as a common expense.

12. Associations May Opt-Out of Section (j): [Addressed in subsections (k) (l) & (m)]

- (k) Associations can opt out of the requirements of above discussed subsection (j) as it relates to the allocation of repair or reconstruction expenses and use the provisions contained in the Declaration or amend the Declaration to provide for whatever method it chooses.
- (l) Multi-condominiums may also opt out of this provision.
- (m) If, however, the members vote to opt-out of (j), a notice of such action must be recorded in the public records. The members can also reverse the decision to opt out by the vote of a majority of the total voting interests.

13. Land Condominiums, D & O Policies, Employee Insurance & Flood Insurance: [Addressed in subsection (e) of the new law]

If permitted by the Declaration, the obligation to insure may be shifted to the owners of freestanding condominium buildings (i.e. land condominiums). The association may also purchase D & O policies for the board members and officers, insurance for the benefit of employees, and flood insurance.

14. Effect on Multicondominiums: [Addressed in subsection (g)(5) of the new law]

Subsection (g)(5) permits multi-condominiums, by a majority vote of the collective members, to operate as a single condominium for purposes of insurance matters. This election constitutes an amendment to the Declaration and must be recorded as an amendment.

15. Fidelity Bonds: [Addressed in subsection (h) of the new law]

Subsection (h) requires Associations to maintain fidelity bonds on all persons who control or disburse funds of the association.

16. Easier Amendment Procedures: [Addressed in subsection (i) of the new law]

Subsection (i) permits condominiums to amend their documents to be consistent with this law without obtaining mortgagee approvals.

The firm of Taylor & Carls, P.A., with offices located in Maitland, Melbourne, Clearwater and Palm Coast, Florida, was founded in 1981 and has practiced in the area of community association law since that date. This edition was prepared by Robert L. Taylor, Esq. and Elizabeth A. Lanham-Patrie of Taylor & Carls, P.A. **The information contained in The Association e-Lawyer should not be acted upon without professional legal advice. The opinions expressed herein are as of the date hereof, and this law firm undertakes no obligation to advise the Association of subsequent changes in the law.**