Learning from the Past

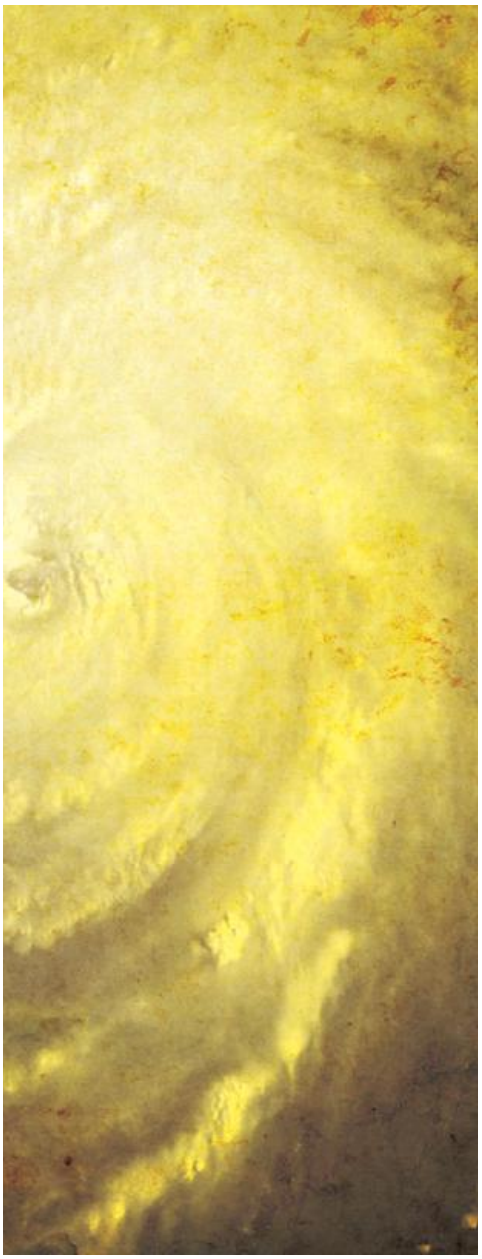
ADDRESSING INSURANCE COVERAGE AND CLAIMS HANDLING

BY LISA MAGILL, ESQ.

Hurricane Wilma may seem like a distant memory, but not to the state and federal Judges serving Florida's courts. Case decisions issued as recently as the past few weeks may significantly impact your insurance coverage under existing policies. Several cases remind us of the harsh consequences that can result from missteps in the claims handling process and others reiterate common policy exclusions.

So, what do you know about insurance policies and presenting your claim?

TRUE OR FALSE: If your insurance company is an admitted carrier in Florida and the policy forms are approved by the Florida Office of Insurance



Regulation, you must have all the coverage required by Florida law.

FALSE. Even though your policy may contain an endorsement that says it conforms to the Florida statutes that doesn't mean that you have all the coverage required by the Condominium Act.

Section 718.111(11), Florida Statutes contains specific coverage requirements. It imposes an obligation upon the unit-owner controlled association to use best efforts to obtain and maintain adequate property insurance. The statute says it is designed to "ensure consistency in the provision of insurance coverage to condominiums and their unit owners." Every condominium association is expected to comply with the statute, regardless of the coverage specified in, or the date of, the declaration of condominium.

With that in mind, you may expect the state-run insurance company, Citizens Property Insurance Corporation, to include coverage for the statutorily required property and improvements as specified in the Condominium Act. Not so, said the Fourth District Court of Appeal in a ruling issued on April 10, 2013.[1] After an appraisal, the River Manor Condominium Association expected insurance proceeds to repair what the adjusters calculated as $1,253,278.84 in damages to common elements. Citizens claimed its policy did not include coverage for landscaping or structures not considered part of the residential building—items like carports, swimming pools, cabanas, walkways, ramps, and patios were not covered. The Court agreed with Citizens. It found the Condominium Act regulated condominiums, not insurance companies, so the coverage requirements weren't automatically incorporated into the policy.

Community leaders need to know what items are covered and what items are excluded from coverage in order to calculate uninsured risks. That disclosure you published last year advising members they are exposed to $1 million in deductible or uninsured loss needs to be adjusted if your board didn't take possible damages to items excluded by the policy into account. Your board may be in the uncomfortable position of shopping for special endorsements or additional coverage on top of the standard property policy and then have to amend the budget accordingly.

TRUE OR FALSE: Your attorney and public adjuster can handle the entire insurance claim after a hurricane. The directors and officers don't need to be involved or know the details about the damages and repair costs to support the claim.

FALSE. Unfortunately, many associations learned this lesson the hard way. Some folks in Broward County were probably upset about a ruling issued on March 8, 2013, by the United States District Court.

The board of directors notified QBE Insurance Corporation about damages from Hurricane Wilma shortly after the storm passed. The insurance company sent an adjuster to evaluate the damages. The adjuster prepared a preliminary report, noting damages to the roof, windows, and screens. That adjuster recommended further evaluation by a roofing expert and asked the board to describe damages to the interior of the building. In the meantime, the board contacted a roofer and had about $16,000 in repair work done. The roofer said that only part of the work was to repair hurricane damage. The association concluded its damages were well under the deductible and withdrew its claim.

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[1] ***Note:*** the ruling isn't final as there is still time for the parties to request a re-hearing.

The following year the board sought wind coverage from Citizens. The application for insurance said there was no unrepaired physical damage to the property. As a side note, filling out applications for insurance coverage can be a trap for the unwary. The applications often contain disclosures—community leaders shouldn't sign or approve the applications without reading them thoroughly.

The roof problems continued, and the association decided to have it replaced in late 2009. In 2010, the association agreed to hire a public adjuster and attorney to pursue an insurance claim for Wilma damages. They filed suit and demanded appraisal in October, ostensibly trying to "beat the clock" on the statute of limitations. QBE objected to an appraisal and further objected to the re-submitted claim. The case went to trial in December 2012.

The Court rejected the claim, finding the association willfully disregarded its obligations under the policy. What did the association do wrong?

It submitted a proof of loss form requesting insurance proceeds for items not damaged by Hurricane Wilma. The proof of loss said all the windows needed to be replaced when an inspection only revealed 19 broken window panes. It also included pre-existing non-Wilma damages. The association did not provide the carrier with an itemized inventory of damages.

The association produced a witness for the examination under oath who knew basically nothing about the damages or the insurance claim. The witness (a board member) did not prepare for the interview, had "no idea" what actions were taken by the board after the storm, was not capable of describing the repairs made by the association, and did not review or know about any association records reflecting Wilma damages.

While the Court did not say the conduct of the association went far enough to be considered fraud, the deficiencies and lack of cooperation precluded appraisal. The "take away" here is that you need to be involved in your own claim. Whoever is going to serve as a witness for an examination under oath or deposition or trial needs to review all the documentation associated with the loss and have the ability to answer questions regarding the damages, the association's efforts to mitigate damages, the repairs, and costs sustained as a result. Just remember that the board of directors acts as

the "owner" of the property for the purpose of the insurance claim, and keep that in mind when board members relocate/change during the time it takes to pursue the claim.

TRUE OR FALSE: You may not be entitled to collect insurance proceeds to repair or replace damaged property until the repairs are complete.

TRUE. A 2012 ruling provides another opportunity to remind community leaders (and CAMs) of the distinction between insurance proceeds for the actual cash value of the lost or damaged property and insurance funds to repair or replace the damaged property (ACV v. RCV). In this case, the Aspen Specialty Insurance Company policy issued to the Oriole Gardens Condominium Association said:

> We will not pay on a replacement cost basis for any loss or damage:
> 1. Until the loss or damaged property is actually repaired or replaced; or
> 2. Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

Remember when the Buckley Towers Condominium Association claimed it was impossible to rebuild the condominium without all of the insurance proceeds up front because the financial burden was too much of an obstacle to overcome? A clear and unambiguous insurance contract will be enforced according to its terms. Here the Oriole Gardens Condominium was not entitled to the millions of dollars it claimed it needed to repair or replace the damaged property; instead, it was only entitled to the actual cash value of the damaged property. The Court likewise ruled in favor of the insurance company with respect to claims for Loss and Ordinance Coverage (increased costs of construction to comply with current codes or ordinances). The Aspen policy said the insured must repair or replace the damaged property within two years of the loss before it would pay insurance proceeds for the increased cost of construction.

TRUE OR FALSE: All claims against the association based on a breach of fiduciary duty or negligence on the part of the board of directors are covered by the association's Directors and Officers (D&O) policy.

FALSE. Exclusions from the coverage may apply, as was the case with respect to a lawsuit brought by a homeowner against the Commodore Plaza Condominium Association. The homeowner filed a lawsuit against the association claiming the board's negligence, breach

of fiduciary duty, and breach of its obligations under the declaration of condominium after Hurricane Wilma caused damages to the roof, floors, walls, and ceiling of his townhouse—those damages consisting of mold and a rodent infestation, among other things. The Travelers Casualty and Surety Company policy contained the following exclusion:

The insurer shall not be liable to make any payment for the loss in connection with any claim made against any of the insureds:

1. for or arising out of any damage, destruction, loss of use or deterioration of any tangible property...

Travelers argued that since the entire dispute flowed from Hurricane Wilma, there was no coverage. No coverage also meant there was no duty to defend by appointing insurance defense counsel. The association argued that Travelers' should provide coverage for the owner's claims that it failed to:

- protect or exterminate the property;
- keep the entire condominium clean and sanitary;
- provide proper security;
- hire all licensed contractors and obtain all proper permits before starting work; and
- start repair work fast enough.

Since none of this would have happened if Hurricane Wilma didn't make its way through Miami-Dade County, interpreting what was meant by the phrase "arising out of" in the exclusion became the crux of the issue for the Court. It cited other cases, including those from the Florida Supreme Court, finding this phrase meant many things including "originating from," "having its origin in," "growing out of," and "having a connection with." Ultimately the Court ruled the D&O policy exclusion applied because of all of the complained of actions occurred after damages were sustained from the storm. The Court said all of the homeowners' claims had their origin in the property damage and, therefore, there was no coverage under the D&O policy.

Community leaders are encouraged to review coverage now that hurricane season has arrived.

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