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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

The Insurance Industry Wants You To Forfeit Your Property Insurance Assets

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As one would expect, the dramatic hurricane seasons in Florida during 2004 and 2005 have had tremendous impact on the laws regulating property insurance claims. Similar to the years following Hurricane Andrew in 1992, the legal landscape has again shifted tremendously since 2004. Most of this evolution has not favored the policyholder. All property insurance policyholders, and especially community associations where volunteer boards of directors act as fiduciaries for many other homeowners, must be mindful of the timelines now being enforced under insurance policies. The deadlines are now shorter, and there is little room for error.

In a very real sense, when an event occurs that may be a covered loss under a property insurance policy, the rights under that contract must be considered and treated as "assets" of the policyholder. Community association boards are obligated to preserve and protect the association's assets, and in this context capturing the benefits available under an insurance policy creates responsibilities much more complex than the more familiar duties of "maintaining" the buildings and common properties of the community.

An insurance policy is a minefield of conditions and requirements that can lead to losses of rights for the policyholder if not met. First and foremost, when a loss event occurs (wind, water, fire or any of the many other covered events under property policies), the insurance company must be given "prompt" notice. Property insurance policies rarely define the notice of loss requirements much more specifically than by using terms such as "prompt" or "immediate." Not surprisingly, how those terms apply under the peculiar circumstances of each claim event has spawned many appellate decisions in Florida state courts (and federal courts applying Florida state law). While the basic legal standard governing what may constitute "prompt" notice is invariably expressed as being dependent on the specific circumstances surrounding the loss, and therefore creating a fact issue that a jury should resolve, in legal practice many "late notice" cases are never able to get to a jury. Most of the common excuses given by policyholders – such as believing a claim to be under the deductible of the policy and only later realizing that the damage is more extensive, having insufficient expertise to have recognized all the ramifications of a particular type of damage even though some damage was evident, or pursuing other recovery options before creating "claim history" by notifying their insurance company – have been rejected by the courts. Once notice is determined by a court to have been "not prompt," the policyholder is navigating an increasingly slippery slope in Florida. It is simply no longer an excuse for a policyholder here to plead any form of ignorance of its obligations under a policy when a loss event should be apparent – report it or lose it.

Now, technically, forfeitures of contract rights are not favored by courts. Long-established law announced by the Supreme Court of Florida has held that notice that is not "prompt" does not, in itself, result in loss of any

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VOLUME IX, 2014
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insurance benefits. "Prejudice" to the insurance company is also necessary. So, late notice, coupled with prejudice to the insurance company, will be fatal to the policyholder's claim. But, courts *presume* that when notice is not prompt the insurance company *has been* materially prejudiced. The Supreme Court created the opportunity for policyholders to put the toothpaste back in the tube by authorizing policyholders to submit evidence to "rebut" the presumption of prejudice from late notice. Lawyers recognize that the burden of proof is

shifted to the policyholder when late notice is involved to show an absence of harm; to prove a negative, which is always difficult. For reasons more involved than this writer can legitimately untangle (*i.e.* without disclosing my bias that the insurance industry has far more influence than it should on law-making that reduces the benefits of the deal sold to policyholders in their insurance contracts), recent cases have used some questionable logic to create nearly insurmountable hurdles to rebutting prejudice.

Recently, in order to uphold trial court decisions declaring a complete loss of policyholder rights after late notice, appellate courts have entertained the speculation that an earlier investigation by an insurance company might have made the cause of the loss more clear; or a more reliable investigation could have been conducted; or, earlier notice simply would have been better in unspecified, but universally accepted, ways. This speculation is relied upon even in the face of expert opinions from the insurance companies' own independent engineers that they have been able to reach their conclusions about causation, or extent of damage, to a reasonable degree of engineering certainty. If courts go down this path, the odds of a "late" policyholder winning the argument – between the speculative truism that "earlier would certainly have been better" versus the factual record showing that there was no interference with the insurance company's real ability to reach a decision to deny the claim on a basis other than late notice – are poor.

We can all debate the public policies being served by the evolution in the laws regulating insurance claims, but the onus is now squarely on the policyholder to move forward with a potentially covered claim quickly. Policyholders are well-advised to work with their legal advisors to prepare (meaning, before they happen) for disaster claims deliberately – assure that the correct insurance coverage is in force; document the existing condition of the facilities; assure facilities are reasonably and consistently maintained; and gather the documents certain to be relevant in the event of a claim in a location where they are preserved and accessible when the need arises.

Community association boards are duty-bound to anticipate the storm and prepare to be able to extract all the benefits from the insurance contract asset they purchase. In most instances, the insurance industry will not help policyholders obtain from their insurance contract all benefits that should be available. And, policyholders cannot blame the courts for harsh forfeiture rulings based on late notice – they are just enforcing the law under the circumstances. The law always favors those who have prepared for the worst. With a little foresight and capable planning, the community's insurance policy will be there when it's needed.

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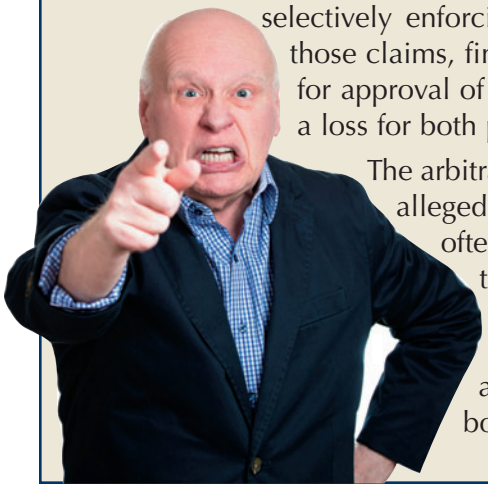
The Carillos also filed a case against the association claiming that the association was harassing them and selectively enforcing the architectural approval procedures against them. The arbitrator rejected those claims, finding that the unit owners failed to furnish the association with a written request for approval of the changes they wanted to make in their unit. Thus, in the end, this matter was a loss for both parties.



The arbitrator did imply that the result of the case may have been different if the association alleged violations of provisions prohibiting nuisances on the condominium property. I often tell clients that while the legal or administrative process can accomplish many things, it cannot make people nice or pleasant to be around. However, the association can establish standards of conduct which, if uniformly enforced, will be upheld by the arbitrators. Perhaps the association should have considered adopting rules and regulations governing decorum and communications with board members. If so, it would have been in a better position to obtain some relief.

How is the Collection of HOA Assessments Impacted when Lots are Combined?

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Homeowners' association assessments are, as a rule, collected from owners in the proportions or percentages provided for in the association's governing documents. In many cases, the governing documents provide for assessments to be collected in equal percentages from owners of all lots in the community. Accordingly, when lots are combined, it often results in confusion over what percentage of the total budget should be assessed against the combined lots.

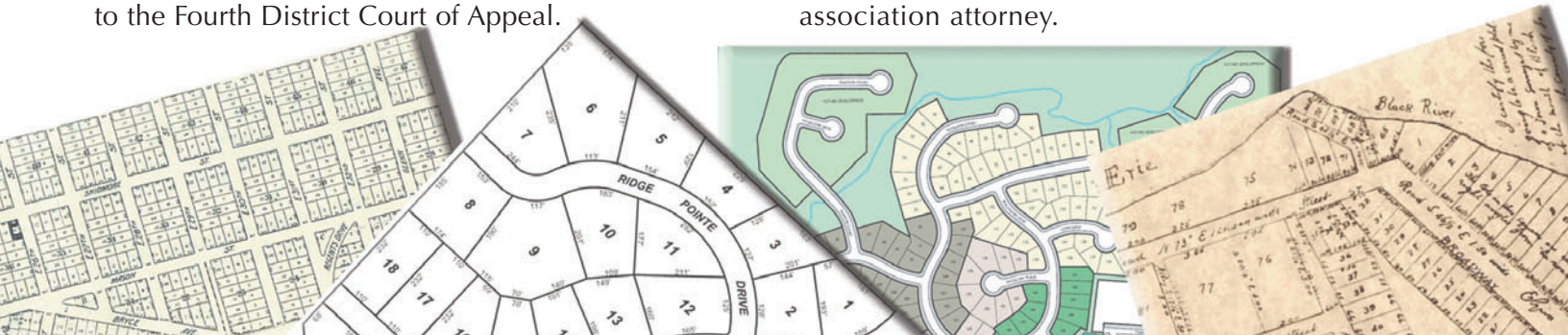
Such was the dispute in the 2013 case of *Straub v. Muir-Villas Homeowners Ass'n, Inc*. The Villas at Muirfield community consisted of several plats of land, each divided into several lots. Plat 5, added to the property in 1988, originally consisted of nine lots all of which were owned by two individuals. The two individuals recorded a re-plat of Plat 5 which reconfigured the nine existing lots into four larger lots.

Some time later, Straub acquired three of these re-platted lots, which constituted lots one through eight in the original plat. When the Muir-Villas Homeowners Association sought to impose assessments against the eight lots, Straub protested that he should only be required to pay an assessment only on each of the three re-platted lots, not on each of the original eight lots.

Litigation ensued. The trial court found in favor of the association, ruling that Muir-Villas HOA was entitled to levy assessments against the eight lots reflected on the original plat. Straub appealed the trial court's decision to the Fourth District Court of Appeal.

The appellate court's examination focused on the association's governing documents. Under the documents, each owner was required to pay his or her portion of assessments based on the number of lots that he or she owns. The term "lot" was defined to mean "one of the numbered parcels of land into which The Properties have been subdivided according to the Plat referred to in Article II." The Plat referred to in Article II was the Muirfield Plat No. 3 as well as any property added to the Declaration by filing a supplemental declaration. The original Plat 5, reflecting nine total lots, was added to the Declaration in 1988 by filing such a supplemental declaration. There was never any amendment to the Declaration after the re-plat was recorded that would have served to change the number of lots from nine to four. Accordingly, the appellate court affirmed the trial court's decision, ruling that the Association properly levied assessments against the eight lots owned by Straub.

While Muir-Villas was able to rely on helpful language in its governing documents to successfully argue its position, it is not always so clear whether a combination of lots should also result in a decrease in the total number of lots assessed by the association. If your association is faced with the prospect of a permanent reduction in the number of lots against which assessments may be levied, it is advisable to consult with your community association attorney.



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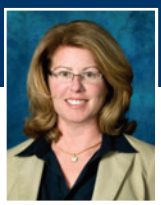
CONDO DIRECTORS NEED THICK SKIN



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Arbitration Rulings Finds Unit Owners Actions "Repugnant" but Not a Violation of Documents

The arbitration case of Majestic Shores Condominium Association, Inc. v. Carillo describes what is all too often experienced by condominium directors. The association filed the petition for arbitration with the Division of Florida Condominiums, Timeshares and Mobile Homes claiming that abusive and threatening behavior on the part of Mr. Carillo inhibited the operation and maintenance of the condominium and interfered with the directors' performance of their duties and obligations.

The arbitrator found that Mr. Carillo regularly communicated with members of the board in an abusive, derogatory and threatening way. His aggressive verbal attacks caused board members to be fearful and led others in the building to believe that board members may be subject to danger. The constant yelling and verbal altercations were described as "out of control".

Ultimately the arbitrator did not believe that such actions actually prevented the members of the board of directors from performing their duties. The verbal attacks may have been considered a nuisance, but the association did not allege that the documents prohibited nuisances. The arbitrator compared board members to elected officials and said that like elected officials, board members should "expect unruly constituents" and disagreements about the implementation of policies and actions. While Mr. Carillo may have made it unpleasant for the board members, none of his actions actually prevented the board from fulfilling its functions and therefore the relief requested by the association was denied.

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