New Law Impacts Condominium Reconstruction After Casualty

by Joseph E. Adams and Yeline Goin

During the 2008 Legislative Session, the Florida Legislature adopted House Bill 601, which became effective July 1, 2008. While HB 601 made significant changes, perhaps fundamentally, to the insurance responsibilities of the association and the unit owners, the focus of this article will be on the new reconstruction after casualty provisions.

As a result of 2003 changes to the Florida Condominium Act regarding insurance, and plenty of opportunity for test cases after the 2004 and 2005 hurricanes, great uncertainty has developed in the law as to who is supposed to pay for what after casualty damage, particularly with regard to damaged items for which no insurance proceeds are available due to a deductible.

In a highly publicized ruling, the State agency which regulates condominiums in Florida (known as the Division of Condominiums, Timeshares, and Mobile Homes) held that the party that is responsible to insure the item is the party that is responsible to pay for loss in situations where insurance funds are not available for a covered loss, which is most often because of a deductible. The Division's opinion was contained in a ruling known as a "declaratory statement," which is technically only binding on the association which asks for it. However, the Division sometimes enforces its interpretations of the law as enunciated in previous declaratory statements, and applies that ruling to other disputes.

The now famous (some might say infamous) declaratory statement involved is known as *In Re: Petition For Declaratory Statement, Plaza East Association, Inc.* Therefore, this issue has come to be known as the "Plaza East issue." Simply stated, Plaza East stands for the proposition that for any item an association insures, the association must pay for the repair of damage caused by an insurable event, and if there are insufficient funds for the work, all unit owners must be assessed as a common expense.

Prior to Plaza East, most attorneys who practice in the condominium law arena took the position that the provisions of the declaration of condominium would control in post-casualty cost allocations. While declarations of condominium are by no means universal or consistent on the topic, many provide that unit owners pay shortfalls for unit damage, and the association pays shortfalls for common element damage. Other documents defer to the general allocation of maintenance responsibilities, stating that whoever is

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generally required by the declaration to maintain the element pays when there are insufficient insurance proceeds. A minority of documents basically follows Plaza East and state that the party who insures the element pays for damage below the deductible or not otherwise covered by insurance.

Let's look at an example of an everyday situation in condominium living, which may illustrate the point. Let us assume that a water heater on the third floor of a condominium suddenly bursts. There is no suggestion of negligence (the heater is only two years old). The resulting water leak destroys the drywall in an interior, non-load-bearing partition in the second floor unit directly below.

Further, assume that bursting pipes and sudden water discharges are a covered cause of loss under the association's insurance policy, so there is coverage for the incident. However, the total damage to the second floor interior partition drywall is $2,300. The association's deductible under the master policy is $2,500. Therefore, no insurance proceeds are available.

Let us further assume, as would be common, that the declaration of condominium states that the unit owner owns this partition, and is required to maintain it. Assume also that the declaration provides that if there are insufficient insurance funds available for damage to units arising from casualty, the shortfall is paid by the unit owner, even for unit items insured by the association, such as this wall.

Prior to Plaza East, most attorneys would have advised the association that paying for the drywall damage was a clear unit owner responsibility. The Division's position, according to Plaza East, is that since the association insures the wall, the association must pay for the wall's repair and assess all unit owners for the deductible.

The Plaza East declaratory statement was widely criticized by commentators and practitioners, for a variety of reasons, mainly focusing on different views of the intent of the 2003 amendments to the law. As a result, it was determined that the best approach to lay the issue to rest would be specific legislative guidance on the point. HB 601 does precisely this. Keep in mind that HB 601 is effective now.

HB 601 states that Plaza East is the "default position" of the law (our term, not the term in the law). This means that no matter what a declaration of condominium provides, the association must pay for repair of damage to property it insures, at least if caused by an insured event, regardless of any provision to the contrary in the declaration. As stated above, this most often arises in situations involving a deductible.

However, the new law also allows associations to "opt out" of the law's default position, by a majority vote of the entire voting interests. In most cases, this will involve an association voting to follow the provisions of its condominium documents. In other cases, amendments to the documents might be required. In that case, although the law is not clear on this point, it is likely that amendments to documents (if they require greater approval than a majority of the entire voting interests) need to follow the higher voting requirements set forth in the particular community's governing documents. If an opt out

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HB 601 also addresses how multi-condominium associations "opt out" of the "Plaza East rule." According to the new law, a condominium within a multi-condominium association that has not consolidated its financial operations may "opt out of Plaza East" with approval of a majority of the total voting interests in that condominium.

This leaves many (probably most) associations in a curious position. If they want to follow the provisions of their present condominium documents, they need to take a vote and follow the steps set forth in the statute. If they do not, the Plaza East doctrine is the rule that must be followed.

In summary, under the new law, the association will be obligated to pay deductible costs for all items it insures, regardless of any contrary provision in the declaration of condominium. However, the new law permits a vote to provide for a different method of cost allocation, an issue many associations will be closely looking at in the coming months.

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