Have Plan Before, After Disaster Hits

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The last five editions of this column, as well as my weekly Q & A segment, have been devoted exclusively to legal issues related to Hurricane Charley.

Hurricanes Frances and Ivan have shown that the historical passing of many years between major storm events offers no guarantee or predictability as to when calamity may strike. Hopefully, Jeanne and Karl will fizzle out and/or avoid landfall, as predicted.

Even without hurricanes, the fickle forces of Mother Nature and the imperfection of human beings remind us that we cannot control the future. Last Sunday's local tornadoes emphasize that point. In the past several weeks, I have also been involved with condominium association clients who have experienced casualties unrelated to the forces of nature. One involved a fire that reportedly resulted in smoke damage to several units. Another case involved a sudden and substantial leak in the building's plumbing system, which dumped thousands of gallons of water through a whole "stack" of units in a high-rise building.

Hurricanes, tornadoes, fires, and bursting pipes are simply part of life. We cannot predict them, and we cannot stop them.

We can learn from our experiences and from the experiences of others. I suspect that many community associations will be focusing on their disaster preparedness plans during the upcoming months that we often refer to as "the season". They well should. In general, there are two phases to the plan, the pre-disaster phase and the post-disaster phase. The pre-disaster segment of the Association's plan should include (among other things) securing of insurance policies in a safe place, designation of an out-of-state contact person, and documentation of the pre-casualty condition of the premises.

The post-disaster phase of a plan includes having pre-established relationship with contractors who can show up and promptly do emergency work, assemblage of a post-disaster team (board members, manager, attorney, engineers, insurance agent and adjusters, etc.) and a process for keeping unit owners informed about what is going on (web-sites, newsletters, e-mail blasts, etc.).

Obviously, this is a thumbnail sketch and just a sampling of the many items to be considered, which will need to be tailored to the physical and occupancy characteristics of a particular community.

While it will be months before the end is in sight for some associations, it is time for the rest of the community to try to get back to business as normal. In the category "back to business as normal", these are my concluding comments about the unwelcomed visitor named Charley. Next week, we will resume a review of changes adopted by the Florida Legislature in 2004, most of which will become effective on October 1, 2004. ⚖

Q&A

Question: Our corporation's bylaws require a six-month residency as an eligibility requirement to run for the Board of Directors. Membership in the corporation is tied to lot ownership. Elsewhere in the bylaws, it is indicated that full membership rights include the right to run for office. I question the legality of this clause. What do you think?

Answer: I assume that your community is a homeowners association, governed by Chapter 720 of Florida's statutes. If your community is a condominium association, then it is clear that a residency requirement is invalid.

In HOA's, the law is not quite as clear. However, because the statute does provide that any parcel owner may nominate himself for election to the Board (from the floor at the annual meeting), I question the validity of the clause (at least as to floor nominations). This is an issue which the Florida Legislature would do well to clarify.

Regardless of the legalities, I do not believe that residency requirements are wise. In fact, many Southwest Florida communities are populated by seasonal residents who spend less than six months here, who may well be the only people interested in serving on the Board, or who may be the best qualified.

Question: Can you please provide me with the correct web-site that I can access to look at the Florida Statutes? B.A. (via e-mail)

Answer: There are many web-sites where you can get access to Florida's laws. The one I use is http://www.flsenate.gov/Statutes/.

Question: My condominium unit is located on the fourteenth floor of our building. Our building's electricity was shut off during one of the recent storms. When power was turned back on, my hot water heater burst and damaged the unit below. My downstairs neighbor has asked for my insurance information. There is damage to the ceiling in her hallway and the carpeting. When I bought my unit, the bank which financed my mortgage told me I did not need insurance, that I was covered by the condominium's master policy. I do not know where I stand, can you give me an idea? J.P. (via e-mail)

Answer: There are two types of insurance that generally come in to play in a situation like this. One is called the "casualty" insurance, which is a "no fault" policy. The association's casualty policy will cover damage to the building's structure, including the drywall in the downstairs ceiling. However, it is likely that the claim will be below the association's deductible, so there may be no insurance. Damage to the downstairs carpeting should be covered by the downstairs owner's casualty policy.

Liability insurance is different, it is based upon fault, such as negligence. The association's liability policy will likely not provide you with coverage for claims made against you. You would need your own insurance for this.

Therefore, if it can be established that you were at fault, you would be liable to the downstairs unit owner (or her insurance company) for the carpet damage and would be liable to the party responsible for fixing the downstairs ceiling (which will either be the association or the downstairs owner, depending on how the documents are written) and only your own insurance could provide coverage to defend or pay claims of that nature.

I believe that every unit owner should have basic condominium insurance which would include liability for situations such as yours, and casualty (no fault) insurance for those items in the building that are not insured under the association's mas-

ter policy (such as floor coverings, wall coverings, ceiling coverings, fixtures, appliances, hot water heaters, etc.). It is also a good idea to include "loss assessment coverage" as part of that policy.

Question: It is my understanding that either a federal law or a Florida statute says that an association cannot deny approval or prohibit the installation of hurricane protection devices. I understand that this applies both to condominiums and homeowners associations. Can you verify this for me and identify the statute? C.C. (via e-mail)

Answer: You are correct as to condominiums. Section 718.113(5) of the Florida Statutes provides that an association may not prohibit a unit owner from installing hurricane shutters. The association can adopt uniform specifications for shutter installation, including both functional and aesthetic items. The condominium board can require that hurricane shutters be installed in accordance with its specifications. There is no parallel law for homeowners associations. Rather, the issue is guided largely by the governing documents, such as a declaration of covenants or deed restrictions. Theoretically, a restrictive covenant could prohibit the installation of hurricane shutters. I would consider such a restriction to be unwise at best, perhaps reckless (arguably contrary to public policy).

It is a proven fact that hurricane shutters save lives and lessen property damage. I would never encourage an association to add a shutter prohibition to their covenants (and would strongly discourage it). In fact, if there were a restriction in a current covenant that prohibited shutters, I would strongly recommend deleting it by amendment. This may be another area where the Florida Legislature needs to look to the history of condominium law development for guidance on a very important topic. ⚖

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.