

Emerging Topics in Condominium Law

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A. Allocation of Insurance Responsibility

1. With many Condominium Associations, especially in Southeastern Michigan, experiencing large losses two of the last four years for ice dam damage, combined with the effects of the aftermath of September 11, many insurance carriers in the State of Michigan are opting out of the Condominium master policy market.
2. These factors have contributed to a restricted market and substantial increases in policy premiums, as well as available deductibles, for Condominium Association master coverage.
3. Unacceptable loss histories are leading to cancellations or insurance through “pool” carriers which can be two to three times higher than premiums previously paid.
 - a. In addition to losses for ice damming, master policy claims also are frequently made for fire, wind and other casualty, personal injury (slip and fall), and property damage claims from flooding, drain backup and other common element related problems.
 - b. The number of claims and loss histories are compounded by the fact that without more, the Condominium master policy is generally considered the primary insurer of most losses that stem from common element related occurrences.
 - c. While co-owners often have similar coverage under their HO6 policies, these insurance policies generally do not respond to the claim unless the Association’s master policy fails to cover the damage.
4. Most master insurance policies are written as a form, and almost universally, insurance carriers are not willing to modify these forms.

- a. The Condominium Documents provide definitions of insurable interest.
 - b. Often times, a duplication of insurable interest exists—sometimes by necessity.
 - c. While an insurer using a form policy is not necessarily interested in concepts of insurable interest, the Association’s counsel can control claims if such concepts are clearly defined in the Condominium Documents and are brought to the attention of the insurer at the time a claim is made.
5. There are a number of provisions in the Condominium Documents that come into play.
- a. Most notably of those provisions is the insurance article.
 1. The provisions in the insurance article should be reviewed to remove as much overlap in coverage responsibility as possible.
 2. An affirmative obligation should be stated for co-owners to obtain and carry insurance for specified parts of the unit and limited common elements, and occurrences related to these areas or elements.
 3. A specific provision should be added defining which policy will respond as the primary carrier in the case of a loss.
 - b. The second area of the Condominium Documents that deserves attention is the article dealing with repair and reconstruction.
 1. The standard language in these articles is often tied to insurance coverage.
 2. In order to promote consistency and add ammunition to any argument concerning insurable interest, these provisions should be revised to be consistent with the previous mentioned concepts of the primary carrier in the case of a loss.
 3. Language providing that the Association is also responsible for incidental damage to a unit in the case of the failure or repair of a common element should be avoided.
 - c. The third standard provision that deserves attention is usually found in the Restrictions Article of the Condominium Bylaws, stating that the co-owner is responsible for maintenance and upkeep of the unit and limited common elements.
 1. In almost all cases, these provisions indicate that the failure of the co-owner to perform proper maintenance, or the co-owner’s damage of any other common elements, is chargeable to the co-owner only in cases where the co-owner’s actions are deemed negligent.
 2. Because negligence is such a high standard to prove, Associations are often left with covering damage caused by co-owners or failure of a co-owner to properly maintain or repair an area

for which he or she is responsible. These situations many times add to an Association's loss history.

3. The simplest way to resolve this problem is simply to remove negligence from the equation by amending it out of the provision.
6. Proper drafting within the Condominium Documents can provide an Association and its counsel with ample ammunition to reduce claims against the master policy and transfer responsibility to the individual co-owner policies.

B. Mold Issues

1. As an adjunct to the proliferation of mold claims in many areas, claims involving mold are increasing in number for Condominium Associations.
2. Most Condominium insurance policies now expressly exclude mold, and mold remediation, as covered occurrences.
3. Given the areas where mold tends to grow, mold will almost always touch or affect general common elements in a Condominium as traditionally defined.
4. One can expect mold claims to increase even more as a result of tort reform, in that personal injury attorneys are flocking to this new area as a potential lucrative source of business.
5. An Association cannot ignore or escape this problem.
 - a. In that mold frequently grows in areas that are considered general common elements under the jurisdiction of the Association, the Association is involved.
 - b. As in the case of any common area maintenance question, due diligence is the watch phrase.
 1. Since volunteer directors of a Condominium Association are entitled to rely upon the advice of their experts, expert evaluation of a mold situation is essential.
 2. It is important not only to identify the types of mold, and their proper remediation procedures, but also to determine the approximate cause of the mold occurrence.
 3. Once these answers are found, responsibility for remediation should be ascertainable from the responsibility provisions contained in the Master Deed for the project.
 4. As an uninsured event, assessments can be made against the co-owners in the project for remediation expenses.
 - c. Due to the probable lack of insurance coverage, defense of mold cases will be left to the Association's counsel.

1. Mold cases invariably involve substantial expert testimony. Qualification of the experts for trial is essential. Association's counsel must be well versed not only in the type of expert required, and the knowledge which would allow that expert to be qualified to testify, the counsel must also be intimately familiar with the evidentiary issues involved in such cases.
 2. From a liability standpoint, counsel should evaluate whether the case should be referred to a specialist.
- d. There are a number of things that Association's counsel should be aware of in evaluating and defending a mold case.
1. Although there is split authority, most courts have not allowed expert testimony to establish the mold and personal injury causal link.
 2. There is as yet very little hard scientific proof in the form of epidemiological studies through which Plaintiff's counsel can qualify its necessary experts.
 3. Because mold is naturally occurring, and takes very little to grow, there is usually more than one source from which a mold can obtain the moisture and food required. Defense strategy should target other potential causes.
 4. Remember that a co-owner's alleged health problems can have many causes. It is not a far stretch that if someone is allergic or sensitive to mold, they are probably allergic and sensitive to other allergens that may cause similar symptoms.
 5. Due diligence is an absolute must. You must be able to establish that your client took action in a responsible and reasonable fashion such that it did not breach a standard of care.
 6. If a mold case is settled, do so only with a complete and full release. Many molds are airborne, and it is likely that future claims may occur.

C. Enforcement of Condominium Charges

1. Most Condominiums provide for the assessment of various charges in the event of unpaid Association assessments. These charges primarily include interest, late fees, attorneys fees and fines.
 - a. Interest is normally stated in the Condominium Documents to be chargeable at either the rate of 7% per annum or the highest rate allowable by law.
 1. In that the current usury limit for these types of obligations is 7%, there is at this time no functional difference.

2. Except in the most extreme cases of delinquencies, the amount of interest recoverable at 7% per annum is probably not worth the time spent to account for it.
 3. Be aware that charging interest in excess of the usury rate renders all interest unrecoverable.
- b. Late fees are generally charged when a specified assessment is not paid within the designated number of days after its due date.
1. Late fees are either stated in the Condominium Documents or established through a rule and regulation. This is implicitly allowed by Section 106(c) of the Michigan Condominium Act (MCL 559.206(c))
 2. In order to be enforceable, a late fee must have some reasonable relationship to the administrative costs incurred by an Association as a result of the delinquency.
 3. Beware of getting too greedy with the late fees in that if they are deemed excessive, they may be disallowed as an unenforceable penalty.
- c. Fines are also allowed to be imposed for failure to pay assessments on time, as a cumulative remedy. Fines are deemed to be a penalty and will be discussed below.
2. Other than litigation for injunctive relief, and alternative dispute resolution procedures, many Condominium Documents may provide for the Association to fine people for behavioral violations of the Condominium Documents.
- a. Fines are construed by the courts to be a penalty and are therefore subject to fairly stringent rules, much the same as a municipality's penal code.
 1. In most cases the power to fine, as well as the procedures for doing so, are contained expressly in the Condominium Bylaws, or again, by rule and regulation. As with late fees, fines are also implicitly allowed by Section 106(c) of the Michigan Condominium Act.
 2. As penalties, due process requirements must be met.
 - a. Due process demands that the co-owner be put on notice of the specifics of the alleged violation, both as to facts establishing the violation, and also as to the specific provisions of the Condominium Documents or Rules which have been violated.
 - b. Arbitrary and capricious or discriminatory application of the fining procedures is strictly prohibited.
 - c. A co-owner cannot be presumed guilty before the violation has been established.

- d. A co-owner must be afforded a hearing before the Board of Directors or any duly authorized enforcement committee before a fine can be levied and collected.
3. Most Condominium Associations do not use proper notices or procedures in order for fines to be enforceable.
4. The Michigan Condominium Act imposes a greater obligation on Condominium Associations than would be applicable under federal law. While federal due process cases speak to the opportunity for a hearing, the Michigan Condominium Act expressly provides in Section 106(c) “a default by a co-owner shall entitle the Association of co-owners to . . . other reasonable remedies the Condominium Documents may provide, including but without limitation, the levying of fines against co-owners after notice and hearing thereon”.
5. The power to fine, even if enforceable, has its limitations.
 - a. With a hearing being mandatory, time and resources concerns exist within most Associations.
 - b. Case law from other jurisdictions also seems to point to the fact that an Association cannot continue to fine, without result, and hope to collect a large sum of fines. At some point, the Association must take other action to alleviate the violation.
- b. As long as the purpose and proper procedures for each type of charge is kept in mind, the Association should be able to collect all charges it levies in cases of violations of the Condominium Documents as cumulative remedies.

Exhibit A
Old Style Provisions

View online at

<http://www.icle.org/partners/materials/2002CP7198/20022B7198-exa.pdf>.

Exhibit B
New Style Provisions

View online at

<http://www.icle.org/partners/materials/2002CP7198/20022B7198-exb.pdf>.

Exhibit C
Make Sure Your Enforcement Charges Are Collectible

View online at

<http://www.icle.org/partners/materials/2002CP7198/20022B7198-exc.pdf>.

Exhibit D
Notice of Violation

View online at

<http://www.icle.org/partners/materials/2002CP7198/20022B7198-exd.pdf>.

Exhibit E
Notice of Fine/Penalty

View online at

<http://www.icle.org/partners/materials/2002CP7198/20022B7198-exe.pdf>.