

After Irma: Examining the Association Loss Prism

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In the aftermath of Hurricane Irma, all types of associations will prioritize the following goals: (1) safety and mitigation; (2) restoration (of improvements) and recovery of monetary losses through insurance and allocation of responsibility; and (3) preservation of evidence and records. After the hurricane, associations should have property inspections performed to determine the extent of damage and safety hazards in relation to the storm. Emergency action should be implemented to protect the association and owners' property. Emergency repairs should be commenced through reputable, licensed, and insured restoration contractors to mitigate damages. Associations should document all property damage, pertinent communications, and evidence, taking photographs and/or videos. Associations and their owners should timely report insurance claims.

SAFETY / MITIGATION

The first considerations for any association after a storm should be safety and loss mitigation. While immediate loss mitigation efforts help to preserve property improvements and are a condition for insurance claims, they also promote safety by preventing mold, fire, debris, electrical hazards, etc. Every association should have a disaster plan, which should be consulted and implemented upon declaration of a state of emergency. Before landfall, the association can circulate first responder information and contact information for officers, directors, key management personnel, third-party vendors, and professionals. In addition, information should be provided to the owners on how to contact management personnel (including cell phones) and city, county, and state officials and hurricane offices, as well as how to contact FEMA. The association must ensure that the property is ready for the storm, including backup systems, emergency supplies, generator preparedness, proper use of existing hurricane protection, and removal of patio/balcony furniture, pool or lawn chairs, etc. The emergency plan and circumstances should dictate system shut-downs, emergency meeting procedures, delegation of emergency contracting authority, and parameters for safety-related property access restrictions, where appropriate.

Both condominium and homeowners associations are provided emergency powers by §718.1265 and 720.316, Fla. Stat., respectively, for any event in which a state of emergency is declared (such as a hurricane) as long as damage is caused by that event. These statutes contain exceptions to typical governing requirements and flexibility to take emergency measures in furtherance of safety and mitigation. These powers include the power to mitigate damage and take safety measures, such as debris removal and water restoration for mold avoidance. In condominiums, the association has the power to contract on behalf of owners for items or services necessary to prevent further damage, irrespective of whether the owner(s) are ultimately responsible for such service or materials. The statutes also provide the power to levy special assessments, borrow money, and pledge assets to fund emergency repairs without a vote of the owners, regardless of whether such vote is otherwise required in the declaration. It is advisable for the board to consult with an attorney before exercising these powers.

RESTORATION

The association has a duty to maintain the common elements and to act reasonably to prevent waste and restore the property. Statutory and/or governing document provisions allocate responsibility for restoration in the event of an "insurable event" (i.e., a "casualty loss"). In homeowners associations, such responsibilities will be addressed in the governing documents, whereas in condominium associations, section 718.111(11), Fla. Stat., governs.

Condominium associations have a duty to restore those portions of the condominium property for

which insurance is required to be maintained by the association pursuant to Sections 718.111(11)(f)(g) and (j), Fla. Stat. For a hurricane or other insurable “event” for a casualty loss, with limited exceptions, the association’s insurance policy covers the common areas and original improvements; including, but not limited to, the bare parametrical drywall and concrete floor slab in the units. However, the association is not responsible for a number of items:

- Personal property within a unit or limited common elements (furniture, clothes, electronics, or art);
- Floor, wall, and ceiling coverings (wallpaper, paint, tile, carpet, marble, or baseboard); or,
- Electrical and other fixtures, appliances, water heaters, water filters, built-ins, counter tops, window treatments, closet shelving/drawers, drapes, or blinds.

With respect to those components for which the owner is responsible, the owner should obtain that insurance. Section 718.111(11)(g)(1) and (2), Fla. Stat., give condominium associations the first option to either perform restoration or permit the owner to move forward upon such reasonable conditions as the association may require (i.e., coordination of access for the association, required permits, licensure, insurance, and acceptance of the contractor by the association).

The legal and practical issues of reconstruction contracts and administration are beyond the scope of this article. Associations should consult with legal counsel as early as possible in the bidding/negotiation process for construction contracts. The association should also consult its management contract with respect to duties and additional expenses that may apply.

PRESERVATION

Preservation is a gateway for all recovery efforts, and its purposes extend beyond the protection of claims to include liability avoidance, restoration of operations, and reasonable decision-making. To illustrate how this issue can arise, at time of writing, news publications in Miami are publishing articles questioning when and why the Florida Governor’s office deleted voice mails from a nursing home in which Irma-related fatalities occurred. Data (including emails, texts, and voice messages) and document preservation should be addressed by the association’s emergency plan. The association and its custodians should securely back up association data, most effectively via an offsite data facility.

Associations still pursuing construction defect claims should not overlook preservation while reconstructing after the casualty loss. For example, the association should notify potential adverse parties of the need for emergency repairs, and they should be given an opportunity to inspect and document any hurricane damage, if practicable. For example, the adverse parties may raise the “hurricane” or other event as the cause of damages rather than the initial construction and design defects. Therefore, it is important to have your expert consultant (engineers and/or architects) evaluate the hurricane damage to address this expected new defense.

Please review our firm’s previous article regarding the pitfall-laden preservation of insurance claims, published on the Florida Community Association Professional’s blog at www.fcagroup.com/hurricane-irma-tips-for-navigating-your-way-through-the-insurance-claim-process/. That article addressed various critical steps involved in pursuit of insurance claims, such as property inventories before and after the storm, preserving evidence, and adhering to policy conditions. Associations should advise owners to place their own insurance carriers on notice of claims and to preserve evidence and documentation.


INSURANCE RECOVERY AND LOSS ALLOCATION

Insured losses consist of those losses covered by either the owners’ or association’s property/casualty insurance coverage. Damage from a hurricane will fall within either windstorm/hurricane coverage or flood coverage. Hurricane preparation actually begins every year when the association openly discusses and votes on the coverages and deductibles within its insurance policies at a board meeting. Deductibles can work in various ways (e.g., by storm or by calendar year). If the latter applies, reporting a claim within the deductible can still document losses, reducing the deductible for future storms within the applicable period. Associations should consult with their legal counsel and insurance agent throughout this process.

In condominiums, uninsured losses are allocated between the association and unit owners by Section

718.111 (11)(j) and (n), Fla. Stat., unless the association has opted out of this framework or certain other limited circumstances apply. The association is financially responsible for the restoration of association-insured components, and owners are responsible for the restoration costs of owner alterations and unit specific developer improvements, along with components that the owners must insure. However, if an owner or their guests, tenants, or residents negligently or intentionally caused the damage, failed to report known losses or conditions causing the loss, or caused the loss by violating a rule or the declaration, then the association can seek recovery from the owner's insurance and/or the owner directly. If the association voluntarily performed work that the owner was responsible for financially, the association is entitled to reimbursement for that work. The association can place a lien on the owner's unit for such loss reimbursement of payments made.


Associations can also pursue claims against responsible third parties, which may include third-party vendors and/or the original construction or design parties. Associations pursuing insurance claims while also pursuing construction defect claims must take care to work closely with their legal counsel and construction/design expert consultants to avoid unintentionally prejudicing one claim in the pursuit of the other.



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