COMMUNITY MATTERS

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News and Trends in Community Association Law

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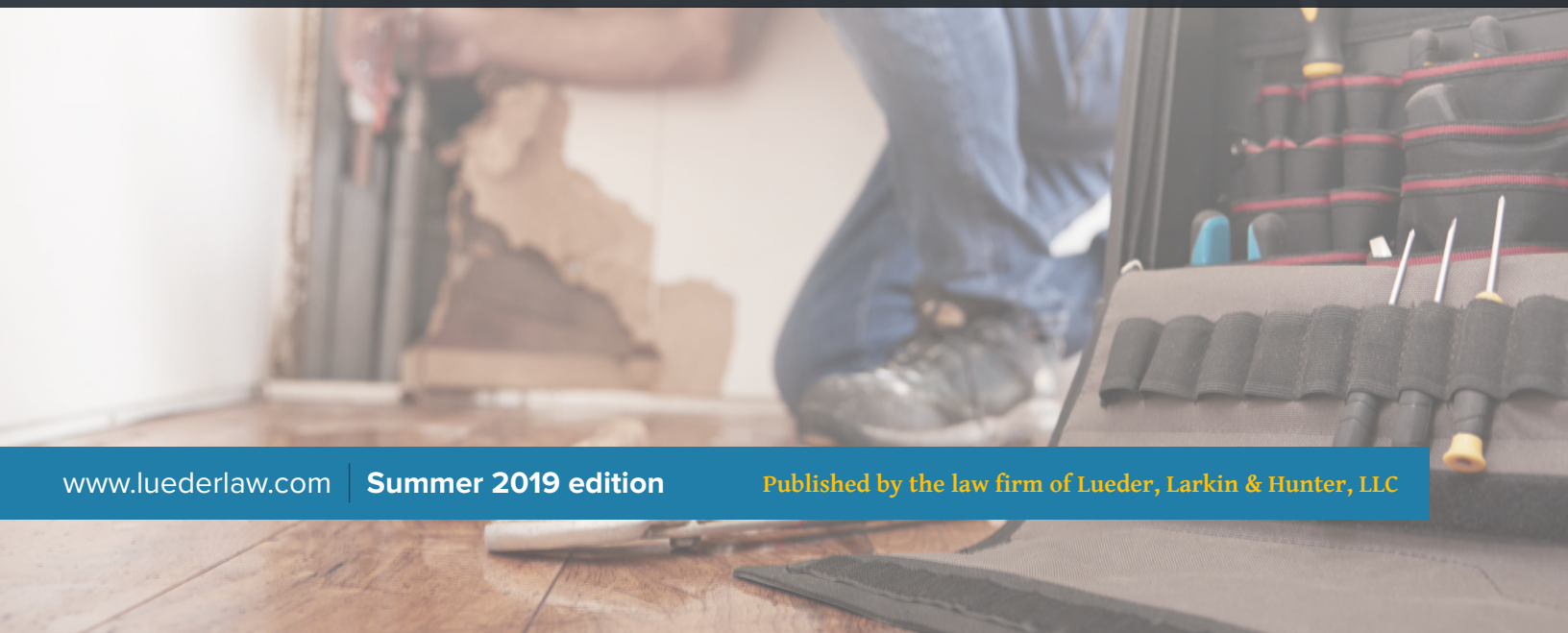

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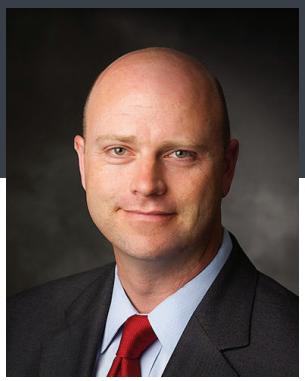


To File or Not to File
– Insurance Claims in a Condominium

by | **Brendan R. Hunter, Esq.**

Understanding insurance requirements in the context of a condominium can be difficult. Generally, the biggest hurdles to this understanding lie in the notions of ownership and maintenance obligations. Boards of condominium associations routinely do not want to file claims for damage to an owner's unit that were caused by that owner. However, as it relates to property casualty insurance for a condominium, neither ownership, nor maintenance obligations, nor fault of the owner are the factors to initially consider when determining whether to file a claim with the association's insurance.

The Georgia Condominium Act requires that the association obtain and maintain certain types of insurance. These requirements relate to both the types of perils that must be covered (fire and extended coverage at a minimum), as well as those portions of the condominium that must be covered. This includes all buildings and structures within the condominium, including the common elements, limited common elements, foundations, roofs, roof structures, and exterior walls, including windows and doors. It also includes the following:

- HVAC systems;
- sheetrock and plaster board;
- floors and subfloors;
- wall, ceiling, and floor coverings;
- plumbing and electrical lines;
- fixtures, built-in cabinetry, and fixtures; and
- appliances used for refrigeration, cooking, dishwashing, and laundry.

The association's insurance covers these portions of the condominium regardless of ownership. As such, the two initial considerations when determining whether to file a claim under the association's insurance policy are: (1) is this a covered peril; and (2) is the property that was damaged covered by the association's policy.

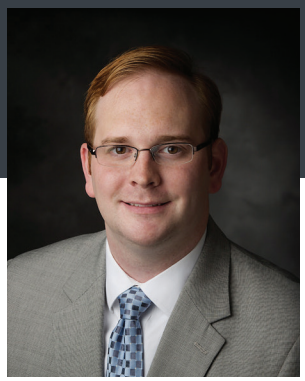
The Georgia Condominium Act also provides that, unless the condominium instruments provide otherwise, in the event of damage to or destruction of any unit by a casualty covered under insurance required to be maintained by the association, the association shall cause the unit to be restored. As such, if the damage to the unit was caused by a covered peril and was to a portion of the unit covered by the association's policy, the association has an obligation to restore the unit. The issues of ownership, maintenance obligations, and fault of the owner are not applicable in determining whether to file an insurance claim. It is important to understand that, between the association's and owners', the association's property insurance policy is generally going to be primary.

There are other factors to consider when deciding whether to file an insurance claim under the association's policy. The board should be aware of how many claims the association has previously filed and the cost to repair the current damage. The board should weigh the out-of-pocket expenses after considering the deductible plus the potential increases in insurance premiums. Filing too many claims within a certain period of time can prevent the association from obtaining a standard insurance policy. As a result, the premiums the association is required to pay can dramatically increase.

Another factor to consider is whether another person's or entity's insurance would be primary. Although this would not generally apply to an owner, if a contractor or vendor caused the damage, the board should consider pursuing such contractor or vendor for the costs of repairs.

When the board is considering these factors, it is important to understand that most insurance policies require the association to notify the insurance company as soon as possible after the damage occurs. Failure to comply with the insurance policy's reporting requirements can have a negative effect on the ability of the association to recover upon a valid claim. It is also important to understand that the failure to take appropriate remedial actions can lead to additional damage to the condominium. As such, it is important for the board to consider all of these factors and make a determination in a timely manner on whether to submit a claim under the association's insurance policy.

Settling Collection Matters Without Giving Away the Farm



by | **Harrison J. Woodworth, Esq.**

Settlement of collection claims with an owner who is delinquent on his or her assessments does not necessarily mean reducing the amounts owed to the association or "caving in."

Oftentimes, settlement means employing cost-saving, efficient collection methods to achieve a formal resolution and potentially avoiding litigating a dispute all the way to trial.

The most effective and efficient way to resolve a dispute with an owner regarding a balance for unpaid assessments is often not to threaten litigation or to garnish an owner's bank account, but rather having a willingness, as a board, to reach a settlement with the owner that minimizes further expense and achieves the association's goal of recovery in a reasonable time frame. Once the parameters of the agreement have been reached, the next concerns for a board are often what form the agreement will take, and, more importantly, what the ramifications will be in case the owner doesn't keep up their end of the deal.

To combat these concerns, the settlement agreement should always be in writing, be clear and concise about the balance owed and payment schedule for the owner to pay, and set out the remedies available to the association in the event of a default. If the parties are at a relatively early stage of the collection process, the settlement agreement will likely be fairly simple as well. In our practice, that takes the form of a letter to the owner stating the amount owed, when the payments are due and in what amounts, and where the payments should be sent. The agreement should also make clear that any future assessments that come due during the payment plan must be paid separately when due, and that if the owner defaults, the association reserves the right to proceed with collection without further notice. The burden is on the owner to be responsible for his or her payments.

In the situation where a collection lawsuit has already been filed, the court will require that any settlement agreement be submitted in writing to be signed off on by the judge. This will take the form of either a consent order or a consent judgment. With a consent order, the case is left open for the owner to complete the payment plan, and if the owner defaults, the association then moves for a judgment, including any assessments or collection costs incurred between when the agreement was made and when the owner defaults. An owner might be happier and more agreeable to enter into a consent order than a consent judgment, because successful completion of the settlement terms means a dismissal of the collection lawsuit. It does not end with a judgment which generally gets added to the owner's credit report as a negative impactor. With a consent judgment, the association would be able to immediately move to collect (via garnishment or other post-judgment remedies) upon an owner's default, but the tradeoff is that the judgment would not include additional amounts incurred in the interim. In recent years, our collection practice has found that some judges favor consent judgments for administrative reasons, as it closes out the case on the court's end and cleans up their dockets. Depending on the judge, a consent order may not be an option whereas a consent judgment will be available as an option. Regardless, reaching a settlement while litigation is pending is advantageous because it essentially skips to the end of the case and reduces the costs of litigating to a final trial and judgment which is never guaranteed to end entirely in the association's favor.

If the prior steps in collections have not sufficiently motivated a delinquent owner to reach out to an association for settlement, the entry of a judgment and a subsequent garnishment attaching to their bank account or wages will often do the trick. If the owner would rather settle their account or enter into a payment plan, the parties would enter into a written forbearance agreement, which would include the balance owed by the owner, both in terms of anything remaining on the judgment and any post-judgment amounts incurred, and the terms detailing how the owner will pay these amounts. For its part of the deal, the association would agree to hold off on further collection such as garnishments, as long as the payment plan is adhered to and future assessments are paid when they come due. When it is a successful garnishment that compels an owner to settle, any settlement should include some substantial and immediate inducement for the association to settle, as opposed to promises of future payment that may turn out to be illusory. For example, this could include the owner surrendering any funds already held in the garnishment, or a down payment in exchange for the release of the garnishment.

In summary, when there is a willing owner, the above methods can be employed pre-lawsuit, during lawsuit, or post-lawsuit and judgment. Each, if adhered to, generally results in greater recovery for the association, less cost to the association, and a quicker end to the collection matter altogether.

Covenant Enforcement in Bankruptcy: Dos and Don'ts

by | **Daniel E. Melchi, Esq.**

Covenant violations occur throughout the year, but they seem to be most noticeable in the spring and summer months, when many of us are outside enjoying the warm weather.

So, this is a good time to brush up on the "Dos and Don'ts" that a community association should be aware of when the violating owner is in an active bankruptcy.

When an owner files for bankruptcy, the owner's home automatically becomes "property of the bankruptcy estate." The "automatic stay" is a specific statute in the Bankruptcy Code that requires creditors to stop regular collection activities, but it also stops any party from performing any act to "exercise control over property of the estate." This means that any action by a third party seeking to exert "control" over a debtor's home while a debtor is in bankruptcy is prohibited without first seeking permission to do so from the Bankruptcy Court.

So how do associations enforce their covenants when an owner is in bankruptcy? It is important to determine what type of violation is occurring, when the violation started, and how the association seeks to remedy the violation. The timing of the violation is key in determining how the association can proceed with enforcement remedies.

Pre-petition Covenant Violations

If a covenant violation is occurring (or exists) when an owner files for bankruptcy, the violation is considered "pre-petition." Any fines being imposed for that violation must stop being incurred upon the filing of the bankruptcy petition. But that does not mean that the association has no recourse to have the violation stopped.

If the owner has filed Chapter 13 bankruptcy, the association has an important tool at its disposal at the very beginning of the bankruptcy case: confirmation of the Chapter 13 Plan (or "Plan"). If an owner wants to reorganize the owner's financial situation under Chapter 13, he or she is required to propose a Plan that must be approved by the Bankruptcy Court. As stated earlier, the owner's home is now property of the bankruptcy estate, and the property of the bankruptcy estate must be maintained. While Plans typically deal with the reorganization of debts, there is nothing in the Bankruptcy Code saying that such Plans may not also deal with the preservation and maintenance of the owner's home. In fact, debtors in Chapter 13 must budget for anticipated expenses such as home maintenance, and such expense must be itemized in the bankruptcy paperwork.

If an association is aware that a covenant violation is occurring, it can file an *Objection to Confirmation of Chapter 13 Plan*, advising the Bankruptcy Court that there is a covenant violation occurring regarding property of the bankruptcy estate, such violation must be remedied, or the Plan should not be confirmed and the case should be dismissed. This can be accomplished by demanding that language be included in the Plan requiring that the owner remedy a covenant violation within a certain time period after Plan confirmation. Failure to follow such requirement would be considered a "material default" of a Plan provision, allowing the bankruptcy case to be dismissed.

Now, if the owner has filed Chapter 7 bankruptcy, it is often advisable to wait out closure of the case. Chapter 7s generally close within five or six months from the date the debtor files his or her petition. After the case is closed, an association is free to require compliance with the covenants pursuant to the governing documents; however, fining for a pre-petition covenant violation may not occur. If an association is not inclined to wait out closure of the case, the association may seek to have the automatic stay lifted to allow the association to exercise self-help to cure the covenant violation, if permitted under the governing documents. Most Bankruptcy Court judges will not deny a stay-lift request for such action, especially if it can be shown that the covenant violation is negatively impacting the rest of the neighborhood.

Post-petition Covenant Violations

What about covenant violations that occur *after* the owner has filed for bankruptcy? Here, violations are occurring that must be remedied; however, an association must be very careful and take the proper steps to seek enforcement. An association or its management company cannot send a notice of violation to an owner who is in bankruptcy to demand that the owner do something to the owner's home, because such action is arguably "exercising control over property of the estate."

In these situations, it is best to seek permission from the Bankruptcy Court prior to sending such demands. This is accomplished by requesting relief from the automatic stay to ensure that the association does not find itself in the unfortunate situation of being found in contempt of court for violating the automatic stay and actually having to pay the owner damages for simply trying to enforce the covenants that the owner was violating in the first place.

If the owner is using the Bankruptcy Code to restructure the owner's debts and obtain a "fresh start," then the owner is expected to abide by community association covenants. Even the most lenient of Bankruptcy Court judges is unlikely to deny a community association's request to be allowed to enforce its covenants; but judges do appreciate being asked first rather than an association not taking the automatic stay seriously.

Covenant violations can occur at any time and during any season. They can occur by owners who are not in bankruptcy and owners who are in bankruptcy. The important difference is that owners who are in bankruptcy have certain protections under the Bankruptcy Code, and associations are often unaware that a simple request asking an owner to take some action to comply with covenants may subject the association to liability if not done properly. Associations should always consult legal counsel when deciding to take covenant enforcement action against an owner who is in bankruptcy to ensure that the problem is remedied and that the law is followed.

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