

Maintenance Responsibility, Insurance Obligations, and Notifying the Carriers

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The CC&Rs for common interest developments typically allocate the responsibility to maintain, repair, or replace various components between the owners and the association. When the CC&Rs are silent, Civil Code section 4775 provides a default allocation of responsibility.

Recently, we have received a lot of questions about how the allocation of maintenance and repair responsibilities relates to an association's insurance obligations. To answer these questions clearly, an association's obligation to insure a component may have nothing to do with its obligation to maintain, repair, or replace that component.

Condo Communities

When it comes to a typical airspace condominium community, each owner's deed defines his or her ownership interests, generally in reference to the condominium plan. The condominium plan describes a three-dimensional airspace that is owned separately by each member and divides the entire community (or a phase of the community) into units, common area, and exclusive use common area. Typically, the interior surface of the perimeter walls and the unfinished floors and ceilings are identified as the boundaries of the condominium units with everything inside these boundaries (excepting structural components such as bearing walls) being part of the units.

Usually, the CC&Rs define "unit," "common area," and "exclusive use common area" in a manner that is consistent with the condominium plan.

Planned Developments

When it comes to planned developments, the community is typically comprised of member-owned lots and association-owned common area.

Allocation of Maintenance Responsibility

The CC&Rs generally identify the maintenance, repair and replacement responsibilities of owners and the association. Sometimes, the CC&Rs simply state that owners are responsible for the maintenance, repair and replacement of their units or lots and any exclusive use common area appurtenant to their units or lots, and the association is responsible for the common area. More recent CC&Rs might include a maintenance matrix that provides greater detail regarding which components the owners and association are responsible for. It is not uncommon, especially for newer CC&Rs, to allocate certain maintenance and/or repair

responsibilities in a way that deviates from a straightforward unit or lot/common area delineation.

Often, when a sudden loss occurs, such as a fire or plumbing leak, associations assume that the location of the damage or the allocation of maintenance, repair and replacement responsibility contained in the CC&Rs definitively determine the party responsible for the damage. However, this may only be partially true.

Insurance Coverage

The CC&Rs generally obligate the association to maintain property and casualty insurance. In some condominium communities and planned developments, especially when the units or homes are attached, the CC&Rs may obligate the association to maintain insurance covering not only the common area, but certain portions of the units or lots as well – portions that the owners may be responsible for maintaining and repairing under the CC&Rs. For example, the CC&Rs for a condominium community may require the association to insure components within the units, such as cabinetry, built-in appliances and flooring, or even structural components that the owners are generally responsible for maintaining and repairing. Likewise, the CC&Rs for a planned development may require the association to insure the homes (i.e., the structures) and, possibly, certain improvements located within the homes. When an association's policy covers any damaged portion of the residence, owners have a right to file a claim under that policy. Because the association is the customer of its insurance carrier, the carrier will often ask the association whether the board would like the carrier to process the claim. Too often, boards of directors instruct the carrier not to process the claim, either because they cite the owner's repair obligations or because they take issue with the fact that the owner sought to file a claim without first seeking the board's permission.

When a board instructs the association's carrier not to process a claim that would otherwise be covered, the board is interfering with the owner's rights under the CC&Rs and under the insurance policy. After all, the owner is an "insured" under the policy and the policy is maintained for the benefit of the owners.

If a board instructs the association's insurance carrier not to process a claim that would otherwise be covered under the association's policy, the board is effectively obligating the association to pay for the damage to the same extent the carrier would have, had the claim been processed.

In some cases, it may make sense strategically for the board to ask the carrier not to process a claim that would be covered. For example, if the amount of the damage is only slightly higher than the deductible, the board might opt to pay the small amount of money the carrier would have paid, rather than allow another claim to affect the association's loss history. However, in most cases, it will make more sense to authorize the carrier to process the claim.

Directors & Officers Liability Coverage

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The decision on whether to authorize the association's carrier to process a property claim should not be confused with the decision to notify the directors and officers ("D&O") liability carrier of facts and circumstances that could lead to a potential claim against the association's board, officers, manager or any other parties who may be covered by the policy. When an owner threatens to sue a community association or its board, there is no reason not to promptly notify the D&O carrier about that threat. And, when a lawsuit is filed, there is no reason not to promptly tender the claim to the D&O carrier. D&O carriers do not base their decisions about renewals and premiums upon the number of claims that they have been notified about. D&O carriers base their decisions on their determination about the risk of future claims.

Failure to promptly notify the D&O carrier about potential claims could cause the carrier to deny coverage for an expensive claim that otherwise would have been covered. Placing the carrier on notice of facts and circumstances that could give rise to a potential claim gives the carrier an opportunity to appoint legal counsel for the association and to make an early settlement offer to limit its exposure to liability. This is why we often say: "Tender early. Tender often."

But, That Can't Be Right, Can It?

Turning back to property and casualty insurance, it may seem counter-intuitive that the association's policy covers an owner's unit or house. After all, why should the association pay to insure an owner's separate interest when he or she owns it and is responsible for maintaining and repairing it under the CC&Rs? For that matter, why should assessments be used to buy insurance that pays to repair damage that the owner him or herself may have caused, such as a kitchen fire? Unfortunately, this train of thought overlooks the realities of common interest living. If owners were given the option to insure their own property, many owners would fail to do so. In the event of a major casualty event, such as a fire, an uninsured owner's unit or home might not be rebuilt. In a typical planned development with unattached homes, this could result in an eyesore for the rest of the community. But, in a condominium or planned development where the structural components of one owner's residence are integrally tied to those of one or more neighboring residences, lack of insurance coverage for one residence could also prevent or seriously delay the repair or reconstruction of multiple residences.

Even when lack of insurance only delays or prevents the repair or reconstruction of the interior of a unit, the appearance of the community and property values may be impacted.

Conclusion

In summary, an association's CC&Rs and its condominium plan, if applicable, can be helpful tools in identifying when owners will be responsible for repairing or replacing damaged components within the community and for identifying when owners will generally be liable for the costs associated with this work. However, the association's insurance obligations may shift this liability to the association – at least in certain circumstances.