

Condominium Casualty and Liability Insurance

Thomas J. Hakala

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CONDOMINIUM CASUALTY AND LIABILITY INSURANCE

The condominium unit owner, like the more traditional fee simple householder, typically makes a major investment in purchasing his home. This investment is subject to all the hazards inherently associated with the use and ownership of real property. Of these potential threats, the most common, and potentially most catastrophic, involve casualty loss and tort liability. Both classes of homeowner must, therefore, seek an adequate insurance program to financially safeguard themselves against such risks.

The insurance coverage necessary to protect the condominium unit owner, however, differs significantly from that required by the fee simple householder or cooperative proprietary lessee.¹ In practice, the separate ownership feature of the condominium, combined with each unit owner's simultaneous responsibility for the common elements, creates a complex of insurance problems resolvable only by careful planning and attentive implementation. Any less thorough an approach may well result in inadequate, incomplete, or overlapping coverage.² Such failings in an insurance program not only jeopardize the security of the unit owners, but detrimentally affect their relationships with prospective mortgagees.³

CASUALTY INSURANCE

The initial question regarding casualty insurance⁴ concerns the manner in which such coverage is to be acquired. In approaching this issue, the interdependence of the interests of condominium unit owners must be borne in mind.⁵ Should serious damage occur to the structure, common areas, or common appliances, only the condominium association will be in a position to undertake the duties of repair, replacement or reconstruction.⁶ Thus, it is imperative that the association retain

¹ See 1 P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* § 11.02[1] (1974) [hereinafter cited as ROHAN & RESKIN]; Rohan, *Disruption of the Condominium Venture: The Problems of Casualty Loss and Insurance*, 64 COLUM. L. REV. 1045, 1047-50 (1964) [hereinafter cited as *Casualty*].

² See Kenyon, *Insuring the Condominium*, 19 PRAC. LAW., Nov. 1973, at 13 [hereinafter cited as Kenyon].

³ *Id.*

⁴ The term "casualty insurance" is used in its broadest sense and includes such forms of coverage as fire, boiler and machinery, plate glass, water damage, etc. See R. KEETON, *BASIC TEXT ON INSURANCE LAW* §§ 1.3(c) (fire insurance), 1.3(d) (casualty insurance) (1971) [hereinafter cited as KEETON].

⁵ ROHAN & RESKIN § 11.02[1].

⁶ *Id.*

unfettered access to the financial resources necessary to fulfill its functions. To obviate the difficulties which would necessarily result if each unit were individually insured, a single policy, in the name of the association covering the structures and common elements, usually provides the best solution.⁷ Such a policy provides the additional advantage of a lower overall premium rate.⁸

Casualty coverage is, therefore, generally best provided for in the form of a master policy.⁹ The master policy commonly covers repair and restoration of the condominium buildings and other common elements and appliances. The personal property of the various unit owners is excluded from master policy coverage and must be provided for by the unit owner through either a rider to the master policy or by separate coverage.¹⁰ The premium costs of the master policy become a common expense of the condominium association to be allocated among the members as are assessments for maintenance.¹¹ Two alternate means of allocating the insurance charge are available. The division may be based either upon each member's interest in the common areas or upon the value of his unit.¹² The latter appears more equitable since each unit owner would thereby be assessed in direct proportion to the proceeds accruing to him in the event of actual loss. In New York, a specific statutory recommendation has been given for such an allocation.¹³

When considering the recommended limits of master policy coverage, the interests of unit owners require that policy limits be suffi-

⁷ To date, at least three different methods of insuring the condominium have evolved: first, the laissez-faire approach under which each unit owner adopts an independent course in acquiring coverage; second, the coordinated policy plan in which the condominium declaration sets out the coverage each unit owner is required to independently obtain; and third, the integrated master policy program. *See id.* § 11.01; Kenyon, *supra* note 2, at 14.

In some limited instances, a condominium association may find that either of the alternate plans will better suit its needs. These instances occur largely in detached resort condominiums where the low degree of interdependence among units avoids the objections to the laissez-faire approach, or in town house developments where similar considerations would lend utility to the coordinated policy plan. In either case, however, the common areas must still be covered by an association obtained policy.

⁸ ROHAN & RESKIN § 11.02[2].

⁹ Under the master policy approach, sub-policies should be issued to the individual unit owners indicating the extent of coverage on their respective units. ROHAN & RESKIN § 11.06[4]; *Casualty*, *supra* note 1, at 1050.

¹⁰ *See* Kenyon, *supra* note 2, at 22-23 (recommended declaration clauses covering the master policy).

¹¹ 4A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 633.36[4] (1972) [hereinafter cited as POWELL].

¹² *See* Kenyon, *supra* note 2, at 15.

¹³ N.Y. REAL PROP. LAW § 339-bb (McKinney 1968) which states in pertinent part: The premiums for such insurance on the building shall be deemed common expenses, provided, however, that in charging the same to the unit owners consideration may be given to the higher premium rates on some units than on others.

cient to enable repair or rebuilding of the structure after any loss, no matter how extensive. Although many declarations require that, at minimum, the structure be insured to full value, the association may discover that the proceeds of such a policy are inadequate to cover restoration costs.¹⁴ Increased construction costs, debris removal, demolition, and state or municipal laws regulating the repair of a damaged building or the construction of a new building may add significantly to the projected restoration price tag.¹⁵ Thus, the association may find that restoration costs exceed the appraised value of the building for insurance purposes. A well planned insurance program may, therefore, have to encompass replacement value rather than merely the present full value of the structure.¹⁶

Despite its many apparent advantages, the master policy approach creates difficulties which must be resolved for the insurance program to be effective. Basic among these difficulties is the possibility that post-casualty insurance proceeds accruing to the association will be dissipated by creditors of owners of damaged units. The greatest danger in this area is the traditional right of a mortgagee to pre-empt insurance proceeds paid on the mortgaged property and apply them to the mortgage debt.¹⁷

¹⁴ Kenyon, *supra* note 2, at 19-20.

¹⁵ *Id.*

¹⁶ As a practical matter the question of full replacement value insurance can only be answered by reference to the needs of the individual condominium. Although the replacement value policy undoubtedly provides the greatest security, it must be remembered that the yearly premiums to be paid will be proportionately higher. The factors to be considered in making the decision as to which policy to acquire include: the probable financial resources of the unit owners; the extent and value of the common elements other than the structures; and the practical difficulties involved in effecting reconstruction in the event of a major loss.

An application of these considerations to a few common examples clearly reveals their relevance. Taking the situation of an urban conversion condominium consisting solely of a fifteen year old apartment building converted to a condominium, it is unlikely that replacement insurance will be of great utility. The impracticality (long waiting time for re-occupancy) and perhaps impossibility (restrictive building codes forbidding construction of a similar building) of reconstruction indicates that a major casualty loss will be followed by dissolution of the condominium. Market value insurance is clearly appropriate in such instances. An opposite conclusion may result in a new suburban development where extensive common elements (swimming pool, golf course, etc.) make up a substantial portion of the condominium assets.

In all cases, however, it must be remembered that the financial resources of the unit owners play an important role. If the loss extends to half of the units (*i.e.*, less than the statutory three-quarters destruction permitting a decision not to rebuild), the differential between the market value proceeds and the actual costs of reconstruction will be a common expense of the association. Should the gap between the proceeds and the restoration costs turn out to be significant, many unit owners could find themselves in financial difficulties. A situation of this nature might be expected to arise in a retirement condominium where the unit owners' financial resources are usually seriously limited.

¹⁷ See ROHAN & RESKIN § 11.06[4]. See generally I. TAYLOR, LAW OF INSURANCE 56-60 (2d ed. 1968) [hereinafter cited as TAYLOR].

It is not at all difficult to foresee the deleterious effects resulting from such pre-emption. For example, pre-emption might be exercised where a significant portion of the component units of a structure suffered damages necessitating extensive repair or reconstruction. As a result, the association would be left without the insurance proceeds necessary to effect restoration.¹⁸ Nevertheless, the repairs might have to be made to maintain the habitability of the remaining units under local building regulations. The cost of restoration would become a common expense of unreasonable proportions to be shared by association members. Should a significant proportion of the members be unable to meet the extraordinary assessments that would result, it is likely that the entire condominium regime would be disrupted.¹⁹

To guard against the threat of pre-emption, the declaration must provide that no portion of the insurance shall be applied to the payment of any unit owner's mortgage indebtedness unless, after extensive damage to the structure, the association determines not to repair or rebuild.²⁰ All mortgages granted to unit owners would be subject to this provision, thereby eliminating the pre-emption problem. The efficiency of the provision can be assured by an additional directive requiring that all insurance proceeds be paid to an independent financial institution acting as trustee for the association.²¹ The trustees, in turn, would disburse the funds directly to contractors performing restoration work.

Mortgagee resistance to this provision should be obviated by the realization that it is as much for the protection of the mortgagee as it is for the unit owner. If the pre-emption right were exercised, the condominium association could, as noted above, be left without financial resources to restore the damaged units. Units remaining in a damaged state would lessen the value of adjoining undamaged units and might, depending on local regulation, render them uninhabitable. Consequently, the security of mortgagees of undamaged units would be endangered and perhaps become virtually worthless. Self-interest considerations should, therefore, lead mortgagees to welcome an abrogation of pre-emption rights since, in practice, the retention of such rights represents a potential threat to the security of all mortgagees.²²

A second factor imperiling casualty insurance proceeds arises from

¹⁸ See Kenyon, *supra* note 2, at 16.

¹⁹ See ROHAN & RESKIN § 11.02[2] n.5.

²⁰ For an example of this type of clause see Offering Plan, The North Quadrant of Parkchester (Bronx, N.Y., Dec. 14, 1972) at 33.

²¹ See ROHAN & RESKIN § 11.03[3].

²² *Id.* § 11.06[4]; Kenyon, *supra* note 2, at 16.

possible duplications in insurance coverage. Should a unit owner purchase additional insurance on his unit covering other than his personal property and improvements, a subsequent casualty loss would result in an apportionment of proceeds between the master policy and the unit owner's separate policy.²³ Casualty policies in New York invariably provide that if two or more carriers insure the same property interest, neither shall be liable for more than its pro rata share of total damages.²⁴ Thus, given a situation where master policy coverage on a unit is \$30,000 and the unit owner purchases an additional \$10,000 of coverage, damages totaling \$20,000 to the unit would result in the association receiving \$15,000 from the master policy carrier. The \$5,000 paid to the unit owner by the separate carrier might not be available to the association for use in restoration, even though the master policy had insured the unit to full value. In effect, the purposes which militated in favor of the master policy approach would be frustrated.²⁵ To avoid this difficulty, the declaration and master policy should contain a stipulation requiring that the association's coverage not be brought into contribution with insurance purchased by a unit owner.²⁶

An additional problem area is created by the time-honored "increased hazard" clause found in standard New York casualty policies.²⁷ This clause relieves the insurer of liability where the insured has increased the hazard of casualty loss to his property interest.²⁸ Since the "insured" in a condominium is an aggregate of unit owners, the insurer could argue that any owner's act increasing the danger to the structures would invalidate the entire coverage.²⁹ Furthermore, a mere prohibition in the declaration forbidding the unit owner to engage in activities that would bring about such a result is likely to be of little utility. At best, it will merely allow the association to take steps against the offending member when and if such activity comes to light. Before the association

²³ Kenyon, *supra* note 2, at 18. See generally TAYLOR, *supra* note 17, at 54; W. VANCE, HANDBOOK OF THE LAW OF INSURANCE § 144 (3d ed. 1951) [hereinafter cited as VANCE].

²⁴ See, e.g., N.Y. 1943 Standard Policy, N.Y. INSUR. LAW § 163.6 (McKinney 1966) [hereinafter cited as N.Y. 1943 Standard Policy]. The clause reads as follows:

Pro Rata Liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

For an example of a policy containing such a clause, see St. Paul Companies, Multicover Policy, General Conditions § 35 [hereinafter cited as St. Paul Policy]. See generally VANCE, *supra* note 23, § 144.

²⁵ Not only would the association fail to receive the expected proceeds, but both the unit owner and the association would have been paying for coverage which, in the end, they did not receive.

²⁶ See ROHAN & RESKIN § 11.06[4].

²⁷ See, e.g., N.Y. 1943 Standard Policy, *supra* note 24.

²⁸ TAYLOR, *supra* note 17, at 51; VANCE, *supra* note 23, § 146. A particularly common example is the storing of excessive quantities of gasoline on the premises.

²⁹ Kenyon, *supra* note 2, at 17-18.

acts, the declaration provision will probably be inoperative as regards the rights of the association vis-à-vis the insurer. Therefore, the danger of the hazard clause can be effectively eliminated only by obtaining a waiver of it from the insurer or, in the alternative, a provision stating that the master policy coverage will be unaffected by the act or neglect of any person if such conduct is beyond the knowledge or control of the association.³⁰

Standard casualty policies also contain a subrogation clause which will undoubtedly cause internal difficulties to the condominium if allowed to remain in force. Such a provision³¹ permits the insurer to maintain an action against a unit owner in the event the latter's negligence causes a casualty loss covered by the master policy. The proximity of condominium units virtually guarantees that a fire, for example, negligently started in one unit, will cause damage to either the adjoining units, the common areas, or both. A suit by the insurer against the negligent owner would clearly be disruptive of the peace of the condominium. Moreover, it would impose financial responsibility on the negligent unit owner for damages he expects to be protected against by the master policy.³² To prevent this contradictory outcome, the subrogation right of the insurer should be modified so as to prevent actions against unit owners.³³

Attention should also be given to possible difficulties arising from co-insurance clauses often found in casualty policies. Such provisions stipulate that unless the property interest involved is insured to at least eighty percent of its value, the insurer will be liable only for that portion of the damages bearing the same relationship to the total loss as the insured's actual coverage bears to the required eighty percent of the true value of the property.³⁴ Under normal circumstances, this provision will not affect the association's master policy since a well planned

³⁰ *Id.*

³¹ See, e.g., N.Y. 1943 Standard Policy, *supra* note 24; St. Paul Policy, *supra* note 24, General Conditions § 12. See generally KEETON, *supra* note 4, § 3.10(a).

³² See ROHAN & RESKIN § 11.05[3]. However, the authors note that courts probably would not uphold the subrogation right in such instances.

³³ Insurance companies will probably be willing to accept such a modification with respect to the unit owner. However, they will seek to maintain the subrogation right against subtenants. Kenyon, *supra* note 2, at 19.

³⁴ See ROHAN & RESKIN § 11.05[1]. The authors give the following example:

Value of the property	\$100,000
Amount of insurance carried	40,000
Amount of the loss	40,000

If the policy contained an 80% co-insurance clause, the insured would recover only \$20,000. Since he carried only one-half the requisite \$80,000 insurance, he became a co-insurer of one-half the loss. In the absence of a co-insurance clause, on the above facts the insured would have recovered \$40,000, the full loss.

Id. § 11.05[1], at 11-30 n.3. For additional illustrations see McCullough, *Property Insurance*, 8 PRAC. LAW., Nov. 1962, at 10, 23-24.

declaration will require that at least full market value insurance be carried.³⁵ However, particularly in conversion condominiums where unit owners tend to do significant in-unit remodeling, cases do arise wherein the value of the structure exceeds the stated limit of the policy by twenty percent or more.³⁶ If a subsequent loss occurs, the association may find that the proceeds are far below the expected return.

To eliminate the possibility of such a detrimental outcome, the declaration should impose a duty upon unit owners to notify the association of all significant in-unit improvements which may be construed to have become a part of the structure. Additionally, requirements of periodic reappraisal of the structure to determine the adequacy of coverage should be instituted.³⁷ Alternatively the master policy may provide that unit owner-installed improvements are not to be considered in the structure's value for co-insurance purposes.³⁸ Such improvements should then be insured by the unit owner in the same manner as personal property, either by a master policy rider or independent coverage.

When these major difficulties involved in the master policy are resolved, the unit owner still faces a number of financial perils. These relate to the position in which he will find himself should his unit be damaged to the point of being uninhabitable for an extended period. When such a situation arises, the unit owner will discover that his maintenance charges, property taxes, and mortgage payments do not abate while his unit remains unusable.³⁹ Furthermore, he must provide living quarters for himself and his family.⁴⁰ In short, during restoration of the unit, the owner's living expenses will nearly double. To provide for these contingencies, additional living expense and maintenance coverage must be purchased. This can be accomplished either through a rider to the unit owner's personal comprehensive insurance or through the association in conjunction with master policy coverage.⁴¹

LIABILITY INSURANCE

The second major field of risk to the unit owner's investment, tort liability, is somewhat more difficult to deal with. Because of the aforementioned unique character of real property ownership embodied in

³⁵ See text accompanying note 14 *supra*.

³⁶ Cf. ROHAN & RESKIN § 11.05[1], at 11-31 n.11, where the authors note that the problem has been encountered by proprietary lessees.

³⁷ See ROHAN & RESKIN § 11.06[4].

³⁸ *Id.*

³⁹ POWELL, *supra* note 11, ¶ 633.36[4]; ROHAN & RESKIN § 11.02[1].

⁴⁰ Kenyon, *supra* note 2, at 21-22.

⁴¹ *Id.* See, e.g., St. Paul Policy, *supra* note 24, Loss of Rents Coverage § 2.

the condominium, prior experience in handling tort liability arising from the ownership and use of property is of limited value.⁴² Therefore, before any accurate statements concerning insurance against this form of liability may be set forth, the current state of condominium tort law must be surveyed.

Unfortunately, there are few authorities providing guidance in the area of condominium tort law.⁴³ Most condominium statutes, and particularly the New York act,⁴⁴ are silent on the nature and extent of the tort liability of the unit owner.⁴⁵ Furthermore, decisional law on the subject is virtually nonexistent. In New York, no case has yet come to light which addresses either the general question or any of its major components. Despite this lack of authority, most commentators agree that unit owners are jointly and severally liable for any tortious conduct performed by any member, the association, or their servants and employees in connection with the common elements of the condominium.⁴⁶

Sources of liability are not difficult to foresee.⁴⁷ Besides the usual exposure to tort actions from ordinary licensees and invitees, the association may be subject to liability for injuries incurred in connection with everything from the negligent operation of condominium owned vehicles to product defects in food items dispensed from on-premises vending machines. In large developments equipped with swimming pools, restaurants, health clubs, and play areas, the sources of liability will be proportionately multiplied. It is apparent that in all cases the sources of liability extend well beyond the limits of the personal conduct and care of the individual unit owner.⁴⁸

In the event a judgment is entered against the condominium, serious difficulties may result.⁴⁹ Since liability is joint and several, a

⁴² See generally ROHAN & RESKIN § 10A.01 *et seq.*; Rohan, *Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance*, 32 LAW & CONTEMP. PROB. 305-06 (1967) [hereinafter cited as *Tort Liability*].

⁴³ ROHAN & RESKIN § 10A.02[3]; *Tort Liability*, *supra* note 42, at 307.

⁴⁴ N.Y. REAL PROP. LAW §§ 339-d -ii (McKinney 1968).

⁴⁵ A number of state statutes, on the other hand, have addressed the issue of tort liability. See FLA. STAT. ANN. § 711.18(2) (1969) (unit owner absolved from personal liability for damages caused by the association or in connection with the common elements); WASH. REV. CODE ANN. § 64.32.240 (1966) (actions based on torts occurring in connection with the common areas to be maintained only against the association of owners); ALASKA STAT. § 34.07.260 (Supp. 1971) (actions based on torts occurring in connection with common areas to be maintained only against the association of owners).

⁴⁶ See ROHAN & RESKIN § 10A.03[1]; *Tort Liability*, *supra* note 42, at 308-09; Note, *Condominiums: Incorporation of the Common Elements—A Proposal*, 23 VAND. L. REV. 321, 327 (1970).

⁴⁷ For an extensive, but not exhaustive, list, see ROHAN & RESKIN § 10A.03[1]; *Tort Liability*, *supra* note 42, at 308-09.

⁴⁸ *Tort Liability*, *supra* note 42, at 308-09.

⁴⁹ To date, the procedures for prosecuting an action against a condominium have

judgment docketed against the property may prevent the sale of any unit until the judgment creditor has been satisfied.⁵⁰ In New York, it has not yet been determined whether the individual unit owner can satisfy the lien against his own unit by payment of his aliquot share of the judgment.⁵¹ In the absence of firm authority on the subject, it appears warranted to assume that he cannot.

Since the neglect or fault of a unit owner or of the association is imputed to every other unit owner for the purposes of tort liability, a joint liability policy would appear to be the best vehicle for protecting the members' interests.⁵² Such a master tort liability policy should include coverage for all claims for bodily injury or property damage arising out of any occurrence in connection with the use and ownership of the condominium property.⁵³ As with all other operational costs, premiums are to be treated as a common expense of the unit owners.

The inclusive nature of the master policy, however, should not lead to the conclusion that all problem areas have been eliminated.⁵⁴ It must be kept in mind that the persons most likely to be injured on the condominium premises are the unit owners themselves.⁵⁵ Suits based on such injuries, either against fellow unit owners or the association, do not fit well into traditional insurance thinking. It is to be expected that the liability insurer may resist claims by a unit owner — a named insured — under the master policy. To avoid this problem, the association policy should contain specific cross-liability coverage for intramural suits of this nature.⁵⁶ It is also important to note that master policies

remained unclear. ROHAN & RESKIN § 10A.02[3]. It has been suggested that, in New York, suits against condominium associations are governed by the General Associations Law. See N.Y. GEN. ASS'NS LAW (McKinney Supp. 1973); Kerr, *Condominium — Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 41 (1963).

⁵⁰ See ROHAN & RESKIN § 10A.02[3]; *Tort Liability*, *supra* note 42, at 307.

⁵¹ Other states, however, have resolved the problem by specific statutory enactment. See, e.g., WASH. REV. CODE ANN. § 64.32.240 (1966) (judgment lien against a condominium association to be treated as a common expense which can be removed from any unit upon payment by the respective owner of his proportional share); ALASKA STAT. § 34.07.260 (Supp. 1971) (judgment lien is removed from an individual apartment upon payment by the respective owner of his proportional share).

⁵² See Kenyon, *supra* note 2, at 20.

⁵³ *Id.* See, e.g., St. Paul Policy, *supra* note 24, Insuring Agreement § 36 (Comprehensive General and Automobile Coverage) and Insuring Agreement § 49 (Personal Injury Liability).

⁵⁴ See POWELL, *supra* note 11, ¶ 633.36.

⁵⁵ See ROHAN & RESKIN § 10A.02[4]; *Tort Liability*, *supra* note 42, at 307-08.

In this regard it is important to note that the right of a unit owner to sue his own condominium association in negligence has been recognized in at least one jurisdiction. In *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (2d Dist. 1971), the California Court of Appeals held that a condominium unit owner could recover against his association for injuries incurred in tripping over a negligently maintained water sprinkler.

⁵⁶ Kenyon, *supra* note 2, at 20.

typically do not cover liability arising from intra-unit injuries.⁵⁷ Intra-unit liability coverage is best acquired from the master policy carrier in conjunction with association coverage. In this way, unnecessary litigation concerning the actual site of the injury, be it within the unit or the common areas, will be obviated.

Finally, if the unit owner plans to take any active part in the management of the condominium, he should assure himself that the board of managers is covered by the master policy for all official acts.⁵⁸ This coverage should include legal fees in litigation commenced against the board of managers by all parties, including unit owners.

CONCLUSION

In arriving at a workable insurance program, condominium unit owners and their attorneys must identify not only the potential pitfalls traditionally associated with home ownership, but also those arising from the unique nature of condominiums. Unless adequate insurance against such risks is procured, the unit owner's investment may be jeopardized by undue exposure to casualty loss and tort liability.

Thomas J. Hakala

⁵⁷ POWELL, *supra* note 11, at ¶ 633.36[2].

⁵⁸ *Id.*