Condo Insurance Changes in the new Law

The 2008 legislative session House Bill 601 was passed. This bill makes changes to parts of Chapter 718 of Florida Statutes dealing with condominium insurance. A summary of the changes is shown below.

Some of the language in the new legislation is troublesome to say the least, while other parts of the statutes are unclear. The effective date of the bill is 7/1/08 except where noted as 1/1/09 in the analysis below. Most legal and insurance professionals agree that an in-force policy is not affected by these changes, thus the changes will be effective at the first renewal date on or after 1/1/09.

Below are comments and observations about some of the changed statutes, as well as comments on issues which did not change yet are still important points.

The insurance statutes deal only with residential condominiums as defined in Chapter 718. Insurance for non-residential condominiums (such as an office complex organized as a condominium) are not addressed in any statutes, thus the bylaws must be consulted to determine insurance responsibility.

Association insurance must be based on the replacement cost of the property as determined by an "independent insurance appraisal" done at least every 36 months. Sources with the State of Florida advised FAIA that an "independent insurance appraisal" would include items such as cost estimator performed with insurance cost estimating software, an appraisal that shows a replacement cost (not just a market value), or a contractor's estimate. While the insurance must be "based on" the replacement cost, this does not appear to be a mandate that associations must insure to 100 percent of value. It is up to the association board to determine what "adequate insurance" is and the argument can easily be made that a board could decide to insure to 90 percent of replacement cost (as an example) and be in compliance with the statute. Finally, an initial appraisal that was completed 36 months earlier could be updated and this would comply with the statute.

Associations are still permitted to self-insure, as long as Florida Statutes 624.460-624.488 are followed. The likelihood of an association being approved as such a self-insurer, however, is remote due to the intense financial requirements required in the statute.

The "pooling" arrangement authorized in the 2007 legislative session is permitted, but only after onerous testing and approval by the Office of Insurance Regulation. It is FAIA's view

that few, if any, such arrangements will meet the criteria specified in the statute. The statutory change applies to new pooling arrangements as well as existing arrangements when they renew on or after 7/1/08.

The board may determine the deductible on the property, subject to revised language in the statute. In selecting a deductible the board must do so in a manner that is consistent with "...prevailing practice for communities of similar size and age, and having similar construction and facilities in the locale where the condominium property is situated." The deductible must be selected after considering the available funds on hand as well as the assessment authority of the board. The meeting where deductibles are discussed must be open to all unit owners and proper notice of the meeting shall be given to unit owners, per Florida Statutes.

The association is still required to "...obtain and maintain adequate insurance..." for the condominium property. "Best efforts" and "adequate insurance" are not defined. D&O, workers' compensation, and flood insurance "may" be obtained; these coverages are not mandated in Chapter 718. (Insurance professionals would, of course, always recommend these coverages.)

If there is a free-standing building in the association consisting of only one unit, the association may elect not to insure the building if the bylaws require the unit owner to insure it. For example, some condominium associations are composed of (for example) 50 single-family structures, yet the legal organization is a condominium. In such cases the statutes allow the association to forego a single master policy if unit owners are required to insure the building.

Heating, ventilating, and air conditioning (HVAC) equipment is longer on the list of excluded property under the association master insurance policy. This would include air handlers, heat pumps, thermostats, compressors, and duct work whether located within the units or not. This equipment is now covered by property losses on a primary basis by the association master policy. Note that the statute addresses only the responsibility to insure the HVAC equipment and does not address maintenance and repair responsibly. The responsibility to repair, replace, and maintain HVAC equipment is not addressed in the statutes or insurance policies; such maintenance and repair responsibility may be addressed in condominium bylaws and documents. FAIA has been asked, "How can an agency determine how much coverage is now needed on the master policy to account for this change?" The answer is, of course, the agency can't. The amount of increased coverage needed under the master policy is a decision left to the condominium association after consultation with an HVAC professional. (Effective 1/1/09.)

The master policy now excludes: "...all personal property within the unit or limited common elements, and floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing." (As discussed earlier, HVAC equipment is no longer excluded by the master policy) Items such as originally installed drywall, windows, interior non-load bearing walls, doors, toilets, bath tubs, sinks, closet rods, and sliding glass doors remain the primary insurance responsibility of the association. (Effective 1/1/09)

The statute states that the unit owner policy shall include "special assessment" coverage of no less than $2,000. Florida Statute 718.103(24) defines special assessment as "...any assessment levied against a unit owner other than the assessment required by a budget adopted annually." This is a troublesome change since unit owners are often assessed for a variety of things such as routine roof replacement, building a new clubhouse, increased insurance expenses, legal fees, accounting fees, and the like. Was the intent of this change that assessments such as these be covered, or was the intent simply to say that the unit owner policy must include $2,000 of loss assessment coverage as defined in the typical HO-6 policy? On September 8, 2008, State Senator Dennis L. Jones sent a letter to Insurance Commissioner Kevin McCarty clarifying the intent of the legislature on this wording. That letter stated in part, "While the nature of the "special assessment" is undefined in the bill, it was the intent of the legislature that this term only apply to assessments for loss, as opposed to assessments for routine and upkeep, such as painting, repaving, or replacing outdated roofs, for example. It was not the intent of the sponsor to create new liability for assessments that were not triggered by loss." It is unlikely that carriers will include a new "special assessment" coverage and it appears that the legislature only intended to address "loss assessment" coverage that is routinely found in homeowners policies. Several carriers have indicated that they intend to issue HO-6 policies with $2,000 of loss assessment coverage, as opposed to the $1,000 basic limit included. This appears to meet the "intent" of the legislature. (Effective 1/1/09.)

Improvements and alterations made by unit owners that benefit fewer than all residents (such as an enclosed balcony, Jacuzzi, new interior walls, or in-ground BBQ pit) shall be insured by the unit owner(s) benefiting from the improvements. Optionally, the association may elect to cover these items and pass that cost along to the unit owner(s) who benefit from the improvements or alterations. (Effective 1/1/09.)

The association shall require the unit owners to produce evidence of insurance, but not more often than annually. This is, essentially, a mandate that unit owners must buy an HO-6 or other similar type policy. It is up to the association to enforce this requirement as there is no enforcement mechanism in the statute. There is no reference to how much coverage must be purchased; again the board will be the entity to determine what the unit owner must carry. If the unit owner fails to purchase such policy the board may do so and collect

the premium in a manner specified in the assessment statute in Florida Statute 718.116. FAIA is not aware of any markets currently willing to write this "force placed" type coverage. (Effective 1/1/09.)

The unit owner policy must name the association as an additional named insured. Note the requirement is not simply for "additional insured" status (The HO 04 41 endorsement would serve that purpose, but is not utilized by HO-6 insurers that FAIA contacted, mainly because it provides liability coverage to the person/entity named); instead the requirement is for additional named insured status. This requirement is, to say the least, very troublesome. For example, if the HO-6 policy named "Joe Smith and ABC Condo Association" as named insureds, a claim check for a theft claim suffered by Joe would be payable to both Joe and the association. The association could claim "insured" status under Section II â€“ Liability of Joe's policy for a slip and fall in the clubhouse. The association, as named insured on Joe's policy, could call Joe's agent and increase or decrease coverage. Carriers will likely refuse to issue a policy in such manner. On September 8, 2008, State Senator Dennis L. Jones sent a letter to Insurance Commissioner Kevin McCarty clarifying the intent of the legislature on this wording. That letter stated in part, "In this instance, the intent was only to apply to "Coverage A" or "Additions and Alterations Coverage" as opposed to liability, injury, or personal property coverage." While the letter helps clarify the intent, the problem remains of how, if at all, the typical unit owner policy can be structured to accomplish this intent. There is currently no industry standard Insurance Services Office (ISO) endorsement available to accomplish what the legislative intent was stated to be. Adding the association as a mortgagee under the HO-6 policy would accomplish the purpose of having the association name on the HO-6 claim check for building losses and one carrier indicated this would be their approach; one carrier indicated this would be their approach to the issue. (Effective 1/1/09.)

Reconstruction work after a loss shall be undertaken by the association, except where noted in the statute. (Effective 1/1/09)

The bonding requirement remains unchanged; the bond or insurance must be adequate to cover the maximum amount of funds in the custody of the association or management agent. Note that this bond/insurance requirement applies to both residential and non-residential condominium associations.

All hazard insurance deductibles, uninsured losses, and other damages in excess of hazard insurance coverage under the hazard insurance policies maintained by the association are now a common expense of the condominium. This statute change is in reaction to a Declaratory Statement (referred to as "The Plaza East case") issued by the Department of Business and Professional Regulation (DBPR). In the case, Plaza East Condominium

Association attempted to require a single unit owner to pay for damage confined to the common elements of their unit since the loss was below the association deductible. The DBPR ruled that such action was in conflict with Florida Statutes and the association could recoup the deductible only by assessing all unit owners. This statute change in effect "codifies" the DBPR ruling. The bylaws can, however, be amended to alter the way such losses are allocated. The result of this "opt out" option is that each of the 23,000+ condominium associations in Florida may now have their own way to address casualty losses that are not covered by insurance. For example, if the bylaws are properly amended, a unit owner could be required to pay for a major fire loss in their unit that was below (for example) the association $100,000 deductible. This would necessitate the unit owner having an adequate Coverage A limit on their HO-6 policy. It will make it even more difficult for a unit owner to decide on an appropriate amount of Coverage A since it will vary from association to association.

The revised statutes are below.

718.111 The association.—

(11) INSURANCE.--In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, this subsection applies to every residential condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for associations described in this subsection.

(a) Adequate hazard insurance, regardless of any requirement in the declaration of condominium for coverage by the association for full insurable value, replacement cost, or similar coverage, shall be based upon the replacement cost of the property to be insured as determined by an independent insurance appraisal or update of a prior appraisal. The full insurable value shall be determined at least once every 36 months.

1. An association or group of associations may provide adequate hazard insurance through a self-insurance fund that complies with the requirements of ss. 624.460-624.488.

2. The association may also provide adequate hazard insurance coverage for a group of no fewer than three communities created and operating under this chapter, chapter 719,

chapter 720, or chapter 721 by obtaining and maintaining for such communities insurance coverage sufficient to cover an amount equal to the probable maximum loss for the communities for a 250-year windstorm event. Such probable maximum loss must be determined through the use of a competent model that has been accepted by the Florida Commission on Hurricane Loss Projection Methodology. No policy or program providing such coverage shall be issued or renewed after July 1, 2008, unless it has been reviewed and approved by the Office of Insurance Regulation. The review and approval shall include approval of the policy and related forms pursuant to ss. 627.410 and 627.411, approval of the rates pursuant to s. 627.062, a determination that the loss model approved by the commission was accurately and appropriately applied to the insured structures to determine the 250-year probable maximum loss, and a determination that complete and accurate disclosure of all material provisions is provided to condominium unit owners prior to execution of the agreement by a condominium association.

3. When determining the adequate amount of hazard insurance coverage, the association may consider deductibles as determined by this subsection.

(b) If an association is a developer-controlled association, the association shall exercise its best efforts to obtain and maintain insurance as described in paragraph (a). Failure to obtain and maintain adequate hazard insurance during any period of developer control constitutes a breach of fiduciary responsibility by the developer-appointed members of the board of directors of the association, unless the members can show that despite such failure, they have made their best efforts to maintain the required coverage.

(c) Policies may include deductibles as determined by the board.

1. The deductibles shall be consistent with industry standards and prevailing practice for communities of similar size and age, and having similar construction and facilities in the locale where the condominium property is situated.

2. The deductibles may be based upon available funds, including reserve accounts, or predetermined assessment authority at the time the insurance is obtained.

3. The board shall establish the amount of deductibles based upon the level of available funds and predetermined assessment authority at a meeting of the board. Such meeting shall be open to all unit owners in the manner set forth in s. 718.112(2)(e). The notice of such meeting must state the proposed deductible and the available funds and the

assessment authority relied upon by the board and estimate any potential assessment amount against each unit, if any. The meeting described in this paragraph may be held in conjunction with a meeting to consider the proposed budget or an amendment thereto.

(d) An association controlled by unit owners operating as a residential condominium shall use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property that is required to be insured by the association pursuant to this subsection.

(e) The declaration of condominium as originally recorded, or as amended pursuant to procedures provided therein, may provide that condominium property consisting of freestanding buildings comprised of no more than one building in or on such unit need not be insured by the association if the declaration requires the unit owner to obtain adequate insurance for the condominium property. An association may also obtain and maintain liability insurance for directors and officers, insurance for the benefit of association employees, and flood insurance for common elements, association property, and units.

(f) Every hazard insurance policy issued or renewed on or after January 1, 2009, for the purpose of protecting the condominium shall provide primary coverage for:

1. All portions of the condominium property as originally installed or replacement of like kind and quality, in accordance with the original plans and specifications.

2. All alterations or additions made to the condominium property or association property pursuant to s. 718.113(2).

3. The coverage shall exclude all personal property within the unit or limited common elements, and floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing.

(g) Every hazard insurance policy issued or renewed on or after January 1, 2009, to an individual unit owner must contain a provision stating that the coverage afforded by such policy is excess coverage over the amount recoverable under any other policy covering the same property. Such policies must include special assessment coverage of no less than

$2,000 per occurrence. An insurance policy issued to an individual unit owner providing such coverage does not provide rights of subrogation against the condominium association operating the condominium in which such individual's unit is located.

1. All improvements or additions to the condominium property that benefit fewer than all unit owners shall be insured by the unit owner or owners having the use thereof, or may be insured by the association at the cost and expense of the unit owners having the use thereof.

2. The association shall require each owner to provide evidence of a currently effective policy of hazard and liability insurance upon request, but not more than once per year. Upon the failure of an owner to provide a certificate of insurance issued by an insurer approved to write such insurance in this state within 30 days after the date on which a written request is delivered, the association may purchase a policy of insurance on behalf of an owner. The cost of such a policy, together with reconstruction costs undertaken by the association but which are the responsibility of the unit owner, may be collected in the manner provided for the collection of assessments in s. 718.116.

3. All reconstruction work after a casualty loss shall be undertaken by the association except as otherwise authorized in this section. A unit owner may undertake reconstruction work on portions of the unit with the prior written consent of the board of administration. However, such work may be conditioned upon the approval of the repair methods, the qualifications of the proposed contractor, or the contract that is used for that purpose. A unit owner shall obtain all required governmental permits and approvals prior to commencing reconstruction.

4. Unit owners are responsible for the cost of reconstruction of any portions of the condominium property for which the unit owner is required to carry casualty insurance, and any such reconstruction work undertaken by the association shall be chargeable to the unit owner and enforceable as an assessment pursuant to s. 718.116. The association must be an additional named insured and loss payee on all casualty insurance policies issued to unit owners in the condominium operated by the association.

5. A multicondominium association may elect, by a majority vote of the collective members of the condominiums operated by the association, to operate such condominiums as a single condominium for purposes of insurance matters, including, but not limited to, the purchase of the hazard insurance required by this section and the apportionment of deductibles and damages in excess of coverage. The election to aggregate the treatment of insurance premiums, deductibles, and excess damages constitutes an amendment to the declaration

of all condominiums operated by the association, and the costs of insurance shall be stated in the association budget. The amendments shall be recorded as required by s. 718.110.

(h) The association shall maintain insurance or fidelity bonding of all persons who control or disburse funds of the association. The insurance policy or fidelity bond must cover the maximum funds that will be in the custody of the association or its management agent at any one time. As used in this paragraph, the term "persons who control or disburse funds of the association" includes, but is not limited to, those individuals authorized to sign checks on behalf of the association, and the president, secretary, and treasurer of the association. The association shall bear the cost of any such bonding.

(i) The association may amend the declaration of condominium without regard to any requirement for approval by mortgagees of amendments affecting insurance requirements for the purpose of conforming the declaration of condominium to the coverage requirements of this subsection.

(j) Any portion of the condominium property required to be insured by the association against casualty loss pursuant to paragraph (f) which is damaged by casualty shall be reconstructed, repaired, or replaced as necessary by the association as a common expense. All hazard insurance deductibles, uninsured losses, and other damages in excess of hazard insurance coverage under the hazard insurance policies maintained by the association are a common expense of the condominium, except that:

1. A unit owner is responsible for the costs of repair or replacement of any portion of the condominium property not paid by insurance proceeds, if such damage is caused by intentional conduct, negligence, or failure to comply with the terms of the declaration or the rules of the association by a unit owner, the members of his or her family, unit occupants, tenants, guests, or invitees, without compromise of the subrogation rights of any insurer as set forth in paragraph (g).

2. The provisions of subparagraph 1. regarding the financial responsibility of a unit owner for the costs of repairing or replacing other portions of the condominium property also apply to the costs of repair or replacement of personal property of other unit owners or the association, as well as other property, whether real or personal, which the unit owners are required to insure under paragraph (g).

3. To the extent the cost of repair or reconstruction for which the unit owner is responsible under this paragraph is reimbursed to the association by insurance proceeds, and, to the extent the association has collected the cost of such repair or reconstruction from the unit owner, the association shall reimburse the unit owner without the waiver of any rights of subrogation.

4. The association is not obligated to pay for repair or reconstruction or repairs of casualty losses as a common expense if the casualty losses were known or should have been known to a unit owner and were not reported to the association until after the insurance claim of the association for that casualty was settled or resolved with finality, or denied on the basis that it was untimely filed.

(k) An association may, upon the approval of a majority of the total voting interests in the association, opt out of the provisions of paragraph (j) for the allocation of repair or reconstruction expenses and allocate repair or reconstruction expenses in the manner provided in the declaration as originally recorded or as amended. Such vote may be approved by the voting interests of the association without regard to any mortgagee consent requirements.

(l) In a multicondominium association that has not consolidated its financial operations under subsection (6), any condominium operated by the association may opt out of the provisions of paragraph (j) with the approval of a majority of the total voting interests in that condominium. Such vote may be approved by the voting interests without regard to any mortgagee consent requirements.

(m) Any association or condominium voting to opt out of the guidelines for repair or reconstruction expenses as described in paragraph (j) must record a notice setting forth the date of the opt-out vote and the page of the official records book on which the declaration is recorded. The decision to opt out is effective upon the date of recording of the notice in the public records by the association. An association that has voted to opt out of paragraph (j) may reverse that decision by the same vote required in paragraphs (k) and (l), and notice thereof shall be recorded in the official records.

(n) The association is not obligated to pay for any reconstruction or repair expenses due to casualty loss to any improvements installed by a current or former owner of the unit or by the developer if the improvement benefits only the unit for which it was installed and is not part of the standard improvements installed by the developer on all units as part of original construction, whether or not such improvement is located within the unit. This paragraph

does not relieve any party of its obligations regarding recovery due under any insurance implemented specifically for any such improvements.

(o) The provisions of this subsection shall not apply to timeshare condominium associations. Insurance for timeshare condominium associations shall be maintained pursuant to s. 721.165.