Condominium Insurance Changes for 2010

By David Thompson, CPCU

It has been a wild and crazy few years for condominium insurance. In 2008, House Bill 601 was passed along with new requirements that were troublesome to say the least. Then in the 2009 legislative session, Senate Bill 714 was passed along with a companion bill in the House of Representatives. It looked like a "slam dunk" to become law, until the governor vetoed it on June 1, 2009 due to a provision dealing with fire sprinklers.

In the 2010 legislative session, bills were introduced into both houses. While not an exact "clone" of the vetoed Senate Bill 714 in 2009, the 2010 bill (Senate Bill 1196) tracks the 2009 version very closely.

In 2008, FAIA summarized the changes that resulted from House Bill 601 and our original analysis is below...indicated by **2008 Legislation.** We have provided analysis of Senate Bill 1196 which was signed by the governor and is effective July 1, 2010.

Overview

2008: During the 2008 legislative session, House Bill 601 was passed. This bill made changes to parts of Chapter 718 of Florida Statutes dealing with condominium insurance. A summary of the changes is shown below. While some of the language in the new legislation is troublesome to say the least, 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. (Example: The condo master policy renews 4/1/09. Changes shown as effective 1/1/09 will not impact the association master policy until the 4/1/09 renewal date.)

2010 Legislation: Parts of the statute have remained unchanged, parts have been deleted, parts have been re-worded, and some new language has been added.

Residential vs. Non-Residential Condominiums

2008: 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.

2010 Legislation: No change. Additionally, nothing in House Bill 561applies to cooperative associations or homeowners associations. Like House Bill 601 in 2008, House Bill 561 applies **only** to residential condominiums.

Amounts of Insurance/Independent Insurance Appraisal

2008: Association insurance must be based on the "full insurable value" 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. For more information on this issue, see our article titled "Condominiums — Adequate Insurance" by **clicking here**.

2010 Legislation: No change other than changing "full insurable value" to "replacement cost."

Self Insurance

2008: 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.

2010 Legislation: No change.

Pooling Arrangements

2008: The "pooling" arrangement authorized in the 2007 legislative session is permitted, but only after stringent 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.

2010 Legislation: No change. Additionally, such program could not have existed after July 1, 2010.

Deductibles

2008: 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.

2010 Legislation: Unchanged, except that the meeting to discuss the deductible is not specific to the subject matter of the meeting. The board remains the entity to select the deductible.

Adequate Insurance

2008: The association is still required to "...obtain and maintain adequate insurance..." for the condominium property. "Best efforts" and "adequate insurance" are not defined. Directors and Officers coverage, 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.) For more information on this issue, see our article titled "Condominiums — Adequate Insurance: by **clicking here**.

2010 Legislation: No change except that the statute now references the requirement to obtain and maintain "property" insurance.

Free-Standing Building

2008: 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.

2010 Legislation: No change.

HVAC Equipment

2008: Heating, ventilating, and air conditioning (HVAC) equipment is no 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 responsibility. 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. The board can not "opt out" of insuring the HVAC equipment.

2010 Legislation: No change.

List of Excluded Items Under the Master Policy

2008: 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.

2010 Legislation: The list of items excluded by the master policy was unchanged, except that the statute would have said the items must be, "...within the boundaries of the unit and serve only such unit."

Special Assessment/Loss Assessment

2008: 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.

2010 Legislation: This part of the statute has been removed and a new statute (627.714) has been added. The new statute requires new and renewal policies on and after July 1, 2010, to contain at least $2,000 of property loss assessment coverage. The deductible can not be more than $250. If the unit owner also suffered direct loss to his/her unit (such as hurricane damage) and was paid for that damage, the deductible for loss assessment will not apply. Additionally, new wording has been inserted stating that if the unit owner increases loss assessment after a direct loss to the condominium property (such as hurricane damage to the building), that increased amount of coverage is not available for an assessment. In other words, the limit of coverage in effect the day before the direct damage generating the assessment is the maximum coverage available. This is contrary to current policy language and it is assumed that new forms and endorsement will have to be created by carriers/ISO and approved by the Office of Insurance Regulation to meet this new statutory mandate.

Improvements That Benefit Fewer Than All Unit Owners

2008: 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.

2010 Legislation: This wording has been removed from the statute. Note, however, the master property policy and the unit owner policy work hand-in-hand so that the master policy does not cover additions, alterations, and upgrades installed within the unit by the unit owners. For about the last decade, this coverage part of the policies has remained essentially unchanged. Unit owners are the ones to insure additions, alterations, and upgrades that they install within their unit, while the master policy does not cover these items at all.

Required Unit Owner Insurance

2008: The association shall require the unit owners to produce evidence of hazard and liability 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. While "hazard" is not defined in the statute, most insurance professionals feel that the term includes coverage for the peril of windstorm. Such being the case, the common understanding of the statute would lead to the conclusion that if a unit owner decided to buy an HO-6 policy with the peril of windstorm excluded, the mandate for coverage would not adequately be met. The "enforcer" for purchasing a policy including the peril of windstorm would be the association board. It's up to the board to determine what type coverage, if any, they decide to require of unit owners. 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.

2010 Legislation: This wording has been removed from the statute. Keep in mind, however, condominium bylaws and documents can (and often do) still require unit owners to obtain and maintain insurance. If an association votes to continue to require unit owners to maintain insurance, there is no statute preventing such action. Disputes over this are best left between the association and the unit owners and, perhaps, the condominium association attorney.

Association as Additional Named Insured

2008: 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 — 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. For a detailed discussion of this issue, see our Education Library articled "Condominiums — Additional Named Insured Issue" by **clicking here**.

2010 Legislation: This requirement has been completely removed from the statute.

Reconstruction Work After A property Loss

2008: Reconstruction work after a loss shall be undertaken by the association, except where noted in the statute.

2010 Legislation: No change other than to change "shall be undertaken" to "must be undertaken."

Fidelity Bond Requirement

2008: 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. For more information on this subject check our article titled "Condominiums — Fidelity Body

Requirement" by **clicking here**.

2010 Legislation: No change.

Uninsured Losses as a Common Expense

2008: 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's $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. For more information on this issue, see our article titled, "Condominium Opt-Out Issue" by **clicking here**.

2010 Legislation: No change other than to change "hazard" and "casualty" to "property" several times.

Rights of subrogation

2008: Even prior to the 2008 changes, the statute specifically stated that the unit owner's policy had no rights of subrogation against the association.

2010 Legislation: This wording has been removed from the statute.

Primary/Excess

2008: For several years (prior to 2008) the statute stated that coverage under a unit owner policy is excess over the amount recoverable under

any other policy. This wording, in effect, stated that the master policy is primary and the unit owner policy is excess. Wording in both the master policy and the unit owner policy has supported this statute for over a decade.

2010 Legislation: No change.

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