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Let's Talk Condo

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Waiver of Subrogation Clauses in Unit Owner Insurance Policies

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Ontario's Condominium Law Experts

by
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The declarations of many condominium corporations contain a provision requiring insurance policies to include a *"waiver of subrogation"* against a number of parties, including the corporation, manager, agents, employees, owners, residents, tenants, invitees, etc. What are the benefits of such a provision, and would unit owners benefit from removing the waiver of subrogation, especially where there are incidents of repeat damage caused by the same unit?

What is subrogation?

Subrogation is a legal concept that permits an insurance company to stand in the place of its insured and seek recovery for losses paid under the insurance policy from a third party that caused the damage. For example, a person in an automobile accident that is caused by another person submits a claim to his or her insurer. The insurance company pays out the insured's claim and then assumes the insured's legal rights. The insurance company then seeks reimbursement from the person that caused the accident, usually via a lawsuit.

When an insurance policy contains a waiver of subrogation, the insurance company knowingly relinquishes any rights that it may have to seek reimbursement from a third party, even if that party is responsible for the damage or loss.

Subrogation in condominium policies

Most declarations that include a waiver of subrogation make this a mutual requirement, so that, the corporation's insurer cannot pursue unit owners that cause damage, and a unit owner's insurer cannot pursue the corporation or other unit owners who may have been responsible for the damage.

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Our Mission

Our mission is to provide comprehensive, competitively priced, value-added, community oriented solutions throughout Ontario utilizing the range of knowledge and depth of expertise of a larger firm, while providing professional, friendly and timely service to our clients.

With offices in Toronto, Markham, Guelph, London and Kitchener-Waterloo, our Condominium Practice Group is part of a full service law firm which provides us with significant strengths in matching your legal needs to our resources. Our office systems and technology assist us in providing quick turnaround on a cost efficient basis.

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It is important to note that, where a declaration includes a waiver of subrogation clause, the actual wording of the insurance policy is somewhat irrelevant. On a number of occasions, courts have found that where a declaration requires a waiver of subrogation, a policy that does not contain the provision will be deemed to contain one. The underlying basis is that the insurer would have had access to the declaration at the time the policy was entered into, and therefore ought to have been aware of the waiver.

Purpose of the Waiver of subrogation

Why would an insurance company agree to waive its right to seek reimbursement from a third party responsible for damage? The answer is that insurance companies have a fear of the unknown. A waiver of subrogation crystallizes the amount that an insurance company may be asked to pay. In the condominium context, the maximum that the corporation's insurer may be asked to compensate under a claim will be based on the common elements and the standard unit for each class of units within the corporation. For the unit owner's insurance provider, the maximum amount that it may be asked to compensate is dependant on the improvements, alterations, fixtures, etc., to the unit it insures. With a waiver in place, it becomes unnecessary to factor in the unknown contents and improvements found in other units.

Would removal of the waiver of subrogation be beneficial?

In our view, removing the waiver of subrogation from a condominium corporation's declaration would not be in the best interests of a corporation or its individual unit owners and residents. Deleting the waiver of subrogation against other owners and residents would negatively impact an owner's ability to obtain insurance for improvements, fixtures, possessions, etc. Without a waiver of subrogation provision, a unit owner's insurer would be liable not only for the costs of repairing the damage to the improvements and content in the insured unit itself, but also for the cost of repairing improvements and contents of all other units and/or common elements that are damaged.

Not all condominium declarations contain a waiver of subrogation provision, and where they do, the parties covered by the waiver are not always the same. For example, tenants may not be protected under the waiver of subrogation clause. The insurance provisions of a condominium corporation's declaration should always be reviewed carefully. A corporation's insurer and/or legal counsel should be contacted for guidance where necessary.

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NEWSLETTER TIP

The installation and use of video surveillance cameras to address breaches of a condominium corporation's governing documents, and/or trespassing, is within the power and authority of the condominium corporation. However, individuals have a right to be advised that they are being monitored. Signs which clearly indicate the presence of video surveillance cameras and their purpose should be posted in the condominium complex. We also suggest that the video surveillance footage should only be regularly monitored by designated representatives i.e. security personnel and property management. Directors should only view video footage if it relates to a specific health, safety, security, rules violation and/or trespassing incident or issue. The corporation and/or its agents will not be shielded from liability if the cameras are used for self-dealing or discriminatory purposes. If the video surveillance is for the purpose of monitoring the corporation's employees, legal counsel should be contacted prior to such surveillance as there are additional factors that need to be taken into account.

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NEWSLETTER TIP

Ontario has legislation specifically dealing with the use of automated external defibrillators (AED). The *Heart Defibrillator Civil Liability Act, 2006* protects individuals from liability for damages that may occur from their use of an AED to save someone's life at the immediate scene of an emergency, unless damages are caused by gross negligence. Condominium corporations on which AEDs are installed are also protected from liability provided that the AEDs are made available in good faith and are properly maintained. If a condominium corporation decides to install an AED, in addition to ensuring that AEDs are properly maintained, it is always a good idea for security staff to be trained in the use of AEDs.

Enforcement: Turning a Blind Eye Is Not an Option

by
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A condominium corporation that turns a blind eye to blatant violations of its governing documents for extended periods may be in breach of the *Condominium Act, 1998* (the **"Act"**). The Act requires that everyone in the condominium community comply with the Act, the declaration, by-laws and rules (the **"Governing Documents"**).

The condominium corporation has a statutory duty to take all "reasonable steps" to ensure compliance. Owners and occupiers are entitled to expect that others will observe the Governing Documents and that if they fail to do so, the corporation will take "reasonable steps" to enforce the Governing Documents.

If provisions of the Governing Documents are left unenforced for too long, the condominium corporation is left vulnerable to a defence that it has "slept on its rights" or waived its right to enforce those provisions, and subsequent attempts to enforce those provisions may be challenged as being discriminatory or contrary to past practice. Although it is not entirely certain whether such a defence will prevent a condominium corporation from enforcing its Governing Documents, it is certainly a factor that may influence the decision-maker's discretion in an enforcement case.

Reasonable and timely enforcement also protects the condominium corporation from allegations of selective enforcement. If violations are brought to the board's attention and are left unpunished, future attempts to enforce those provisions may give rise to allegations of selective enforcement. Generally, the decision-maker will not substitute its own opinion for that of the board of directors, unless the decision maker is of the view that the board has acted capriciously or unreasonably. Nevertheless, in so far as reasonably possible, the Governing Documents should be enforced uniformly.

At the same time, the condominium corporation is not required to adopt a "compliance at any cost" approach when responding to complaints made by other unit owners. Enforcement is very fact driven. A brief note from management or the board may be "reasonable" where the violation is minor or an isolated incident. However, a stronger response from the condominium corporation's solicitor may be required where the violation has a greater or immediate impact on the condominium community. The importance of the provision being violated, the duration of the problem, the potential financial impact of the breach or the impact on the lives of others, should all be taken into account to determine the "reasonable steps".

In most instances, the first step is for the board or manager to send the non-compliant unit owner a brief letter, advising of the complaint and requesting voluntary compliance. If this does not result in compliance, then the board or manager should provide the non-compliant unit owner with a second letter requesting voluntary compliance. The second letter should advise the non-compliant owner of the

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nature of the complaints, the provisions of the Governing Documents that are being breached, the duty of the condominium corporation to seek compliance, the required corrective action for compliance, and give a reasonable deadline by which corrective action must be taken, failing which further enforcement steps will follow.

If voluntary compliance is not secured, then legal counsel should be consulted to discuss the various options for proceeding, along with the cost and likelihood of succeeding in the case.

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Change — It is one of those things you just grow to accept.

We are excited to announce that Marko Djurdjevac has been asked to join the Ministry of Consumer Services to work on the amendments to the Condominium Act. The opportunity to be involved in creating the future condominium law for Ontario was just too good for him to pass up.

Marko has been a real asset to our group and we will miss him, but we like to think his association with Miller Thomson LLP has made him the most qualified person for this newly created position with the government of Ontario. We congratulate him and wish him all the best with this new challenge.

The good news is that the Province is serious about amending the Condominium Act. The bad news is we are losing Marko. Since the Miller Thomson condominium group members are also actively involved in the amendments to the Condominium Act we expect that we will remain in close contact with Marko.

We have gone through many changes over the years. We are proud to say that we have weathered all of them, with extra effort at transition but with no gaps in our service to our clients. We expect this to be the same.

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