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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE PETITION FOR DECLARATORY STATEMENT **DS 2006-007**

Docket No. 2006007698

ALLSTATE FLORIDIAN INSURANCE COMPANY, Insurer of a Unit Owner, Winding Lake at Welleby Condominium Association, Inc.
_____/

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) hereby issues this Declaratory Statement in the affirmative pursuant to section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

On February 14, 2006, the Division received a petition for declaratory statement from Allstate Floridian Insurance Company (Allstate). Notice of receipt of the petition was published in Florida Administrative Weekly on March 3, 2006. The Division received a response from Winding Lake at Welleby Condominium Association, Inc. (Winding Lake) on March 23, 2005. No hearing was requested, and none was held.

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FINDINGS OF FACT

The following findings of fact are based on information submitted by Petitioner and Winding Lake. The Division takes no position as to the accuracy of the facts presented by the parties, but merely accepts them as submitted for purposes of this final order.

1. Allstate issued a condominium policy of insurance to Peter Perez (Perez), a unit owner of Winding Lake, a condominium "association" as that term is defined by 718.103(3), Florida Statutes.

2. Allstate's petition states that Perez "suffered a water loss caused by a burst drain in his unit." Under its 2005 policy with Perez, Allstate extended coverage for "all damage to the insured unit excluding damage to the interior drywall of the insured condominium unit." Allstate's petition explains that "Winding Lake has denied liability for the insured's interior drywall under its policy of insurance based upon the declaration of association stating interior drywall of a unit is the unit owner's responsibility to insure."

3. Allstate argues that since the interior drywall is property located inside the unit as initially installed, the interior drywall is Winding Lake's insurance responsibility under section 718.111(11)(b)2, Florida Statutes, regardless of any language in the declaration to the contrary.[1]

4. Perez provided a copy of the association's 2005 insurance policy. The policy excludes coverage for "loss or damage caused by or resulting from...wear and tear... [c]ontinuous seepage or leakage of water that occurs over a period of fourteen (14) days or more... and [f]aulty, inadequate or defective...maintenance" of association property covered by the policy. Causes of Loss – Special Form, art. B Exclusions, §§ 2(d)(1), (f); 3(c)(4). The association's policy covers damage to the property of others if caused by an insured loss. Endorsement #001.

5. Winding Lake's response maintains that the issue in this proceeding is not the statutory division of insurance responsibilities, but the division of maintenance

responsibilities between the association and the unit owner under the Winding Lake Declaration.

6. Winding Lake provided the Division with a copy of a letter from Allstate to Perez's representative. The Allstate letter reports that the drywall damage was due to the normal wear and tear of the unit owner's water heater rather than a burst pipe. Winding Lake's response alleges that "[t]he unit owner is responsible for maintenance of his broken water heater because it is an appliance located within the boundaries of his unit. He is also therefore responsible for all damage resulting from the leaking appliance, especially when the appliance failed as a result of 'normal wear and tear.'"

7. Winding Lake argues that the question is one of negligence and covered by the unit owner's responsibility to maintain his unit so as not to cause damage to the condominium property. Article VIII, section 5 of the declaration provides that "Unit Owners shall be responsible for any damage caused to the Common Elements or Limited Common Elements by their negligence" and article XI, section 3, provides that "[e]very Unit Owner must perform promptly all maintenance and repair work within his own Unit which, if omitted, would affect part of the Condominium Property belonging to other Unit Owners or which would affect any Common Element; Unit Owner is hereby made expressly responsible for the damages and liabilities that his failure to do so may engender."

8. Winding Lake's response also implies that the actual issue in this proceeding involves a dispute over coverage under Perez's policy. Winding Lake suggests that Perez "litigate against his own insurance carrier if he thinks his policy covers the loss."

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[1] Article IV, section 1(d) of the Declaration for Winding Lake at Welleby Condominium provides that the unfinished surfaces of perimeter walls are not part of the unit, making the drywall for these walls common

9. Perez's insurance policy covers loss to his residence premises, including "fixtures, construction materials and supplies, installations or additions" within the residence. Allstate policy, art. A at 5. The policy covers the cost of repairing the "condominium premises which are [Perez's] insurance responsibility as expressed or implied under the governing rules of the condominium." Art. I, § (5)(c) Conditions, Allstate policy at 16. Allstate provides optional coverage for water damage and the "cost of tearing out and replacing any part of your condominium necessary to repair the system or appliance." Art. III, § (4)(G) Optional Protection at 26. It does not appear that Perez purchased the additional coverage.

10. The Allstate letter dated May 20, 2005 regarding Perez's claim includes the following:

> As discussed, under the Allstate Floridian Condominium Owners Policy, Losses We Do Not Cover Under Coverage A #15a) "wear and tear, aging, marring, scratching, deterioration, inherent vice, or latent defect." This section of the policy pertains to the hot water heater that leaked and has allowed water to enter and damage the home. The hot water heater leak is due to normal wear and tear and therefore repairs or replacement of the hot water heater is not covered under the policy. Also as discussed, there is no coverage for any drywall repairs as this item is considered part of the condominium building and as such are [sic] the responsibility of the Condominium Association and/or their insurance carrier.

11. Neither Allstate nor Winding Lake indicates the specific location of the drywall at issue.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

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elements, while the "interior walls and partitions" are part of the unit.

2. Allstate originally petitioned the Department of Financial Services, which suggested that it petition this department. Because Allstate is representing a question of unit owner insurance under section 718, Florida Statutes, and Winding Lake has not challenged its standing to do so in this proceeding, the Division finds that Allstate has a substantial interest in the application of section 718.111(11), Florida Statutes (2005), to its provision of condominium unit owner insurance.

3. Winding Lake, as a condominium association subject to chapter 718, Florida Statutes, has standing to intervene in this proceeding.

4. Perez, as a condominium unit owner with rights accorded by chapter 718, Florida Statutes, would have standing to appear but has not done so.

5. Lexington Insurance Company, the association's insurer, appears to have a similar substantial interest in these proceedings as Allstate because it provides condominium association insurance in accordance with the association's requirements under section 718.111(11), Florida Statutes. Indeed, Allstate's petition appears to place the responsibility for payment of the damage claim on the association's insurer. Lexington has not intervened.

6. Section 120.565, Florida Statutes, provides:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

7. Rule 28-105.001, Florida Administrative Code, provides:

> A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over

> which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

(emphasis added).

9. Allstate asserts that the association has an obligation under section 718.111(11)(b), Florida Statutes, to insure the interior drywall in the unit. Allstate alleges that the association denied responsibility on the grounds that the interior drywall is part of the unit under the declaration. See note 1.

10. The association states that the location of the drywall has not been established nor has the cause of the damage, which it states was determined by Allstate's claims adjuster to be caused by a leak from the water heater. It questions whether Perez's insurance policy should cover the damage to the drywall if the damage is found to be caused by an event covered under his policy.

11. Allstate claims that the association's insurer, Lexington Insurance Company, must insure the drywall against any loss and repair the damage. The association's policy appears to insure all of the common elements with exclusion for its failure to maintain any part of the common elements. The hot water heater is Perez's property and his duty to maintain. The association has an ultimate duty to maintain the common element drywall with perhaps a right of recovery of the cost to repair or the right to require Perez to repair if he has negligently or intentionally damaged the drywall. Arts. VIII, XI, Declaration; § 718.113, Fla. Stat.

7. Allstate argues that the association has a duty to insure the drywall inside the units as initially installed; therefore, the association's insurer must pay for the repair. The interior drywall is part of the unit under the declaration and not part of the common element drywall.

8. Section 718.111(11), Florida Statutes, provides in pertinent part with emphasis added:

> 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, paragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration....
> (a) A unit-owner controlled association 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 required to be insured by the association pursuant to paragraph (b). . . .
> (b) Every hazard insurance policy issued or renewed on or after January 1, 2004, to protect the condominium shall provide primary coverage for:
> 1. All portions of the condominium property located outside the units;
> 2. *The condominium property located inside the units as such property was initially installed*, or replacements thereof of like kind and quality and in accordance with the original plans and specifications or, if the original plans and specifications are not available, as they existed at the time the unit was initially conveyed. . ..
> (c) All portions of the condominium property for which the declaration of condominium requires coverage by the association.
>
> Anything to the contrary notwithstanding, the terms "condominium property," "building," "improvements," "insurable improvements," "common elements," "association property," or any other term found in the declaration of condominium which defines the scope of property or casualty insurance that a condominium association must obtain shall *exclude* all floor, *wall*, and ceiling *coverings*, ...*water heaters*, ... which are located within the boundaries of a unit and serve only one unit. ...

9. The Division recently issued a declaratory statement finding that an association could not pass on the cost of the insurance deductible amount to only those unit owners whose windows and doors had been damaged by a hurricane under section 718.111(11),

Florida Statutes, despite a general maintenance provision in the declaration requiring unit owners to maintain the windows and doors in good condition because the insurance deductible is a common expense that must be paid by all unit owners in their proportionate share. Plaza East Association, Inc., Docket No. 2005059934; BPR Agency Clerk No. BPR-00-0239 (Jan. 13, 2006). Repair of hurricane damage is not part of a unit owner's general maintenance obligation.

10. The association is responsible for insuring the drywall in the units, whether it is perimeter drywall or interior drywall, because it is responsible for insuring "the condominium property inside the units as initially installed," but Perez is required to insure the water heater. § 718.111(11)(b), (c), Fla. Stat.

11. Allstate's petition is framed as an extension of Plaza East; however, it is not an extension of that statement. Rather, the declaratory statement in Lake Maitland Terrace Apartments, Inc., is more closely analogous to Allstate's petition. (Sept. 30, 1983). In Lake Maitland, the dispute was over whether the unit owner's negligence in maintaining the shower stall soap dish was the cause of the water leak that damaged the apartment below. Both the association's insurer and the unit owner's insurer denied coverage. Courts not the Division determine questions of negligence, liability, and damages.

12. This appears to involve a contractual dispute involving the interpretation of the Perez's condominium unit insurance policy, the coverage under that policy, the association's insurance policy and coverage, and Perez's duty to maintain his property with the liability imposed under the declaration if he fails to do so. The Division does not have the power to interpret ambiguous condominium documents or an insurance contract

in a declaratory statement proceeding. Grippe v. Div. of Florida Land Sales, Condo. and Mobile Homes, 729 So. 2d 459 (Fla. 4th DCA 1999); Lake Maitland, (Sept. 30, 1983).

13. Further, a declaratory statement is not the proper forum to resolve disputes of fact. § 120.565, Fla. Stat.; Fla. Admin. Code R. 28-105.003 (only hearings not involving disputes of fact may be held). Winding Lake disputes the factual statements in Allstate's petition regarding the cause of the drywall damage and any resulting maintenance responsibilities. This factual dispute may not be resolved in this proceeding. Lake Maitland.

14. Finally, a declaratory statement is not proper where it determines the conduct of a third party. Fla. Admin. Code R. 28-105.001. In this case, neither the unit owner nor the association's insurer are parties to this proceeding.

15. Section 718.111(11)(b), Florida Statutes, imposes the obligation on the association to insure all of the condominium property inside the unit as initially installed regardless of any provision to the contrary in the governing documents. However, this does not resolve the dispute between the parties or the issues of liability, negligence, cause of the damage, damages, insurance coverage, and repair. Saying that the Condominium Act obligates the association to insure the drywall inside the unit does not answer what duty the unit owner and his insurer have in regard to the damage, the cause of the damage, the location of the damage in relation to the cause of the damage, the liability for the cost of repair, or who must make the repair. All of these questions appear to be disputed as well as the basic issue. These are matters for resolution by the courts.

For the reasons stated above it is hereby:

ORDERED:

1. In accordance with section 718.111(11), Florida Statutes, Winding Lake at Welleby Condominium Association, Inc. is obligated to make its best effort to obtain and maintain adequate property and casualty insurance for the condominium property located inside the units as such property was initially installed, which includes the interior drywall in the units, but excludes any wall coverings.

2. The Division is without jurisdiction to determine the other issues raised by the parties.

DONE this 12th day of April, 2006, at Tallahassee, Leon County, Florida.



Michael T. Cochran, Director
Department of Business and
Professional Regulation,
Division of Florida Land Sales,
Condominiums and Mobile Homes.
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS ORDER DENYING PETITION FOR DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to David W. Molhem, Molhem & Fraley, P.A., 320 W. Kennedy Boulevard, Suite 330, Tampa, Florida 33606 and to Cheryl J. Levin, P.A., Courtyard Business Center, 4694 NW 103rd Avenue, Sunrise, Florida 33351, this 18th day of April, 2006.

Robin McDaniel

Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson,
Chief Assistant General Counsel