PAVESE LAW FIRM est. 1949

October 5, 2022

SPECIAL ALERT

HURRICANE IAN RECOVERY – CONDOMINIUMS AND HOAS BEWARE

By: Christopher L. Pope, Esq., Christopher J. Shields, Esq., Alexander J. Menendez, Esq., and Vanessa Fernandez, Esq.

The aftermath of Hurricane Ian has left many condominium and homeowners' association communities with severe damage, many of which are uninhabitable, or, for those located on the barrier islands, without access at all. As a result, volunteer Board Members shouldering the enormous burden and responsibility of restoring these communities will be inundated with information and proposals from contractors that benefit the proposing party rather than the community. With the surge in demand for construction services magnitudes above available supply, the association may have little leverage in negotiating for emergency services. The lack of leverage, the pressure from unit owners for fast action, the lack of information, and the concerns of where the money will come from to pay for repairs can leave the Board of Directors vulnerable to being exploited.

Although there will be numerous decisions for the Board of Directors to make, below is a list of some of the common issues associations must consider immediately in the aftermath of Hurricane Ian.

(1) Assignment of Benefits ("AOB") – **Do not sign any contract that assigns your benefits to your insurance or directs your insurance company to make any form of direct payment to the contractor.** In the past, AOBs were provided to the contractor in exchange for the contractor starting work immediately, and then the contractor would pursue the owner's insurance company for payment. However, after Hurricane Irma in 2017, many contractors were collecting AOBs, but not performing the work until a settlement or litigation was resolved with the insurance company. The contractors teamed up with attorneys and were submitting highly inflated claims leading to prolonged resolutions – if any. At the time, Florida law encouraged litigation because there was a one-way attorney provision that could be paid to the owner's attorney. As a result of the delays, associations and owners were left without work being done for an extended period of time, if at all, and in some cases, had to sue or intervene to be released from their AOB. In other cases, owners later paid for the work out-of-pocket and were forced to pursue their original contractor and insurance company. To curtail AOB abuse, the

Florida Legislature significantly reformed the statutes with changes to the law in 2019 and 2022. If an attorney is recommended to you by a contractor, look for a conflict waiver and inquire as to whether the attorney previously represented the contractor recommending them.

(2) Public Adjusters – **Do not rush to engage a Public Adjuster.** Public Adjusters may normally charge up to 20% of the claim payment. When a state of emergency is declared by the Governor for a natural disaster, the Public Adjuster fees are limited to 10% of the claim payment for one year after the declaration for initial claims for damages caused by that disaster. We would argue the value of the Public Adjuster should be measured by what the association would recover over and above what it would have recovered, not the value of the entire claim. Note that Florida law prohibits Public Adjusters from charging a fee for any claim payments made before the time of entering the contract with the Public Adjuster.

Although the Public Adjuster is supposed to serve the public, many are incentivized to maximize the gross amount of the claim rather than quickly resolving the claim to make the association whole. Following this strategy can lead to delayed repairs and expose the association to claims from owners for failing to timely make repairs. It is important to keep in mind that Florida law allows for special assessments to raise money for repairs. For this reason, associations must eventually front the cost of repairs to restore their condominiums and seek reimbursement from insurance at a later date. Special assessments are discussed in greater detail below. In addition, a Public Adjuster cannot represent the association in mediation or litigation, so associations often find that after submitting their claim, the claim must be handled by their attorney. This has been especially true given the number of claims combined with the recent failure of so many insurance companies. In our experience, the cost of litigation (based on an hourly rate) has been far less than the contingency fee paid to Public Adjusters, especially on large losses. If your association is going to hire a Public Adjuster, make sure you have the contract reviewed by your attorney. If your community has already hired a Public Adjuster, Florida law gives you 10 business days to cancel the contract without penalty.

(3) Out of State Contractors – **Be very wary of out of state contractors, no matter the size of the company, if they are here following the so-called "contractor gold rush".** This is especially true for specialty work like roofing. The primary issue is that our local roof types and building codes differ from other areas in the country and, as a result, the out of state supervision and workers often do not have the skills and experience to properly install roofs in Florida. Even the large out of state corporations are usually relegated to subcontracting inexperienced workers. In our experience, the associations are far better off using one of the local reputable contractors even if the wait is longer and the cost is higher. The benefit is that these companies are familiar with our local codes, many of their workers are employees as opposed to subcontractors, they provide the proper supervision, and they are still around to perform warranty work for years after the gold rush ends. Following Hurricane Irma, the problems encountered with out of state contractors were innumerable. Our firm dealt with the failure of a billion dollar out of state contractor, out of state arbitration clauses, and out of state contractor bankruptcies; and there were condominium associations that ultimately had to completely replace roofs defectively installed by the out of state contractors.

(4) Properly Licensed Contractors – **Use only contractors properly licensed with the Florida Construction Industry Licensing Board.** We would also generally recommend that associations use well capitalized companies rather than shell contractors with no assets or employees. If the association is unfamiliar with the company, we would recommend that you require the license qualifier to meet with you in person to help ferret out any situations where there may be a rented license. Furthermore,

if the license qualifier won't meet with you to get the project, it is unlikely that he or she will be around to supervise the project as is required by Florida law. Another thing to look for is the physical address of the contractor's business. If, for example, it is a UPS Store, then you may want to consider conducting more due diligence on the contractor.

(5) Avoid Large Deposits – **Do not pay large upfront deposits.** Contractors will often require a large amount for an initial deposit. The justification is generally a long lead time for materials. However, if this is the case, alternative arrangements can be made to order materials and avoid giving a large sum of money directly to the contractor to hold. For example, the association and contractor could agree for the association to issue a joint check or make direct payment to the material supplier, which is often a larger company that is more established and better capitalized than the average contractor. Furthermore, by making direct payment to the supplier, the association will often be able to receive confirmation from the supplier that the materials have actually been ordered.

(6) Avoid Time and Materials Contracts. **Avoid entering into Time and Materials Contracts without a maximum price.** Time and Materials contracts are open-ended contracts where the contractor charges for their time and materials. The problem is that there is no incentive for the contractor to work efficiently. Unless the association has experienced supervision, it is nearly impossible to verify the number of hours and quantities of materials. As a result, the cost of the project can be many multiples of what it should have cost, resulting in sticker shock to both the Board and the unit owners. Associations should be particularly mindful of any equipment left at the property for which it is being charged an hourly rate (for example, fans and dehumidifiers).

(7) Loss Assessments Coverage – **Do not hesitate to levy a special assessment for repairs of the condominium.** Associations can take comfort that any unit owner with an HO6 insurance policy will have coverage for assessments levied for repairs due to insurable events. Section 627.714, Florida Statutes, provides that a unit owner's residential property policy must include at least $2,000.00 in property loss assessment coverage for all assessments made as a result of the same direct loss to the property, regardless of the number of assessments, owned by all members of the association collectively, if such loss is of the type of loss covered by the unit owner's residential property insurance policy, to which a deductible of no more than $250.00 per direct property loss applies. In other words, unit owners with insurance on their unit will be covered for at least $2,000.00 for special assessments levied by the association. Note that the loss must be for the type covered by the unit owner's policy, meaning it could exclude any special assessments for flood damage. Please seek counsel to be sure that you levy the proper assessment and follow the correct procedures, including the preparation of a written resolution that clearly delineates the terms of the special assessment and what it covers. Your members' insurance carriers may also wish to review a written resolution and/or meeting minutes before paying toward property loss assessment coverage. Lastly, the Board should not provide advice to unit owners on their ability to recover loss assessment coverage, other than it may be available under their personal policy. Unit owners' interests may be adverse to the association when collecting the special assessments, so the Board should take care not to create any defense for the unit owner.

(8) Rental Equipment – **If your Association had an active construction site prior to the storm where rental equipment was present (especially on Fort Myers Beach, Sanibel/Captiva, and Pine Island), the equipment owner has lien rights on the property.** Unlike with labor and materials that have effectively stopped being provided to the construction site, the rental equipment on-site continues to accrue expenses at the rate for which it was rented. After Hurricane Irma, our firm had numerous associations that collectively had liens placed on their condominium units for thousands, if not hundreds

of thousands, of dollars by an equipment rental company for idle equipment that needlessly accumulated rental payments that were not paid by the contractor. Even worse, the equipment may not actually be at your job site if the contractor transported it to other jobs. However, there is a solution to protect owners. Pursuant to Section 713.01 (13), Florida Statutes, an association can stop the clock in two business days by sending notice directly to the rental equipment provider that the equipment needs to be picked up.

(9) Exaggerated Claim Amount – **Do not get misled into signing an exaggerated Proof of Claim.** A Board member will eventually be required to sign a Proof of Claim under penalty of perjury. People are sometimes tempted to gross up claims to cover their costs (contingencies to Public Adjusters or attorneys) or to avoid paying a deductible. Engaging in these practices could be considered insurance fraud that will be pointed back to the individual.

(10) Exaggerated Scope of the Claim – **Beware of scopes of claim that include items that are not the association's responsibility to repair.** After Hurricane Irma, some condominium associations unwittingly exposed themselves to liability by submitting Proofs of Claim alleging that items that are normally the unit owner's maintenance responsibility (for example, windows) were damaged due to the hurricane, triggering the condominium insurance statute. The issue was that the claim for these items was often made without ample evidence that the damage was caused by the insurable event, but based on a sample of one or two bad windows. If the condominium could not support the claim to the insurance company, it may have had its claim denied or reached a lower settlement than the cost to replace the windows. Because of the inclusion of the windows in the claim, even though there was no proof that the storm damaged the windows, the association was arguably responsible for replacement of the windows instead of the unit owners because it submitted a sworn Proof of Loss with its claim alleging that all of the windows in the condominium were damaged by the storm. As a result, some condominiums had to levy a massive special assessment to cover the shortfall of replacing all the windows – even if some of the windows had recently been replaced by the unit owners. Alternatively, if the association chose not to replace the windows it could have faced future insurance coverage issues or liability for future leaks due to it swearing that the windows were compromised by the storm. Therefore, the association should be careful not to box itself in without adequate support for its claim.

A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

Christopher L. Pope is a Partner with the Pavese Law Firm and is triple Board Certified by the Florida Bar in Condominium and Planned Development Law, Real Estate Law, and Construction Law. He is one of only two attorneys in the State of Florida to be recognized with all three certifications. **Christopher J. Shields** has been a Partner with Pavese Law Firm for over 30 years and is Board Certified by the Florida Bar in both Real Estate Law and Condominium and Planned Development Law. **Alexander J. Menendez** is an experienced attorney who specializes in community association law and real estate law, and **Vanessa Fernandez** is an experienced attorney who specializes in community association law.

To view past articles, please click "Publications" on our firm's website at paveselaw.com. Pavese Law Firm, 1833 Hendry Street, Fort Myers, FL 33901; Telephone: (239) 334-2195; Fax: (239) 332-2243.

Pavese Law has five attorneys Board Certified in Condominium and Planned Development Law; three of only thirty attorneys in the State of Florida who are Board Certified in both Real Estate Law and Condominium and Planned Development Law; and one of only two attorneys in the State of Florida who is Board Certified in both Construction Law and Condominium and Planned Development Law.

We are a full-service law firm and capable of handling all of your legal needs.

Firm Practice Areas include:

- Agricultural
- Banking and Finance
- Business and Corporate
- Civil Litigation
- Condominium and Homeowners' Association Law
- Construction
- Employment
- Environmental and Water
- Estate Planning, Probate and Trusts
- Land Use and Local Government
- Marital and Family
- Real Estate

Visit us on the web at www.PaveseLaw.com.