MASSACHUSETTS Lawyers Weekly

# Condo board not liable for shortfall in insurance coverage

*Master policy insufficient for code upgrades after fire*

By: Eric T. Berkman November 23, 2022

A condominium unit owner could not bring negligence and fiduciary claims against board members for obtaining insufficient insurance to cover code upgrades to the building after a fire, a Superior Court judge has determined.

Pursuant to the condominium's bylaws, the defendant board members delegated procurement of insurance to their property manager, which apparently represented to the board during annual renewal periods that coverage was sufficient.

As part of the post-fire renovations, the Boston building had to be brought into compliance with code restrictions from which it was previously exempt. That resulted in a $3.6 million insurance shortfall, which, in turn, caused plaintiff Joseph Cimino to be assessed more than $300,000 for his unit's share of the levy.

When Cimino sued the board's members, they argued that the business judgment rule, under which they could not be liable absent a showing that they acted outside their authority or in bad faith, applied to the claim.

Judge Debra A. Squires-Lee agreed.

"Under the By-Laws, [the board] was permitted to delegate [insurance] to a managing agent or manager," Squires-Lee said, granting summary judgment to the defendants. "It is not disputed that members of the Board queried [the manager] regarding whether the amount of coverage was sufficient and were assured that it was. Cimino offers no law, regulation or rule that would have required the Board to obtain any additional coverage [and] offers no facts that would give rise to a conflict of interest, bad faith, or self-dealing."

The judge also found that the defendants owed no fiduciary duty to Cimino as a matter of law.

The 11-page decision is *Cimino v. Ornstedt, et al.*, Lawyers Weekly No. 12-072-22.

**Assurance to board members**

Michael W. Merrill of Boston, who represented the defendants, said the case helps define the responsibilities of condo board members.

"Condominium trustees rely on their property managers and insurance agents to recommend condominium master policies of insurance to them, which is what happened in this case," Merrill said.

> ***"You wouldn't think this kind of thing happens a lot, but it happens more than you could ever imagine."***
>
> ***— Michael W. Merrill, Boston***

Merrill also noted that the case involved a two-building condominium with eight units in one building and nine units in the other. The fire was in the eight-unit building and only three units were significantly affected.

However, he said, it was an older building that had to be rebuilt to code requirements that were not in place when the building was constructed, creating a result with insufficient coverage for that purpose.

"You wouldn't think this kind of thing happens a lot, but it happens more than you could ever imagine," Merrill said, noting that the case illustrates why it is important for condo trustees to be knowledgeable about master insurance policies and to learn the right questions to ask of their property manager. "It's not like the whole building has to burn down."

Scott J. Eriksen, a condominium lawyer in Westford, said he was not surprised by the ruling.

"It affirms what we always articulate for our clients, which is that as long as you as a board member are acting in a reasonable and prudent way, you can make mistakes or things can happen that go wrong and that doesn't necessarily mean there will be liability," said Eriksen, who was not involved in the case.

He added that the decision is helpful for condominium boards because it can be difficult to recruit people to volunteer.

"The more you erode protections for board members who are doing the right thing, the more you eliminate the likelihood of people stepping up to serve on their board," he said. "That can be a real challenge in a lot of communities."

Edmund A. Allcock of Braintree said that if delegations of duty by condominium boards are going to be subject to review by courts, the business judgment rule is the appropriate standard.

"Condominium boards are comprised of volunteers," he said. "It would be rare that they have expertise in the complexities of ordinance of law coverage," which insures property against losses caused by enforcement of legal provisions regulating construction and repair of damaged buildings. "Hence the delegation."


Allcock also said, however, that the case could create tension between condo boards and property managers over delegation in this particular area.

"Condominium insurance can be a hot potato, and this case highlights that," Allcock said. "I typically advise condominium boards and/or property managers, depending on who has the responsibility for procurement, to consult with insurance professionals."

Allcock further emphasized the need for the procurement process to dig deeper than simply getting a policy to cover replacement costs for the buildings, and instead explore not only things like code upgrade and demolition riders, but also collapse, partial collapse, or structural integrity coverage, given how many condo communities and buildings are either aging or aged.

"The recent Surfside tragedy in Florida also highlights the importance of insurance for condominium owners," Allcock said, referring to the June 2021 collapse of a 12-story condo building that resulted in the deaths of 98 people.

Neither Danielle E. DeBenedictis of Boston, nor Mary-Ellen Manning of Peabody, who represented the plaintiff, could be reached for comment prior to deadline.

**Delegation of duty**

`Cimino owns residential and commercial properties for investment purposes.

One of Cimino's properties is Unit 8A, a residential unit in a condominium at 32-34 Hancock St. in Boston that he rents to tenants.

The condominium's bylaws require the board of managers — comprised of uncompensated volunteers elected by unit owners to serve the association — to obtain insurance for the condominium.

One of the bylaws allows the board to delegate the task of insurance procurement to a property manager.

In 2013, the board designated Charlesgate Property Management to act as its representative in obtaining insurance for the condominium.

Charlesgate, in turn, purchased insurance through Brownstone Agency, which, in 2015, obtained a master policy from Aspen Insurance Co. that provided $4.1 million in property damage coverage, $2 million in liability coverage, and $500,000 in demolition and code upgrade coverage.

Brownstone's head underwriter characterized the policy as Aspen's "standard form" commercial policy for condominiums and was the same as what had been in place since 1997, except that the property damage limit increased from $4 million to $4.1 million in 2015.

Apparently, Brownstone never informed Charlesgate or the board that there were options for increased building code upgrade coverage, and no board members were aware of such options.

Meanwhile, according to the testimony of two board members, the

**Cimino v. Ornstedt, et al.**

**THE ISSUE:** Could a condominium unit owner bring negligence and

Cimino, for his part, never attended unit owner meetings or asked the board about insurance coverage. Nor did he ever ask Charlesgate or Brownstone any questions about coverage.

In June 2016, a fire started on the roof deck of Cimino's unit, causing significant damage to the building and several of the units.

Though the buildings, constructed in 1974, had previously been exempt from certain building code requirements, the city required substantial code upgrades as part of the restoration after the fire. Those upgrades totaled $4.1 million, creating a $3.6 million shortfall.

To cover the shortfall, the board issued a levy against unit owners, including a $326,000 assessment to Cimino.

code upgrades to the building following a fire?

**DECISION:** No (Suffolk Superior Court)

**LAWYERS:** Danielle E. DeBenedictis of Boston; Mary-Ellen Manning of Peabody (plaintiff)

Michael W. Merrill of Merrill & McGeary, Boston (defense)

Though he did not challenge the assessment, Cimino filed suit in Suffolk Superior Court alleging fiduciary violations and negligence on the part of board members. The defendants moved for summary judgment.

**Business judgment**

In granting summary judgment to the defendants, Squires-Lee found that the business judgment rule applied to the negligence claim, insulating the board members from liability as long as they acted within their authority and in good faith.

Here, she said, the bylaws gave the board the authority to delegate insurance procurement to its property management, which it did, and Cimino alleged no facts that would indicate bad faith.

Even if she were to apply the reasonableness standard instead, the judge continued, "the Board acted reasonably in retaining Charlesgate, relying on Charlesgate, and accepting Charlesgate's representation that coverage was sufficient.

With respect to the fiduciary claim, "'as matter of law, members of a governing board of a condominium association … owe no fiduciary duty to individual condominium unit owners,'" Squires-Lee said, quoting the Supreme Judicial Court's 2002 *Office One, Inc. v. Lopez* decision.

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