

# PITFALLS AND DANGERS OF CONDO INSURANCE

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## CIMINO V. ORNSTEDT, MASSACHUSETTS SUPERIOR COURT DECISION DATED OCTOBER 27, 2022

### FACTS:

- Cimino unit owner at the 32-34 Hancock Street Condo in Boston.
- June 2016 fire on Roof Deck of Cimino's unit spread to other units, caused significant damage.
- Property insured by Aspen \$4.1 Million Property Damage, 2 Million Liability Coverage and \$500,000 demolition and code upgrade coverage (often referred to a Law and Ordinance Coverage).
- Condo Building was constructed in 1974 and was exempt from certain requirements of the building code prior to the fire (typical code upgrades can be sprinklers or fire suppression systems, elevators, electrical wiring, etc.).
- Unit owners voted to reconstruct the Building under G.L. c. 183A section 19 and the governing documents.
- The cost of the code upgrades as a result of the fire were \$4.1 Million, leaving the Condominium with a \$3.6 Million shortfall for the required code upgrades.
- The Condo assessed the owners for the shortfall. Cimino's share of the shortfall was \$326,264, which he paid, although the record indicates Cimino received about \$31,000 from his H-06 Insurer for damage to his unit.

## DIGRESSION #1

- A. Law and Ordinance Coverage: Building Upgrades necessitated by a change in law, codes or ordinances that were not in place at the time the building was first constructed or occupied. It is a supplemental endorsement or coverage, think elevators, sprinklers, wiring, ADA requirements, etc. Code upgrades are excluded from the original policy amount or replacement cost factor. Demolition coverage usually separate.
  
- B. Vote to Rebuild. G.L. c. 183A § 17 requires 75% unit owner vote to rebuild if the amount of the loss exceeds 10% of the value of the condominium.
  - a) If no 75% vote any owner can proceed with suit to partition (usually a Court ordered sale) of what's left....split up value of land and proceeds, after paying creditors, lenders, by percentage interest.
  - b) If you get 75% and there is a shortfall that exceeds 10% (after accounting for all available common funds and insurance proceeds) then any unit who did not vote to proceed (not part of the 75%) can go to Court to force the condo association to buy his unit, the cost of which is a common expense.
  
- C. H-06 Insurance. Cimino had some.
  - a) Every unit owner should have.
  - b) Documents should require it, most do not.
  - c) Allows condos to get higher deductibles, dovetailing.
  - d) Covers contents of unit.
  - e) Can add coverages to cover deductible, risk assessment (i.e. special assessments).

## PROCEDURAL HISTORY OR TRAVEL:

Cimino sued the Condo Association and the Insurance Agent, Brownstone, for Negligence and Breach of Fiduciary Duty.

Theory being that they breached their duty to procure insurance that was adequate for the Building as provided for in the Condominium Documents.

Condo Association turned around and brought Third Party Claim against Charlesgate, which was Property Manager.

Condo Board's Defense was, we delegated responsibility for procuring insurance to our Property Manager, Charlesgate, we asked them if what we had was sufficient and they said yes and they told us they have a good working relationship with Brownstone.

Condo moved to dismiss.

Charlesgate moved to dismiss.

Brownstone moved to dismiss.

## DIGRESSION #2

All condo documents require the Board to obtain and maintain insurance for the building (other policies too like General liability and D & O) (some of these amounts are outdated).

Older condominium documents are outdated in terms of what they required a Board to obtain.

Sample from the 1980's

### *Older Condo Insurance Provisions:*

The Trustee(s) shall obtain and maintain, to the extent available, master policies of insurance including fire and extended coverage and all other coverage in the kinds and amounts commonly required by private institutional mortgage investors for projects similar in construction, location and use on a replacement cost basis in the amount of 100% replacement cost.

## DIGRESSION #2

*Newer Condo Insurance Provisions (these documents were 2018):*

The Trustee(s) shall obtain and maintain, so-called master policies of insurance providing fire-with-extended coverage and so-called "all risk" coverage insurance, insuring the Building(s) including, without limitation, the Common Areas and Facilities, all of the Units with all fixtures, additions, alterations and improvements thereof, all heating and cooling equipment<sup>1</sup> and other service machinery, apparatus, equipment and installations comprised in the Common Areas and Facilities, and also all such portions normally deemed to constitute part of the buildings and customarily covered by such insurance, but not including any furniture, furnishings, or household and personal property belonging to and owned by individual Unit Owners or Tenants, in an amount equal to not less than one hundred percent (100%) of the full replacement value thereof (exclusive of foundations, land and other items normally excluded therefrom) without deduction for depreciation. Coverage may be subject to a reasonable deductible as the Trustee(s) may determine, and shall include Agreed Amount, Inflation Guard (if reasonably obtainable), Ordinance or Law coverage including increased cost of construction and demolition (if applicable), Replacement Cost Endorsements and boiler and machinery insurance in such limits as the Trustee(s) may, from time to time, determine. In determining full replacement value, the Trustee(s) may reasonably rely upon the advice of the insurer or other commercially reasonable appraisal and such replacement value should be updated periodically but no less than every three (3) years.

Some insurers require separate policies for equipment like boilers and machinery used to heat or cool the building.

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## CHARLESGATE DECISION

- Court dismisses claims brought by the Condo against Charlesgate.
- Remember the essence of the Condo's claim is that it delegated the responsibility to procure adequate insurance to Charlesgate, its manager.
- Court said that Complaint had a technical defect, because it did not alleged derivative liability, i.e. that Charlesgate had an obligation to contribute or indemnify the Condo.
- Furthermore, the Court pointed to Section 3.3 of the Management contract which it said "squarely placed" the responsibility for obtaining insurance on the Association" [not the Management Company], even though it said that "Charlesgate could assist".
- Condo argued that there should be an implied right of indemnification (even though it was not in the Contract) because Charlesgate was managing agent, dealt exclusively with Brownstone and where Board members relied on Charlesgate's experience in obtaining appropriate coverage.
- Court rejected Condo's theory because it said that: (1) it was foreclosed by other language in the contract that precluded any implied rights to arise, and (2) there were insufficient allegations of a "special relationship" between the parties which would be sufficient to create an implied indemnity obligation.
- Special Relationship is worth noting---comes up with Insurance Agent as well.
- Court also noted that the nature of the indemnification language and point of the indemnification language in the contract with the Condo was to protect the Management Company, not make them liable for the matters which the Condo was responsible for.

## CONDO DECISION

- Different Judge dismisses claims against Condo case later on.
- This Judge finds that the Board delegated the Decision to Procure Insurance to the Management Company!
- **DOESN'T THAT CONFLICT WITH THE Charlesgate DECISION?** That is what Cimino's Lawyer Argued---argued it was the law of the case.---Court said not inconsistent.
- Court found that condo documents allowed for certain responsibilities to be delegated and that this responsibility was delegated, based on evidence that Charlesgate had a relationship with Brownstone and answered question of condo Board member "YES" as to the adequacy of the insurance.
- In my view if there was a delegation (which I think is questionable as a matter of law, could be factual issue and it is seemingly contradicted by Management Contract and
- Court further analyzed the delegation itself. Was the delegation negligent. Court applied the business judgment rule, absent bad faith, conflict of interest or self-dealing, Board's decision should be upheld.
- That is a significant development for condos in MA. Been arguing that for years when it comes to Board decision making. Often judged by reasonableness standard.



## BROWNSTONE DECISION

- Court dismissed Cimino's claims against Brownstone.

### TWO REASONS:

- First, Cimino has no direct right of claim against the Agent, Cimino was not the customer, the Board was.
- Second, the law with regard to Insurance Agents is that they are mere order takers, they have no obligation to provide "adequate or certain types and kinds of insurance". Kind of like going to McDonalds and ordering a #3.....unless the client can demonstrate a special relationship or there are special circumstances. No special circumstances alleged.

Special Circumstances very hard to prove.



1. Decision highlights complexities of condo insurance. Educates about importance of law and ordinance and demolition...special coverages. Possibility of multi-million dollar shortfalls.
2. Some things Insurers never likely to pay: Management/Project fees/Public Adjuster Fee.
3. Most condo board members are volunteers---and duty to procure falls on them.
4. This case highlights that Managers are going to be less likely to take on this duty and/or delegation and will want clarification in their contracts specifically disclaiming any such duty----expect that in the next round of management contracts.
5. Positive note that delegation of authority examined under Business Judgment Rule.
6. Case highlights that insurance agents are like going to McDonalds, they sell you what you choose on their menu. Special circumstances and special relationship very hard to prove.
7. What is a Condo Board to do?
  - a. Hire an Insurance Professional to advise on coverages. **THIS IS NOT AN AGENT**—Insurance Professional. Appraisals.
  - b. In connection with that, might need a code expert to evaluate potential upgrades to building, provide a realistic demolition cost.
  - c. Evaluate other coverages. Many condo documents are outdated on insurance, i.e. Million Dollar liability coverage.



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Q&A