

PUBLICATION

Insurance deductibles - What every condominium board needs to know

David S. Cumming

July 4, 2016

Insurance deductibles - What every condominium board needs to know

Insurance deductible chargebacks are often seen as a scourge for Condominium Corporations. The reason being that not only can they be a substantial expense, but also an unexpected one. If there is a clogged toilet or burst water pipe in one of the units, that could mean a hefty repair bill which is only partially covered by insurance. The deductible has to be picked up by the owners by either dipping into the operating budget, reserve fund, or in some cases issuing a special assessment.

It doesn't have to be this way. Recently, Condominium Corporations have been moving towards better managing these deductibles by passing the risk on to the individual owners themselves. The law on this new scheme is still developing, but as it becomes more and more common we can expect more cases on it as well.

So here's where the law stands today. The Court in Alberta reasoned a few years ago that as the Condominium Corporation is obligated to insure, they are also obligated to cover the deductible. In other words, even if the unit owner is at fault the Condominium Corporation cannot pass the deductible on to the unit owner themselves. Although some cases from other Provinces have cast doubt on this notion, as of this writing it remains the law of the land.

The problem with this is that it is somewhat unfair to the other owners who had nothing to do with the loss but still end up having to pay for a portion of the deductible. Imagine this situation. Your neighbour down the hall goes out of town for a ski weekend and leaves the balcony door open causing a pipe to freeze and burst. The Corporation has to go in and repair the damage. They're required to be insured for this loss, but the deductible for something like that could easily be \$50,000. Now you and all the other owners in the project have to share this cost even though only one unit owner was at fault.

In response to this, Condominium Corporations have begun adopting bylaws which state that if the owner is responsible for the loss, or even if it originates from their unit, then the deductible can be charged back to the unit in the same manner as condominium fees. These Bylaw provisions have recently been challenged but have been upheld by the courts. Hence now Corporations are able pass a bit of the loss on to the responsible owner themselves.

I see this particular scheme as preferable for a number of reasons. Firstly, it makes sense from a fairness perspective that those owners who are at fault for a loss pay the full deductible rather than split it with their neighbours. Condominium fees can be reduced as the Corporations won't be on the hook for deductibles. Owners in turn gain greater control over the management of their own properties as they can choose whether they want to get insurance to cover a potential deductible chargeback or whether they want to risk it and be uninsured. Lastly, this also encourages owners to take care and maintain their property as failing to do so means they could be stuck with a large chargeback.

If your Condominium Corporation is faced with an insurance deductible chargeback situation, you want to ask a few questions first. Number one, do the bylaws address this at all? If the bylaws do not have a provision allowing for the deductible to be charged back to the unit owner, then you are likely out of luck and the Corporation will have to pay. If there is a provision in the bylaws, then the next question is - what does it say? It may be that the owner has to be found to have been negligent in causing the loss for the deductible to be charged back, or it may be enough that the loss originated from the unit. Lastly, can you charge the cost back to the Unit and register a caveat if it is not paid? Again, this will all depend on your Bylaws.

When Boards don't know their Bylaws or get proper legal advice, that's when problems can arise. The Condominium Corporation may end up paying for a deductible when it was in fact the owner's responsibility. They could also end up charging a unit for a deductible without the proper authority to do so. This can (and believe me, it does) lead to lawsuits on behalf of the unit owners resisting a charge back that the Corporation may have had no authority to pass on in the first place. Now both the Condominium Corporation and the owner are out a bunch of money in legal fees, and the owner and the Board members are likely at loggerheads. Hardly a good outcome.

To avoid this situation, don't just run off and pay that deductible or bill an owner for it right away. Look at your Bylaws. Consult a lawyer. Only after you've done this should the Board be making a decision.

As one further piece of commentary, a Provincial Court decision recently suggested that if the deductible in question is too high then the Condominium Corporation can't charge it back to the unit owner, even if the Bylaws state that they are able to do so. The reasoning of the Court in this case was that the Condominium Property Regulations talk about a "reasonable" deductible, and if the deductible in question is so high that it is not considered reasonable, then the courts may decline to pass it on to the owner. Although said as an aside in this case, this issue will likely come to a head and Condominium Corporations may be called upon to prove that the deductible they've agreed to is reasonable. This will no doubt require evidence from Condominium Boards as well as their insurance companies. Unfortunately, it will be difficult to judge what is or is not a "reasonable" deductible until an authoritative decision comes down the pipe. Stay tuned.