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## Acts of God and Recovery... before the Event

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A quick look at headlines in past months indicates that weather/weather related incidents have been wreaking havoc on common interest communities recently. Our own area has suffered at the hands of tornadoes, hurricanes, rising water and ultimately, rising insurance policy rates. What is a common interest community to do, when faced with all of the obstacles and unforeseen events that are whittling away at your annual budgets?

For our Condominium communities, one item to review is whether your documents contain any exculpatory clause limiting the association's liability in the event of a natural disaster, and if not, what can be done to place some limit on the Association's responsibility for damages when acts of God or other unforeseen circumstances intervene in your carefully laid financial planning.

First, we recommend you review and update your reserve study to ensure you have adequate reserves on hand in the event of any natural disaster. This should become second nature to your Association Board, just as reviewing budgets and setting assessments is now.

Virginia law requires a review of the reserve report each year, and Maryland requires that reserves be a part of any budget presented and adopted by the members.

Second, we recommend that you amend your bylaws to include some limited exculpatory language to relieve the association from liability for unit damages that arise from common element conditions that are the direct result of acts of God or other unforeseen circumstances, and not association negligence or neglect.

So, that said, what can be considered an act of God or unforeseen circumstance? Generally, an unexpectedly heavy rain storm, hail storm, a fallen tree, hurricane, tornado, earthquake, tsunami, etc. are considered an act of God. The courts have determined that an "act of God" is such an unusual and extraordinary manifestation of the forces of nature that it cannot under normal conditions be anticipated or expected. It does not have to be unprecedented. For instance, even if a building is located in a fault zone, the destruction of the building as a result of an earthquake

would be considered an act of God. If the damage that results cannot be anticipated or expected, under normal conditions, that is sufficient for the event to be considered an act of God. See Southern Railway Co. v. E. P. Neal, 146 Va. 229, 135 S.E. 703 (1926).

Why limit your association's liability? First, the courts generally will enforce and support a reasonable limitation on the association liability for property damages that result from a condition that originated in the common elements if some simple requirements are met: (1) where the members of the community are on notice of the limitation on liability, and (2) where the limitation is not contrary to public policy. Generally, liability limitations are found in the Bylaws of a condominium and provide in part that the Association will not be liable for damages that result from a condition that originated in the common elements unless the damages were the result of the Association's negligence or neglect. This "exculpatory" clause prevents owners from suing the Association for damages to personal property or to betterments within a unit that are caused by conditions or events beyond the Association's control.

Because litigation can deplete the operating capital, and eventually the reserves of an association, some mechanism should be in place to assist in ending the potential lawsuit before it happens. If the damage to personal items or betterment within a unit is caused by a natural event, the law would allow a document provision that would limit the exposure to litigation and

resulting damages with an exculpatory clause excluding the association from liability for the damages caused by an acts of God or other unforeseen circumstance. The Association would still have to repair/replace the damaged common area or unit component, as determined by your association documents, but would be excluded from having to pay damages resulting from the natural disaster to the unit owners for the loss of their personal property. An exculpatory provision can also be used to limit the Association's exposure in cases where repairs that were undertaken by the Association, which were not performed in a negligent manner, damaged an owner's unit or the personal property within their unit.

With insurance premiums on the rise, and with limitations being placed on perils covered by the insurance industry, isn't it time you took a proactive approach to limit the funds the Association has to pay out when an act of God or other unforeseen event strikes your community?

If you would like one of our attorneys to review your document or discuss with you the feasibility of amending the bylaws of your condominium to include an exculpatory clause, please contact any one of our community association attorneys at [www.rbdlaw.com](http://www.rbdlaw.com).