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Condominium Insurance Issues – Recent Virginia Legislation May Answer the Question of Who Pays the Deductible?

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On July 1, 2003, legislation that expands the Board's authority to assign responsibility for payment of a condominium's master policy deductible to the Association's unit owners was enacted in Virginia. The legislation amended Section 55-79.81(C) of the Condominium Act and states that:

Except to the extent otherwise provided in the condominium instruments, any insurance deductible under the master casualty policy shall be paid by the unit owners association as a common expense if the cause of the damage or destruction of any portion of the condominium originated on or through the common elements or an apparatus located within the common elements. However, a unit owner shall pay such deductible if the cause of any damage to or destruction of any portion of the condominium originated in or through a unit or any component thereof with out regard to whether the unit owner was negligent.

The purpose of this legislation was to expand the authority of community association Boards to pass along the costs of the master policy deductible to unit owners without requiring a determination as to whether or not the damages to the condominium were caused by the unit owner's negligence.

In light of escalating insurance costs for condominiums, the amendment of Section 55-79.81 of the Condominium Act has been welcomed by a many people in the community association industry.

Increasingly, post-9/11, a number of our condominium association clients have been forced to obtain master policies of insurance with deductibles from coverage of \$5,000 or more. This new legislation may end the question of who is responsible for payment of the master policy deductible when a claim is less than or equal to the amount of the deductible for some community associations, but only after a careful review of the community's condominium instruments.

A number of the Virginia condominiums that we represent have a provision in their Bylaws or Declaration that limits a unit owner's responsibility for damages that originate from their unit to damages that are attributable to the unit owner's negligence or their negligent failure to maintain the components within their units. For those condominiums that have these restrictions in their Bylaws or Declaration, an amendment of the Declaration or Bylaws will be required before the association can take advantage of the this new legislation. Specifically, under the express terms of the newly amended Section 55-79.81(C) of the Condominium Act, the guidelines regarding allocation of the master policy deductible to the unit owners will only apply when they do not conflict with the terms of the association's existing condominium instruments.

Consequently, if your condominium's Declaration or Bylaws set forth a negligence standard for the assignment of any policy deductible, then the Association cannot use the newly amended Section 55-79.81(C) of the Condominium Act to assign the master policy deductible to a unit owner where it is

unclear that the damages to the condominium were the result of the unit owner's negligence. However, a condominium association can take action to amend its Bylaws or Declaration to delete similar negligence language from its condominium instruments, which should permit Boards to utilize the deductible allocation guidelines set forth in Section 55-79.81(C).

As a final related point, please note that Section 55-79.81(B) of the Virginia Condominium Act requires condominium associations to provide the unit owners with written notice of **any** changes in the Association's master insurance policy coverage. This notice requirement includes notice of any changes in the Association's master policy deductible.

For additional information on the legislation addressed in this memorandum, please contact any one of our community association attorneys.

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