

The new *Strata Property Act* is overwhelming. Each month we attempt to inform and educate you on different provisions and we hope this process is helpful. If you need a copy of previous bulletins please feel free to ask your property manager. If you have joined your strata council in recent months you should obtain a copy of previous bulletins as they are most useful. The content of these bulletins does not purport to offer legal opinions or advice. You should retain and consult with legal professionals.

FEATURES THIS MONTH

- Insurance Claims: Even the Jerks Can Benefit
- Bylaws That Are Probably Unenforceable
- Insuite Fire Devices: Who Pays To Fix Them?

INSURANCE CLAIMS: EVEN THE JERKS CAN BENEFIT

It really galls council members to see the strata corporation pay for resultant damages caused by careless owners or tenants. It is understandable but, unfortunately, the way we interpret the *Strata Property Act*, it is our view that the corporation is responsible for all damages, even when caused by the jerks. Strata councils are encouraged to obtain their own independent legal advice on this topic. VCS is not offering a legal opinion.

In order to benefit from an insurance claim, three things must occur:

1. There must be a sudden occurrence. For example, a rainstorm.
2. There must be resultant damage.
3. The claim must be reported in one year.

There are other requirements of most insurance policies but these three conditions relate to this article. Virtually all policies contain deductibles and the one that is most frequently contested in the water escape deductible.

Irrespective of the above, every owner (and tenant) is entitled to use of the insurance policy. A strata council cannot pick and choose which claims can be made; which can be set aside. When an owner pays his or her strata fee each year, the owner is, in effect, paying for insurance coverage since the insurance premium is included in the budget. The reason the

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premium is included is that Section 149 of the *Act* requires it. The section reads:

Property insurance required for strata corporation

149 (1) *The strata corporation must obtain and maintain property insurance on*

(a) common property,

(b) common assets,

(c) buildings shown on the strata plan, and

(d) fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.

(2) For the purposes of subsection (1) (d), "fixtures" has the meaning set out in the regulations.

(3) Subsection (1) (d) does not apply to a bare land strata plan.

(4) The property insurance must

(a) be on the basis of full replacement value, and

(b) insure against major perils, as set out in the regulations, and any other perils specified in the bylaws.

Look at this from a different perspective. Let's say you owned a house and your hot water tank burst and did damage to the flooring, carpets, etc. As an owner you would have the right to make an insurance claim on your homeowner policy. Your condo is your house: it's just "formatted" differently but it's still your house and you have purchased insurance for

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normal risks and perils. Although the strata corporation administers the policy and the process for handling claims, your insurance benefit remains intact.

Let's assume that the strata insurance policy has no deductible. There is a flood of water (sudden occurrence) and carpets are soaked (resultant damage). Did the water (flood) come from a pipe in the wall (common property) or from under the sink (strata lot property) or from a waterbed (private property)? The *Act* does not ask this question: it does not make a distinction as to source or reason or conduct of the occupant (the jerk). It says merely to obtain and maintain insurance coverage on the basis of full replacement value. Since, in this example, there is no deductible, it becomes relatively easy, eh?, to agree that the strata corporation's insurance policy ought to be called upon (within one year) to provide benefits. In effect, this example costs the strata corporation nothing.

In reality, insurance policies have deductibles but irrespective of the amount of the deductible, all of the guiding principles remain the same as in the initial example above. The only difference is the question of who pays the deductible. Let's say the deductible is \$1,000 and the source was a pipe in the wall. The strata would pay the \$1,000. If the source was within the strata lot, i.e., supply line under the sink, a waterbed, an overflowing bathtub, a plugged toilet, a badly caulked shower stall, an elderly, forgetful owner who left taps running, a jerk watering his or her flowers, or, or, or... who is going to pay this deductible? Councils frequently face this question and usually attempt to adjudicate to determine culpability. Of course "the jerk" is easy to target because it feels like the right thing to do. Unfortunately, the statute does not make provision to distinguish the good

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guys from the bad guys, so, everyone is entitled to the benefits of the policy, even the jerks.

In order to recover insurance deductibles, many strata corporations introduced the Insurance Deductible bylaw. In essence, it gave authority to the strata corporation to charge an owner the equivalent amount if council so decided. All that came to an end December 31, 2001 with the new *Strata Property Act*. At Section 158, the strata corporation is directed to treat the deductible as a common expense.

Insurance deductible

158 (1) Subject to the regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99 (2) or 100 (1).

(2) Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.

Note that Subsection (2) permits the strata corporation to sue an owner (not a tenant) for recovery of the deductible. What this means is that the strata council can no longer adjudicate the validity of a claim: it must be decided by a court of law. This, in turn, means that the strata council would have to prove in court (probably Small Claims Court) that the owner (or his/her tenant) was negligent and should not be entitled to the benefit

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of the insurance policy. Will that be easy? Not likely. And what about the jerks? Just about every strata corporation has one, right? How do you explain to a judge that the very nice person (defendant) standing in the courtroom beside you is actually the nightmare person in your strata corporation; that this person breaks all the bylaws and rules, all the social niceties that go with communal living known as condo ownership. Not easy, right? And this person dropped a cup of coffee on the living room rug (oh, by accident, of course) and is making a claim for new carpet (at "replacement value") and should not have to pay any deductible.

If you have the answer, let us know.

INSUITE FIRE SAFETY DEVICES

Are they common property or are they strata lot property? Hmm... What does the *Act* say?

Common property is defined at Section 1 of the *Strata Property Act*. It says:

"common property" means

- (a) *that part of the land and buildings shown on a strata plan that is not part of a strata lot, and*
- (b) *pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located*
 - (i) *within a floor, wall or ceiling that forms a boundary*
 - (A) *between a strata lot and another strata lot,*
 - (B) *between a strata lot and the common property, or*
 - (C) *between a strata lot or common property and another parcel of land, or*
 - (ii) *wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;*

Oh oh. Nothing in there that mentions fire systems. Would "*other similar services*" be sufficient to include fire systems?

Common sense drives virtually all strata councils to ensure that the fire system for the strata corporation is checked annually and maintained and

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repaired whenever necessary. Councils are split, however, when it comes to determination of responsibility for costs to repair or replace insuite devices. Some councils readily adopt the notion that the insuite, hard-wired smoke alarms and heat detectors are an integral part of the overall fire system; therefore, any repair or replacement costs belong to the strata corporation.

Other councils hold the view that insuite devices are "in suite"; therefore, not the responsibility of the strata corporation. In these instances, when the fire service company provides a deficiency report following the annual inspection, the council insists that the individual owners pay for the costs. What is your view?

While the *Act* is not clear, VCS recommends that all insuite, hard-wired, fire safety systems be treated as common property.

Councils that do not treat insuite devices as common property should be cautious when authorizing annual inspections. If council will not accept the responsibility for repairs or replacement, should council have provided inspection in the first place? By authorizing and initiating inspection, council is suggesting that the liability is indeed with the strata corporation. If the deficiency report identifies certain devices as defective, can the strata council now say that those devices are not under the jurisdiction of the corporation?

We welcome your thoughts.