

Insurance

Know your role in the procurement process

deally, commercial property and community managers play an integral role in the insurance procurement process.

After all, they are the stewards of the property and run the day-to-day matters of the property. However, the role of the property manager in the insurance procurement and claim process varies greatly depending on the type of property and the number of properties managed. It also may depend on the level of ownership, if any, that the property manager has in the property.

For example, large portfolio managers who have an equity interest in the properties they manage might be charged with procuring the property and casualty insurance under one program for all of the properties that they own and manage. This would normally involve selecting the insurance producer (agent/broker), providing all the underwriting data, selecting the insurance coverage, paying the premiums, and notifying the insurance company of additions and/or deletions to its portfolio.

In the event of a claim, this type of property manager would report the claim to the insurance company, engage a construction contractor to perform the necessary repairs, engage the necessary professional assistance (e.g., public adjuster, forensic accountants and, if necessary, legal counsel), prove his claim to the insurance company as required by the insurance policy, and negotiate the final settlement.

Conversely, smaller third-party property managers may be charged



R. Scott deLuise,
CCIM, CPPA,
SPPA
President and
CEO, Adjusters
International
Matrix Business
Consulting,
Broomfield

only with providing information for the underwriting and claim process to the owners of the property. This might include providing current rental income for apartment communities, assisting with site visits, mitigating damages after a loss, etc.

Finally, association managers for communities may serve in a hybrid mode, wherein they assist in or manage

the procurement of insurance and claim process but not in the decision-making or selection process.

As you can see, roles vary greatly. The actual versus the most efficient role depends on the type of property, the number of properties under management and the level of ownership in the property. A risk management consultant, such as member of the Society of Risk Management Consultants, can help you decide the best role for your organization.

• **The insurance product – who's who in the procurement, maintenance and claim processes?** Property and casualty insurance producers (aka insurance agents/brokers) sell policies that guard individuals and businesses from financial loss stemming from events that cause property damage, such as floods, fires, earthquakes or storms.



Todd Thomas
Executive director,
Adjusters
International
Matrix Business
Consulting,
Broomfield

The duties of a property and casualty producer vary from state to state. Normally, they are the legal agent of the insurance company, but also may have certain duties owed to you, the insured.

In Colorado, the courts have been active in establishing the role of an insurance producer. Please note that absent "special circumstances" an insurance producer has no legal duty to counsel you – the insured or insurance buyer – as to specific matters regarding insurance coverage, valuations of property or adequacy of coverage. If you need qualified independent counsel, engage an attorney or member of the Society of Risk Management Consultants to assist you.

Excluding a catastrophe/disaster, once you notify your insurance producer, most insurance producers will come out to survey the damage right away. Please note that most insurance producers can assist in reporting the claim, but do not normally have much hands-on claims experience. Normally, they will only be involved in the process as long as you want them involved. Again, note that, in most cases, the insurance producer has no legal duty to counsel you.

To further this point, in the event

of a property loss, your insurance company will assign an adjuster to your claim. The adjuster may be an employee of the company or an independent adjuster. Please don't let the words "independent adjuster" fool you. An independent adjuster works for the insurance company, not you – the insured. If you need independent advice and/or help proving your property claim, engage an attorney or a member of the National Association of Public Insurance Adjusters.

• **What is the role of the insurance producer (broker/agent) in the revenue and expense for the insurance?** In most cases, the insurance producer (agent/broker) can assist property managers in estimating what the insurance-related expenses will be for budgeting purposes. With larger insurance programs, your insurance producer should be able to assist you in estimating your total cost of risk related to your program. Furthermore, if insurance sales to your tenants are part of your operations, then your insurance producer should be able to assist you in forecasting your potential revenue for budgeting purposes and any accounting assistance that you may need.

• **The scope of responsibility and authority for properly insuring the real estate.** As stated above, it is the insured's responsibility to determine if he is properly insured. One of the most complicated coverage items to determine is the replacement cost value of the property. The replacement cost has little correlation to

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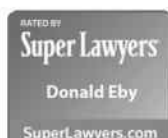
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Sessions

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it. Most force majeure provisions expressly exclude rental obligations and instead apply only to performance obligations. Assuming a tenant has the right to invoke a force majeure provision, it only will serve to provide a tenant with relief if the default is outside of the tenant's control. Otherwise, it offers no protection.

- **Sessions:** Which default provisions do the parties heavily negotiate?
- **Halstead:** It is not uncommon for tenants to request longer grace periods for the payment of rent or that they be provided with written notice and an opportunity to cure before a failure to pay can ripen into a default. Many tenants will request that vaca-

tion of the premises not be construed as a default.

- **Sessions:** What is the main cause for a landlord default?
- **Halstead:** Not surprisingly, the most frequently asserted landlord defaults relate to a landlord's maintenance and repair obligations.
- **Sessions:** Should there even be a landlord default provision in a lease?
- **Halstead:** A well-drafted lease will provide a landlord with the right to written notice of a breach and an opportunity to cure before such breach can ripen into a default. This can be critical particularly in an eviction action where a tenant, who has failed to pay rent, argues that the tenant should be excused from performance due to a landlord default. It's very easy to establish that the tenant failed to provide the requisite

notice and therefore the landlord cannot technically be in default.

- **Sessions:** Should lenders be given an opportunity to cure?
- **Halstead:** Lenders usually have

A landlord should, however, be weary of granting cure rights to the tenant's lenders.

the right to cure a landlord's default pursuant to the deed of trust, which most leases are subordinate to. A landlord should, however, be weary of granting cure rights to the tenant's lenders. It's not uncommon for a lender providing a loan to a tenant to request that a landlord waive its lien rights and agree to provide the lender with, among other things, cure rights, access to the premises and the right to remove collateral.

Counsel should review these types of agreements, typically drafted by the lenders, in advance. Such agreements typically provide tenants' lenders with rights that far exceed those which would be afforded a tenant and which can greatly lengthen the period of time required for a landlord to obtain legal possession of its property following a default. ▲

deLuise

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market value of a property. Therefore, we normally recommend hiring a firm that specializes in valuing the insurance replacement cost of your property to help determine the proper amount.

Although an insurance producer can be helpful in determining what proper insurance should be, there is no legal duty for them to assess, advise or recommend the proper amount or type of insurance coverage to purchase.

- **The claim process and how it ties in with everything above.** The insurance claim process can be quite challenging for a property manager. Not only does the property manager have to deal with tenant issues, but also may have to mitigate further damage to the property. You should notify your

insurer of your claim as soon as possible. Often the insurance producer that you have chosen to work with can assist with this process.

Remember it is the insured's duty to prove its claim. This means that

you will have to demonstrate to the insurance company the extent of your damages and the cost to make it whole again. If you have never handled a claim before, it may be in your best interest to engage the services

of a public adjuster, who represents your interests and not the insurance company's.

- **How can you, as the property manager, use this information to protect the client and yourself?** Engage the services of an independent risk management consultant to identify your exposures to risk, assess the situation and assist in the selection of coverage. You may want to engage a public adjuster on a standby contract in the event that you have a property loss. Usually there is no cost or obligation to engaging a public adjuster prior to a loss. If your insurance company allows it, you also may want to preselect the independent or company adjuster who will handle your claim in the event of a loss. Most of these items can be assessed in an insurance or risk management audit. ▲

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