

INSURANCE: Loss payable clause to mortgagee in policy insuring  
CONDOMINIUMS: condominium property is ineffective. 448.120 requires  
proceeds of policy to be paid to manager or board of  
managers.

OPINION NO. 165

December 6, 1966

Honorable Frank J. Cordes, Jr.  
Supervisor, Division of Savings and Loan  
Department of Business and Administration  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Cordes:

Reference is made to your letter requesting the official opinion of this office as follows:

"This office has been requested by the Federal Home Loan Bank of Des Moines as a supervisory matter to obtain a ruling from your office on the following problem;

Under Missouri law, a master hazard insurance policy covering the common elements and individual units of the condominium is required to be taken out by, with claims payable to, the manager or board of managers of the condominium as trustee for the individual unit owners. A letter from an attorney for an association states that the loss payable clause on the master insurance policy which is intended to protect the interest of the mortgagees of record is ineffective under Missouri law.

We will appreciate any assistance you can give us on this matter."

At our request you have furnished us with a copy of the letter from the attorney for the association referred to in your letter. The statement of the attorney which gave rise to this question is as follows:

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"The master policies will have a loss payable clause running to the mortgagees of record as their interests may appear provided that this endorsement is not in violation of the Missouri Condominium Law. As I explained, this is primarily window dressing for the examiners since both Mr. Tzinberg and myself feel that this clause is ineffective under Missouri Condominium Law."

The policy was issued by the Insurance Company of North America and bears the label "Apartment Owner's Policy." The policy states that it is "broad, simplified protection at reasonable cost to meet the modern needs of apartment owners." The policy appears to be a standard form for use by the company in issuing policies insuring apartment buildings generally. The loss payable clause in question is recited under E-Conditions, paragraph 11, Mortgagee Clause, and the relevant provisions thereof are as follows:

"Loss or damage, if any, to buildings under this policy shall be payable to the aforesaid as mortgagee (or trustee) as interest may appear \* \* \* "

The condominium concept for the ownership and use of property has developed into rather widespread application throughout this country in recent years. The term "condominium" is defined and described in 15 Am. Jur. 2d, 978 as follows:

"Both standard and legal dictionaries recognize that the term 'condominium' refers to joint ownership of real property. In recent years, however, 'condominium' has come to refer specifically to a multiunit dwelling, each of whose residents (unit owners) enjoys exclusive ownership of his individual apartment or unit, holding a fee simple title thereto, while retaining an undivided interest, as a tenant in common, in the common facilities and areas of the building and grounds which are used by all the residents of the condominium. The major characteristics of a condominium have been said to be the following: (1) individual ownership of a unit or 'apartment,' (2) an undivided interest in certain designated common elements which serve all the units in the condominium, and (3) an agreement among the unit owners regulating the administration and maintenance of the property. Consequently, the condominium has been characterized as a 'welding of

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two distinct tenures, one in severalty and the other in common.' It is to be distinguished from the various forms of cotenancy; in a cotenancy, ownership of the entire res is joint or in common, whereas under a condominium, ownership is joint or in common as to part of the res, but several as to other parts."

\* \* \* \* \*

This description of condominium property is consistent with the statutory provisions in regard to such property as set forth in Chapter 448 RSMo Cum. Supp. 1965. Section 448.010 (1) defines common elements; Section 448.010 (9) defines unit; and Section 448.010 (10) defines unit owner.

The question which you have raised is whether the loss payable clause intended to protect the interests of the mortgagees of record in the master insurance policy insuring condominiums is effective in this state. The master insurance policy is subject to Section 448.120 which provides as follows:

"The manager or the board of managers shall obtain insurance for the property against loss or damage by fire and such other hazards as are covered under standard extended coverage provisions for the full insurable replacement cost of the common elements and the units. Such insurance coverage shall be written in the name of, and the proceeds thereof shall be payable to, the manager or of the board of managers, as trustee for each of the unit owners in the percentages established in the declaration. Premiums for the insurance shall be common expenses."

Thus, the cited statute requires that the proceeds of such insurance coverage shall be payable to the manager or board of managers as trustee for the unit owners. The disposition of such insurance proceeds by the trustee is provided for by Sections 448.130 and 448.140. Pursuant to the cited sections, the insurance proceeds must be applied to restoration of the building to substantially the same condition in which it existed prior to the loss or damage. It is further provided that if the insurance proceeds are insufficient to reconstruct the building, and if all parties of interest do not voluntarily make provision for reconstruction within 180 days from the date of damage, the property may become a tenancy in common owned by the unit owners and subject to an action for partition. In the event of partition, Section 448.140 (4) provides in part as follows:

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" \* \* \* the net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and shall be divided among all the unit owners . . . after first paying out of the respective shares of the unit owners, to the extent sufficient for the purpose, all liens on the undivided interest in the property owned by each unit owner."

Thus, the statutory scheme in regard to insurance for condominiums and the disposition of such insurance proceeds is designed to protect all of the owners interested in the condominium as well as mortgagees who have an interest in the condominium.

It is appropriate to comment that the condominium concept of property ownership is a unique concept and that the drafting of policies to insure interests in the condominium may require unique concepts in insurance contracts. The policy which gave rise to the question before this office appears to be a standard apartment owner's policy. The standard apartment owner's policy may not be the most efficacious insurance instrument for the protection of interests in condominium property. It is not the function of this office to offer suggestions as to the mechanics of contract draftsmanship that may be appropriate for particular purposes. However, no irreconcilable conflict is apparent in affording adequate protection of the interests of mortgagees in condominiums and in the statutory provisions applicable to insurance for condominiums.

#### CONCLUSION

The provision of Section 448.120, RSMo Cum. Supp. 1965, that the proceeds of insurance covering the common elements and the units of condominium property shall be payable to the manager or the board of managers is as a matter of law included in the insurance policy, and the insurance company must pay the proceeds of the policy pursuant to this statutory provision. Therefore, a clause in the insurance policy providing that loss or damage shall be payable to the mortgagee is ineffective.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General