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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

The Condo Conundrum . . .

WATER LEAKS IN CONDOS, WHO FIXES . . . WHO PAYS?

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Water is life's most basic necessity. It makes up about sixty percent of our body weight and must constantly be replenished. Civilizations need reliable sources of water to survive. Ancient Rome thrived and prospered by engineering a complex system of aqueducts that brought water from distant locations to its cities and towns. But while water is an essential need, storing it and moving it from place to place can prove problematic. When water unexpectedly escapes the vessels and pipes designed to contain it, damage frequently follows. The problems stemming from unwanted water are often magnified in the context of condominiums, where maintenance and insurance responsibilities are divided between unit owners and condominium associations, and where escaping water can migrate from unit to unit, doing damage to the property of numerous owners within a brief time span. There is perhaps no area of condominium law more befuddling to owners, and indeed even to licensed community association managers and lawyers, as the question of who is responsible for the damage caused by water intrusion in a condominium. The duties and liabilities are not always clear, and the proper method of analyzing liability can be confusing and elusive. There are, however, a few principles that if properly applied, will clarify the issues of responsibility for water damage. Let's examine them.

Is the damage a result of a casualty?

A good place to begin is to determine whether the unwanted water resulted from a maintenance issue or a casualty event. A slow-leaking pipe that does damage over an extended time period is a maintenance issue. Wind driven rain from a major storm is a casualty event. What about a twenty year old water heater that rusts through and suddenly fails, flooding an entire stack of condominium units below? While the failure to replace an aging water heater is certainly a maintenance issue, this event will be considered a casualty due to the immediate and unanticipated damage that ensues. It is the sudden and unexpected nature of an event that causes it to be characterized as a casualty.

Did the damage result from "wear and tear"?

If the damage was caused by a maintenance issue, we must look to the condominium documents to determine who is responsible for the repair costs. Assume we have drywall within a unit that was damaged over time by a persistent water leak. This is a clear maintenance issue. Depending upon how the condominium documents are worded, the drywall

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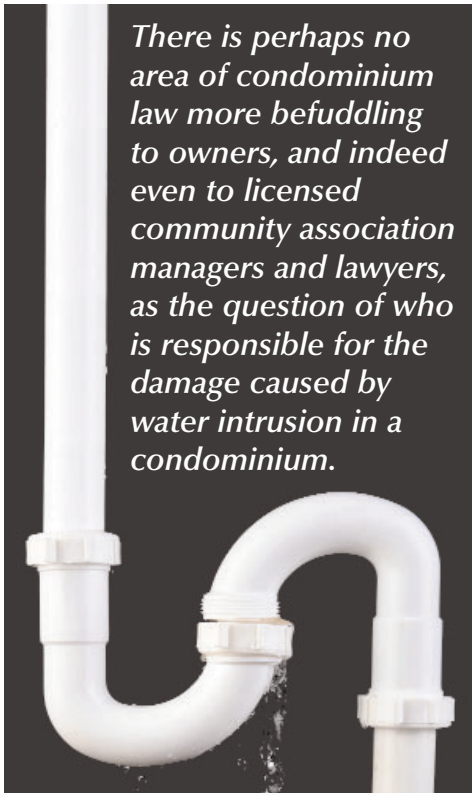
could be a part of the unit or a part of the common elements of the condominium. If a common element, the maintenance responsibility will fall on the condominium association. If a part of the unit, responsibility will usually, but not always, fall on the unit owner. Condominium documents sometimes require the association to maintain portions of the unit, so the documents must be consulted to determine where responsibility lies. Note that it does not matter whether the damaged drywall is within the unit where the leak originated or in a unit below the leak. Responsibility for repair lies with the owner of the damaged unit, unless the condominium documents impose that obligation upon the association.

Insurance Considerations

If the damage was caused by casualty, the next question to ask is who insures the damaged property. In Florida, responsibility for repairing and restoring property damaged by casualty rests with the party who insures it. Who insures what part of a condominium is not determined simply by whether the element in question is a part of the unit or a part of the common elements. Florida statutes requires that a condominium property insurance policy must cover "[a]ll portions of the condominium property as originally installed," except for, "all personal property within the unit ... floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components." (See, §718.111(11), Fla. Stats.) Thus, if we return to our example of damaged drywall and assume this time that the damage was caused by a casualty event, the responsibility for repair will lie with the association which insures it. It does not matter whether the drywall is a part of the unit or part of the common elements-if it is a part of the original construction, it is insured by the association, and the association is therefore responsible for it. Conversely, responsibility for repair or replacement of floor covering and cabinetry will lie with the unit owner.

It is certainly logical, on the face of things, for the party collecting the insurance proceeds to shoulder the burden of the repairs. But what if an insurance claim for damaged drywall does not meet the association's deductible? Is the association still responsible? In Florida, the answer is yes, and this is true *even if* the governing documents provide otherwise. The only way to shift the loss back to the unit owner is through a owner vote to opt out of this statutory requirement. The statute requires that a majority of the total voting interests of the condominium must approve the opt out in order for it to be effective. Otherwise, the association is obligated to repair anything that it insures, regardless of whether it ever collects a dime of insurance proceeds.



Was someone negligent?

Quite often, water damage in a condominium is the result of someone's negligence: an owner fails to replace an old water heater; a maintenance man incorrectly installs an ice maker; spring breakers allow a bathtub to overflow. Water escapes the unit and damages other units and common elements below the source of the leak. How does this negligence affect the analysis of who must pay for the repairs? It is important to remember that negligence is secondary to the issue of who is initially responsible for repairing the damage, and the possibility that the damage may have been caused by negligence does not change that part of the analysis. However, the presence of negligence may allow the party saddled with the repair responsibility to recover his losses. Thus, if Ms. Pent-House's twenty-year-old water heater bursts and floods the five units immediately below, those five unit owners may have claims against her for the damage to their draperies, cabinets, and priceless Turkish carpets. Likewise, the association may have claims for damage to the drywall and other affected elements that it insures. Hopefully, Ms. Pent-House carries adequate liability insurance.

While dissecting the responsibility for repair of water damage in a condominium context can sometimes seem tricky, the above roadmap should prove a useful tool. If you have the misfortune of suffering significant damage from a condominium water leak, it would be wise to consider consulting with legal counsel. Meanwhile, ask yourself these questions: do you know how old your water heater is and do you have adequate liability coverage?

How A Rarely Utilized Remedy Is Making Its Way Into The Mainstream

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BLANKET RECEIVERSHIP

Almost every association is affected by it in one way or another. A deadbeat unit owner has stopped paying their monthly maintenance payments to the association yet they continue to rent out their unit and collect all of the monthly rental proceeds from their tenant. Not surprisingly, the tenant resides within the subject unit, as if nothing is wrong, and enjoys all of the association's amenities which the paying members of the association are financing.

The appointment of a "blanket receiver", whose main job is to collect rental proceeds from these third-party tenants and distribute the money to the Association, may greatly benefit struggling associations. Previously, condominium associations were only able to petition the courts to appoint a single receiver in each individual case to try and collect rent from those tenants and/or unit owners, but this was often an expensive and timely process, as each unit was assigned its own receiver on a case-by-case basis. For a financially distressed Association this may not have always been the best, or fiscally sound, option.

Enter the blanket receivership concept. Several provisions of Section 718.116,

Florida Statutes allow for this extraordinary remedy, which is quickly becoming an effective tool in combating delinquencies within an association. Under the "blanket concept", instead of appointing an individual receiver on a unit-by-unit basis, the blanket receiver oversees the collection process of all the units which are delinquent in the payment of assessments. The blanket receiver's main job is to collect rent on behalf of the association. Once appointed by the court, the receiver can demand rent from units within the association that are delinquent in the payment of their assessments yet are occupied by tenants. In addition, the receiver may also be able to take control of those units within the association that have been abandoned by their delinquent owners and rent them out to tenants on behalf of the association.

While the blanket receivership concept is a viable option for many associations facing rising delinquency rates within the community, this method of supplementing collection efforts as a whole is not a panacea for all associations. The costs associated can be substantial in comparison to the potential rents which are actually collected. It is imperative that the Association conduct its own cost/benefit analysis prior to proceeding, considering:

- The number of units in collections that are being leased;
- The status of the collection matters;
- Whether there are existing bank foreclosures on those units; and,
- The current condition of those units, and the cost of getting them into leasing condition;

The receiver's fee is generally deducted from the rental proceeds that he collects and thus the Association is not directly responsible for paying his monthly costs and expenses. The question to ask as indicated above is whether the fees to the receiver deplete the rents received by such a large amount so as to not really provide any relief. The order appointing the blanket receiver is continuing in nature and once it is put into place, it will remain in effect until further order of court. Essentially, the "continuing nature" of the receivership allows the association to be protected against future owners who may fall under the purview of the receivership while not necessarily being a candidate when the initial order was entered.

While there have been an increasing number of blanket receiverships springing up throughout the state, it should be noted that the practice of appointing a blanket receiver should still be classified as a novel approach that is being tested in the courts. Prior to the summer of 2009, the only method by which a receiver could be appointed to collect rents from a tenant was if there was an existing condominium association foreclosure matter. In those instances, the association could have the court appoint a receiver for that particular unit to collect rents.

The future for blanket receivership looks bright and the court system seems to be embracing its benefits. The appointment of these types of receivers has been appealed and affirmed by at least one appellate court in Florida. Nonetheless, associations seeking this extraordinary remedy should take a proactive and aggressive approach, as the appointment of a blanket receiver can greatly help bring down the delinquency rates in record time.

FLOOD INSURANCE REFORM

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The National Flood Insurance Program (NFIP) was established by Congress in 1968. The law gave property owners access to flood insurance. Many owners of existing homes and businesses received subsidized rates that did not reflect their true risk. The Biggert-Waters Flood Insurance Reform Act was signed into law in 2012 to extend the National Flood Insurance Program (NFIP) for five years, while requiring significant program reform.

Premium subsidies for flood insurance policies are supposed to be phased out over a 5-year period. The owners of non-primary residences, businesses, and severe repetitive loss properties will see immediate changes to their premiums. Rates for these properties will increase by 25 percent per year until premiums meet the full actuarial cost.

Ten percent of all NFIP policies cover subsidized primary residences, which will remain subsidized, unless or until:

- The property is sold (new rates will be charged to the next owner);
- There are severe, repeated flood losses;
- The policy lapses; or
- A new policy is purchased.

FEMA has not published any guidelines yet for phasing-out subsidies for condominiums. For now, the association will continue to enjoy NFIP subsidies so long as the policy remains effective.

How will it affect you?

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