



# Water Leaks in Condominiums

*Who Fixes; Who Pays,* By: John Cottle, Esq., Becker & Poliakoff

Water is life's most basic necessity. It makes up about sixty percent of our body weight and must constantly be replenished, thus civilizations need reliable sources of water to survive. A perfect example is ancient Rome, which thrived and prospered by engineering a complex system of aqueducts that collected water from distant locations and moved it to Rome's outlying cities and towns.

Life is no different today. Water is still collected, stored and moved from place to place to meet the people's need. However, it is the storing and moving of this essential resource that can prove problematic.

When water unexpectedly escapes the vessels and pipes designed to contain it, damage frequently follows. And, in the context of condominiums the problems stemming from unwanted water are often magnified. The escaping water can migrate from unit to unit, doing damage to the property of numerous owners within a brief time span. To further complicate matters, the

maintenance and insurance responsibilities are divided between unit owners and condominium associations. So there may be no area of condominium law more befuddling to owners, and indeed even to licensed community association managers and attorneys, 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.

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. But, what about a 20-year-old water heater that rusts through and sud-

denly 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.

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 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.

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 that 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 an 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. ➤

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Otherwise, the association is obligated to repair anything that it insures, regardless of whether it ever collects a dime of insurance proceeds.

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 20-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? ■

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