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Dealing with Water Damage to a Unit

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Your condominium unit has sustained water damage to carpeting, kitchen cabinets, furniture or clothing, due to a burst pipe, leaking roof, or other problem. Who is responsible for performing the repairs and paying for your property damage, you or the condominium association? The answer can vary depending on the location and cause of the leak, the specific property that has been damaged, the scope of the association's insurance and other factors.

Some of the most common situations in which these issues arise are:

1. *Damage caused from inside the unit.* Ordinarily, a unit owner is responsible for performing all repairs to his unit, at his own cost, and for bearing any accompanying loss of personal property, while the association is responsible only for the common elements. This division of responsibility is normally established by an association's master deed and by-laws, which should define the "common elements," the boundaries of an owner's "unit," the items it includes, and the parties' respective repair obligations. The unit owner's burden can shift to the association, however, if the owner's damage was caused by the common elements or the association's negligence, or is covered by the association's property damage insurance, as follows.

2. *Damage caused by or through a common element where the association is not negligent.* Sometimes a condominium unit sustains water damage due to a problem with common elements outside the unit, such as a leaking roof. Contrary to common belief, an association is not automatically liable for the unit owner's damage in these instances, especially if the association was not negligent. Instead, most associations' governing documents only require them to repair the common elements up to the unit's boundaries; this usually results in the association fixing the unit's perimeter walls, sub-floor and ceiling assembly, with the unit owner remaining obligated to restore painting, wallpapering, carpeting and other decorations, and to bear any other loss to his unit and personal property.

The good news, however, is that insurance may cover a substantial amount of the unit owner's losses. Although state law requires associations to maintain insurance covering only the common elements against loss by fire or other casualties (known as a "bare walls" policy), the majority of associations now maintain more extensive "single entity" policies that also cover damage to certain items (e.g., wall and floor coverings, cabinets and other fixtures) that were originally installed by the developer in individual units. If the association has obtained an even broader "all-in" policy, then upgrades or betterments subsequently installed by the unit owner may be covered.

Note, however, that an association's property damage insurance, like other policies, commonly contains numerous exclusions, and does not cover an owner's personal property (e.g.,

furniture, furnishings, clothing, computers and other electronics). Accordingly, it is important for owners to protect themselves by obtaining their own personal insurance, known as an “HO-6” policy, covering the unit and its contents. The HO-6 policy is intended to provide coverage not afforded by the association’s master policy. Unit owners should consult with their own insurance agents to assure they obtain appropriate coverage.

3. *Damage caused by the association’s negligence.* While most associations diligently fulfill their maintenance and repair obligations, if an association’s negligence causes damage to an owner’s unit or property, the association may be liable. In its most basic terms, negligence involves an association’s breach of a duty of care owed to a unit owner, by a failure to exercise reasonable care (failing to act as an ordinarily prudent person would act in the same or similar circumstances), which causes foreseeable injury to the owner.

For example, if a common element pipe suddenly bursts and damages a unit, an association may not have been negligent at all if it did not have prior notice of the problem and could not have prevented the incident – if the association did nothing wrong, it should not be liable. If, however, an association failed to exercise reasonable care in attempting to remedy a leaking roof after being notified about it, and subsequent damage occurs from a heavy storm six months later, there is an increased possibility that the association may be deemed negligent. There is no simple rule for determining whether a party has been negligent, because such determinations are highly fact sensitive and involve numerous legal issues. Unit owners should be aware, however, that they have their own legal duty to take reasonable steps to mitigate their damages once they are aware of the situation. The failure to do so may reduce an otherwise negligent association’s liability.

4. *The Upstairs Owner.* If your unit has been damaged due to your upstairs neighbor letting the bathtub overflow, failing to grout the shower, or similar problem, submit a claim to your insurance carrier under your HO-6 policy. Your carrier hopefully will pay your claim and then pursue your neighbor or his insurer for reimbursement, a process called subrogation.