

DECEMBER 2008

Water, water, water

By: Peter S. Philbin, Esquire
and Kathleen N. Machado, Esquire

Essential for life as we know it, making up almost two-thirds of the average human body, fundamental to almost everything we are, water is truly the universal bond. However, as a wise man once said, *“Fire, water and government know nothing of mercy.”*

When it comes to unexpected maintenance and repairs in the community association context, there is certainly no more common cause than water discharge. Whether in a high-rise or garden condominium, cooperative or townhome association, water leaks have and will continue to be a central part of the average community association governance and will influence budgets and the abilities of residents to get along cooperatively. Boards and managers are constantly being challenged by water leaks and below is a short primer on some of the major issues that can arise. While our condominium clients are most directly impacted by water claims, our homeowners associations and cooperative clients do experience water claims associated with common area-originated losses.

Insurance v. Repair Responsibility

Responsibility for attending to water leaks (either from Mother Nature or plumbing-related) is often difficult to pin down due to the over-lapping provisions within the governing documents of the average association. On the one hand, there are typically “master insurance” requirements, while on the other hand there are also general “maintenance and repair” obligations. Such overlapping obligations can be found both in the internal governing documents of the community and the pertinent statutory overlay (e.g., the Condominium Acts of various jurisdictions).

In a typical condominium, for example, the maintenance and repair provisions may obligate the unit owner to keep his or her unit in good condition and to attend to the “maintenance and repair” of his or her unit (however that is defined). On the other hand, the insurance provisions of the governing documents may require that the Board obtain “master” insurance policies on both the common elements AND “units”. Therefore, when a leak occurs, the

overlapping provisions often appear contradictory and send us in two directions.

While most governing documents and related statutes require some form of water-damage master insurance coverage some do not. The Board should review the coverage requirement in the policy to see what is (or is not) required and the extent of the insurance requirements in the governing document. If coverage is required and a water event rises to the level that would trigger coverage, the Board will have to decide how to attend to the loss and some written rules (see below) may help the Board in this regard. Owners have paid for master insurance coverage through their assessment contributions and generally have a right to expect the benefit of any available coverage.

Deductibles

Even if water coverage is part of the master insurance scheme, such insurance will typically not cover personal property or other betterments installed by owners. In addition, such claims will be subject to ever increasing deductibles. When a loss occurs, the master insurance will pay out the amount of the covered damages less any deductible under the policy.

It is the responsibility for the deductible that generates most of the debate and uncertainty with respect to water-related claims. Depending on your governing documents and state law, the owner may be responsible for some or all of the deductible. Often, the deductible portion is treated as if there were no insurance proceeds and responsibility is then decided on the basis of the general "maintenance and repair" provisions of the governing documents. Again, the Board is well-advised to try and deal with the deductible issue in the form of a written policy. If your association's governing documents are silent or ambiguous

regarding maintenance of certain components, such as piping and/or roofing, a clear set of guidelines should be adopted and distributed to the membership to ensure each unit owner complies with the preventative maintenance measures that can head off most common causes of water damage.

Managing Water Incidents/Claims

In the event water damage does occur, it is best to have specific policies/rules in place governing how the owners and the association are required to respond to and manage incidents of water damage, as well as the administration of all related insurance claims. Any set of guidelines regarding these matters must comply with the provisions of the association's existing governing documents, which may already contain express requirements related to these matters.

Important issues to be addressed by rules and regulations related to water damage are:

- 1) the required insurance coverage for both the association, and the individual owners;
- 2) loss investigation measures that should be taken once a water damage incident occurs;
- 3) repair responsibility and cost allocation between the association and the individual owners.

Regarding loss investigation, owners who suffer or cause water damage to his or her unit, should be required to immediately report the incident to the association (through management, site staff or Board liaison), who must then investigate the loss and determine the source thereof for purposes of allocating repair and cost responsibility. The association can provide each owner with a damage report form to utilize, which will aid management in gathering the necessary information related

to the water damage to assist the association in determining whether the damage merits reporting the claim to the master insurance carrier.

The association's rules should also require the owner to contact an experienced emergency servicing contractor, in the event of a water damage incident that requires immediate response to mitigate any further damage to the common elements and other neighbors. It is recommended that the association provide its unit owners with a list of preferred contractors to use in such an event.

The rules should also require the owner to provide the association's management agent with an immediate right of entry into a unit, in the case of an emergency, so that management can take immediate steps to mitigate damage as well. Again, access rules (like all rules) need to be consistent with the Bylaws, Declaration and state law.

Once management has the necessary information, it can proceed with evaluating the source of the water damage, and determine whether the loss suffered is covered by the association's master policy, or the individual unit owner's policy, or is not covered by either insurance policy. Further, some thought ought to be given to whether the Association submits the claim to the carrier (even if it is "covered") or whether the Association can and should self-insure for the loss in recognition of the negative consequences that a small claim (or several claims) can have on the master insurance premiums and overall coverage availability.

With respect to responsibility for the costs of repair, in general and depending on the provisions of the association's governing documents, this determination is contingent on the origination point of the water damage.

In a condominium, if the source of the water damage originated in the common elements of the condominium and there is no liability exclusion expressly provided for in the governing documents, the condominium may be on the hook for the costs of repair, including the insurance deductible. Further, if the source of the water damage was a particular unit or was caused by the negligence or carelessness of the unit owner, the unit owner may be responsible for the payment of all or a portion of the any deductibles and/or any cost that is not covered by the insurance proceeds. Many association's Bylaws provide for this allocation of cost, but if not, it is essential that the allocation of for payment of the master policy related to the deductible be specifically addressed in some fashion by rule or governing document amendment.

Ultimately, water damage is best handled by preventative maintenance, and ensuring that in the event damage occurs, the association and its membership have a clear set of guidelines in place to mitigate of the damage immediately. Additional guidelines on payment of the deductible and how a loss will be assessed are also important and our office can help the Board come to grips with these often-vexing repair issues.

Best wishes to all for a joyous (and leak-free) holiday season!!