

WATER, WATER EVERYWHERE ... AND WHO DO YOU THINK IS GONNA PAY?

Water damage is the most common casualty claim in buildings with attached units. Whenever water escapes from a pipe or hot water heater, or an appliance malfunctions or a bathtub overflows, the natural reaction of the owner whose unit is flooded or damaged is: "Someone else has to get rid of the water and repair my unit." That is especially true when the owner of the damaged unit did not do anything to cause the damage. Being a *reaction*, it is a conclusion without any analysis of the facts – the who, what, where, and when.

Like a broken clock that is correct twice a day, the conclusion that "someone else" will be responsible for removing the water and repairing the unit is correct only half of the time. A condominium association is liable for damage to a unit **only** if the claim is covered by property insurance or if the association is negligent in exercising its maintenance, repair, and replacement responsibilities.

PROPERTY INSURANCE

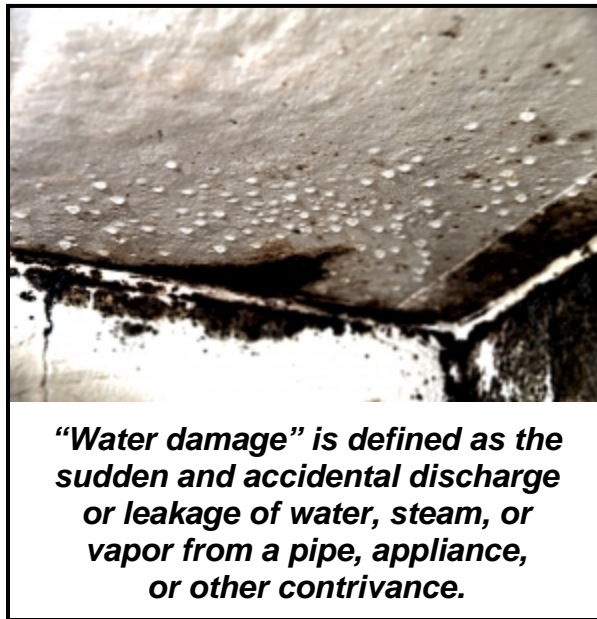
A property insurance policy identifies the building(s) and perils which are covered. Following a loss, an insurer only looks at whether the cause of the damage and the damaged property are covered by the policy. In the absence of an intentional act (i.e. arson, turning the heat off in winter), an insurer pays a property claim regardless of fault. If a unit owner causes a fire by leaving a pot on a stove (**IF** the policy covers fire) the insurer will pay even though the unit owner's negligence caused the damage.

Many boards of directors want to either sue an owner or refuse to file a claim on the association's policy when damage is caused by a negligent unit owner. A board cannot take either of those actions. The reason is because each unit owner is an insured under the association's policy. Each unit owner pays a portion of the premiums as a part of the annual assessment. That makes each unit owner a beneficiary of the policy, regardless of fault.

Think of it this way. If the owner of a single-family detached house leaves a pot on the stove, that owner pays the premium, is an insured, and will be paid for the damage. A unit owner of a multi-family structure is the same as the owner of a detached house – the unit owner pays the premium, is an insured, and will be paid for the damage.

CAUSE OF DAMAGE

The Georgia Condominium Act (“Act”) requires a property insurance policy to cover the perils of fire, windstorm, hail, automobile, aircraft, riot, civil commotion, vandalism, explosion, and malicious mischief. That coverage is known as Fire & Extended Coverage (“Fire & EC”). You should have noticed that water is not a peril that is a required coverage under the Act. Therefore, no assumption should be made that an association’s insurance policy covers water damage.



If a policy includes water as a covered peril, it is generally referred to as “water damage” coverage. “Water damage” is defined as the sudden and accidental discharge or leakage of water, steam, or vapor from a pipe, appliance, or other contrivance. It **does not** include water that leaks through a foundation, a roof leak, water that backs up through a sewer or drain, or a flood.

The who, what, when, and where must be addressed to determine if a water claim is covered.

The following examples explain water damage coverage:

- (a) A common element water supply line breaks/develops a leak. It is sudden and accidental. The policy will pay, subject to any deductible, to repair the damage to the Unit. The policy does not pay to repair/replace the water line.
- (b) Following a few days of rain, water enters a Unit through a foundation wall or floor. That damage is not covered.

- (c) A dishwasher in a unit leaks, causing damage to the unit and adjacent unit(s). It is sudden and accidental. The policy will pay, subject to any deductible, to repair the damage to the unit and the adjacent unit(s), but will not pay to repair the dishwasher.
- (d) If a tree root clogs a sewer or drain that then causes a back-up of water into a Unit, that damage is not covered unless the policy expressly covers that peril.

(e) Damage caused by flood waters is not covered by a standard property policy. Flood insurance is a separate policy.

Section 94 of the Act authorizes an association to impose a deductible of up to \$2,500 per unit for a claim required to be covered by the Act. Since the Act does not require water damage coverage, the \$2,500 limitation does not apply. There is **NO** limit on the amount of a deductible

for water damage which can be imposed on a unit owner.

Go back to example (a). Assume the damage to the unit is \$5,000 and there is a \$10,000 water damage deductible per unit. The owner of the damaged unit would not receive any money from the insurer, since the damage is less than the deductible. The unit owner would pay the \$5,000 to repair the damage to the unit.

WHAT PROPERTY IS INSURED?

If an association has an insurance policy which includes water damage coverage, the property that is covered relates to the unit, such as walls or floors, cabinets, appliances, HVAC system. The association’s policy does not cover the personal property of a unit owner. Personal property is clothing, furniture, books, televisions, etc. . . . in other words, items **in** a unit, not part of the unit. If personal property is damaged, the cost of repair or replacement is the responsibility of the owner.

WHAT IF THE ASSOCIATION'S POLICY DOES NOT INCLUDE WATER DAMAGE?

In the above examples, water flowed from items that were either the maintenance responsibility of an association or a unit owner. If it was a covered claim, the property insurance policy paid, subject to any deductible, without regard to fault. When an association's policy does not include coverage for water damage, fault determines if the claim is covered by insurance. Rather than a property claim, the claim becomes a liability claim against either an association or a unit owner, depending on who is responsible for the maintenance of the pipe, appliance, etc. that leaked.

Liability insurance covers claims for bodily injury and property damage caused by an insured. Coverage is totally dependent on whether the insured was negligent. A claim for negligence requires proof that a person owed a duty to someone else, the person breached that duty, and the breach was the cause of the damage. That concept is explained by the following two examples:

- (a) An owner of a washing machine has no indication the water supply line is ready to rupture. Owner comes home to find unit and adjacent unit(s) flooded.
- (b) Same owner, same washing machine, EXCEPT, owner has repeatedly wrapped small holes in the supply line with duct tape. Owner returns home to a flood in unit and adjacent unit(s).

In example (a), the unit owner would not be liable for the damage to any of the adjacent units. The unit owner was not negligent because there was no breach of duty. The adjacent owners would be responsible for all expenses to fix their units. In example (b), the unit owner was negligent

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because there was a breach of duty, the owner knowingly failed to properly maintain (i.e. repair) the leaky supply line. That owner would be liable for the neighbors' damages.

In example (a), the owners of the damaged units will not like that outcome because they did not do anything wrong. But, neither did the owner of the washing machine. Each owner will be responsible for the cost to repair the damage to their own unit.

NOTE: The result would be the same in both examples if the washing machine was a common element. In example (a), the association would not be liable for the damage to the units and would be liable in example (b). Unit owners can avoid out of pocket costs to repair a unit by carrying their own insurance. A unit owner's policy is known as an HO-6 policy. It provides property, liability, and personal property coverage.



WHAT ABOUT A LEAKY ROOF?

Rain that enters a unit is not water damage. Coverage is determined by what caused the rain to enter a unit. If a tree limb falls on a unit during a storm and the tree limb punctures the roof, the damage caused by the rain is covered. Why? Because the cause was a windstorm and the rain damage was a consequential damage. If a shingle wears out, damage caused by rain is NOT covered because it is not a covered peril under Fire & EC. Even if the policy had special form coverage, which provides broader coverage than Fire & EC, wear-n-tear is an exclusion in all property policies.

Damage caused by a roof leak oftentimes turns into a liability claim when the roof is the maintenance responsibility of an association and the damage is not covered by an association's

property policy. Unless the source of a leaky roof is obvious, the ability to pinpoint a roof leak is an inexact science. The place the water exits is obvious; however, tracing the leak to its source can be a series of trial-and-error tests based on a roofer's experience.

As with damage caused by a broken water pipe, an owner of a damaged unit assumes an association is responsible for repairing a stain on a ceiling that results from a roof leak. As with a broken pipe, that assumption is not correct; negligence must be established to win a liability claim. The inexact science of roof leaks makes them more challenging in determining if an association breached its duty. Normally, an owner becomes aware of a roof leak with the appearance of a ceiling stain. If the owner reports the leak and the association acts promptly and diligently to repair the leak, the association is not responsible for repairing the stain. It is not liable because it did not breach its duty to maintain the roof.

Rather than successfully finding and repairing the source of a roof leak, assume the next time it rains, the roof again leaks and causes more damage to the ceiling. A roofer is called and, based on experience, thinks he has it fixed that time. Is the association responsible for the additional damage? What if the roof leaks one more time, causes more damage, and the roofer determines the water is entering a hole in a shingle that is 50-feet away, traveling along a beam and then leaking into the unit. Was the association ever negligent? If so, when? There is no answer.

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If the owner sues the association, a court will have to determine if the action of the board was both reasonable and appropriate. A court will look at the response of the roofer; were the first two attempts to locate the source of the leak reasonable and appropriate (i.e. something the average roofer would do), etc. If the court rules that the board's actions were sensible, rational, logical, and sound, then there would be no negligence and no liability. If a court found there was negligence, the liability insurance policy would pay for the damage.



Water damage claims are inevitable in buildings with attached units. Who pays the cost to repair the damage depends on whether the association's policy includes water damage coverage or if the association or unit owner was negligent. ❖❖❖



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