

Insurance HOA COLO condo leak

[Altitude Community Law](#) > [Resources](#) > [Maintenance & Insurance](#) > [Who Pays For What In A Condominium Water Leak Situation?](#)

WHO PAYS FOR WHAT IN A CONDOMINIUM WATER LEAK SITUATION?

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One of the most difficult questions posed to a condominium association board is: Who is responsible for damage caused by a water leak? For example: water comes through the roof, intrudes into and damages upper condo unit #1, passes through and damages the common element walls and floors along the way, then ends up in, and damages, lower condo unit #2. Who is responsible for damage to the roof, condo unit #1, condo unit #2, and all the common elements in between?

When our office is asked this question, our response is usually "It depends." I know you hate hearing that answer, and I hate giving it. But I have to give that answer until I know more. And the analysis is often complicated.

This article will hopefully make the infamous water leak analysis easier to understand. When you analyze a water intrusion question, you need to answer three basic questions:

1. What, exactly, was damaged?
2. Who is responsible for maintaining and repairing the damaged component(s)?
3. Does negligence or insurance serve to shift the cost of repair to another party?

1. What, exactly, was damaged?

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The first thing you want to do is figure out what was damaged by the water. Carpet? Drywall? Furniture? Subflooring? It is important to know the extent of the water damage for a number of reasons, including determining and prioritizing scope of repairs, mitigating further damage, and evaluating whether to file an insurance claim.

I know you're probably thinking: "But don't you want to first figure out where the water came from?" Well, yes, you want to know where the water came from, as you want to ensure the component that failed is sufficiently repaired. But for the purposes of determining who is responsible for water damage, the answer is no. The source of the water could be irrelevant to determining who is responsible for repairing the damage. DO NOT get stuck on this question as it is not relevant until question no. 3.

2. Who is responsible for maintaining and repairing the damaged components?

Once you have compiled the list of damaged components, the next you thing you want to do is figure out whether the association or the owner is responsible for maintaining and repairing each of the damaged components. Maintenance and repair responsibilities are laid out in the declaration (i.e., CC&Rs or covenants), so that's where you want to look first.

In condominium communities, most often the declaration provides that the association is responsible for maintaining and repairing the common elements, and the Owner is responsible for maintaining the unit. Sounds easy, right? Wrong. Be careful not to make any assumptions of what is included in the common elements vs. the unit.

For example, if the declaration defines "common elements" as everything in the property "other than a unit", which is a fairly typical definition, then where does the unit start and the common elements begin? If unit boundaries are the perimeter walls, floors and ceilings, does the wall start at the paint, drywall or studs? Does the floor start at the carpet or subflooring? Where would a fireplace fall within the unit boundaries? What about a pipe that exclusively serves a unit, but part of the pipe is on the inside of the unit, and the rest of the pipe is on the outside of the unit? *

Even if the declaration clearly identifies the boundaries of a unit, sometime maintenance and repair obligations are not tied to whether the component is part of the unit or the common elements. For example, it's not uncommon for a declaration to require an owner to maintain his or her limited common element balcony or patio, even though it's not part of the unit. It is also common for an association to be responsible for maintaining certain pipes that serve the common elements or other units, even though they are located inside the unit boundaries.

Finally, what if the declaration is silent as to who is responsible for what? What if it's the crawlspace, or the attic, or the storage closet on the balcony that has been damaged, and the declaration states a whole lot of nothing about who maintains such items? In those cases, you may want to review the condominium map for the association, as it may provide an answer. For example, if the declaration states that the owner is responsible for maintaining all limited common elements, and you're unsure whether the attic is a limited common element, the condo map might clearly depict all the limited common elements in the project, including the attic. *

If neither the declaration nor the condo map assist, then you need to fall back on the general analysis of whether such component is inside or outside the unit boundaries in order to determine maintenance and repair obligations. You should also contact your attorney!

Bottom line: Review the declaration (and sometimes the map) carefully and thoroughly, to ensure you've appropriately identified the parties responsible for maintaining and repairing each damaged component.

3. Does negligence or insurance serve to shift the cost of that responsibility to another party?

Now that you've identified who has the general underlying obligation to maintain or repair the damaged component, the analysis does not stop there. Two things could shift the obligation to pay for such maintenance or repair to another party: (i) negligence, or (ii) insurance obligations. Let's review both.

Negligence

Although the declaration might, for example, require the owner to maintain and repair their hardwood floors, if someone else's negligence was the cause of the hardwood floor damage, then under a negligence theory the person that caused the damage should be responsible for the cost of repair.

How do you analyze whether someone was negligent? Look to the following four elements of a negligence claim:

- Duty – The defendant owed a legal duty to the plaintiff under the circumstances;
- Breach – The defendant breached that legal duty by acting or failing to act in a certain way;
- Causation – It was the defendant's actions (or inaction) that actually caused the plaintiff's injury; and
- Damages – The plaintiff was harmed or injured as a result of the defendant's actions (or inaction).

Element #1: Duty

The first step is to determine whether the defendant owed the plaintiff a legal duty of care. In the context of a condo water leak, the association and owners owe the following duties of care to one another: properly and timely maintain and repair the components they are obligated to maintain and repair.

Element #2: Breach of Duty

Next, determine whether the defendant breached this duty by doing (or not doing something) that a reasonably prudent person would do under similar circumstances. In the context of a condo water leak, did the association fail to timely maintain the roof? Or, did the owner fail to adequately repair a water heater line?

Element #3: Causation

The third element requires that the plaintiff show that the defendant's negligence actually caused his or her injury or damage. Sure, someone might be acting negligently, but the plaintiff can only recover if this negligence causes the injury.

For example, the association might have acted negligently by failing to repair a hole in the roof which could allow water to intrude. But if the unit water damage was caused by a *failed pipe* vs. the association's failure to repair the hole, the association's negligence did not cause the damage.

Element #4: Damages

The final element of negligence is damages. This element requires that the owner or association suffered damages due to the other party's negligence, such as the incurring of repair costs, or the incurring of hotel bills for living offsite while repairs are being performed.

If the association or owner can prove the above four elements of negligence, then the negligent party should be responsible for the costs of repairing the damaged component, even though they're not responsible for repair under the declaration.

Keep in mind that negligence only shifts the responsibility for the cost of repairs to the negligent party. It does not shift the duty to repair the damaged component. For example, if the association has a duty to repair the garage doors, but the garage doors were damaged due to an owner negligently backing into them, then the association still has the duty to perform the repairs to the garage, but may hold the negligent owner responsible for any costs incurred by the association for such repairs.

Also, keep in mind that there are other examples of negligence than what is set forth above. If you're unclear about whether the association or an owner was negligent, review the situation with your attorney.

Insurance

Again although the declaration might, for example, require the owner to maintain and repair the drywall of the unit, either the declaration or the Colorado Common Interest Ownership Act ("CCIOA") might require the Association to insure such component. If the declaration and/or CCIOA require the association to obtain property insurance coverage over a unit component that was damaged by a water leak, then you will need to determine two things: (i) estimated cost of repair, and (ii) whether the type of loss is excluded under the association's insurance policy.

When determining whether the association or owner is required to insure a particular component, note that insurance and maintenance obligations in a condominium community do not always
 * overlap. The association might, for example, be required to obtain insurance coverage over components that it is usually not required to maintain or repair. Post-CCIOA associations (i.e., associations that were created on or after July 1, 1992) fall into this category.

C.R.S. 38-33.3-313(2) of CCIOA requires post-CCIOA associations that have horizontal boundaries (such as condos) to insure not only the common elements, but also the units, regardless of whether the declaration states otherwise. However the policy need not include the finished interior surfaces of the walls, floors, and ceilings of the units, or the improvements and betterments installed by unit owners. So even if the owner is usually required to maintain and repair the units, CCIOA requires the association to insure the unit structures, except for the above-identified exclusions.

If the association is a pre-CCIOA association (i.e., created prior to July 1, 1992), then look to the specific language of the declaration itself for insurance responsibilities. Some declarations require the association to cover appliances, and even carpet, furniture, and other personal property of the owner. Some declarations require the association to cover improvements and betterments, whether installed by the declarant or the owner. Insurance obligations are document-specific, so be sure to review the declaration thoroughly.

If the association is required to insure the damaged unit component per the declaration or CCIOA, then you will need to determine the estimated cost of repairs. Why is this important? Because if the cost of repairs is less than the deductible on the association's policy, then there's no duty to file an insurance claim since there will be no insurance proceeds available to fix the repair.

The deductible portion of the policy is what the association is required to pay before any additional insurance proceeds are available. So if the deductible on the association's policy is \$10,000, but the cost of repairs is only \$5,000, then filing an insurance claim is moot since the association is responsible for the first \$10,000 worth of repairs.

In the situation where the cost of repairs is less than the deductible amount, then review the declaration for who is responsible for the loss within that deductible amount. Some declarations will require the association to be responsible for such loss if the association is required to insure the component. In that case, the association should pay for such repairs. *

Other declarations will require the party who is responsible for the underlying maintenance and repair of the damaged component in the absence of insurance to be responsible for such loss. In that case, if the owner has the underlying obligation for maintaining and repairing the damaged component, then the owner should pay for such repairs.

Other declarations are silent on who is responsible for the loss within the deductible portion of the policy. In that case, C.R.S 38-33.3-313(6) allows post-CCIOA associations to adopt written nondiscriminatory policies and procedures regarding, among other things, the responsibility for deductibles. For example, the association can hold negligent owners causing such loss or benefiting from such repair or restoration responsible for the deductible. *

The second thing you have to determine is whether the type of loss is excluded from the association's policy. For example, mold is often excluded, as is groundwater intrusion. If the loss is excluded, then even though the association may be required to insure the damaged component, and even if the estimated cost of repairs is more than the deductible amount, no insurance proceeds are available. In this scenario, you fall back on who has the underlying obligation for maintenance or repair of the damaged component; that party will be responsible for repairing the damaged component. *

In the event the loss is covered under the policy, and the cost of repairs is higher than the deductible amount, then the association should file a claim to trigger coverage, and use the insurance proceeds to perform the repairs on behalf of the owner. That being said, there may be reasons why the association might not want to file a claim, the discussion of which is outside the scope of this article, but typically it would be appropriate to file a claim.

CONCLUSION:

Analyzing water leak questions can be quite complicated, as seen above. But answering the following three questions should make your analysis easier:

1. What, exactly, was damaged?
2. Who is responsible for maintaining and repairing the damaged component(s)?

3. Does negligence or insurance serve to shift the cost of repair to another party?

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Another way to make it easier? Adopt a maintenance & insurance chart that clearly defines whether the association or the owner is responsible for maintaining, repairing and insuring each component in the condo complex.

Another way to make it easier? Adopt a water leak policy, which provides specific steps the Association will take when analyzing responsibility for damage caused by water leaks. The water leak policy would follow the steps outlined above.

Another way to make it easier? Amend the declaration to add the maintenance & insurance chart discussed above and/or to address liability for water leaks.

If you would like more information on any of the cost or process for any of the above recommendations, or if you have questions on this article, please do not hesitate to contact an Altitude Community Law attorney today at 303-432-9999 or hoalaw@altitude.law.

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