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Who Pays? Insurance Coverage for Property Damage

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Common Interest

Probably the most controversial and difficult to apply of all the 2010 amendments to the Common Interest Ownership Act (CIOA) are the changes to the manner in which property damage costs and insurance are allocated. Two years after they went into effect, these provisions are still causing confusion.

Whenever any property in a common interest community is damaged, the obligation to repair it depends on the location and cause. Some parts of the buildings are the association's responsibility, while others are the unit owner's responsibility. In either case, insurance may or may not cover the cost of the repairs. The association and unit owners alike must comply with CIOA, the declaration and bylaws, and the terms of the applicable insurance policies.

The association is required to maintain traditional property insurance coverage for direct physical loss to the community's common elements. Unit owners should, of course, separately insure their own units and personal items. The precise boundaries of the unit are governed by the declaration, but the unit often includes everything inward of the undecorated walls, floors, and ceiling. If the association is responsible, then the association's adjuster must inspect the damage. In such a case, the executive board rather than the unit owner should select the contractors, direct their work, and pay them directly with the insurance proceeds. Only when the unit owner is exclusively responsible should the unit owner control the repair project – either with or without the benefit of individual homeowner's insurance.

Let's take a closer look at the latter situation. When a person or fixture that the association does not control causes damage only to a unit's interior or personal items, the association is not responsible and its insurance does not apply. The unit owner is individually responsible for repair or replacement, and should submit a claim to his or her own insurer or look to the person who caused the damage for reimbursal. This might include, for example, harm caused to a unit owner's laptop computer, carpeting, or furniture by another unit owner, a tenant, or a malfunctioning fixture or appliance. The association should really not be involved at all, except perhaps to punish a rulebreaker. But if the damage is unrepaired and threatens to cause harm to another unit or common element, the association may have the right to make the necessary repairs itself and charge that expense back to the owner enforceable as a lien against the unit.

In most other cases, however, the association and its insurance will probably have to become more directly involved at the outset. When a person that the association controls, or a defect in an area or fixture that the association is responsible to maintain, causes harm to anything in the community, the association is likely responsible. Based on the severity, nature, and cause of the loss, the association should promptly determine

whether and how to submit claims against its property, liability, or other insurance policies. This might include, for example, water damage to a roof, ceiling, and carpet caused by shingle leakage. The unit owner remains responsible to notify the board immediately and take reasonable measures to prevent further damage, and liability might shift to a unit owner who makes the problem worse by failing to do so. Any portion of the loss that insurance does not cover – like deductibles, exclusions, and any overage – will be considered a general common expense payable by the association.

There's a third scenario: damage to a common element caused by a person or thing the association does not control. When a unit owner, tenant, guest, or anyone they invite into the community causes harm to common elements, or to both common elements and a unit's interior or personal items, the association may still be responsible to make the repairs and submit a claim to its insurer. The difference is that the association may have the right to seek reimbursal from the person at fault for its out-of-pocket costs. The board can conduct a hearing to determine whether the loss was caused by the person's willful misconduct, gross negligence, or failure to comply with a written maintenance standard. If it was, then any portion of the loss that insurance does not cover can be assessed exclusively against the unit associated with the person at fault. This might include, for example, a tenant who turns the heat off in winter causing the pipes to freeze and burst, or a unit owner who causes a toilet to overflow and damage the subflooring. The association could charge all deductibles, exclusions, and any other losses not covered by its insurance back to the owner enforceable as a lien against the unit. Since this may be impossible without a written maintenance standard in place, the importance of adopting rules which make clear how unit owners must take care to prevent such losses cannot be overstated.

Of course, every situation is different. Outcomes may turn on the provisions of specific laws, governing documents, and insurance policies, as well as the circumstances of the individual loss. The board must always work closely with its legal and insurance advisors to comply with its legal obligations and its responsibilities to all the unit owners.

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