WHAT TO DO WHEN A WATER CATASTROPHE STRIKES!

Lazega & Johanson
Attorneys at Law

We Understand Community Associations.

Lazega & Johanson LLC is a law firm dedicated to representing community associations. We believe in building and maintaining long-lasting relationships with community associations and their managers by providing personal attention and superior services. We take pride in being a part of the team of experts you rely on to ensure the successful operation of your community.

© 2023, 2020, 2012 Lazega & Johanson LLC
All Rights Reserved.

COMMON QUESTIONS ON INSURANCE FOR WATER DAMAGE

Although snow and freezing temperatures are often anticipated events in Atlanta, for many community association managers, winter is something to dread. With winter comes freezing temperatures and frozen pipes, and, invariably, pipe bursts and failures, and water leaks.

Frozen pipes are certainly not the only source for water leaks, this time of year typically brings an increase in the number of claims being made against association water damage insurance. These claims raise a number of questions concerning the application of water damage insurance, the responsibilities of the association and affected unit owners, and the application of insurance deductibles. The following are some of the more common questions we are asked when it comes to water damage insurance and pipe bursts.

WHO IS RESPONSIBLE FOR INSURING AGAINST WATER DAMAGE?

The Georgia Condominium Act requires condominiums to maintain basic perils, or fire and extended coverage, casualty insurance. That insurance must cover plumbing lines within a unit regardless of who is responsible for them (subject to some limitations as to the type and quality installed). But, The Georgia Condominium Act does not require the association to carry insurance specifically covering water damage, such as from pipe bursts, washing machine overflows, or similar events.

However, given the fact that a water pipe burst in a condominium building can have a serious impact on other units and the common elements alike, it is normally a good business decision on the part of the board of directors to obtain insurance for such events. Furthermore, in some instances, the governing documents for a condominium will require the association to obtain water damage insurance even though the Act does not. Additionally, in some communities, the provisions of the governing documents addressing repair and reconstruction will have provisions which go beyond those in the Act as well, and consequently, may impose costs and duties regardless of the existence of insurance coverage. These costs can be expensive. In those communities in particular, it is normally a wise business decision to obtain insurance for such events – specifically meaning water damage insurance. Water damage insurance is typically not the same insurance as causalty/ property damage insurance.

In a townhome community that is not a condominium the association is only required to maintain insurance to the extent provided in the community's governing legal documents. In some townhome communities, the association has no responsibility to insure the lot or the unit at all. However, in many, the association's responsibility is similar to that of a condominium association.

The purpose of water damage insurance is, of course, to cover water damage caused to units or the common elements or common areas of a community. Water damage is typically defined in the insurance industry as the "accidental discharge or leakage of water or steam as the direct result of breaking or cracking of any part of a system or appliance containing water or steam." Specifically excluded from an average water policy are any damages caused by the continuous or repeated seepage or leakage of water (such as recurring window leaks), or the presence of condensation or humidity, moisture or vapor that occurs over a period of 14 days or more. Accordingly, damages from an accidental and sudden break or burst in a pipe or appliance would typically be covered under an association's water damage insurance policy, while damages caused from a continuous slow leak that has developed over time would not be covered.

Water damage insurance typically does not cover the costs of repair to the appliance, system, or pipe itself, but rather only the damages caused by the discharge of water. For example, if a water pipe serving a unit should suddenly burst, causing damage to three units, the damage to the units will be covered, subject to any deductibles, but the repairs to the pipe itself will not be covered by the water damage insurance – it will need to be covered by some other insurance, such as the Association's general casualty insurance. Also, any water damages that are caused by something that is excluded from coverage under the policy will not be covered. Damages caused by normal wear and tear of an appliance, or by a latent defect in an appliance, are typical exclusions under insurance policies.

Why does the association have to cover the damage under its insurance if it is an owner's responsibility to repair the leak or maintain the unit ?

Perhaps one of the most common questions we receive when there is a pipe burst or a toilet leak or other similar incident where the water damage stems from an area within an owner's maintenance responsibility is why the association has to cover the damage under its insurance in the first place. Maintenance and insurance responsibilities are two different things that do not always go hand in hand, and the obligation of an owner to maintain a certain pipe or appliance does not negate the association's insurance obligations or the coverage carried by the association. The equation of "if it is in your unit, you take care of it, and if it is outside of your unit, we take care of it" does not apply when it comes to insurable events.

If the association carries water damage insurance for the building or condominium, then regardless of who ultimately has the maintenance responsibility over the pipe or apparatus that caused the damage, the association's insurance will normally be primary when it comes to covering the costs of the damage.

This means that the association's insurance is the first line of defense, and the individual owner's insurance should pick up where the association's insurance leaves off. It is not uncommon, when there is a pipe burst or other similar water event, for a board to instruct the owner to notify his or her carrier, only to be frustrated when the owner's carrier refuses to cover the claim until the association's insurance kicks in. Unless the damage is below the deductible on the association's insurance, the owner's agent is typically correct in going to the association's insurance first. Remember, the association buys this insurance as trustee and for the benefit of the owners.

Do we have to file a claim?

The second most common question following a pipe burst or similar event is whether the association is obligated to file a claim. If the association is certain that the damage is below the deductible on the association's policy, the answer to this is generally no. However, where the damage exceeds the deductible, there may also be circumstances where the association wants to avoid filing a claim, though these should be evaluated carefully and cautiously. These reasons can include fear of an increase in premium, being dropped from insurance, and not wanting to file a claim on an event that is clearly the fault of the owner or within the owner's maintenance responsibility.

The answer to this is that, when an association carries insurance, it carries on behalf of and for the benefit of all the owners. While the Association might not be required to submit the claim, the owner's can reasonably expect that the Association will submit it, and if the Association does not, may submit it themselves. It is usually better for the Association, then, to submit the claim and try to keep control of it. While in some newer community declarations, the association may reserve the right to withhold insurance disbursements to an owner to cover delinquent assessments, this practice should be approached with caution, and if used, done in coordination and consultation with the insurer.. Moreover, if the association refuses to file a claim where there is coverage, in addition to trying to file the claim directly, the owner may be able to file an action to try to force the association to do so.

Additionally, there may be circumstances where the damages only exceed the deductible by a little amount or where the association would rather negotiate a deal to pay for the damages that would otherwise by covered by insurance in lieu of filing a claim. This could be an acceptable resolution if all parties agree. However, in making such a decision, the Association should be certain that the damages are known and are indeed within this relatively small range, and that there are no undiscovered damages or claims. Many insurance policies also have notice provisions setting a time limit on the period for notice to be given, and some water damage claims can have damages or additional issues that can go undiscovered.

"We made it through the winter storm, but are still dealing with the aftermath."

© 2023, 2020, 2012 Lazega & Johanson LLC
All Rights Reserved.

However, regardless of whether the Association actually files the claim itself, the Georgia Condominium Act also requires that if there is a potential or submitted claim related to water damage on any insurance policy, the Association provide a copy of its certificate of insurance to an owner if an owner makes the request (within five business days of receipt of the request). The opposite is true as well – the Association can request this information from the owner for the same type of actual or potential claim. Note that because this includes "potential" claims as well, if an owner believes that an Association's insurance can or should cover the claim, the owner can request information to try to notify the Association's insurance as well. The Association can also consider, in an appropriate circumstance, obtaining the owner's insurance information (for instance, in some cases, if the cause of a leak which caused other damage to the condominium was within the owner's own unit). Given these relatively recent changes to the Act, unless the Association is certain that the damages will be under the deductible or it can negotiate a quick settlement and release, in many cases, it will make sense to submit the claim on its own terms.

Who covers the deductible?

If an association carries water damage insurance, any claims submitted under the policy are subject to the deductible as set forth in the policy. Like deductibles on auto insurance, the water damage insurance deductible is essentially the amount of damage that is not covered by the insurance. Up to the amount of the deductible, the association or the owner, as the case may be, self-insures. The application of a deductible when there is an insured loss is often a confusing issue for owners. There are a few things associations and owners should be aware of when it comes to water damage insurance deductibles.

1. Except in some instances of owner negligence, most community legal documents provide that the deductible is charged to the person who would have to fix the damage if there was no insurance. This is often a difficult issue for unit owners to understand, particularly if it is a unit owner affected by a water leak that stems from another unit. Most owners do not understand why they have to pay anything if they were not responsible in the first place. This often means that if the leak or burst pipe is within the unit, the owner will be responsible for the deductible. Likewise, it often means that if the leak occurs in the common elements or common area, the association will bear the cost for the deductible. Many association policies apply the deductible on a per unit, per occurrence basis, so the deductible can be as much as $5,000 to $10,000 per affected unit. If there is no negligence involved, then each affected unit owner who would otherwise be responsible for the repair of his or her unit in the absence of insurance is responsible for covering the damages not covered by insurance. Ideally, each owner has an insurance policy that will insure his or her unit to the extent not insured by the association so that his or her insurance will kick in to cover the applicable deductible. However, their own policy may also have a deductible (or, as discussed below, may not have sufficient coverage), so some owners will often still have some amount out of pocket amount to cover.
2. The cap of $5,000 of a deductible that may be charged back against a unit owner under The Georgia Condominium Act does not apply to water damage insurance deductibles, as water damage insurance is not required under The Georgia Condominium Act. This means that owners can be responsible for the full amount of the deductible.
3. If there is a limit on the amount of the deductible that may be charged against the owner, it is governed by the governing documents for the community. The declaration for most communities will allow for the entire amount of the water damage insurance deductible to be charged back to the owner who would be responsible for the damage in the absence of insurance, but that is not always the case. It is imperative for boards, managers and owners to check the community legal documents any time a claim is made.

So what is considered negligence?

In any instance where there is negligence involved, then even if the association's insurance kicks in for the coverage, it may be possible under some community legal documents to hold the negligent party responsible for the costs of the deductible or other damages not covered by insurance. Whether or not there is negligence greatly depends on the facts of the specific situation and the maintenance responsibilities of the parties involved. However, when it comes to water leaks and/ or pipe bursts, there are a few common instances of damages that are often caused by negligence.

INNOVATORS.

The firm prides itself on taking chances and being the first to try something new that changes industry practices and opportunities. Our goal is to meet the goals of our clients and do whatever it takes to make sure that those goals are not compromised or neglected due to financial or other restraints. We consistently make efforts to think outside the box to find ways to assist our clients in meeting their goals.

© 2023, 2020, 2012 Lazega & Johanson LLC
All Rights Reserved.

The governing documents for many communities require owners to maintain their heat at 55 degrees Fahrenheit or higher during periods of freezing temperatures and/or to take measures to prevent pipes from freezing. Failure of an owner to do so, resulting in a pipe burst, is arguably negligence on the part of the owner. Another common scenario is when an owner fails to replace his or her water heater after being notified that the appliance is at the end of its life span. Failure of an owner to replace a leaking appliance or pipe after being notified of the need to do so is also a common basis for an argument of negligence. Yet another example is those owners who have left their faucet or tub running, flooding their units and others.

The tricky part for any association or its manager in an instance where negligence of a unit owner is involved is helping owners understand the limits of the association's authority and involvement in the issue. Many owners whose units have been damaged through the negligent acts of another owner expect that the association will bring an action against the responsible owner to recover the damages to his or her unit.

The fact of the matter is that the association's authority with respect to the matter is typically limited to the enforcement of the terms of the governing documents and to pursuing the responsible owner for damages to the common areas, if any. Since the association does not have an ownership interest in the actual unit itself, it does not have a cause of action to recover any damages to the unit on behalf of the damaged unit owner. The association's cause of action, if any, is limited to pursuing the negligent owner for damages to the common elements, or if the cause of the leak is in a unit and the owner is not cooperating with the association, to an action for equitable relief.

How should an owner protect himself or herself from water damages?

The most important thing an owner can do is to ensure that he or she has adequate insurance on his or her own unit. Most governing documents require an owner to maintain insurance on his or her unit to the extent not provided by the association. Homeowner policies are known in the condominium and townhome industry as HO-6 policies. The typical HO-6 policy will have some coverage for deductibles or uninsured property damage that will apply to association deductibles.

The issue is that this usually has a limit that is well below the average association deductible. Owners will need to ensure that they either increase this limit or increase their property coverage in an amount sufficient to cover association deductibles. Owners should also ensure that their HO-6 policy does not include an unexpected exclusion for certain types of water damage or definitions that might limit coverage (such as limitations based on “resulting damage” or “initial damage”), particularly where that would apply to limit the coverage for association deductibles. While not typically an issue in modern HO-6 policies, in some rare instances, these issues can occur in owner policies.

We are committed to your success.

Our attorneys and staff have decades of experience and are proven leaders in their fields. Our attorneys are uniquely qualified and have been recognized on both a national and local level for their knowledge and commitment to their respective fields. We value the relationships we have with our clients. We are proud to be a part of the team of experts they rely on, and we work hard to maintain those relationships everyday.

Another issue owners should consider concerns the causes of loss covered by his or her HO-6 policy. Most HO-6 policies cover named perils, not special perils. Water damage typically is covered by special perils. Consequently, owners should confirm with their agent that they have special perils coverage to receive payment for water damage. Likewise, owners who are using the unit as rental property need to be aware than it is not uncommon for an HO-6 policy to have an exclusion for damages caused by a tenant. Therefore, if a tenant were to leave a thermostat set too low, or failed to take reasonable steps during cold weather to stop a pipe from freezing, in some instances this could result in coverage being denied on the policy. This has become more common with the increase in rental properties and recent trends in short term rentals.

It is often a good idea to keep your owners informed about these current trends and concerns in HO-6 policies, as if coverage is denied for the owners on their policy, they could be out of pocket for their own expenses, as well as the deductible amounts for their share, where they (and as a result the association) otherwise could be better protected.

Pipe bursts and other water events and the resulting insurance issues can be a headache for any board or manager. Many times, these situations are fraught with anger and misunderstanding on the part of those involved, which can make a difficult situation even harder to deal with. Understanding the application of insurance and the responsibilities of the association versus those of the owners beforehand, can help greatly when it comes to dealing with an insurable event when it does happens. The foregoing is meant as a general guide, but it is a good idea to have a handbook explaining the application of insurance and deductibles and the process for when there is no insurance coverage so that owners have a resource for when there is an insurable event. Any such handbook or guide should be specific to your association and insurance. Managers and boards alike should contact their attorney or insurance agent for guidance.

Contact Us:

To learn more about the services and programs we offer our clients, feel free to contact us directly at:

Lazega & Johanson LLC
PO Box 250800
Atlanta, GA 30325
(404) 350-1192 Tel
(404) 350-1193 Fax
www.LJLaw.com

© 2023, 2020, 2012 Lazega & Johanson LLC
All Rights Reserved.

To learn more about L&J, scan the image using your smartphone's barcode app or visit:
www.LJLaw.com

**Individual situations may vary. This document is not intended to use as specific legal advice.*

Lazega & Johanson
Attorneys at Law