

CIC Midwest News

VOL. 19, NUMBER 4

Fall 2020

Common Interest
Communities of the
Minnesota Multi Housing
Association

MANAGEMENT RESOURCES FOR COMMUNITY ASSOCIATIONS

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AARON BURDEN



Common Mistakes Associations Make Regarding Insurance Claims and Repairs

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Few things seem to cause as much confusion among association boards and managers as knowing what to do when damage occurs to part of the association that may be covered under the Association's master insurance policy. The confusion tends to increase when dealing with condominiums, partly because people do not understand, or perhaps forget, where the unit boundaries lie and what is and is not part of an owner's unit. This confusion about unit boundaries can also exist with townhomes as well, as some people tend to forget that the owner's lot usually extends beyond the building footprint.

One common mistake that associations make with regards to insurance claims is relying on the governing documents to determine who is responsible for maintaining or repairing the damaged portions of the property. There is often a difference between which portions of the property the association is obligated to maintain, repair, and replace under normal circumstances and which portions the association may be insuring against certain types of loss. Typically, associations insure the structure of the building and the unit at least through to the bare perimeter walls inside the unit (usually called a "bare walls" policy) but may be insuring items inside the unit as well, such as appliances, cabinetry, trim work, flooring, etc. under what is referred to as an "all in" policy. If damage occurs from a covered loss to a unit, in most cases the association is

going to be responsible for adjusting the loss and for repairing or replacing those damaged portions of the property that are covered under the master policy, regardless of who normally is responsible for maintaining each of those items. Yet many boards still make the mistake of refusing to address needed repairs because they do not understand

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this distinction or when the insurance provisions come into play.

Another common mistake that associations make when it comes to insurance claims and repairs is to tell the affected homeowners that they are responsible for submitting and handling claims under their individual HO6 policies when the amount of damage does not exceed the applicable deductible under the association's master policy. Under the Minnesota Common Interest Ownership Act, Minnesota Statutes Chapter 515B ("MCIOA") and many associations' governing documents, the association must adjust any loss covered by its property policy and it must repair or replace any portion of the property that is damaged or destroyed as the result of a loss covered by the association's insurance.¹ A loss may be covered under the association's insurance

notwithstanding the fact that the cost to repair or replace the damaged portion may not exceed the amount of the deductible under the association's policy. An association may choose not to tender a claim to its insurance carrier where the repair costs are not expected to exceed the deductible in order to avoid having that loss on its claims history, but that

does not change the fact that the loss is a covered loss under the policy or that any repair costs in excess of the deductible would be paid for by the insurer. Under MCIOA, in the case of a covered loss to one or more units, the association can assess the amount of the deductible and/or the cost of any repairs in excess of any insurance proceeds to the affected unit owner(s), whereas the cost of repairs to the common elements in excess of any insurance proceeds are

to be paid by the association as a common expense. Therefore, these claims should be handled just like any other insurance claim under the association's master policy, meaning that the association shall arrange for all repairs to any portion of the property that is covered under the policy but assess back to the affected unit or units the amount of the deductible or the cost of repairs *for that unit* (not for repairs to the common elements) up to the deductible that is not being paid for by insurance proceeds.

Similarly, I have seen a number of associations incorrectly treat losses that originate in one unit and impact a neighboring unit as a matter to be handled entirely between those two individual unit owners and their insurance companies. This is particularly common in condominiums where a water leak originates in one unit and causes damage in the unit below or next door to it. However, since the unit

¹ See Minn.Stat. §515B.3-113(e) and (h).

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boundaries in most condominiums are defined as the interior unfinished surfaces of the perimeter walls, floor and ceiling, most damage from water leaks in these situations will be to the common elements between the two units and not to the units themselves. Not only do the unit owners not insure these common elements, but an association should never allow, much less require, an owner to make repairs to the common elements. As with the above situation, the association must adjust the loss with its insurer if the amount of damages exceeds the deductible and then seek to assess back any costs for repairs to the actual units themselves. The cost of repairs to the common elements may not be assessed back to a unit owner unless that owner is at fault for causing the damage. If the owner (or their occupant, tenant, guest, etc.) in whose unit the loss originated was negligent in some way that caused or allowed the damage to happen, the association may be able to assess the entire cost of repairs, including repairs to the common elements and any other units that were damaged, to that responsible unit.² Otherwise, the deductible under the master policy and/or the cost of repairs to the unit(s) themselves in excess of insurance proceeds may be assessed back to the affected units in any reasonable manner.



Those owners are then free to submit a claim to their own HO6 carrier to cover the deductible or repairs that were assessed to them by the association a loss assessment or under any other applicable coverage that they might have, as well as for any damage to their personal property or other portions of their unit not covered under the master policy.

Another common mistake associations make is confusing a loss that is covered under the association's property policy with a loss that is not covered either because the loss was not caused by a covered occurrence such as fire, weather, accident, etc. or because the damaged item is not covered under the policy (i.e. cabinetry or flooring in a unit with a bare walls policy). If the damage was not caused by a covered loss, then the provisions in MCIOA and/or the

association's governing documents regarding insurance and insurance claims are not applicable and the association would look to the maintenance provisions of its governing documents to see who is responsible for any repairs.

Finally, it should be noted that under MCIOA and many associations' governing documents, damage that is caused to a unit as the result of the acts or omissions of the association or its agents, including damage resulting from the association's lack of maintenance or failure to perform necessary repairs or replacement, is the responsibility of the association.³ This means that if the association is responsible for causing the damage either because it or its vendor did something or because the association failed to properly maintain the property, the association is going to be responsible for any and all repairs to the common elements and to any units that were damaged as a result. I have seen a number of associations try to pass these costs on to unit owners as if it were a normal insurance claim and/or try to limit their liability for these damages by adopting policies to reimburse unit owners only for a certain amount of the repair costs, thereby leaving the unit owner to pay for the rest. As with many situations, it may come down to the particular facts and evidence to determine whether the association was, in fact, negligent and whether said negligence caused the damages, but MCIOA is clear that if the association is at fault, the association and not the unit owner must pay for the repairs to the unit. If your association is not governed by MCIOA, you will need to look at your documents to determine who is responsible for repairs in any particular situation. ■

² See Minn.Stat. §515B.3-107(a) and §515B.3-115(g) (for common interest communities created prior to August 1, 2010) or §515B.3—1151(g) (for common interest communities created on or after August 1, 2010).

³ Minn.Stat. §515B.3-107(a).

Attorneys Named to Best Lawyers List

Hellmuth & Johnson announced that seven attorneys have been named to The Best Lawyers in America[®] 2021 list and one named to the inaugural The Best Lawyers in America-Ones to Watch[®] 2021 list.

The following H&J attorneys were named to The Best Lawyers list: KC Ahrens – Litigation - Insurance; David G. Hellmuth – Real Estate Law; Joel A. Hilgendorf – Real Estate Law; Phaedra J. Howard – Real Estate Law; Chad A. Johnson – Real Estate Law; Michael D. Klemm – Real Estate Law; and Nancy T. Polomis – Real Estate Law. The following H&J attorney was named to The Best Lawyers to Watch: Cole A. Hickman – Business Organizations (including LLCs and Partnerships)

Best Lawyers lists are compiled based on an exhaustive peer-review evaluation. More than 112,000 industry leading lawyers from around the world are eligible to vote, and they have received more than 11 million evaluations on the legal abilities of other lawyers based on their specific practice areas around the world. Lawyers are not required or allowed to pay a fee to be listed.



Ten Tips for New Property Managers

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Just when we think we have a handle on things—whether COVID-19 related or otherwise—the rules change. Kudos to everyone for doing your jobs so well, especially while in the throes of a pandemic.

2020 has brought an influx of new managers into the industry. Here are a few tips that new managers in particular may find helpful.

- 1. Be a Sponge.** Take advantage of in-housing training, lunch & learns, and other seminars/webinars to learn as much as you can about property management. Not only is it beneficial to learn new things, but it's also reaffirming to learn you're doing lots of things right!
- 2. Ask Questions.** Take advantage of senior managers around you, as well as other professionals. Every industry has "tricks of the trade" that you may not learn if you don't ask. A daunting situation may be made much easier if you ask colleagues how to handle something and they share how they resolved a similar situation.



- 3. Review the Governing Documents for the Associations You Manage.** You certainly aren't expected to know all the provisions of each association's governing documents, but you should be generally familiar with them. Make checklists and "cheat sheets," so you can respond to some of the more basic questions Board members and/or homeowners may ask. Pay particular attention to spending limits, assessment caps, and special approval requirements.
- 4. Don't "Wing It."** It's okay to admit you don't know something, as long as you assure people you'll find out. Then go find out.
- 5. Take Advantage of Other Professionals' Expertise.** You don't have to know everything about everything; you just need to know who to contact for help. Questions about tax liability? Ask an accountant. Questions about interpreting governing documents? Ask a lawyer (and, in particular, a lawyer who works with homeowners associations on a regular basis). Questions about tree health? Ask an arborist. Question about insurance coverage? Ask an insurance agent (and, again, make sure it's an agent who works with homeowners associations).
- 6. Don't Be Afraid to Challenge the Board of Directors** (but do it nicely, of course!). Some associations' board members have been serving on their board of directors for years. It can be intimidating for a new manager to begin working with well-established boards. However, it's important that you do all you can to ensure a board is following its governing documents. If the Bylaws say there are supposed to be five directors, but the board tells you, "Yeah, but we've always had only three," impress upon them the

need to abide by the Bylaws (and all the governing documents). Don't let the Board bully you into doing whatever the Board wants.

- 7. Never Give Legal Advice**—even if you think you know the answer. If a board wants an interpretation of the governing documents, strongly recommend they get that interpretation from an attorney. You know a lot – but not everything. (See Tip #5.) Because you're not a lawyer, you may overlook or misinterpret a certain word or phrase—to the detriment of the association. Having an attorney give a legal opinion on a legal issue also insulates you and your management company from liability. Don't forget that practicing law without a license is illegal!
- 8. Listen.** As Epictetus observed, we have two ears and one mouth so that we can listen twice as much as we speak. Enough said.
- 9. Don't Dwell on Mistakes.** Nobody's perfect. Nobody. We all make mistakes from time to time. It's important that, when you make a mistake, you take immediate action to rectify the situation if you can. DO NOT try to cover it up. In all likelihood, the longer you wait to "fess up," the more difficult it will be to fix it. DO learn from your mistakes.
- 10. Revel in Your Successes** (no matter how small). Whether it's completing a major project under budget, finding a way to do something others said couldn't be done, or finally getting that hornet's nest down for good, revel in your successes.

Sometimes we get so caught up in the complex, we overlook the simple. Whether you are building a home or a career, start with basic building blocks and then build on that a solid foundation. ■