



## Q & A: Who's responsible for leak damage?

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**Q:** For the second time in the past year, my upstairs neighbor has had a leak that ran down through the wall and damaged my ceiling and drywall. The first time it was a toilet leak and this last time his refrigerator water supply line leaked. In both cases, he refused to pay for the repair to my ceiling and drywall and the condominium association had to complete the repairs. I was told that I was responsible for repairing the drywall damage, but the condominium association decided to take care of it since the damage to the drywall was very minimal. I simply don't understand how I can be liable for this and the upstairs owner is not responsible to pay for this damage. **(B.C. via email)**

**A:** Your question involves what is arguably the most complicated and uncertain issue facing condominium associations today. The general concept concerning repair of casualty damage in a condominium is that you initially look at what item of property is damaged as opposed to whose conduct caused that damage. The primary reason for this approach is to allow associations and unit owners to know what they are responsible to insure, as insurance is the first line of defense against this type of damage.

The issue is complicated by the construction of most condominium buildings. As you may know, it is necessary to define unit boundaries, general common elements, and limited common elements, which are general common elements owned by all

owners in pro rata shares, but reserved for the exclusive use of certain owners. Then, provisions in the condominium declaration assign various general, day-to-day maintenance responsibilities for these various items and areas of property to the unit owner and to the association. However, because casualty damage is different than day-to-day maintenance, both because of the nature and cost of repairs for casualty damage and because casualty damage is insurable, most declarations have separate, often different, repair and replacement responsibilities from the general day-to-day maintenance responsibilities assigned to unit owners and the association respectively in the event of a casualty event. To further complicate matters, the Florida Condominium Act dictates the casualty insurance that must be maintained by the association, which includes insurance of the unit as initially constructed, excluding certain items of property such as wall coverings, floor coverings, built-in cabinets, and others. As a result, the association's insurance covers initially constructed wallboard and ceiling drywall even though those items of property are inside the unit.

Historically, the actual repair responsibility for interior drywall rested, in most cases, with the unit owner, even though the association insured that property. However, to add further to the complication and confusion, the Division of Florida Land Sales, Condominiums, and Mobile Homes issued a Declaratory Statement in January 2006, generally referred to as the "Plaza East"

Declaratory Statement, in which the Division took the position that the association is responsible to repair and replace any item of property which the association is obligated to insure. This decision caused some difficulties because many declaration of condominium casualty repair provisions did not follow the concept that the association must repair and replace everything that the association insures. The Plaza East reasoning was recently overturned by a State Hearing Examiner in another case, and that matter is pending appeal. Condominium communities have lived with this uncertainty for the last two years.

Currently, House Bill 601 is awaiting the Governor's signature, or veto, to address the confusion and uncertainty caused by the Plaza East Declaratory Statement. House Bill 601, if it becomes law, will codify the Plaza East ruling, unless the association affirmatively votes to be bound by the same other casualty repair protocol.

In any event, any liability of your upstairs neighbor will not be based upon any statutory obligation contained within the Condominium Act, but would be based upon a theory of negligence. Unfortunately, negligence is more difficult to establish than one might think. It is not enough to show that some damage occurred, but you must show that the conduct, or failure to act, of your upstairs neighbor was unreasonable or careless. If the upstairs neighbor had no notice whatsoever that the toilet nor the refrigerator supply line would leak, it is unlikely you will establish that he was negligent.

Moreover, if the upstairs neighbor was aware of potential leaks by these items, most of that information would be held by, and known only to, the upstairs neighbor. It can be very difficult for you to establish these important facts. However, it is true that any person damaged by the upstairs neighbor's leaks, including the insurance company that pays to repair such damage, can investigate and explore a possible negligence action against the upstairs neighbor and, if appropriate, recover the cost of the damage from that responsible party.

**Q:** Can husband and wife simultaneously serve on the Board? **(M.R. via email)**

**A:** Simple question, complicated answer.

First, it is necessary to understand that, in the absence of restrictions in the condominium documents (declaration of condominium, articles of incorporation, or bylaws) any natural person age 18 years or older may serve on the board of directors, which is the law generally applicable to Florida corporations.

Most condominium documents do contain some restriction on board eligibility. Many documents limit board eligibility to record title holders (persons named on the deed). The Florida Condominium Act has also been consistently interpreted to permit any person named on the deed to stand for election to the board.

Accordingly, as the law stands today, if a husband and wife are both record owners of a unit, they are both legally entitled to run for, and be elected to the board, even though they may only own one unit. In other words, if both are elected, they would get two votes on the board, even though they only share one vote for the unit.

The law has been recently amended on this topic, effective October 1, 2008. The change in the law states that "co-owners" of a unit may not simultaneously serve on the board. Clearly, this would prohibit a husband and wife, who own only one unit, from simultaneously serving on the board.

There are many grey areas created by this law. For example, if a husband and wife owned five units, would they still be limited to one board seat? What about those situations where a husband and wife have been properly elected, can the Florida Legislature remove a board member from their seat? How is the law to be phased in? Can husband and wife both run? If so, and both win, which spouse do you disqualify?

More to come on this topic when this column begins its annual review of condominium and homeowners' legislation.

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