

HOA Mold Damage Liability that Results from Water Leaks – Who is Liable?  
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HOA mold damage liability is in question. A common problem that frequently results in litigation between condominium owners, their homeowners' associations, and their respective insurance carriers relates to who is responsible for damages that result from mold contamination caused by unrepaired moisture. In the typical scenario, the moisture that creates the mold is caused by a condition that originates in the common area, such as a roof leak, a broken water pipe, or poor exterior waterproofing. When an owner experiences mold on the drywall within their unit, or behind the drywall, conflicts over who is responsible for cost of abating the mold and the resulting repairs are commonplace.

#### Responsibility for Common Area Maintenance

An association has a duty to maintain the common areas unless the association's governing documents state otherwise. In addition, the association's directors have a duty to maintain the common areas in a reasonable manner to prevent injury to third persons. This duty necessitates the board making routine maintenance checks of the common areas and responding in a reasonable time and manner to complaints about issues involving areas that are under the association's control. The directors of associations that retain property managers should also periodically check to verify that the management company is performing its maintenance functions, because the directors are ultimately responsible for common area maintenance.

The association maintenance duties include: (i) a duty to inspect the common areas; (ii) a duty to investigate complaints; and (iii) a duty to make necessary repairs.

If the association does not have adequate funds to repair and maintain the common area components, the board should attempt to raise assessments and should document its efforts to do so. Thus, even if the association's members refuse to approve a proposed increase, the directors will have demonstrated a good faith effort to fulfill their duties.

#### Water Damage and Mold Contamination

Regardless of fault, damage to common areas must be repaired. If the leak is an owner's responsibility and he, or she, refuses to repair the leak, the association has three options: (i) commence proceedings to impose daily fines until the owner makes the necessary repairs; (ii) repair the leak, if the board has access to it, and then bill the owner for reimbursement; and (iii) seek a court order compelling the owner to either repair the leak or allow the association to do so.

When confronted with water damage and resulting mold contamination, the association's governing documents (generally the CC&Rs and the Condominium Plan) should be thoroughly reviewed to clarify exactly what is deemed to be "common area" and for relevant provisions relating maintenance. Even if the source of the water is determined to be a common area component that the association is obligated to maintain, the association will not necessarily have automatic liability just because the leak occurred. Establishing HOA mold damage liability on the part of the association will in most instances necessitate a determination that the association was negligent in some manner, or engaged in some other conduct that intentionally caused the leak.

If the cause of the leak was not due to either negligence or intentional conduct on the part of the association, each party (the association and the homeowner) will be responsible for the cost of the repairs— the association repairs the common areas and the owner his or her own unit. If the cause of the leak is attributed to either negligence or intentional conduct on the part of the association, which may be attributed to its agents, then the association would be responsible for repairing all of the resulting damage, including the cost of remediating the mold that resulted from the water damage.

When a homeowner suffers damage from water leaks that originate in a common area component, the owner still has the burden of proving that the association is responsible for the resulting damage due to either negligence (i.e. breach of a duty to maintain the component), or some intentional conduct. Establishing such liability would require a showing that the association knew or should have known of the potential problem (i.e. roof leak). The owner would want to know if there were previous reports of other leaks which would have put the association on notice, or whether the common area component that caused the problem was beyond its useful life as set forth in a reserve study, or if the component was properly maintained. If there is evidence that the common area component in question was periodically inspected and properly maintained, and there were no history of prior occurrences, it is less likely that the owner would successfully establish liability on the part of the association.

When there has been resulting HOA mold damage liability caused by the water leak, there are additional considerations relative to establishing liability for the cost of remediating it. As a general rule, if the mold is on a common area component such as a wall that the association is responsible for maintaining, the association is obligated to remove it regardless of who was at fault. If the owner, or some other third party (i.e. a neighboring unit owner) caused the water leak and the resulting mold, the association could seek reimbursement of the cost of remediation and repairs from that person, after first conducting a proper hearing to establish their responsibility. If the mold is on a portion of the property that the owner is responsible for maintaining, then the owner would be responsible for making the repairs and then seeking reimbursement from the party that caused the damage.

When insurance is involved, the parties will typically turn the matter over to their respective insurance carriers. Typically, insurance companies will cover water damage that results from a sudden leak, as opposed to seepage over a period of time, but will not cover the cost of mold removal or personal injuries associated with exposure to mold.

When water damage is encountered, it is critical that immediate steps be taken to thoroughly dry out everything that was exposed to the water as it is the moisture from the water that triggers the mold growth. Association management personnel should have information on local restoration companies available before an incident occurs so they could be immediately contacted when the need arises. They will bring in fans, water vacs, and dehumidifiers to remove all moisture and prevent the mold growth. As soon as the source of the water leak is determined, it should promptly be repaired. Photographs should be taken and all repairs should be fully documented. This should be falling into the HOA mold damage liability and what the Association should be doing about this issue.

To be prepared when the need arises, associations should develop maintenance charts that identify the various common area components, exclusive use common areas, and owners' separate interests, and clearly describe the respective maintenance duties of the association and the owners with respect to said items.

