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GENERAL EXPLANATION OF LIABILITY FOR“LEAK FROM ABOVE OR OUTSIDE INTO THE UNIT” SCENARIO©

A common scenario encountered by Condominium Associations is the water leak into a Unit from the Common Elements outside the Unit and/or from the adjoining Unit above. Under the best of circumstances this is a complex scenario that often involves 6 different parties - the Association, the Association’s insurance company, the upstairs owner, the upstairs owner’s insurance company, the downstairs owner and the downstairs owner’s insurance company.

The responsibility of each party is controlled by the Condominium documents, the Condominium Act (Chapter 718 FS) and the law of negligence. This memorandum addresses the question of whose responsibility it is to pay for and repair the damage to the Common Elements, the upstairs Unit and the downstairs Unit. The question of whose insurance covers the damage is a separate but related issue covered in another memorandum.

First, it is important to understand the general division of responsibility between the Association and the Unit owner. Typically, the Association is responsible to maintain, repair and replace the Common Elements and the Unit owner is responsible to maintain, repair and replace his or her Unit. (Note: The boundaries between the Unit and the Common Elements are determined by the Declaration of Condominium.) However, these responsibilities can be shifted in two ways.

First, the Condominium documents can require the Association to maintain portions of the Unit, for example load bearing interior partition walls within a Unit. Likewise the Condominium documents can require the Unit owner to maintain portions of the Common Elements such as Limited Common Element parking spaces or lanais. The second way the responsibility can be shifted is through negligence.

In the typical water intrusion case where water comes in from the outside, through the Common Elements and/or from the upstairs Unit into the downstairs Unit and in the absence of negligence each party will repair and pay for the items they are responsible for as provided in the Condominium documents. IE: Association repairs and pays for damage caused to the Common Elements and each Unit Owner repairs and pays for the

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damage caused to his or her Unit and its contents. Typically, the fact that the water came into the downstairs Unit from the Common Elements or the upstairs Unit does not matter if it was a pure accident without negligence. (Note: Very rarely, some governing documents do provide a strict liability standard which means the party responsible for the location from which the water emanated is responsible for all resulting damage even without a showing of negligence.)

When negligence can be proven the burden to pay for the repairs (but not the obligation to physically make the repairs) can be shifted to the negligent party and/or their insurance company. For example, if the water comes in because the Association negligently failed to repair the roof then the Association could be made to pay for the repairs to the Unit. Another example would be if the upstairs owner tried to repair his own plumbing instead of using a plumber.

Negligence is a higher standard than a pure accident. Negligence occurs when one party has a duty to another and breaches that duty. The Association does have a duty (aka a legal obligation) to maintain, repair and replace the Common Elements. If the Association breaches its duty by failing to do normal maintenance, repair and replacement or if the Association knew or should have known that there was problem that would result in leaking ahead of time then the Association could be deemed negligent and therefore responsible for the cost to repair the damage to the Unit caused by the leak. However, if the Association had no prior knowledge or reason to anticipate a leak then the Association is not negligent and thus not responsible to repair or pay for the damage caused to a Unit or its contents by an accidental leak. Likewise, typically an upstairs Unit Owner is not responsible to repair or pay for the damage caused to the downstairs Unit if suddenly, without warning his toilet overflows.

Unit owners are not required by law but are certainly wise to have insurance for their Units including its contents. Leaks from outside the Unit whether from the roof or from an upstairs Unit into a downstairs Unit happen with some frequency. If the Association goes ahead and pays for non-negligent leaks it sets a very bad, and ultimately expensive precedent and I do not recommend you do it. If a downstairs Unit owner makes the decision to forego insurance to pay for damage caused by accidental leaks then that is a risk he or she assumes.

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In the typical case the Common Elements are everything from the Unit perimeter drywall out. This includes the Unit boundary drywall, the studs, the CBS block and the exterior of the building wall. Thus, in the absence of negligence the Association must pay for and repair the perimeter drywall out, including removal of mold from the Common Elements. The downstairs Unit Owner is responsible to pay for and repair all other things within their Unit such as carpets, drapes, interior partition drywall* and the removal of mold in the Unit. *However, the insurance covering the interior partition drywall in the Unit is now provided by the Association pursuant to the Condominium Act thus under certain circumstances while the Unit Owner may have to make the repairs to the interior partition drywall some or all of the cost is covered by the Association's insurance. This topic is covered in another memorandum which should be read in conjunction with this information.

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The foregoing information is general in nature and is not intended as specific legal advice applicable to your Association. Further, the principles of law cited herein are subject to change from time to time. Each case is fact and Condominium document specific.