

MERCERTRIGIANI

NEGLIGENCE DETERMINATION

Sometimes damage to Association property is necessitated or caused by the negligence of an owner, resident or guest. Depending on the recorded documents of a community, it may be possible to assess charges related to fixing the damage to an owner. But, prior to assessing the costs of repair, a majority of the board of directors must make a determination (at a properly convened meeting) that the damage was caused by the act, neglect or carelessness of the owner or the owner's household member, tenant, or guest. Background information and details regarding the damage, the cause of the damage and the cost of repair will be necessary to consider. It is a board decision whether there was negligence, whether that negligence was the cause of the damage and whether the costs of repair should be charged to the owner.

A board may establish a policy addressing how claims will be investigated, but consideration must be given to facts and circumstances. Under Virginia law, negligence is the failure to use ordinary care in performing one's responsibilities. *Ordinary care* is the care a reasonable person would use under the circumstances. Many considerations go into the determination of negligence. For example:

- Where did the damage originate?
- What caused the damage?
- Is the association or the owner responsible for maintenance of the property damaged?
- *If* the owner has maintenance responsibility:
 - Was the defect visible or behind a wall where inspection is not common?
 - What maintenance or repair was performed relating to the damage?
 - What maintenance or repair was expected?
 - Were there any warning signs of impending failure?
 - Have there been similar problems that have been made known to owners?

There may be other questions pertinent to a determination of negligence, depending on the circumstances of each water intrusion event.

Given the myriad of circumstances that may result in damage, it is impossible to establish a single rule that applies in all circumstances. The determination of negligence must be made on a case-by-case basis, based on the facts presented – not on assumption or conjecture. If negligence is determined and the costs to repair are assessed against the owner, evidence supporting these determinations should be sufficient to support judgment in favor of the Association if the owner challenges the matter through legal action.

Although not required, it is recommended that owners be provided notice and an opportunity to address the board if the issue of the responsibility will be considered at a board meeting. This may help avoid any claim of surprise by the owner if a charge is imposed and may help reduce the level of conflict with the owner.

However, there is no guarantee that an owner (or an owner's insurance carrier) will agree with a board determination that there was negligence. In the event an owner refuses to pay expenses, it may become necessary to initiate legal action to collect the unpaid amount. Because of the possibility of litigation, it is necessary to carefully document the board determination process and retain documents and correspondence evidencing support that there was negligence in every instance. The prevailing party in a lawsuit likely will be entitled to an award of costs and reasonable attorneys' fees.