SOMEBODY HAS TO PAY - OR DO THEY?

Making the tenant pay for damage can be problematic. For example, a tenant's own washing machine doesn't stop filling and floods several units resulting in $15,000 of damage. The washer flooded because of a defective valve that failed to turn the water off. The tenant had no prior knowledge that the washing machine was defective or in need of repair, nor was the tenant's use of the washer improper. The tenant carries renter's insurance. However, the insurance company denies the tenant's claim because the tenant was not at fault. OK, the insurance company won't pay, but the tenant still has to pay the community, right? Surprisingly, probably not.

For a tenant to be legally liable in damages to a landlord, the landlord must have a legal basis to hold the tenant liable. In any tenant lawsuit, a landlord must prove two things. The landlord must first establish that there is a legal basis to hold the tenant liable for what happened. If a tenant is legally liable, the landlord must also prove damages. In our scenario, the landlord clearly will be able to establish damages. The problem is proving liability. Specifically, the landlord will have difficulty proving that the tenant is legally liable for the washing machine flood.

While the law imposes legal liability based on many theories, the most common legal liability theories by far are contractual and tort. Contractually liability is straightforward. The tenant agreed to be liable so the tenant is liable. Tort (negligence) liability is based on duties imposed by society. For example, society imposes a duty to exercise caution while driving a car. Thus, if you are texting while driving a car and run over a pedestrian, you have breached the duty to exercise care while driving. Since you breached your duty of care while driving, you were negligent and are now legally liable for all damages that proximately flow from your negligent operation of a motor vehicle.

Whether a tenant owes a legal duty, in a particular circumstance, is a question of law. When an issue is a question of law, the judge decides the issue. In our washing machine flood scenario, this means a judge would decide if the tenant owed you a duty with respect to operating the washing machine. Clearly, the tenant has duties to use the washing machine properly, and to not use the washing machine if the tenant knows that the machine is defective or in need of repair. But does the tenant have a duty to monitor the washing machine? After all, if the tenant was watching his wash, he could have turned the water off.

Courts consider a number of factors in determining whether a person owes a legal duty to another. Factors include risk, the foreseeability and likelihood of injury, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon an individual. No one factor is controlling. The question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards. Would reasonable persons recognize a duty and agree that it exists? Reasonable persons would not recognize a duty to watch a washing machine. We have all left washing machines unattended when doing our laundry. Based on Colorado legal precedent, tenants have no duty to monitor or watch washing machines when doing laundry. Without a legally imposed duty, a tenant can't be held legally liable for negligent laundering.

What about the lease? Surely, the tenant has to be liable for the washing machine flood under the lease. Again, the answer is probably not. Contractual liability is based upon agreement. For example, in every lease, the tenant agrees to pay the rent. Thus, if a tenant doesn't pay the rent, the tenant breaches the agreement and is legally liable in contract for the rent. To hold the tenant legally liable in our scenario, your lease must have a clause where the tenant agreed to be liable for events that cause damage even if the tenant was not negligent. Based upon our experience, most leases do not hold tenants strictly liable for events regardless of negligence or fault.

Rather, most leases make tenants liable for intentional or negligent acts, including both THS's lease product and the National Apartment Association's Blue Moon lease. For example, a tenant shall always be liable to an owner for any damage caused, whether intentionally or through negligence, by tenant any occupant, family member, guest, invitee, licensee of tenant, or any other person on the premises or the community due to tenant. Negligence includes acts of commission (breaching a duty by overt act) and acts of omission (breaching a duty by failing to do something the tenant should have done, e.g. leave the heat turned on during the middle of winter when the tenant is absent from the unit for an extended period of time).

OK, we get it. The tenant isn't going to be held liable based on a negligence theory and our current lease probably doesn't protect us. So the solution is to fix our lease, right? Yes, we definitely recommend fixing washer and dryer language in your lease as a step in the right direction. You should add language similar to the following: Regardless of Tenant's knowledge or fault, Tenant assumes all risks and agrees to assume strict liability for all damages to the Premises, to other units, and to personal property in the Premises and other units caused by the Tenant's equipment, including but not limited to leaks and flooding. Owner's insurance will not cover such damages. Tenant agrees to indemnify Owner and Agent and their agents for any and all damages of any kind arising from Tenant's equipment.

We know what you're thinking. If a strict liability clause is great for washers, we should extend strict liability to all circumstances. Specifically, by agreement, let's make the tenant liable for every event regardless of fault, and regardless if the tenant has any connection to the damage. Such a clause is known as a blanket indemnity clause. Blanket indemnity clauses shift all risk of damages from one party to another regardless of fault or the circumstances. Courts have routinely held that blanket indemnity clauses in residential leases are unenforceable. A well-written lease should impose liability on tenants for damages negligently or intentionally caused by the tenant. When your lease's general damage clause goes from being based on fault to a blanket indemnity clause, you risk having a court ruling that your damage clause is unenforceable even in fault cases.

In no-fault cases, specific strict liability clauses will give you a chance, but unfortunately a specific strict liability clause won't guarantee that you will be reimbursed for flooding washing machine damages for several reasons. First, and foremost, even with a strict liability clause (the tenant is liable for washing machine related damages regardless of fault), you may not prevail in court. Absent knowledge (tenant knew that the machine was in need of repair or was defective) or fault (tenant overloaded machine or used improperly), many, if not most, judges may be

reluctant to stick a tenant with a $15,000 repair bill for doing what every American does, starting the washing machine and leave.

Assuming no knowledge or fault upon the part of the tenant and even if you have a strict liability clause, a judge could easily find that the tenant is not liable for a washing machine flood based on the adhesion contract or unconscionability doctrines. An adhesion contract is a contract drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public. An adhesion contract is generally not bargained for, but is offered on a "take it or leave it" basis. Similarly, a finding of unconscionability can result based upon overreaching on the part of one of the parties that results from an inequality of bargaining power. Based on Colorado law, these doctrines should not defeat a limited strict liability contract clause. However, courts can and do use both the adhesion contract or unconscionability doctrines to justify not holding tenants liable.

Strict liability clauses also do not solve the renter's insurance problem. Even if you have a strict liability clause and the court enters judgment against the tenant for the damage, the tenant's renter's insurance, in all likelihood, still won't pay the claim. Again, renter's liability insurance only covers negligent acts on the part of the tenant. Renter's liability insurance does not cover damages based upon the intentional acts of a tenant or damages that result without tenant fault. Your sole remedy at that point is to collect from the tenant. Because most tenants can't pay a $15,000 judgment, you're left with a $15,000 judgment against the tenant that you can't collect.

Absent fault, tenants are not always liable for all damage events. If a tenant is not at fault, you should carefully evaluate the tenant's legal liability. The only thing worse than a tenant or an insurance company not paying is wasting your time, effort, and more money pursuing a futile claim. Scenarios involving malfunctioning appliances such as washers are among the most common damage scenarios where a tenant may not be at fault. If your community or your portfolio keeps incurring losses, you should evaluate changing your lease to impose strict liability on the tenant regardless of fault for specific damage scenarios. However, strict liability should only be imposed in limited circumstances. Otherwise, you may risk your ability to recover damages from the tenant in cases where the tenant is clearly at fault.