

# Tragedy of the Common Elements

*Distribution of Risk  
& Resources in  
Condominiums &  
Planned Communities*

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DECEMBER 2009—Many lawyers who represent owners in claims against condominium or planned community associations or the condominium or planned communities themselves assume that the law requires a shared distribution of resources, risk, pain and reward in community associations<sup>1</sup>. In many cases, the law does not impose a rigid shared distribution of resources and risk and in many situations where the law does impose such distribution of resources and risk, it should not.

In representing community associations, lawyers often confront challenging scenarios where one owner has a claim against the community association. Victory for the owner means defeat for the community association and vice versa. Disregarding insurance for the moment, if an owner slips and falls and suffers personal injuries at the community owned or maintained swimming pool, successful prosecution of the slip and fall claim against the community association results in money paid to the injured owner directly from the community association's funds (nearly always accumulated entirely by mandatory assessments on all owners of units or lots in the community association). The injured owner has an incentive to maximize his claim at the expense of his fellow owners. The fact that the injured owner may be forced to contribute his fractional share of the resulting compensation (depending on the number of units and the required distribution of community association liabilities) rarely offsets his motivation. The "win/lose" nature of owner disputes with their community associations presents challenges to boards of directors of community associations, insurance carriers, professional community managers, lawyers, and judges<sup>2</sup>.

Motivation for the behavior of owners who have a legal claim against their community association is better understood through the lens of a concept known as "The Tragedy of the Commons." The Tragedy of the Commons" is the title of an article written by Garrett Hardin, PhD, published in the journal Science in 1968. The article identifies a dilemma in which individuals acting independently in their own self-interest can ultimately destroy a shared resource even where it is clear that it is not in anyone's long term interest. Dr. Hardin describes the tragedy through herders sharing a common parcel of land (the commons) on which they are all entitled to let their cows graze. It is in each herder's interest to put as many cows as possible onto the land, even if the commons is damaged as a result. The herder receives all the benefits from the additional cows but the damage to the commons is shared by the entire group. If all herders make this individually rational decision the commons is destroyed and all herders suffer.

The "Commons", the resource shared by several people, applies to varying degrees to all community associations. Community associations are created on the principle that certain portions of the property will be individually owned and controlled, and the remainder will be owned in common or shared and managed in common. The "resource" could be the amenities, the money held as reserves for future capital expenditures, the periodic assessments, an association insurance policy, etc. There are a number of "Tragedies" in community associations that, left uncorrected by the law, will contribute to the inevitable decline of community associations.

An example of the challenge of resolving resource conflicts fairly and without undermining the association over the long term is roof repairs in a condominium. Although nothing about the legal structure of a condominium automatically requires the condominium association to maintain the roofs of the units, assume that the condominium association is responsible to maintain the roofs of the units as set forth in the condominium declaration. Assume further that the condominium contains 100 units, all of which are one story units where each and every unit has a roof. Most

<sup>1</sup> In this essay, "Community Association", as used herein, will refer to a condominium or "planned community," regulated in Arizona at A.R.S. §33-1201 et seq. and §33-1801 et seq., respectively.  
<sup>2</sup> This essay, before publication, has already sparked significant controversy within the author's law firm.

lawyers approach the problem of roof repairs the same way by considering the statutes, A.R.S. §33-1201 et seq., and the governing documents to determine whether the condominium association or the unit owner is responsible for the repair. In this example, assume the roof has failed in a storm and there is a \$10,000 roof repair bill (and that this roof is the only roof in the condominium

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that failed). Setting aside the question of insurance, who’s responsible for what? There are not enough facts in the hypothetical to address certain lawyers’ concerns. Issues such as “what caused the leak?,” “How did the water get inside the unit?” are good candidates for the “additional information” necessary to render a decision. But the very notion of this “additional information required” feeds the tragedy. Those questions assume that there are scenarios whereby the condominium association would be required to fix the roof, at the expense of the condominium association, and distribute that expense among all owners. The existence of this possible outcome puts the unit owner in the position of advocating for the community association to fix it as an association expense (costing that unit owner a penny for every dollar expended), and puts the community association in the position of insuring roof failures of all units. Is this the correct legal result? Is it the best approach to the problem?

Section 3-115 (c)(2) of the Uniform Condominium Act<sup>3</sup> states in part as follows:

To the extent required by the declaration...any common expense or portion thereof benefitting fewer than all of the units must be assessed exclusively against the units benefitted.

The Commissioner’s Comment to this section of the Uniform Condominium Act<sup>4</sup> states, “Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107<sup>5</sup> as to limited common elements, other expenses benefitting less than all units, insurance costs, and utility costs.”

Section 3-115 of the Uniform Condominium Act and the related comment stands in stark contrast to A.R.S. §33-1255(c)(2), unchanged since adoption by the Arizona Legislature in 1985. A.R.S. §33-1255(c)(2)<sup>6</sup> states in part as follows:

Unless otherwise provided for in the declaration... any common expense or portion of a common expense benefitting fewer than all of the units shall be assessed exclusively against the units benefitted.

In rejecting the Uniform Condominium Act approach of requiring the declaration to create the “pass through” of common expenses that benefit fewer than all of the units, the Arizona Legislature created a different public policy. The default position in Arizona, unlike the result contemplated by the Uniform Act, is that unless the declaration creates a different result, a unit owner who benefits from a common expense must be assessed the common expense or portion that benefits less than all of the unit owners.

There is a debate among lawyers whose practices involve condominium clients as to what the words “otherwise provide” mean. The two most discussed alternatives are:

1. A condominium declaration “otherwise provides” only if the topic of common expenses that benefit fewer than all of the units is explicitly addressed, such as, “Common expenses that benefit fewer than all of the units will be paid equally by all unit owners anyway.”
2. A condominium declaration “otherwise provides” if it states that common expenses will be divided equally among the unit owners.

Given the public policy in favor of unit owners paying the common expenses that benefit them

<sup>3</sup> In 1985, Arizona adopted most of the Uniform Condominium Act, but modified Section 3-115.

<sup>4</sup> In Griffith v. Faltz, 162 Ariz. 599, 601, 785 P.2d 119, 120 (Ariz. App. 1990) the Court stated, “Although this court is not bound by the interpretation of the Commissioners on Uniform State Laws, that interpretation is highly persuasive and should be adopted unless it is erroneous or contrary to settled policy of the state.”

<sup>5</sup> Similar to A.R.S. §33-1217.

<sup>6</sup> There are no reported cases in Arizona that cite A.R.S. §33-1255(c)(2). The statute is referenced in dicta in a memorandum decision titled McLoughlin v. Alameda Park Condominium Association, 2007 WL 5463519, Ariz.App. Div. 1, September 27, 2007 (NO. 1 CA-CV 06-0784).

and thereby protecting their neighbors from paying a share of costly repairs that do not impact their units, the only consistent interpretation of “otherwise provide” and A.R.S. §33-1255(c)(2) is the first option above.

A.R.S. §33-1255(c)(2) acknowledges the problem of requiring the condominium association to pay for all roof repairs as a common expense. At best, condominium associations collect assessments to fund reserves to deal with ongoing maintenance of the roofs typically done at the same time (and thus a common expense that benefits all units). Condominium associations do not assess the owners to have a cash fund fully funded with the total cost of repairing (as opposed to maintaining) all parts of the condominium the association is obligated to maintain.

There are times when a planned community association is obligated to maintain the roofs on units that are not in a condominium. Sometimes called “townhouses”, these “planned community” associations (governed by A.R.S. §33-1801 et seq.) look and feel like condominiums in that the association maintains portions of the structure typically thought of as the “home.” The result of a roof leak and the costs of repair will be entirely dictated by the governing documents because there is no analogous statute to A.R.S. §33-1255(c)(2) in the planned community statutes. Often the governing documents are explicit that the community association must maintain the roofs, but silent on what to do with a common expense that benefits fewer than all of the units. Most lawyers, community managers and judges, in this void of direction, will simply conclude, correctly in many instances, that a roof repair is the responsibility of the whole, and must be paid from association funds.

Sometimes governing documents are drafted to attempt to avoid this potentially unfair result in cases of willful conduct, gross negligence or even negligence. For example, if a unit owner were to place flammable materials in an attic, and then light a match in the attic, the roof repairs necessitated by the resulting fire would be the planned community association’s responsibility

but the cost would be reimbursed by the owner if that particular association has language in the governing documents regarding such an event. But what about the attic fire in an association without the “gross negligence” reimbursement language? The planned community association would be obligated for the entire expense and have no contractual ability to pass the costs through to the unit owner who benefited from the expense, unless the documents address this situation<sup>7</sup>. “Gross negligence willful misconduct” provisions acknowledge the unfairness of all owners paying for the cost to repair a problem created by one owner’s gross negligence or willful misconduct. But what about a unit owner’s “negligence”? Why should all unit owners pay the cost of a unit owner’s “negligence”? For that matter, when there is no negligence but a “bad thing happens”, why should all owners share the cost of that event?

Although insurance was not considered in the examples above, the association’s insurance policies are a shared resource. Most community associations implicitly recognize the impossibility

### *—Why should all unit owners pay the cost of a unit owner’s “negligence”?*

of having sufficient cash on hand to reconstruct the condominium or planned community and purchase insurance to shift the risk. Community association insurance policies can cover portions of the units or just the common elements. Claims on community association insurance policies have no detrimental effect on a unit owner’s personal insurability. When a claim arises in a condominium that is covered by the community association’s insurance policy, the coverage available under the condominium insurance policy is a readily accessible source of recovery. The downside is that the resulting claim is distributed over all the owners in the form of negative claim history, higher premiums and higher deductibles. Even if the premiums go up \$10 per year for each owner in the condominium due to Unit Owner X’s claim, Unit Owner X got paid \$10,000 for the damage to

<sup>7</sup> The community association would presumably consider asserting claims at common law against the unit owner but the unit owner would argue that the entirety of the legal relationship between the unit owner and the planned community association is in the governing documents.

his unit from the roof failure. Unit Owner X, if acting economically rationally, will pay \$10 per year to receive \$10,000 today. Over time, however, the claims history will catch up to the entire condominium and impact all of the owners.

Mold is often not covered by community association insurance. The existence of mold inside a unit often creates a challenge. If the mold exists inside the unit due to a failure of roof maintenance (again assume a condominium where the association is responsible for roof maintenance), many lawyers will conclude that the community association is responsible for the mold

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remediation costs inside the units. Determining the origin of mold can be an exercise in frustration. Mold is ubiquitous and thrives where there is moisture. Mold’s existence in a unit could be explained by a problem with a shower, roof or an indeterminate cause.

Assuming the mold is the result of a roof maintenance failure, the mandatory nature of A.R.S. §33-1255(c)(2) creates a baseline outcome that, if the condominium documents require the association to repair the roof, the unit owner “benefits” from the roof repair and is therefore obligated to receive an exclusive assessment of the resulting common expense. Some are uncomfortable with this result, especially with respect to the interior damage “caused” by a roof failure. But in a 100 unit condominium project where only one unit has mold, the other 99 unit owners could be equally uncomfortable. But, remarkably, in most cases (anecdotally) the other 99 do not revolt. Why? Perhaps people who live in a condominium have “bought in” to the shared

resources and shared risk philosophy common in condominium living – the very philosophy that feeds the Tragedy. Or perhaps because each of those other unit owners believes that when their time comes and there is mold in their unit the association will be there to bail them out. Regardless of why the other 99 generally accept the outcome where the association pays for the mold remediation necessitated by a roof failure, it is an observation worth making that this result is generally not controversial in the average condominium association with this problem. It is in the context of inevitable redistribution of common expenses in which the Tragedy becomes most pronounced. Although there may be money to repair the first case of mold, by the time the 75th unit is in need of mold remediation work, the group consensus for redistributing mold remediation costs among the owners vanishes.

The most straightforward solution to the Tragedy is to enact the following statutory change to the Arizona Condominium Act and to enact it in the planned community statutes:

Notwithstanding any provision of the association’s governing documents to the contrary, all common expenses that benefit fewer than all of the units must be assessed exclusively against the Units benefited.

This would solve the problem of unit owners having an incentive to foist as many unit expenses onto the community association as possible. Perhaps a unit owner would think twice about ignoring the brown stain on the ceiling of the unit and would report it as a possible roof failure more quickly if the cost of the roof repair were to be paid by the unit owner whose unit is protected by the roof. Perhaps the existence of mold in a unit would be seen more readily as the unit owner’s problem rather than an opportunity to stay at a hotel for a week at association expense while the unit is being remediated.

The proposed statutory solution does not make any exceptions in the case of community association wrongdoing or negligence. What if the roof fails because the community association’s

board of directors ignored recommendations from roofing consultants to repair the roof before it failed? Currently, A.R.S. §33-1255(c)(2) does not address association negligence, gross negligence or willful misconduct either. Taken at face value, A.R.S. §33-1255(c)(2) simply asks one question, “Do the governing documents ‘otherwise provide?’” If not, the expense will be passed through. The existing statutory scheme does not address the cause of the common expense and the proposed fix does not either.

Many boards, community managers, and lawyers reject this outcome as unfair and work to avoid situations where “negligent” boards of directors escape the consequence of their negligence. Board members contribute to this outcome for any number of reasons including that the association funds are only the board member’s funds to the extent of their contribution on a per unit basis, the board members want to be re-elected, the board members want the association to be there for them when a loss occurs in their unit, etc. Foisting

would be the only predictable way to avoid a pass through assessment.

Conflict in community associations will always exist. Although imperfect, making the current public policy of A.R.S. §33-1255(c)(2) mandatory in all condominiums, and enacting it in planned communities, will significantly reduce unfair and unjust distributions of risk and resources in community associations. Such a policy shift will better preserve finite resources in community associations and slow the inevitable decline of scarce shared resources.

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the entire expense of association negligence on a unit owner, even though likely required by existing law in condominiums that have declarations that do not “otherwise provide”, is perceived as bad politics, bad business and bad legal decision making, even though it contributes to the inevitable decline of the shared resource.

Another criticism of the proposed statutory modification is that boards of directors may do no preventive maintenance and simply wait for failures, the cost of which can be exclusively assessed against particular owners who benefit. Owners who face being on the receiving end of a “pass through”, however, would insist on high quality preventive maintenance because that