

YOUR HOME, YOUR BUSINESS AND SEWER BACKUPS

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Legal Liability, Negligence, and Sewer Backups

Can a wastewater utility (like a Sewer District) be liable to pay for sewer backups that originate in their lines?

That depends on whether or not the wastewater utility has committed an act that would be considered to be “negligent”, or a “tort” in legalese. As examples:

A wastewater utility has received complaints about backups that they determined to come from one particular spot in their lines. Rather than taking any action to clean up this identified “hot spot”, they decide to just let it be. Soon after, another backup occurs, causing damage to property, and it originates with the known “hot spot”. In this case, the utility will most likely be considered to be “negligent”, and this would make the utility legally responsible for resulting damages (within limits prescribed by law).

A neighborhood of homes experiences a sewer backup. Upon investigation, it is learned that an anonymous party had opened a manhole and dumped large amounts of construction materials into the system the day before the backup, covering the manhole so as to draw no suspicion before leaving the scene. In this case, the utility hasn’t done anything wrong, and therefore there is no “negligence”. In the absence of that “negligence”, the utility is not responsible for any damages from the backup.

Before going further, let’s back up for a minute and look at the concept of what it takes to establish liability or negligence – that is, determining whether a “tort” has been committed. Common law requires the following elements exist in order to establish this:

1. There must be a duty owed
2. There must be a breach of that duty
3. There must be damages incurred
4. There must be a proximate cause connecting the breach of duty and resulting damages

In the first example above, the “duty owed” is the duty to cure known problems with the sewer line. That duty was breached when the utility decided not to take action. Damages occurred to properties from a later backup. The proximate cause of the sewer backup damages was the breach of the utility’s duty to cure the known problem.

In the second example, though, there is no legal duty to keep manholes locked down, to keep guards overseeing the system or other acts that could “prevent” others from unauthorized dumping of materials into the sewer system. Lacking a duty owed, there can be no breach, and while damages did occur, they did not happen due to a breach of duty, as no breach took place. Therefore, no tort has been committed by the utility.

Just because there’s a sewer backup on your property does not mean the utility has done something wrong!



Is liability an “all or nothing” thing in Colorado?

Actually, it is not. Colorado courts subscribe to what is commonly known as the “comparative negligence” system. That means that should there be an incident that results in injury or damage, part of determining if there is liability is making a determination of how much the negligence (if any) of any party has contributed to an event that results in damage or injury. Damages are then allocated based on the percentages established. An insurer of a utility will also take this into consideration. For example, a court may determine in examining the facts that a utility may have committed a “tort”, but that the “tort” they committed was only 20% of the cause of damage, thus limiting the utility to being responsible for only 20% of the damages determined in trial or settlement. This system is in contrast to the “contributory negligence” system used in some states, where if a plaintiff is found to have contributed either a minimum percentage or any amount at all to an event, they are barred from recovery from another party.

What effect might that have, and is there an example of this effect?

As cited above, there’s always the chance that even if a utility is found to have contributed to damage caused by its negligence, it wouldn’t necessarily be responsible for all the damages caused. For example, if a restaurant were to fail to maintain its grease traps properly, resulting in an excess of grease being flushed into the local sewer system, and the result were damage from a sewer backup that affected the restaurant and others in the area, then the case becomes far less black-and-white. Taking this scenario, any number of facts could develop that would reduce what the utility may be responsible for. For example, if the utility knew that a certain quantity of grease was being released, and had failed to take any action to deal with the discharge, the liability may sit with both the utility and the restaurant, whose failure to properly maintain their grease traps contributed to the backup incident. If the court assigns 50% liability each to the utility and the restaurant in this example, then the utility would be liable for only 50% of the damages caused. If, on the other hand, the utility had addressed the problem, was doing its necessary cleaning, but the grease traps had recently fallen into disrepair which caused an unexpected and unforeseeable increase in the accumulation of grease in the line, the court may assign little or no liability to the utility, and place the responsibility more with the restaurant. From the standpoint of the person or entity who has suffered damages, this can seriously slow down efforts to recover their damages, or may significantly limit how much each entity might pay. Imagine if the plaintiff was the restaurant itself...the facts may be such that the restaurant can’t recover any damages at all because it was a major contributor to the cause of the damage.



What are the generally accepted legal duties of a wastewater utility with respect to its collection lines?

Believe it or not, there is no “industry standard” dictating how often a line needs to be inspected or cleaned. There is a logical reason for this. Collection lines are built using many kinds of materials (including clay, ductile iron, plastic pipe), and the type of material can affect the maintenance requirements. Geological considerations also affect maintenance requirements. A system in a flatland will require more tending than a line running downhill; some lines are in more geologically active areas subject to soil movements and earth movements that may dictate more or less frequent inspection. Some areas of a system are more prone to tree root intrusion than others. The type and volume of waste taken in can affect maintenance requirements. The size of the collection line also has an effect.

Even without that industry-wide standard, a utility will customarily develop some kind of schedule or system for cleaning and/or inspecting its collection lines. As long as the utility follows its own schedules (allowing for delays that may be due to weather, construction or other extraordinary circumstances), then it is acting prudently. In addition, if a problem develops in spite of the cleaning schedules, so long as the utility investigates and takes reasonable actions to prevent or mitigate future backups from the problem identified, then it is also acting prudently. Keep in mind that knowing what certain lines need is an evolving process, not one that can be known with certainty at all times now and in the future.

Why do companies who insure wastewater utilities deny claims by individuals and businesses who experience sewer backups?

The claims aren't always denied to begin with, but taking the question at face value, an insurer's duty is to defend its policyholders against claims that it has been negligent resulting in damage to the party making the claim, or to pay for claims that they have sufficient reason to believe are due to the negligence of their policyholder and are not otherwise excluded under the policy provided. For all of the reasons you see above, an insurer will normally pay a claim when they feel their policyholder has been negligent, and the damages claimed are not excluded under the policy. Often, though, the insurer will determine that the utility was not negligent, and will then deny the claim. Put simply: if they feel the utility isn't to blame, they will deny because their policyholder is not legally liable.



Can utilities purchase insurance for backups that are not their fault?

In practical terms, no. There is one insurer in Colorado, and only one that we know of, that offers a clause which pays limited amounts of damage, at the request of the utility, regardless of fault (and then, only over and above any coverage available to the claimant). The coverage is very limited, and the limits are easily exhausted. The utility can elect to take that offered benefit, or reject it.

We have been approached in the past on the idea of putting together a statewide policy for public entities that would cover sewer backups without regard to fault. Efforts have gone nowhere because anyone who would undertake to insure that risk would have to know what each possible participant's experience has been with sewer backups over at least a three-year period, including the number and extent of backups and damages that resulted. That's just a starting point, and gathering that data seems to be nearly impossible. Even if such insurance was available, there are problems with that kind of coverage, such as what happens when the company providing the no-fault coverage believes there is fault, and the liability carrier believes there is not? Or, what happens when there's a dispute over whether a backup originated in the utility's collection lines or was a result of trouble in the service line (which runs from the personal or business property to the collection lines)?

Do insurance policies written for homeowners, tenants, condo-owners and businesses cover sewer backup?

If you look at industry-standard forms, no. Sample language is included later in this presentation, with emphasis is given to the language that excludes the coverage. You will see that on those policies where the cause of loss must be listed in order to be covered, the list does not include sewer backup.

Some companies build in sewer backup coverage, but the way in which it is offered varies widely. When offered, it is often for a small limit. Some companies offer high limits. Some offer no coverage at all.



What's the best way for a person or business to know if they can get insurance for sewer backup losses?

Talk to your insurance agent. Begin with the thought that most policies will either not cover any sewer backup losses at all, or will cover only a limited amount or in limited circumstances. When you speak to your agent about this, they should be able to tell you what you have or don't have, and how much is available, if any. Assume nothing in this regard. If you are told you have coverage, ask where in your policy that benefit is located, or have the agent give you something in writing explaining your coverage.

When you go to look for other offers of insurance, ask the same question and ask for the same "proof" before you buy. Just asking an insurance company or agent to "match what you have" can lead to troubles for you, particularly in regard to this issue.

Why should I, as a businessowner or individual, carry my own insurance against sewer backup?

The first reason should, by now, be obvious: many backups cause damage for which a wastewater utility has no legal obligation to compensate you. Getting your own coverage assures that whether fault exists or not, you will have coverage under your own policy.

The second reason is far less obvious, and may surprise you. Let's say that you have experienced a backup and it is determined that the utility is legally responsible for your damages. That means the utility will be paying for cleanup expenses, possibly the tearing out or replacing of some things like carpeting or drywall. However, when it comes to your own possessions, you may be surprised to learn, after the fact, that any time someone is legally liable for damage to your property, they are not obligated to pay the cost to replace what was damaged with something new; their liability is only for the "actual cash value" or "depreciated value" of the object that was destroyed. For example, if you had clothing in your basement that was damaged by the backup, and on the average, the clothing was worn enough to have lived half of its useful and expected life, then the utility is legally liable for only half of the cost to replace that clothing. If you have your own insurance (and it has "replacement cost" coverage), then you would get the cost to go buy new clothing to replace the "old" damaged clothing.

The final reason is the best reason of all: you have your own policy to collect from. Whether the issue is getting "replacement cost" instead of "actual cash value" or a dispute over whether the utility is legally responsible for the damages, you collect (less your deductible) from your own insurer, and then your insurer can "battle it out" with the insurer for the utility over any disputed causes or amounts.

Commercial Property
Special Causes of Loss Form
Exclusion:

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(2) Mudslide or mudflow;

(3) Water that backs up or overflows from a sewer, drain or sump; or

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

But if Water, as described in **g.(1)** through **g.(4)** above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

This form (“Special Causes of Loss”) is the most commonly sold form of coverage for commercial properties. The other forms that may be used, the “Basic” and “Broad” forms, list only those causes of loss that are covered, and sewer backup is not among those causes named.

The only way to obtain coverage for sewer backup for the sake of the policyholder is to ask if the insurer offers any extensions or endorsements that would cover sewer backup. Not all companies will do that. Among those that do, the amounts of coverage they offer vary widely, and may be arbitrary numbers that can’t be changed. There is no “industry standard” endorsement that’s used to cover sewer backups.

Homeowners Policy

HO-3 Form (open peril coverage for the dwelling, named peril for contents)

Dwelling (the building) is covered for any cause of loss unless excluded. Here's an exclusion:

3. Water Damage

Water Damage means:

a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

b. Water or water-borne material which backs up through sewers or drains or which overflows or is discharged from a sump, sump pump or related equipment; or

c. Water or water-borne material below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure; caused by or resulting from human or animal forces or any act of nature.

Direct loss by fire, explosion or theft resulting from water damage is covered.

Contents Coverage under HO-3

Perils Covered:

1. Fire Or Lightning

2. Windstorm Or Hail

3. Explosion

4. Riot Or Civil Commotion

5. Aircraft

6. Vehicles

7. Smoke

8. Vandalism Or Malicious Mischief

9. Theft

10. Falling Objects

11. Weight Of Ice, Snow Or Sleet

12. Accidental Discharge Or Overflow Of Water Or Steam (see language below)

13. Sudden And Accidental Tearing Apart, Cracking, Burning Or Bulging

14. Freezing

15. Sudden And Accidental Damage From Artificially Generated Electrical Current

16. Volcanic Eruption

12. Accidental Discharge Or Overflow Of Water Or Steam

a. This peril means accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance.

b. This peril does not include loss:

(1) To the system or appliance from which the water or steam escaped;

(2) Caused by or resulting from freezing except as provided in Peril Insured Against 14. Freezing;

(3) On the "residence premises" caused by accidental discharge or overflow which occurs off the "residence premises"; or

(4) Caused by mold, fungus or wet rot unless hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

- c. In this peril, a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment.
- d. Section I – Exclusion A.3. Water Damage, Paragraphs a. and c. that apply to surface water and water below the surface of the ground do not apply to loss by water covered under this peril.

This clearly excludes any loss from a municipal water or wastewater line backing up and causing damage to your “contents.”

The HO-5 Form

This form is an “open perils” form, meaning that damage is covered unless excluded. The exclusion cited above under the Dwelling coverage for the HO-3 form is still contained in the HO-5 form, clearly excluding damage due to a sewer backup.

The HO-4 Form

This form is designed for tenants in a residential structure, whether a home, townhouse, condominium or apartment. This form is worded similarly to the HO-3 form with respect to coverage for “contents”, so there is no coverage for sewer backup claims under this form.

The HO-6 Form

This form is used for owners of condominiums and for owners of townhomes in cases where a Homeowners Association is providing coverage on the “common structures.” Like the HO-4, it is a “named peril” form, and there is, as you’ve seen, no coverage for sewer backup claims.

Dwelling Fire Policies

These forms, usually labeled as a “DP” form, are written to cover property owned but leased out, such as a rented house. These forms have the same exclusions as the HO-5 and HO-3 policies, and therefore, do not have sewer backup coverage.

