

Your Home, Your Business and Sewer Backups

Mark Carlson, CPCU, CIC, CRM, CWCA, President

TCW Risk Management

In cooperation with Pagosa Area Water & Sanitation District



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?

Has the wastewater utility committed an act that would be considered to be “negligent” or a “tort” in legalese?


Examples of possible negligence:

A wastewater utility has received complaints about backups that they determined to come from a 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.



Has a “tort” been committed? What does it take to establish liability or negligence?

Common law requires the following elements exist
in order to establish tort

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 the resulting damages

Recapping our examples

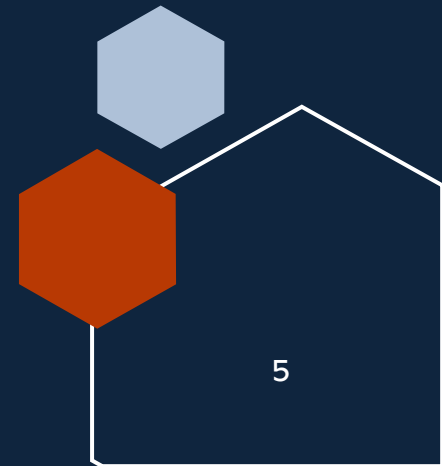
First Example – backup from one particular spot in the lines

- 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.

Second Example – a neighborhood experiences a sewer backup

- 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!



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

With logical reason, there is no “industry standard” dictating how lines should be inspected or cleaned

- Collection lines are built using many kinds of materials (including clay, ductile iron, and 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?

- 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 the insurer feels the utility isn't to blame, they will deny because their policyholder is not legally liable.






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 given to the language that excludes the coverage.
- You will see that on those policies where the cause of the 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 knowing that most policies will either not cover any sewer backup losses or will cover a limited amount 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.
- Simply asking an insurance company or agent to "match what you have" can lead to troubles for you, particularly regarding this issue.

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

Reason #1

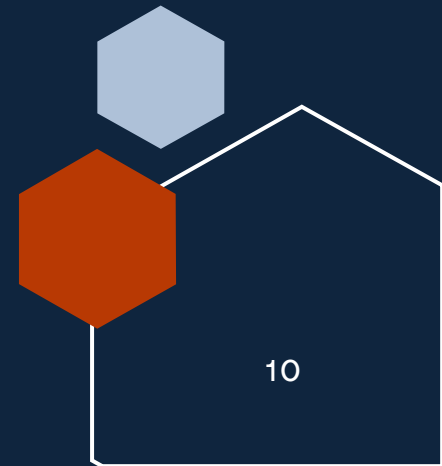
- Many backups cause damage for which a wastewater utility has no legal obligation to compensate you. Having your own coverage assures that whether fault exists or not, you will have coverage under your own policy.

Reason #2

- If you have experienced a backup and it is determined that the utility is legally responsible for your damages the utility will be paying for clean up expenses, possibly the tearing out or replacing of some things like carpeting or drywall.
- However, when it comes to your own possessions when 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 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.

Reason #3

- You will 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, including tidal wave and tsunami, tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind, including storm surge;
- b. Water which:
 - (1) Backs up through sewers or drains; or
 - (2) Overflows or is otherwise discharged from a sump, sump pump or related equipment;
- c. Water below the surface of the ground, including water which exerts pressure on, or seeps, leaks or flows through a building, sidewalk, driveway, patio, foundation, swimming pool or other structure; or
- d. Waterborne material carried or otherwise moved by any of the water referred to in A.3.a. through A.3.c. of this exclusion.

This Exclusion A.3. applies regardless of whether any of the above, in A.3.a. through A.3.d., is caused by an act of nature or is otherwise caused.

This Exclusion A.3. applies to, but is not limited to, escape, overflow or discharge, for any reason, of water or waterborne material from a dam, levee, seawall or any other boundary or containment system.

However, direct loss by fire, explosion or theft resulting from any of the above, in A.3.a. through A.3.d., 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 the detailed language on the next slide)
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, 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

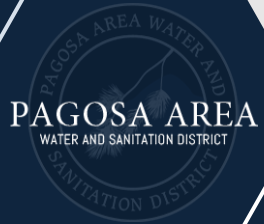
This form is designed for tenants in a residential structure, whether a home, townhouse, condominium or apartment. This form is worded similarly to the HO-3 form with respect to coverage for “contents”, so there is no coverage for sewer backup claims under this form.

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.



Thank you

Mark Carlson

mcarlson@wilsonins.com

TCW Risk Management

