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Academy for Board Members

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COVID-19 Affecting Your Association Insurance

As we know, during this COVID-19 pandemic, community associations are facing new and difficult challenges and uncertainties. As a result, members of association Boards, as well as their managers, are confronted with the question of whether or not to open amenities. A major factor in this decision-making process relates to insurance coverage for the amenities should a resident contract the virus. These are new times and the future is uncertain. Accordingly, the goal for all Boards is to minimize the risks that are confronting associations during this pandemic.

There are two major types of community association insurance coverages pertinent to this discussion. First, there is the Directors and Officers ("D&O") liability coverage and the second is General Liability ("GL") coverage. D&O insurance protects directors, officers and the organization itself against any claims of alleged wrongful acts when acting within the officers' and directors' capacity. Such insurance usually does not cover bodily injury, but it would provide a defense should a unit owner bring an injunction action to force the association to open an amenity. Thus, there most likely, would be coverage and defense should an association be sued for not opening the amenity, but there most likely, would not be coverage should the amenity be open and a person contracts the virus. In short, claims for bodily injury caused by the COVID-19 virus will not be covered by the D&O policy.

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On the other hand, the GL policy covers bodily injury claims, but many GL policies contain exclusions to that coverage. For example one exclusion is the "expected or intended injury exclusion," which is when the insured foresaw or intended the claimant's injury. This exclusion applies when a reasonable person could or should expect the virus to spread because of actions taken or decisions made. Some may say that opening the amenities, such as pools, where more than ten people can gather during this pandemic may trigger the expected injury exclusion. Another exclusion is the "communicable disease exclusion," which focuses on bacterial diseases and some viral infections. Finally, there is the "pathogen exclusion," which not only excludes mold and fungi claims but also in some instances may exclude claims related to viruses. No court has opined on these exclusions as they relate to COVID-19-related claims. Thus, it is important that all managers and Board members work with counsel, to understand the laws of their specific jurisdiction and to minimize financial exposure to the associations.

Needless to say, COVID-19 is a serious public health threat which has never been confronted by the community associations or their insurance companies in the past. A decision as to whether there is or is not coverage is very fact specific and depends upon the actual language of the association's insurance policy as well as the specific facts relating to a claim. Any questions relating to coverage are best addressed by counsel who can review the association's insurance policy, as well as applicable court decisions, to guide directors and managers in determining the scope of the association's insurance coverage. This may avoid a potential coverage dispute with the insurance carrier, which is not in the association's best interest.

If there is no coverage, associations may work with counsel to determine if the risks, such as the costs of defending oneself in court, outweigh the benefits of allowing a few residents to enjoy the amenities under the different re-opening phases. Unfortunately, at times, difficult decisions have to be made, even if some residents do not welcome those decisions. Following your state public health orders and working with your HOA attorney will give the members of the Board and management the legal foundation in which to address those frustrated residents so they understand the Board's rationale.

When conducting meetings of the Association it is important meeting minutes are kept. The recording of meeting minutes are normally required by your community's bylaws as well as state statute. The duty of maintaining association records is often a task assigned to the board secretary. If you have volunteered to serve as your board secretary, don't worry, meeting minutes are much simpler than you think.

According to Robert's Rules of Order,

"Minutes should be a record of what happens at a meeting, not what was said by members or guests attending."

Per Community Association Institute (CAI), meeting minutes should simply outline:

- Actions taken
- The reason why they were taken
- Board voting record on the topic

Meeting minutes should NOT include:

- The name of the person seconding a motion
- Remarks made by guests or board members on the subject
- Personal opinions on anything said
- Motions that were withdrawn (some exceptions do apply to this item per Robert's Rules of Order)

Do the Board of Directors have a Responsibility to Address Harassment? **YES!**

Many boards have taken the position that the Board does not have an obligation to address reports of harassment in the community.

Generally, Boards try to avoid confrontation and are unsure how to deal with a resident who harasses others. Boards tend to be reluctant to escalate matters and incur legal fees. Some Board members are concerned the bully will shift his/her attention and retaliate against the Board. They hope the bad behavior will subside on its own and they feel that if the conflict does not involve the Board in any way then it is not the Board's place to try to resolve the conflict. It is important for boards to know that they can no longer passively watch a conflict involving harassment play out. Recent federal case law and updates to federal statutes require a Board to act when they receive complaints regarding harassment, but what exactly should a Board do to safely address a resident who is engaging in harassing behavior?

Once the Board learns that a resident is engaging in harassing behavior the Board needs to take action. A.R.S. Section 12-1809 defines harassment as "a series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose."

The Board's first action should be to contact the resident and tell them, in writing, that they must cease from engaging in harassing behavior. It is important that the Board try to get all communications in writing so the Board has written proof that it took steps to address the problem. The resident may prefer to communicate over the phone or in person. If that is the case, the Board should keep a written log of phone calls or in person conversations. When the Board contacts the resident they need to take a firm position and inform the resident that harassing behavior, whether toward another resident, Board member or vendor, will not be tolerated.

Passive or conciliatory Board responses only encourage more bad behavior. There are times when intervention by the Board can cause the resident to engage in additional bad behavior to make a point. If this occurs the Board must take a strong position and ensure that the resident knows significant legal and financial consequences can occur if the bad behavior continues. The Board should get the association's attorney involved if the resident continues to escalate the conflict.

If a Board learns that harassment is occurring in the community and the Board fails to act there can be legal consequences for that failure. Victims of discrimination and harassment can sue the association for the Board's failure to intervene. If the Board is found to have failed to act properly after learning about the harassment the Court can award a judgment against the association and the association would be responsible for reimbursing the plaintiff for the amounts awarded in the judgment.

There have been recent changes in federal law which require a homeowners association to act when a resident who falls within a protected class is harassed in the community. On October 14, 2016, the U.S. Department of Housing and Urban Development (HUD) established regulations requiring all housing providers take steps to end harassment of protected classes. The regulation includes homeowner associations as a housing provider. (Code of Fed. Reg. §100.7(a)(1)(iii).) If a Board fails to investigate complaints and take appropriate action, the target of harassment can either sue the association or file a complaint with HUD. These complaints are very costly for the association and can have serious ramifications. The complaints are filed with the State Attorney General and the Attorney General proceeds with the case with little to no investigation. Due to the seriousness of these HUD actions it is best for boards to take action whenever they receive a report of possible harassment.

If the Board receives a report or complaint of harassment and the Board isn't sure if the behavior really constitutes harassment, the Board should contact the association's legal counsel. Your counsel will be able to determine if the behavior needs to be addressed. If your counsel determines that the behavior constitutes harassment they can send the resident a "cease and desist" letter. Many residents immediately stop their bad behavior after receiving a letter from a law firm. If that doesn't work, the Board may need to consider further legal action.

The best way to avoid to escalation of these issues is to address any reports or complaints of harassment quickly and swiftly. Do not be afraid to contact your legal counsel since a misstep in these matters can have serious legal ramifications. All residents, vendors and Board members deserve to operate in the community free from harassment and the Board should ensure that it does its part to make sure that their community is a place where harassment is not tolerated.

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Electric Vehicle Charging Stations in HOAs

Electric vehicle ownership is on the rise. Especially in densely populated states, owning an electronic vehicle has become more popular, as more of our population seeks cost-effective and environmentally friendly transportation alternatives. In most states, homeowners are allowed to install an electric vehicle charging station in deeded or exclusive-use parking spaces. In single family communities, residents can install personal charging stations and many HOAs are considering the benefits and the steps it takes to offer EV charging stations in community parking areas.

Here are some points for the HOA Board to consider before installing a communal EV (electronic vehicle) charging station:

How Many Residents are Actually Going to Use It?
Although the idea of having a communal charging station is tempting, it's a good idea to take a survey of your community and make sure you have enough residents in need of a EV charging station in order to justify the cost of installation and maintenance.

Know Your Charging Station Tech
There are two types of charging stations: Level One and Level Two – a Level One charging station is a standard, low or no cost option which uses a 120-volt AC wall outlet. The charging process is slow, however can be implemented at almost zero cost to the HOA. A Level Two charging station is the preferred professionally installed EV charging unit. It can cost several thousand dollars to install; however charging a car will only take 3-6 hours, vs. a Level One unit which requires vehicles to charge overnight.

Ask a Pro
Encourage the Board to meet with an electrical contractor to help assess your community's needs. Speaking with a professional and asking them to analyze your preliminary data will ensure your Board is making the right decision for the community at the right price for installation and equipment.

Compile Your Costs
What is the installation fee? Are you going to raise assessments or charge residents individually? If you charge residents individually, are you going to use a meter or allow them to use their credit card to charge, per use? Who is going to be responsible for the month-to-month electricity usage fees? At a few hundred dollars per car, per year, the usage costs need to be projected properly.

Establish Ownership and Management
Make certain you check the HOA CC&Rs for requirements of the Board and vote the decision to install a EV charging station through properly. Finally, make sure you delegate ownership and management responsibilities between your HOA and any second or third party management companies.

Electronic vehicles are paving the way for a more environmentally, community conscious civilization. Addressing these questions now will help your HOA prepare for a brighter future as well as offer a more attractive, functional amenity to your community.