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When Are You Not Covered by Your Directors and Officers Policy?

by Joel W. Meskin, Esq., CIRMS

The question being posed: "When Are You Not Covered by Your Directors and Officers Policy?" is really a multi-part question:

- First, where does a community association's Directors and Officers policy fall within the entire insurance puzzle?
- Second, are all Directors and Officers policies created equal?
- Third, how does the community association maximize its coverage?

The reason association members ask these questions is because they want to know if the policy covers them for what they do in their volunteer work for the community association. For example, they want to know if they will be covered for the types of situations in **Table 1**.

TABLE 1

Is Your Board Covered?	Covered	Not Covered
A vendor sues the board and the association for breach of contract?		
A unit owner sues to compel the board to purchase insurance?		
The community manager sues the association for slander seeking emotional distress damages?		
A unit owner's tenant sues the board for wrongful eviction?		
A unit owner sues because a volunteer sexually harasses a child at the pool?		
The association's doorman sues for wrongful termination?		
An outgoing board president sues to challenge the validity of an election?		
A unit owner sues to challenge an assessment for a new pool?		
A unit owner sues to prevent the removal of trees in common areas?		
The property manager is sued for an alleged unauthorized entry into a unit owner's condominium?		

The Community Association Insurance Puzzle—What Doesn't Your Directors and Officers Policy Cover?

The basic concept of insurance is to spread the risk of the consequences

of life that are not contrary to public policy and which the insured can afford to pay the price of transferring the risk. For a community association, there are a number of puzzle pieces. The purpose of this article is to better understand what the Directors and Officers policy is intended to cover or not cover. The basic notion is

TABLE 2

General Liability Coverage	Property Coverage	Directors and Officers Liability Coverage— Employment Practices Liability	Fidelity/Crime Coverage
Workers Compensation Coverage	Umbrella Coverage	Homeowners Policy	Flood and Earthquake



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TABLE 3

Board Decision	Damage or Demand	Potential Coverage
The board decides to install speed bumps throughout the association streets and the bumps are two inches higher than code.	Due to the height of the speed bump, one of the association members new Mercedes SL Coupe is damaged to the bottom.	The alleged property damage is possibly covered by the General Liability policy if the bump's height is determined to be negligent. This would not be covered by the Directors and Officers, because of the Bodily Injury or Property Damage exclusion.
The board decides to install speed bumps throughout the association streets and the bumps are two inches higher than code.	A group of association members sue the board and the association to compel them to remove the speed bumps as allegedly being in violation of height requirements.	The board will be defended by the Directors and Officers policy. However, if the board loses, the policy will not pay the cost to remediate the bump height.

that if something is covered under one policy, it generally, with few exceptions, is not covered or "excluded" under another policy.

If you were to ask a Directors and Officers policy claim adjuster what is the number one most rejected claim, the answer would be claims seeking "bodily injury and/or property damages." The reason for this is twofold. First, "bodily injury" and "property damage" claims are normally covered under a general liability policy. Second, the most common misunderstanding of the insured is that if the damage is the result of a board decision or misconduct, it should be covered. However, if the damage is only bodily injury or property damage, they must look to the general liability policy. This can be exemplified by Table 3.

The second reason that bodily injury or property damage matters are the most commonly rejected claims is that community managers and insurance agents are of the position that it is better to be safe than sorry to submit this to every insurer and let the insurance companies deny the claim. On the one hand, this is understandable; on the other hand, what these professionals must understand is that every submission costs the insurer money to set up and investigate a submitted claim and the insurer is required to investigate and respond pursuant to most state

insurance statutes. The purpose of this is not to tell the insured not to submit potential claims, but to consider the consequences of shotgunning a matter to all insurers. In the alternative, the insured can submit a matter as a notice of potential claim that they are making to preserve their rights pursuant to the terms of the policy, but that they believe that it is more likely covered under another policy within their insurance program.

Another matter that is not covered under the Directors and Officers policy is any

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action being brought "by" the board or the association against association members or third parties. The Directors and Officers policy is a liability policy where the insured are going to be defended for their conduct. The policy does not fund an action by the insured against others. This is very often the case when the board or association wants to sue the developer.

Other types of "damage" that are not covered under the

D&O policy are breach of contract damages or the coverage that the board failed to obtain when purchasing insurance. In the D&O context, something that is unique is that the policies will sometimes provide a defense for the board and the other named insured, but it will not provide coverage for the damages that the claimant has incurred as a result.

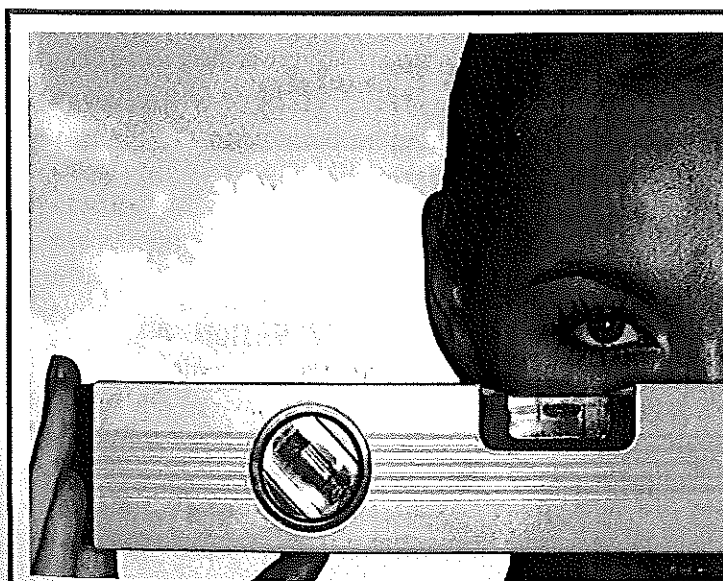
To provide coverage for those items would be what is known as a moral hazard. These can be exemplified by **Table 4**.

Not All Directors and Officers Policies Are Created Equal

Thus far, the article has been focusing on what is not covered that is covered elsewhere in the insurance puzzle. The bigger issue is whether the policy purchased provides the association with the coverage that it needs. One basic notion in life applies directly to insurance: "you get what you pay for." If you are paying \$250 or \$350 for a Directors and Officers policy as opposed to \$850 and \$1,000, do you truly believe you are getting similar coverage?

TABLE 4

Claim	What Is Covered	What Is not Covered
The association fires the landscaper in year one of a two year contract due to incompetence. The landscaper sues the board and the association for breach of contract.	The Directors and Officers policy will provide defense fees and costs for the board and the association if the Directors and Officers policy provides coverage for breach of third party contracts.	If the board is found to have breached the contract, the policy will not pay the breach of contract damages. To do so would encourage the board to breach contracts and look to the Directors and Officers to provide coverage.
The board of directors decides to buy a Directors and Officers policy that does not provide non-monetary damage coverage to save money. There was a challenge to an election of board members and the board spends \$10,000 to fight the claim. An association member sues the board for its failure to purchase a Directors and Officers policy that would have provided coverage for the failure to purchase this type of policy.	The Directors and Officers policy will provide defense fees and costs for the board and the association if the Directors and Officers policy provides coverage for failure to maintain or obtain insurance.	If the board and/or the association are found to have failed to obtain the appropriate coverage, the policy will not become the insurance coverage that the board failed to obtain. To do so would encourage the board to only purchase a Directors and Officers policy and nothing else.



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TABLE 5

Exposure	Covered	Not Covered?
Non Monetary Claims		
Breach of Third Party Contracts		
Failure to Maintain or Obtain Insurance		
Emotional Distress Damages		
Past or Future Directors and Officers		
Committee Members, Volunteers or Leased Employees		
Challenge to Architectural Review Committee Decisions		
Challenges to Board Elections		
Discrimination Claims		
Challenge to Assessments		

There are two types of Directors and Officers coverage. First, there is Directors and Officers coverage that is included in a package policy. On the other hand, there are carriers that issue "stand alone" policies that are tailored for the community association industry. The key to keep in mind is that if the insurance policy does not provide coverage, the association will be responsible for uninsured losses through a "special assessment." At the end of the day, someone has to pay. The increased cost of a valuable Directors and Officers policy is less than what each association member probably pays for their individual auto policy.

When you are looking at your current policy, some questions to ask are in Table 5.

How Does the Association Maximize Its Directors and Officers Coverage?

The first thing that the association must do is use "specialists." We live in a complex world and it is imperative to use specialists. This is particularly the case where the board has a fiduciary obligation in the process of purchasing insurance. There are insurance professionals that specialize in community associations. The board should not go to a medical malpractice specialist to purchase community association insurance. Does the professional know the issues? Does the professional know the different products?

How many associations does the professional insure?

The second step would be to make sure the association and the board has its own risk management program. Make sure the board understands its duties and obligations.

The final step is to not be pennywise and pound foolish. One non-covered claim will dwarf any savings that the board will save in buying a cheap policy.

Joel Meskin, Esq., CIRMS, is vice president of community associations' products with McGowan and Company, Inc. For more information, visit www.mcgowaninsurance.com. ■

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