



# Directors & Officers Liability

## Not All Policies Are Created Equal

by Joel W. Meskin, Esq., CIRMS w Featured in *The Cooperator, The Co-op & Condo Monthly*, August 2004

Do you sit on the board of your condo or co-op? If you do, are you sure that you and your personal assets are adequately protected when the board of directors and the association are sued?

Most of us want to do the right thing, and many of us want to participate in the governance of our board or community association. In fact, we generally take on this responsibility in a volunteer capacity, believing it to be free from personal exposure. In most cases that is true; however, there are other times when these seemingly innocuous volunteer opportunities can turn into a living nightmare. You may ask yourself: who would sue me for volunteering to be on the board? You would be surprised.

The good news is that adequate and reasonably affordable coverage is readily available. The bad news is that most boards or associations do not have adequate coverage.

The problem very often occurs because the directors and officers (D&O) liability coverage is not the focus of the co-op board or homeowner association's insurance package. The reason it is often not the focus is that most insurance agents are not intimately familiar with the coverage, and to be honest, this is not a big-ticket item for most insurance agents. Although it is not the main generator of premium, it is a coverage that requires careful thought. In fact, the board, which is generally charged with the purchase of insurance, should demand that the best available coverage be presented.

The second problem is due to the fact that, most often, the main insurers of boards and community associations from the property and casualty side are the direct insurers like the big, nationally-known insurance carriers. (This is not to say that some of these carriers

may not have a more comprehensive product available.) These carriers may provide a great product from a property and general liability standpoint; however, they generally do not provide a comprehensive, or in fact adequate, directors and officers liability product. If I were to speculate, I would assert that the reason that they do not offer an adequate product is that no one has demanded that they do so. Everyone assumes that they have full coverage. The reality is that "full coverage" and "appropriate coverage" are not the same thing. In brief, would I allow my family member to serve on a board with one of these policies? Not on your life!

There is no question but that you get what you pay for in insurance. The shame, however, is that the adequate coverage is not much more expensive than the coverage provided by the typical D&O endorsement or add-on coverage provided with the package. For example, the comprehensive, stand-alone coverage in most states for fewer than 50 units is \$600. On the other hand, the D&O portion of most major carriers' package policies is probably not that much less. One widely circulated myth is that if a direct writer of insurance, such as those who generally provide a package policy, offers a package, the board or the association must take the whole package or nothing. In most cases, that is truly just a myth. In fact, quite often, the insurers that write the packages are eager to get another specialized insurer to accept the D&O risk. The issue is generally one of convenience for the brokers. However, it is the association and its board that should be the priority, not the broker's convenience. In summary, if you cannot answer yes to virtually all of the following questions, your D&O coverage is probably not adequate:

- Does the definition of insured extend beyond the actual directors and officers?
- Does the definition of insured protect past, present,



and future directors?

- Does the definition of insured include committee members or volunteers?
- Does the definition of insured include employees?
- Does the policy cover spouses of directors and officers?
- Does the policy provide a defense to claims and lawsuits (as opposed to just reimbursing for such costs)?
- Does the policy cover libel and slander?
- Does the policy defend claims seeking non-monetary loss?
- Does the policy cover wrongful termination or other employer liability claims?
- Does the policy cover discrimination?
- Does the policy defend you where there is a claim or lawsuit for failure to maintain or obtain adequate insurance?
- Does your policy provide coverage for your property manager?
- Are you protected for the decisions you make in accepting or rejecting contracts?
- Are you protected if there is a claim that you denied someone approval of a building plan because of race, religion, or other basis?
- Does the insurer provide the association with risk management advice?

The exposure for most co-op boards and condominium associations is complex, but the solution is simple. The potential claims against associations and their boards of directors are only limited by the creativity of plaintiffs and their attorneys. In these times when people have no qualms or concerns about suing their neighbors, let alone their own board or community association, the proper protection is worth its weight in gold.

The following is a brief comparison of two D&O coverages that will exemplify some significant differences that exist. The first is a sample of a stand-alone policy

that provides broad comprehensive coverage. The second example exemplifies what is often found bundled in a package policy for boards and associations.

Under a **stand-alone policy**, an “insured” means the entity or any subsidiary, and an individual insured means all persons who were, now are, or shall be duly elected or appointed directors, trustees, officers, employees, committee members, or volunteers of the entity, including their estates, heirs, legal or assigned representatives. Under a **package policy**, the term “Directors” or “Officers” means all directors and officers of the corporation named in item no. 1 of the declaration. The coverage is provided to “all persons who are or will become directors or officers of the corporation during the policy period.”

**Conclusion:** The scope of the insured is unacceptably narrow in the package policy. In addition, the package policy will not cover a director or officer after they exit the board if they are named in a lawsuit for something they did while they were on the board. This alone is a deal breaker.

*Will I be defended in a lawsuit or claim?* The stand-alone policy provides both defense and indemnity. It will defend the insured against a claim or in a lawsuit, and it will pay for those amounts the insured becomes legally obligated to pay. The package policy is only an indemnity policy. The policy will only pay on your behalf sums for which you are liable, but not until your liability has been made fixed and certain by final judgment or agreed upon by the insurer in writing. The policy expressly provides that “[The insurer] shall not be called upon to assume control of any settlement or defense of any suit against you.” However, the policy’s definition of “loss” does include the cost of defending an action.

**Conclusion:** Any person who serves on a board where



they do not have coverage that will defend them against a claim or lawsuit has inadequate coverage! End of story! Based on experience, D&O claims often do not involve indemnity payments. Rather, it is attorney fees and costs that make up the majority of the payments. If the insured board member wants to go through litigation paying the cost and is comfortable waiting to be reimbursed after it is resolved, he should truly think twice.

*Am I covered if the board fails to maintain or obtain adequate and proper insurance?* The stand-alone policy will defend the insured in an action or against a claim for the failure to maintain or obtain adequate insurance. The package policy expressly excludes this type of coverage.

**Conclusion:** A significant role of the board is to oversee the purchase and maintenance of proper insurance. In fact, this is probably one of the major budget items of the association. Not being covered for these decisions is dangerous.

*Am I covered if the board is sued for something other than monetary damages?* The stand-alone policy will defend the insured against claims for monetary or non-monetary damages. Specifically, it will defend the insured for its conduct in the approval or rejection of contracts, the interpretation of bylaws, and application of such determinations. First and foremost, a package policy will not defend the insured. Secondly, it will only pay monetary damages.

**Conclusion:** This is a critical coverage. How often is the claim or complaint against the board for something other than a monetary damage? Most of the time. What if someone complains about the color of a house? What if someone complains because one association member can have pets and another cannot? What if someone complains about an assessment? The

examples are endless.

*Does any policy provide coverage for our property management company?* The stand-alone policy generally provides property manager coverage, but not the package policy.

**Conclusion:** Very often, the co-op board or association property manager is sued for their own conduct or the conduct of the board or association they represent. In any event, the board or the association undoubtedly has an indemnity obligation in its property management contract. This can be a major expense for most boards or associations to defend the property manager, especially when the cost would be out of pocket.

The comparisons set forth above are based solely on typical policy forms as interpreted by the author. There may in fact be additional endorsements that may impact this review and analysis. This comparison does not constitute a legal opinion as to coverages under either policy and is solely intended for general informational purposes.

Not all coverages are the same. In any event, it is extremely important to evaluate your D&O coverage to make sure your board or association is adequately insured.

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