



Community Association Governance

Protecting Community Association Assets

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Most Common D&O Claims

1. Challenges to the board's failure to properly make, adhere, or apply association by-laws, CC&R(s), and board-adopted rules.
2. Challenges to association elections, election procedures, vote counts, or improper election notices.
3. Allegation of discriminatory application of association rules, including allegations of harassment by rule enforcement.
4. Challenges to board's exercise of authority.
5. Challenges to the board or independent manager's refusal to make association documents and records available to association members.
6. Challenges to board decisions resulting in property damage or bodily injury.
7. Challenges to assessments and association and management company collection procedures.
8. Challenges to architectural application decisions (generally by an architectural committee).
9. Breach of third party contracts.
10. Allegations of personal injury offenses, including defamation and invasion of the right of privacy.

Trending D&O Claims: Emotional Support Animals, AirBNB, Rental Restrictions, Cyber Liability and Data Breach, Drones





TOP 10 Property Managers E&O Claims

1. Diminished property value – due to improper maintenance of managed properties.
2. Loss of Income – reduction of rents due to poor upkeep of managed properties.
3. Discrimination – related to leasing of property.
4. Discrimination – related to implementation of rules or CC&Rs of a managed association.
5. Wrongful termination of property manager's employee(s).
6. Wrongful termination of association or property owner's employee(s) under PM's supervision.
7. Claims involving the properties owned by a PM.
8. Claims arising out of the sales of real estate.
9. Claims by the owners of managed properties against PM.
10. Administrative & Licensing actions against PM.



To Tender,
or
Not to Tender?
That is the question...

Directors & Officers Liability – Claims Made Reporting Policy

*If you are asking the question, tender! Report to the carrier. Do not pass go!
(Caveat: a carrier is not obligated to pay any defense fees and costs before a matter is reported.)*

Do the allegations constitute a “claim”?

Definition of a Claim:

Not all definitions of claims are created equally. Some are very narrow, such as “the service or a suit.”

Claim Commonly Means...

1. Written demand for monetary damages or non-monetary relief (caveat: what is a written demand?);
2. Civil Proceedings;
3. Criminal Proceedings; or
4. Formal civil administrative or regulatory proceeding

...against an Insured for a Wrongful Act.

If it is a “claim,” then what?

Most D&O policies are claims made and reported policies that if a “claim” is received by the “insured” or the “insured” is aware of the “claim,” it must be “reported” to the carrier within the “policy period” or the “discovery period,” if applicable.

If it is not a “claim,” then what?

If there are facts and circumstances that have not matured into a “claim,” but give rise to a potential claim, then submit notice of those facts and circumstances to the carrier. If it later matures into a “claim,” then most policies will “relate” back to the prior policy.

CAUTION: Failure to report a “claim” to the carrier within the policy period or discovery period (if applicable) = NO COVERAGE. END OF STORY!



Condominium Unit Buyer's Checklist



- ☐ By-laws: Obtain a copy of the condo association by-laws, the association's operating manual (who has authority to do what, who is a member, who is eligible to vote, and how to elect board members).
 - ☐ CC&Rs: Obtain a copy of the CC&Rs (covenants, conditions, and restrictions), the association rules (what can you put on your door, how loud can music be, who can live in the unit, can you have pets, etc.)
 - ☐ Delinquent Assessments: How many association unit owners are more than 20 days delinquent in paying assessments? What percentage of those delinquencies are more than 60 days past due? (If unit members are delinquent, someone has to cover the shortfall [the remaining current members].)
 - ☐ Pending Lawsuits Against the Association: Are there any lawsuits or administrative proceedings (i.e. EEOC or fair housing) pending against the association? If not, have there been any lawsuits in the past 5 years? (Do a civil index check in the county court.)
 - ☐ Pending Lawsuits Against Unit Owners: Does the association have any lawsuits pending against any unit owners or vendors?
 - ☐ Reserve Study: Does the Association have a reserve study? If not, why?
 - ☐ Funded Reserve Study: If the association has a reserve study, is it funded? If so, what percentage is it funded?
 - ☐ Reserve Study Update: When was the reserve study last updated?
 - ☐ Capital Improvements: Does the association have any substantial capital improvements or repairs planned within the next 24 months? If so, how is it going to be funded (reserves, special assessment, loan?)
 - ☐ Special Assessments: Does the association currently have any special assessments other than normal monthly dues/assessments? If not, are there any special assessments planned in the next 24 months?
 - ☐ Insurance: Who is the insurer for the condo association master policy providing coverage for the building and providing coverage for the general liability coverage? Who is the agent for the association? Is he or she a Community Insurance Risk Management Specialist?
 - ☐ Appraisal: When was the last time an appraisal was done to determine the appropriate amount to insure the condo association property? What was the appraised value?
 - ☐ Umbrella Insurance: Does the association have an umbrella liability policy? If so, what are the limits? Does the umbrella policy provide follow form directors and officers' coverage?
 - ☐ Directors & Officers Insurance: Who is the insurer for the directors and officers' liability insurance?
 - ☐ Employee Dishonesty/Crime Insurance: Does the association have a fidelity (employee dishonesty/crime) policy? If so, what are the limits? Does the limit equal at least the total of all operating accounts, reserve accounts, and 3 months assessments?
 - ☐ Employees: Does the association have any of its own employees? If yes, does the association have workers' compensation insurance? If so, does the association have an employee manual?
 - ☐ Property Manager: Does the association use an independent property or community manager? If so, what is the name of the management company and who is the key contact? Is the manager on site or is it a portfolio manager?
 - ☐ Property Manager Indemnification: If there is an independent management company, is there a written management agreement? Is there a written management agreement, is there a mutual indemnification provision or just unilateral provision running in favor of the management company?
 - ☐ Property Managers Errors & Omissions: If there is an independent management company, does it have its own errors & omissions policy?
 - ☐ Property Managers Fidelity/Crime Insurance: If there is an independent management company handling the association's funds, does it have a fidelity crime policy?
 - ☐ Association Financials: Does the association have audited financials? If yes, provide a copy of the most current financials. If not, does an independent accountant handle the finances? If not, who handles the finances?
 - ☐ Positive Fund Balance: Does the association's current balance sheet show a positive fund balance?
 - ☐ Collections: Who handles the association's collections? Association? Attorney? Manager?
 - ☐ General Counsel: Does the association have general counsel? If so, who?
 - ☐ Elections: Has there been a challenge to the board election within the last 24 months?
 - ☐ Developer: Is the developer on the board and/or in control of the board?
- Miscellaneous notes:





Community Association Directors & Officers Quality of Management Worksheet

- ☐ 1. Has each board member read the association by-laws?
- ☐ 2. Has each board member read the covenants, conditions & restrictions?
- ☐ 3. Has each board member read all the association rules and regulations?
- ☐ 4. Are board members prohibited from handling issues individually outside board meetings without board delegated authorization?
- ☐ 5. Have all board members complied with Board Member Certification, if required by State?
- ☐ 6. Does the board out-source collections to a collection firm or law firm?
- ☐ 7. Does the association have an annual audit of its financials?
- ☐ 8. Does the board consult legal counsel before terminating employees, if any?
- ☐ 9. Does the board seek legal counsel before entering into a contract greater than \$5,000 or longer than a year?
- ☐ 10. Does the board seek legal counsel before terminating a contract greater than \$5,000 or longer than a year?
- ☐ 11. Does the board only hire managers with licenses required by the state, if any?
- ☐ 12. Does the board require that any managers hired have professional liability insurance?
- ☐ 13. Are all meetings open to all owners, except if involving litigation and personnel issues?
- ☐ 14. Does the board maintain meeting minutes approved as to form and content?
- ☐ 15. Does the board use Roberts Rules of Order or other parliamentary rules for meetings?
- ☐ 16. Does the board maintain copies of all contracts?
- ☐ 17. Does the board maintain copies of all insurance policies?
- ☐ 18. Does the board meet directly with its insurance professional at least annually?
- ☐ 19. Does the board have a reserve study?
- ☐ 20. Does the board have a written policy regarding the funding of the reserve study?
- ☐ 21. Is the association a member of the Community Association Institute ("CAI")?
- ☐ 22. Do any board members attend CAI classes or other relevant educational presentations?
- ☐ 23. Does the board have a written procedure for unit owners to share concerns?
- ☐ 24. Are board decisions issued in the name of the board and not individual board members?
- ☐ 25. Does the association use an accountant to handle the association financials?
- ☐ 26. Does at least one board member review actual bank statements each month?
- ☐ 27. If the association does not do an annual audit, does it do a Review or Compilation?
- ☐ 28. Does the board have a bidding process for contracts over a certain price?
- ☐ 29. Does the board/association have a disaster plan?
- ☐ 30. Has the board participated in board training?
- ☐ 31. Does the board have a new board member orientation program?
- ☐ 32. Does the board require certificates of insurance directly from the vendor's agent?
- ☐ 33. Does the board survey board members annually to identify association goals and priorities?
- ☐ 34. Does the board have an infrastructure plan? (Committee initiatives and goals)?
- ☐ 35. Does the board have a FAQ regarding association life that it provides to prospective buyers?
- ☐ 36. Does the board have a procedure for welcoming new residents?
- ☐ 37. Does the board have a succession plan or any idea how to groom new community leaders?
- ☐ 38. Does the board review contracts each year and meet with vendors to maximize performance?
- ☐ 39. Does the board have a written Conflict of Interest Policy in place?
- ☐ 40. Do board members sign a Community Association Board of Director's Code of Ethics Agreement?



Fraud Prevention Checklist



QUALIFIED PROFESSIONALS

- ☐ Are background checks performed on all employees, board members, volunteers and independent managers who handle association funds?
- ☐ Is an accounting professional retained to set up or confirm that proper checks and balances as well as financial protocols are in place?
- ☐ Are employees adequately supervised?
- ☐ Are all vendors and contractors vetted by the board?

FINANCIAL ANALYSIS

- ☐ Is an audit, compilation or review of the association's financials conducted annually?
- ☐ Does the association have and regularly update a reserve study??
- ☐ Are financial reports reviewed monthly
- ☐ Are bank statements reconciled monthly, or at least quarterly?

CHECKS & BALANCES

- ☐ Is the same individual making deposits and reconciling the accounts?
- ☐ Is more than one signature required on each check, or is a rubber stamp used for check payment?
- ☐ Are original invoices required and marked "paid" with every check request?
- ☐ Are all PIN numbers, access code and bank signature cards secure and updated regularly?
- ☐ Are blank and unused checks kept in a secure location?
- ☐ Are duplicate statements sent directly to two separate board members?
- ☐ Are checks issued in numerical order?

INSURANCE

- ☐ Does the Association have fidelity (employee dishonesty) coverage with the directors and officers included in the definition of "employee" or added as a "designated agent"?
- ☐ Does the Association have third party crime coverage that parallels the fidelity coverages?
- ☐ Does the Association require that any retained independent management company have sufficient employee dishonesty and crime coverage?



Experience & Reputation of Community Manager Worksheet

Community Association Directors & Officers Liability Policy Underwriting



The following items indicate qualifications, education, experience, training and certifications for community managers. Managers with demonstrated experience, education and training help to minimize the likelihood of claims against a board, an association and the managers.

1. Does the individual professional manager(s) retained by the association have any of the following certifications conferred by the Community Association Institute ("CAI"):
 - a. Association Management Specialist (AMS)
 - b. Professional Community Association Manager (PCAM)?
 - c. Large Scale Manager (LCM)
2. If the association has an independent management company, does the management company have the Accredited Association Management Company (AAMC) certification conferred by the Community Association Institute?
3. Does the individual professional manager(s) retained by the association have any certifications or designations conferred by any other community manager professional organizations such as the California Association of Community Managers or the Arizona Association of Community Managers:
 - a. Organization: _____ Designation _____
 - b. Organization: _____ Designation _____
4. If the association has an independent management company, does the management Company have any certifications or designations conferred by any other community manager professional organizations such as the California Association of Community Managers or the Arizona Association of Community Managers:
 - a. Organization: _____ Designation _____
5. Does the independent management company have professional liability Insurance?
6. Does the association have a written agreement with the management company?
7. Does the written management agreement have a mutual indemnification provision?
8. Does the individual manager have more than five years of management experience?
9. Is the manager a member of the community association institute?
10. Does the manager attend community association institute educational events?
11. Has the management company completed background and criminal checks on all employees working for the association?
12. If the association is in a state with manager licensing requirements are all managers working for the association currently licensed and in good standing?





Board of Directors Test

| # | QUESTIONS | TRUE | FALSE |
|----|--|------|-------|
| 1 | The association board of director's authority is set forth in the articles of incorporation? | | |
| 2 | The association by-laws set forth how (a) directors and officers are elected; (b) notice requirements for meetings; (c) who is eligible to vote; (d) the terms for officers and directors? | | |
| 3 | Original by-laws can not be amended to reflect the changing needs of the association? | | |
| 4 | The procedures for amending the by-laws require a unanimous vote of the association membership? | | |
| 5 | State law requires that board members read the by-laws prior to taking office? | | |
| 6 | By-laws take precedence over state law? | | |
| 7 | The procedures set forth in the By-laws are only advisory and need not be followed? | | |
| 8 | Actions of a Board of directors can be invalidated if the board was not properly elected or formed? | | |
| 9 | A Not For Profit community association is not held to the same standard of a For Profit board of directors. | | |
| 10 | The board of directors' can not be sued if it chooses not to enforce the rules set forth in the CC&Rs? | | |
| 11 | The board of director's is only responsible for claims asserting monetary damages? | | |
| 12 | The CC&Rs set forth the board's authority to govern? | | |
| 13 | The CC&Rs take precedence over state law? | | |
| 14 | The CC&Rs need to be updated periodically to comply with new changes in the law? | | |
| 15 | The CC&Rs set forth the rules and regulations for life in a community association? | | |
| 16 | The CC&Rs are not applicable to a member if he or she has not read them prior to moving into an association? | | |
| 17 | The board of directors are required to adhere to all rules promulgated by the hired property managers? | | |
| 18 | The board of directors and it association members are immune for liability if they took action pursuant to the advice of an attorney? | | |
| 19 | The board of directors can not be sued if the property management company fires or harasses an association employee? | | |
| 20 | The board of directors can not be sued for making the wrong decision regarding what insurance to procure for the association, or the amount of limits as long as some type of insurance is purchased? | | |
| 21 | The board of directors can not be sued for breach of contract by a third party vendor? | | |
| 22 | The Board of directors, the association, or association volunteers can not be sued for libel or slander based on things put in an association newsletter or on an association web page? | | |
| 23 | The board of directors can be sued for a claim by an association member for interference with right of quiet enjoyment of the member's property? | | |
| 24 | A board or its association can not be sued for more than \$1 million for a board's mistake? | | |
| 25 | If the board of directors has insufficient limits of liability, the association members can not be held responsible for a judgment in excess of the purchased insurance limits, an no assessment can be issued for the uncovered amount? | | |

Does your
D+O Policy
Cover These
Claims?



Have Your Broker Call McGowan!!

1. A vendor sues the board and the association for breach of contract?
2. A unit owner sues to compel the board to purchase insurance?
3. The community manager sues the association for slander, seeking emotional distress damage?
4. A unit owner sues because a volunteer sexually harasses a child at the pool?
5. The association's doorman sues for wrongful termination?
6. An outgoing board president sues to challenge the validity of an election?
7. A unit owner sues to prevent the removal of trees in common areas?
8. The property manager is sued for an alleged unauthorized entry into a unit owner's condominium?
9. Unit owner sues board for its declination of emotional support dog request.
10. Unit owner sues board for new rental restrictions disallowing AirBNB.
11. Unit owner sues board for an order preventing the association from using drones claiming that it is an invasion of the right to privacy.



Insurance for the Mandatory Homeowner or Condominium Association

■ The Board of Directors is the Association's Risk Manager with the Fiduciary Obligation to Protect the Association's Assets

- Each board member must put the interest of the Association above individual interests
- The board must do its homework (it cannot delegate this to others)
- The board must engage a Community Association Insurance Specialist

■ The Board's Homework

- Reserve Study/Appraisals – the best tool to analyze the association's common elements
 - Understand the appropriate/realistic valuations of the common elements
 - Understand the association's level of risk tolerance
- Governing Documents – Are there insurance requirements?
 - If yes, do they make sense for the association or do they require updating?
 - If yes, does the existing insurance program comply?
 - The required types of insurance
 - The required limits of insurance
- State Statutes
 - Are there any statutory insurance requirements?
 - If yes, do they conflict with the governing documents?
- FHA Requirements – is the association required to comply with FHA requirements?
- Understand the Association Insurance Puzzle – so you know the questions to ask?
- Has the board done an audit on the potential liability exposure of the association?
 - Are any association members doing things that increase potential liability for the association (neighborhood watch, swim teams)?
 - What activities and events take place in the association (socials, clubs)?

■ Select a Community Association Insurance Specialist to Develop the Insurance Program

- Shop for the Community Association Insurance Specialist (licensed insurance agent), not the product
- How long has the insurance professional been involved with community associations?
- How many associations does the professional handle, including ones like yours?
- Obtain references to contact at neighboring associations handled by the specialist
- Ask what they need to analyze your program (if they do not ask for your governing documents, if they do not ask to review your existing policy, or if they do not ask if you have a reserve study, say thank you and interview the next candidate)
- Ask how many management companies they work with at this time
- Ask if they have any community association or relevant insurance designations
- Ask if they participate in any industry organizations, such as the Community Association Institute
- Ask what role they will play in the event of a loss
- The professional must present to the board in person – end of story!
- Ask what the community association insurance specialist will do once the program is put together; i.e. explain the requirements of each policy in the event of a loss, provide education

■ The Community Association Insurance Puzzle – It May Include Some or All of the Following:

- Property Coverage
- General Liability Coverage
- Directors & Officers/Employment Liability
- Fidelity/Crime Coverage
- Workers Compensation

■ Property Insurance

- Adequate Building Limits – Appraisals
- Replacement Cost?
- Sewer Backup?
- Building Ordinance?

■ General Liability

- Governing Document Requirements?
- Statutory Requirements?
- Limits, Limits, Limits?
- Can Liability be shifted? Association v. Individual Unit Owners?

■ Directors & Officer's Liability (This policy differs significantly from carrier to carrier)

The most common D&O claims – are the board and association covered for these claims?

- Challenge to elections
- Parking space disputes
- Challenge to assessments
- Breach of Third Party Contracts
- Architectural review challenges
- Defamation
- Discrimination
- Employment Issue

■ Fidelity (Employee Dishonesty)/Crime (non-employment theft)

- Make sure the appropriate limits are obtained (all accounts + investments + 3 months operating expense)
- Make sure director & officers and volunteers are within the definition of “employee”
- Make sure an independent property manager/management firm is covered as an “employee” or designated agent

■ Umbrella Liability Coverage

- What limits do you need to sleep at night?
- Limit alternative = special assessment

- Auto Liability
- Earthquake/Wind/Flood
- Homeowners/Condo Unit (HO6)
- Special Event Coverage
- Cyber Liability/Data Breach

- Boiler/Machinery or Equipment Breakdown?
- Flood; Windstorm; Earthquake?
- All Risks or Specified Perils?
- Deductibles?

- Deductibles the cost benefit analysis?
- Definition of Insured?
- Personal Injury Coverage?

Beware of Key Exclusions

- Non-monetary claims
- Insured v. Insured exclusion
- Personal Injury/Defamation
- Breach of Contract
- Insurance Claims
- Fraud/Punitive Damages



Special Event Insurance

McGowan Program Administrators provides a simple and inexpensive risk management solution for Community Associations that rent out their clubhouses, pools and other common area amenities: *Special Event Insurance for your Community Association.*

EASY AS 1,2,3...

1. Insert link in your community association special event rental agreement.
2. Renter goes to link and answers a few simple questions and pays for the coverage online.
3. The association contact person receives a certificate of insurance online.

What types of events are contemplated?

- Meetings, seminars, Boy Scout or Girl Scout events
- Birthday, anniversary, and graduation parties
- Weddings, Bar Mitzvahs, and family reunions
- Classes, swimming lessons sponsored by third parties

What is covered?

- Bodily injury; property damage and Personal Injury Offenses
- Liquor Liability
- Hired and Non-Owned Autos
- Medical Pay

Who is covered?

- The Association
- The person(s) and/or the Entity renting the facility

For more information, visit mcgowanprograms.com/products/community-association-insurance



The Blessing and Curse of Technology in Community Associations



Cyber Liability and Data Breach Insurance

Technology is changing how we manage our Community Associations – Is your Community Association prepared for these changes?

McGowan Program Administrators announces its **Cyber Liability and Data Breach** solution specifically tailored and priced for Community Associations. **Simple and Affordable – We heard you!**

- Information Security and Privacy Liability
- Regulatory Defense and Penalties
- Website Media Content Liability
- PCI Fines, Expenses and Costs
- Privacy Breach Response Services - Notification and Credit Monitoring
- Legal Services, Computer Expert Services, Public Relations and Crisis Management Expenses



McGowan Program Administrators

Joel W. Meskin, Esq. CIRMS

jmeskin@mcgowanprograms.com

440-333-6300 x2240

mcgowanprograms.com

