The Unnecessary Voluntary Assumption of Liability By the Association Board

by Joel W. Meskin, Esq., CIRMS – Featured in Indiana Association Help Now Issue 5, 2013

Community association boards of directors are comprised of volunteer association members who, in the course of their daily lives, have the greatest intent to do the right thing for their communities. These communities are where these volunteer board members have entrusted two of their greatest assets, their home and their lifestyle.

Unfortunately, however, one person or board's great intention can unknowingly constitute an unnecessary assumption of liability for the association of liability can give rise to financial exposure that may not fall within the board member's proper management of the association. For example:

- The board president coaches his pee-wee football team on the beautiful community association greenbelt area.
- The board allows Ms. Jones, a former Olympic swimmer from the 1968 Olympic Games, teach swim lessons in the association pool.
- The board creates a dog park in its sub-association and opens it up to the other nine sub-association of which it is a part.
- The master association decides to maintain the entry way hedges and monument for one of its sub-associations, because the sub-association decided it cannot afford the maintenance.

Preliminarily, I do not intend this article to be dispositive in all states. The law of each state must be examined state by state. The general concepts should apply in most states, however. The basic elements of "negligence" require that for someone to be held liable for damages arising from negligence, they must have breached a duty. Accordingly, with few exceptions, an association can be held liable for having breached a duty.

The volunteer board manages the association. The board manages pursuant to the governing document and applicable law. Beyond that, unless the board "assumes" liability, it should not have any exposure to a claim for damages. Two questions exist however: (1) What happens if the volunteer board assumes a liability that its association does not have; or, (2) what happens if the volunteer ignores a duty it does have, but someone else or another entity has voluntarily assumed that duty on behalf of the association that had the duty.

These issues came up recently in a question from a concerned association member who raised the issue set forth in the fourth bullet point above. The sub-association completely ignored its liability (tantamount to putting its head in the sand) and the master association voluntarily assumed the sub-association. However, the master association decided for reason of aesthetics, that a roadside hedge would be maintained at a height that apparently impeded the view of the roadway by drivers. Both the master and the sub-association were placed on notice of the danger as well as possible accidents at the location. The master board refused to trim down the hedge and the sub-association board assumed that since the master took over the maintenance, it was relieved of duty for the property for which it in face owned.

Whose case would you bet on? The case of the nine-year-old child killed by a car running the child over, or the sub-association and the master association sued for wrongful death of the child? Under the circumstances, the master association assumed a liability that it did not otherwise have. This could require higher liability insurance expenses both for liability and umbrella liability coverage. The sub-association cannot avoid liability because another entity is taking it over. The association may be able to pursue the master, but as to the dead child, the sub-association will be liable.

Something board members and associations must keep in mind is that some of these assumed or ignored liabilities may not be covered by insurance. Most board members do not realize that director and officer liability policies do not cover the board or the association if as a result of their decisions there is a bodily injury or property damage. Here, there is no D&O coverage for the child's death. However, the absence of insurance does not let the association and "all its members" off the hook. Some states such as California may not allow a direct action against the individual association member, but that does not mean that the association may not be on the hook which may expose reserve funds to a judgment or give rise to a special assessment that will impact the marketability of a home.

However, the general liability policy and an umbrella policy may respond. There are a couple of issues to pay attention to even if they would respond. First, there is a potential insufficient limits issue. For example, if you have a $1,000,000 general liability limit and a $1,000,000 umbrella limit, but there is a $30.7 million judgment against the association, how will the $24.7 shortfall be covered? It will be covered by the association's assets. If there are not assets, the board may need to issue a special assessment as the only solution. The second issue is if the board's decision is in direct contravention of advice that by doing so there will in fact be a problem. For example, an expert may tell the master association above that if it does not cut the hedge, there "will" be an accident, not that there may be an accident. Under a general liability policy that does cover bodily injury claims, if the damage is not unexpected, the insurer may deny coverage.

Association volunteer boards must take their jobs seriously and really have to consider the impact their decisions may have on liability for the association even if the decision is to do something that good neighbors think they should do. What if one of the pee-wee football players breaks his neck by stepping on sprinkler? What if the swim teacher is not able to monitor students waiting for a lesson and they fall and drown in the other end of the pool? What if a Rottweiler eats your poodle or mauls your child?

No one said volunteering would be easy.

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