

What Every Broker Needs to Know About Directors & Officers Liability for Community Associations

Consider the Facts...

- A community association board may spend several hundred thousand dollars to over \$1 million defending itself against a resident alleging that a special assessment was too high and inequitably distributed.
- In a dispute over a homeowner's gate and improvements, the community association was ordered to pay more than \$250,000 in legal fees.¹
- In an argument over parking and towing, the association was ordered to pay the homeowner \$28,000 in attorney's fees.²

Why Directors & Officers Insurance Is Critical

Despite good intentions and the care your clients take in performing their duties, community association boards are being sued with increasing frequency.

A study of community associations found that about 20% of associations face a legal claim each year.³

The good news is, affordable Directors & Officers (D&O) Insurance is available. It provides financial protection for lawsuits arising from the board members' actions or decisions made while serving.

The bad news is, many associations don't have adequate protection. Without the right insurance, their personal assets could be on the line. In addition, you could find yourself in the line of fire.

Ensuring Your Association Clients Have The Right Policy

Not all community association Directors & Officers Insurance is created equally. There are no "standard" D&O policies. As a result, doing an apples-to-apples comparison for your clients can be tough.

- Confirm coverage provides for the defense of non-monetary claims which often times excluded. Considering that the majority of community association claims involve suits for non-monetary damages⁴; this could be a big expense that comes back to haunt you.
- A stand-alone policy typically provides superior coverage.
- Work with an underwriter who knows real estate and has experience writing policies for community associations.

Community Association Directors & Officers Insurance Checklist

Make sure the policy:

- Provides coverage for the:
 - association as an entity
 - past, present, and future board members
 - property manager
 - builders and developers serving on the board
 - individual working at the discretion of the board (e.g., volunteers, committee members, employees, etc.)
- Provides coverage for defense costs that is in addition to the limit of liability with no limit cap and is not subject to a deductible.
- Provides defense for both monetary and non-monetary (defense) claims.
- Covers defense costs associated with breach of third-party contract claims.
- Enables the association to choose their own counsel.
- Contains broadly defined protection for claims related to Employment Practices Liability, such as wrongful dismissal, discharge, termination, and sexual harassment.
- Includes coverage for prior acts.
- Pays on the association's behalf, so there is no waiting to be reimbursed.

Choosing Policy Limits

Limits vary from \$1 million to \$3 million. These limits may be extended by most commercial umbrella policies. Look for a policy that does not diminish the limit of liability for defense.

While the “right” limits depend on your client’s individual situation, it is extremely rare for any D&O claim, defense and/or indemnity, to break the \$1 million mark.

Insurance is Only the Beginning

Finding the right Directors & Officers Insurance for your client is critical; however, there is a lot you can do in terms of risk management and loss control to limit their odds of being involved in a suit. Encourage your association clients to:

- Elect board members who are serious and understand what their responsibilities will entail.
- Provide training for all board members.
- Make sure all board members have a good understanding of the association’s covenants, conditions & restrictions (CC&R), by-laws, and any other governing documents.

- Retain association counsel and hire experienced professionals if decisions are outside of the board’s comfort zone.
- Require new residents to read and sign-off on the by-laws and other regulations when they move in.
- Provide a mechanism that enables residents to address problems or grievances. Communication can keep small issues from becoming big ones.
- Review by-laws, CC&R’s and other governing documents regularly to ensure they are up-to-date.
- Keep good records and accurate board minutes.
- Maintain a complaint log that includes details on how you responded.
- Keep emotions and personalities out of the equation.

How Claims Work

Directors & Officers Insurance is a “claims-made” policy. If the association even suspects that a situation could lead to a claim, they should immediately notify you, their insurer, and property manager. The report of a potential claim will not impact the association’s insurance rates.

About Distinguished Programs

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The Most Frequent D&O Claims

Breach of Fiduciary Duty - For example:

- A board member approves one color for the whole condo association, but his unit gets its own shade.
- Officer elects to hire the services of his brother-in-law’s pool maintenance company without disclosing the information to the board.

Breach of By-Laws - For example:

- Not enforcing rules and regulations with a neighboring unit that failed to submit plans for improvement prior to making changes.
- Failing to obtain the requisite number of votes prior to hiring a contractor to do some work.
- Failure to provide access to books and records.

Assessment Disputes

Discrimination - For example:

- Approving a front yard fence for one unit and denying an application for the same fence for another unit.
- Selectively restricting use of association facilities.

Wrongful Employment Practices

- For example:

- Wrongful termination
- Sexual harassment
- Unfair hiring practices

Sources

The sources listed on this page are provided for reference and informational purposes only. Inclusion of a source does not imply endorsement, accuracy, or completeness of the information contained therein.

¹Grossman v. Park Fort Washington Ass'n, 212 Cal. App. 4th 1128 (Cal. Ct. App. 2012).

²Wright v. Misty Pines HOA, 415 P.3d 1206 (Wash. Ct. App. 2016)

³Foundation for Community Association Research. (2023). *Community Association Fact Book*. Retrieved from <https://foundation.caionline.org/publications/factbook/>

⁴Community Association Underwriters of America. (n.d.). *Directors & Officers Liability: Claims trends and risk-management guidance*. Retrieved from <https://www.cauinsure.com>

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