

Liability Changes Offer More Coverage

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Today's column continues our review of changes to laws affecting community associations enacted by the 2004 Session of the Florida Legislature. In the first five installments, we looked at significant changes affecting the laws for homeowners' associations. Last week's column reviewed changes to the condo law involving so-called lender questionnaires received by associations in connection with the financing or refinancing of condominium units. Today's topic is one that has been covered in past editions of this column, liability affiliated with the use of

The new law, which takes effect October 1, 2004, provides that community associations (cooperative associations, condominium associations, homeowners' associations, and mobile home homeowners' associations) are immune from civil liability for any harm resulting from the use or attempted use of defibrillators. However, it should be noted that the immunity is not available unless the association has notified the local emergency medical services director of the most recent placement of the defibrillator within a reasonable period of time after it has been acquired; the association properly maintains and tests the device; and must provide appropriate training in the use of the device.

Of equal importance, the law also will provide that an insurer may not require an association which purchases a defibrillator to purchase medical malpractice liability coverage as a condition of issuing other coverage. Further, an insurer may not exclude damages resulting from the use of defibrillators under general liability policies issued to associations.

that might arise from the ownership of defibrillators and/or the application of defibrillation treatment to a heart attack victim.

Thanks to the efforts of Community Associations Institute, through its Florida Legislative Alliance, Florida's Cardiac Arrest Survival Act, which is found at Section 768.1325 of the Florida Statutes, has been further amended to provide better protection for community associations.

As reported in this column previously, more than 350,000 Americans die of cardiac arrest each year. According to the experts, every minute spent waiting for paramedics to arrive reduces the chance of survival by ten percent. While nothing in life is risk free, it certainly seems that this year's changes to this law will encourage more associations to review defibrillator acquisition, and hopefully save a few lives. ☺

Q&A

Question: I serve on the board of my condominium association. I am currently out of the state of Florida and requested to be called to participate in a board meeting by conference call. The board said that I could not participate in the meeting by conference call unless I paid the phone charges. What do you think? V.W. (via e-mail)

Answer: I think you have a short sighted board. While I am aware of no legal authority by which you could require the association to permit you to participate by telephone (at association expense), it is highly unusual for an association to disenfranchise duly elected directors who happen to be out of the state. Frankly, many association boards are staffed largely or even completely by seasonal residents, and association business could not go on without the use of conference call meetings, as permitted by statute.

You could presumably initiate a petition to amend the bylaws to require that absentee directors be permitted to participate in association board meetings by telephone, at association expense. The procedure for getting a bylaw amendment on the ballot depends upon how your documents are written.

Some condominium association bylaws also provide that directors are entitled to reimbursement for expenses they reasonably incur serving on the board. In my opinion, long distance phone charges to participate telephonically in a board meeting would be an expense reasonably incurred. However, it is likely that the board would refuse to pay you, so this may not be of much help unless you wanted to submit a reimbursement request and take the association to small claims court.

Question: I am an officer in a homeowner's association consisting of 423 lots. We are trying to amend our covenants and restrictions. Our declaration states that the covenants, conditions and restrictions may be amended by "an instrument approved by not less than two-thirds of the unit owners. Any amendment must be properly recorded." We have been advised that we must obtain signatures of seventy-five percent of the lot owners, and that such signatures must be witnessed and notarized. We feel that this is going to be a very long and onerous task, if not impossible. Does this seem reasonable or overkill? J.T. (via e-mail)

Answer: Whether written instruments approving an amendment must be witnessed and/or notarized depends on the actual language in your declaration. The portion of the declaration that you quoted does not appear to require the signatures on the written instruments to be signed with all the formalities of a deed, or acknowledged, or even recorded. However, many declarations are ambiguous on this issue and therefore, the most conservative position in such cases is that the written instrument should be witnessed and notarized.

The amendment itself must be recorded, and when the amendment is recorded, a certificate is usually prepared that is signed and executed by the president of the association attesting that the amendment received the requisite approval of the unit owners. The certificate of amendment should be witnessed and notarized and recorded.

If you are amending the documents, this is a good time to clean up that issue and remove any ambiguities.

Question: How much authority does the president of a condominium association have to decide an association's meeting agenda? If another director wants something on the agenda, can the president remove it arbitrarily? What is the remedy if the president refuses to put an item on the agenda? D.M. (via e-mail)

Answer: Unfortunately, this is an area that is not well addressed by Florida's condominium laws. Sometimes, the bylaws of the association may lend guidance. For example, in bylaws which I write for condominium associations, there is a clause which vests the authority to set the agenda with the board president, but requires an item to be added to the agenda if requested in writing by at least two members of the board.

Most association boards operate under Robert's Rules of Order, which generally permit the majority of the body (here the board) to set or alter the day's agenda. Unfortunately, that is not feasible in condominium associations, because the law requires that the agenda be posted at least 48 hours in advance of the meeting, and items not on the agenda cannot be considered by the board, except in limited emergency circumstances.

In the absence of guidance from the bylaws, your board may wish to set a policy on establishment of agenda items. For example, you could require that agenda requests be submitted in writing, at least a certain number of days before the board's meeting, and depending upon the size of your board, you could establish whether the addition of an agenda item requires the concurrence of more than one board member.

Question: In the past, our condominium association has had a number of incidents where board members' cars have been vandalized after involvement in some controversial association issue. For example, many board members have had their cars "keyed" (scratched with keys). We want to establish a policy that will reimburse a board member for repair costs when their car is vandalized on condominium property. We feel that if the perpe-

trators know that everyone has to pay, and that the expense is not coming out of the board member's own pocket, they may be less likely to destroy everyone else's property, since they will have to share in the cost of fixing it. Would this policy be legal under Florida law? D.M. (via e-mail)

Answer: It is indeed unfortunate that your community is populated by one or more cowards who express their disagreement through anonymous criminal activity. Frankly, I question whether your proposed reimbursement policy will have much impact on anti-social personality types.

In order for condominium associations to expend common funds, the use of the money must be for a "common expense," which generally means the operation and maintenance of the commonly-owned property. Certain expenses which might seem normal in the course of operating most organizations (such as flowers to commemorate the death of an organization member) have been held not to be proper common expenses for condominium associations.

Your inquiry presents a close call. If there is a clear nexus between board service and being the target of the vandalism, you could probably justify use of association funds to support the plan. Many bylaws entitle directors to reimbursement for expenses they incur while serving on the board, although such clauses are typically geared toward long-distance telephone bills, necessary travel on behalf of the association, and the like.

I would recommend that you look into installing security cameras to catch the culprits. I am sure that assistance will be provided by your local law enforcement officials and prosecutors if evidence of the perpetrator's identity can be obtained.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.