



## HOW MUCH DIRECTORS' LIABILITY INSURANCE IS ENOUGH?

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By **Joe Adams**

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**Q:** I currently serve on the board of my condominium association and am running to serve for another year. With the new statutes passed last year, for the first time I have been asked to sign a certification form stating that I have read and understand the statutes and declaration of condominium for my community. Also, our association attorney informs us that there are new provisions in the Condominium Act that appear to require new duties for directors. The board president tells me that I should not be worried because the association carries directors and officers liability insurance. My question is, how much directors and officers liability insurance is enough, and what happens if somebody makes a claim against the directors in excess of the directors and officers liability policy limit? I enjoy serving on the condominium board, but I certainly do not want to put any of my personal assets at risk. **N.N. (via e-mail)**

**A:** You are correct that many new provisions were added to the Florida Condominium Act in 2008. It is not clear yet what the legal effect of the changes regarding a director's liability will be. As you probably know since you have served on the board previously, directors have always had a fiduciary duty to be reasonably well informed and to investigate and make a good faith evaluation of

issues before voting. Directors have also always been required to keep reasonably apprised of association activities. Therefore, from one point of view, nothing has changed with the new statutes except that previously existing fiduciary duties have been expressly codified in the Condominium Act.

The new provisions in the Condominium Act concerning a director's duty of care are basically the same duties that have been found in the Florida corporate statutes for many years. Only time and perhaps some appellate court decisions will tell whether the new certification requirement for directors, or the inclusion of director and officer liability standards in the Condominium Act, change existing law.

The answer to your first question is that the board should consult with the association's insurance broker/agent as to the appropriate amount of directors and officers insurance coverage (usually referred to as the D&O policy). A million dollars coverage is probably the bare bones minimum. It is my understanding that coverage of three million, or even five million, can be obtained for a modestly higher premium. Obviously, the size of your association and the nature of your operation

has some bearing on risk and the best balance between coverage and cost control.

In answer to your second question, the Florida statutes permit the bylaws of the association to contain comprehensive indemnification provisions which could become extremely important should insurance coverage not be adequate to cover a claim against you arising from board service. You may want to ask the board to check with the association's counsel to ensure that your bylaws contain thorough indemnification provisions. If a claim against a director exceeds the amount of insurance coverage, indemnification means that the entire community essentially acts as your insurer. However, there will likely be no insurance coverage and no right to indemnification in the event criminal action, fraudulent acts, or if willful or reckless misconduct or self-dealing is established.

**Q:** One topic of particular interest to me is how the sunshine laws apply to condominiums. I believe our condominium association board is in violation of the sunshine laws for holding a board meeting to "plan for" a separate board meeting, without providing notice of their "planning" session. On another occasion, our board held a meeting with the association's attorney and while I know that these meetings are not required to be open, I believe they are still required to be noticed, which did not occur. Thanks for your columns.

**L.S. (via e-mail)**

**A:** Technically speaking, Florida's Government in The Sunshine statutes, Chapters 119 and 286 of the Florida Statutes, do not apply to community housing associations. However, each housing law does contain open meeting requirements and other member rights. These statutes are often referenced to as "sunshine laws" for associations. The law to which you are referring is Section 718.112(2)(c) of the Florida Condominium Act. Under the law, meetings of the board of administration at which a quorum of the members is present (either in person or by telephone) must be open to all unit owners. For example, if you have a five member board, three members sitting in the same room or on a

telephone conference together conducting association business constitutes a meeting, whether votes are taken or not. An exception to the "open" meeting requirement exists where the board and the association's attorney meet with respect to proposed or pending litigation, when such meeting is held for the purpose of seeking or rendering legal advice.

All board meetings are required to be properly noticed, even meetings between the board and the association's attorney. Proper notice generally requires posting notice conspicuously on the condominium property at least 48 continuous hours in advance of the meeting except in an emergency. Board meetings at which nonemergency special assessments, or at which amendment to rules regarding unit use will be considered require written notice be mailed, delivered, or electronically transmitted to unit owners and posted conspicuously on the condominium property not less than 14 days prior to the meeting.

I often see attempts by boards to bypass the open meeting and/or notice requirements by saying that their meeting is an "executive session" or is being held "planning" purposes only. Some boards believe that so long as no binding vote is taken at the gathering, the open and/or notice requirements simply do not apply. This is inaccurate. In my opinion, where a quorum of the board is present and discussing association business, a "meeting" is being held, whether votes are taken or not, and the "sunshine" laws do apply.

### **Local Trade Show Aimed at Associations**

On February 20, 2009, the local chapter of Community Associations Institute (CAI) will host its 15th Annual Conference & Trade Expo at the Alico Arena on the grounds of Florida Gulf Coast University. The Expo is open to the public from 9 A.M. to 3 P.M.

Over 80 exhibitors providing services to community associations will be represented. A two hour continuing education course, "2009 Legal Update" will be presented by Attorney Joe Adams

at 8:00 A.M. Both managers and board members are welcome to attend. Registration can be confirmed by calling Robert Podvin at the CAI Chapter's office. The telephone number is 239-466-5757.

At noon, CAI's Florida Legislative Alliance will meet and discuss current legislative issues and proposals. Following this there will be an open

forum to debate "Legal and Insurance Issues Confronting Community Associations Today". Local attorneys, insurance brokers and members of CAI-FLA will provide an abundance of information to fuel and debate and respond to the issues presented.

All events are free of charge.

*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](mailto: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](http://www.becker-poliakoff.com).*