



LAW OFFICES

BECKER & POLIAKOFF, P.A.

Community Up-Date™

Vol. 103 APRIL 2003 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

IS YOUR DIRECTORS & OFFICERS LIABILITY COVERAGE ADEQUATE?

By Donna D. Berger, Esq.

If you've ever served on a community association board of directors, you've probably asked yourself, just before the election results were returned, what kind of liability you could be exposed to as a result of your director status. Lawsuits, in general, are on the rise across the nation so it is a pertinent question.

Community association board members have been sued for a variety of actions including discriminatory hiring practices, tortious interference with a sales contract, and prohibiting the installation of a satellite dish on a front lawn. The person suing could be a unit owner, an association employee or a contractor who is working on the common elements. These suits can expose both the individual board members and the association to financial disaster if a proper directors and officers (D & O) liability policy is not in place.

Industry analysts warn that most D & O policies are inadequate; providing only a fraction of the coverage many associations need. These policies are often not scrutinized as closely as they should be because many directors believe they will be covered in the event of a lawsuit by the language found in most declarations requiring the association to indemnify their board members. An indemnity agreement basically says that if an officer or director is sued, the association will pay him or her back for any costs and fees incurred.

However, indemnification may provide a false sense of security if the association

does not have enough money budgeted to pay those costs. Moreover, most indemnification clauses require the association to repay costs only after they have accrued, so a board member who has been sued may spend months paying large legal bills before being reimbursed by the association. The prudent course of conduct is to ensure that a thorough D & O policy is in place which contains the proper provisions to meet the common legal challenges that face associations and board members today. The benefits of having such a policy in place extends beyond covering just the board members and their personal assets, to covering their spouses, committee members, volunteers, the association and its employees against most types of lawsuits.

In order to ensure that the D & O policy you buy is actually the type of coverage you need, you should review the policy carefully (and be sure to check with your attorney and other informed professional advisers prior to buying) to determine that the following areas are covered:

1. Make sure there is sufficient coverage. The coverage limit on your policy should be sufficient to pay both the cost of defending the suit as well as any eventual settlement or judgment. The cost of protracted litigation can quickly erode your policy limits well before a settlement or verdict is reached so the limit must be high enough to cover the worst-case scenario.

continued on page 2

TIDBITS

Did You Know ???

Pursuant to Section 718.3025, Florida Statutes, no written contract to provide maintenance or management services for a condominium association shall be valid or enforceable unless the contract:

- ✓ Specifies the services, obligations and responsibilities of the party contracting to provide maintenance or management services to the unit owners.
- ✓ Specifies those costs incurred in the performance of those services, obligations or responsibilities which are to be reimbursed by the association to the party contracting to provide maintenance and management services.
- ✓ Provides an indication of how often the service obligation or responsibility is to be performed whether stated for each service obligation or responsibility or in categories thereof.

continued on page 2

COVERAGE...*continued from page 1*

2. Make sure that the policy covers past, present and future board members. This should alleviate any concerns potential board candidates may have about their predecessors' actions. You should also insure the board members' spouses since particularly disgruntled unit owners will occasionally name them as defendants as well. An example of the type of language being suggested would be:

"Insured Persons" means any persons who were, now are, or shall become: 1. duly elected or appointed directors, trustees, or officers of the Insured Organization, and spouses thereof.

3. Make sure committee members and other volunteers are covered by the D & O policy. The work of volunteers and committee members is essential to many community associations but remember that their actions can lead to a lawsuit even though they do not serve on the board. They need to be insured as well. An example of the type of language being suggested would be:

"Insured Persons" means...2. members of duly constituted committees or other volunteers of the Insured Organization, and spouses thereof.

4. Make sure all association employees are properly covered. Your D & O coverage should include all past, present and future association employees and should include full-time, part-time, seasonal and leased employees as well. A strict reading of the policy is especially important since terms such as "employee" can be defined to exclude seasonal workers or leased employees. An example of the type of language being suggested would be:

"Insured Persons" means...3. employees of the Insured Organization, including all employees, whether they be full-time, part-time, seasonal or leased.

5. Make sure your D & O policy **does not** exclude non-monetary claims unless you specifically request that exclusion. An example of a non-monetary claim would be one in which

an association member was requesting the right to do something that the board attempted to prohibit. For example, a board denies an owner's request to install a satellite dish and the owner sues to force the board to approve the request. If the court rules in the owner's favor, it would probably just enter an order requiring the board to grant the installation request but probably not require the board to pay damages. In that event, a D & O policy that excluded non-monetary claims would not pay for the board members' legal fees and costs no matter how substantial they may have been in defending their course of conduct in denying the installation.

Including non-monetary claims in your coverage will certainly increase the cost of your premium, but as the number of lawsuits for non-monetary damages rises, it may prove to be a prudent investment.

6. Insured vs. insured coverage is another area that merits closer consideration. Perhaps one member of your board might sue another member. This could become a real threat in the event one board member takes unilateral action that puts the entire board at risk. You could also face the proposition of current board members suing prior board members. You should know ahead of time if your D & O policy covers these types of insured vs. insured claims since most do not.

7. Discrimination lawsuits have been gathering steam over the last twenty years. Make sure your D & O policy will protect your board members in the event they are sued over a housing discrimination claim or an employment discrimination matter. These are particularly vulnerable areas for associations, and board members may be wholly unprepared to deal with requests for handicapped accommodations in a sensitive manner. These are also the types of cases that carry the potential for disastrous damage awards, so specifically review your policy beforehand to assure coverage is warranted.

8. You should ensure that your D & O policy contains coverage for "full employment practices" or EPL. Since so many associations today do have employees, this coverage is particularly important. This coverage should protect the directors, officers, property

TIDBITS**Did You Know ???***continued from page 1*

- ✓ Specifies a minimum number of personnel to be employed by the party contracted to provide maintenance or management services for the purpose of providing service to the association.
- ✓ Discloses any financial or ownership interest which the developer, if a developer is still in control of the association, holds with regard to the party contracting to provide maintenance or management services.

This statute applies only to maintenance or management services for which the association pays compensation and does not apply to contracts for services or property made available for the convenience of unit owners such as coin operated laundry, food, soft drink or telephone vendors, cable operators, retail store operators, businesses, restaurants or similar vendors.

manager and employees from lawsuits involving employment discrimination, handicapped discrimination, racial discrimination, etc. If your D & O policy does not offer this type of coverage, you may want to consider purchasing a separate EPL policy.

9. Do not accept a reimbursement policy which requires your board members to lay out costs and attorneys' fees ahead of time only to receive reimbursement from the policy post-settlement.

By thinking about your board members' needs and the unique functioning of your association, in advance, you should be able to procure D & O coverage that will thoroughly protect your members, employees, and volunteers and allow them to serve your community in as positive an environment as possible.

REFLECTIONS; PRELUDE TO THE HOUSING FOR OLDER PERSON'S ACT

By Gary A. Poliakoff, J.D.

Recently, while preparing for a presentation at a legal forum, I had the occasion to re-read the Florida Supreme Court decision, *Franklin v. White Egret Condominium, Inc.*, 358 So.2d 1084 (Fla. 4th DCA 1977), which, 25 years ago, affirmed the right to maintain "adult" communities. The issues debated then seem as relevant today, so I have chosen to share some of the poignant quotes from the decision, and those of the Fourth District Court of Appeal. Quoting Judge Letts of Florida's Fourth District Court of Appeal:



"The majority opinion believes that age restrictions run afoul of fundamental rights such as marriage and procreation. These are 'motherhood and the flag' proclamations and the cases cited in support simply do not relate these unassailable fundamentals to an age restriction. Certainly, this particular age restriction does not deny the right of any adult owner to take a bride and continue to live in his condominium apartment. Nor does it deny him the right to procreate; he simply has to move when the child is born. This is comparable in principle, to a couple with three kids having to move to a bigger house upon the

arrival of the fourth, because the existing living quarters are bursting at the seams and the zoning will not permit the addition of another room."

Judge Letts, went on to note:

"There are countless examples of apparently valid and enforced age restrictions which run the gamut from the required 3 years of age for Kentucky Derby entrants, all the way to the necessary 35 years that any aspirant to the presidency must attain under the Constitution itself. (Article II §1, U.S. Constitution.) Judge Kovachevich finds it difficult to comprehend the ...change that occurs on a child's twelfth birthday which suddenly renders him fit to live in a condominium. Maybe so, but from whence the magic of a 35th birthday which suddenly renders a person fit to live in the White House, even though one can serve as a U.S. Senator for 5 years before that? (and why 30 years of age for the Senate?) The answer is that, between night and day, childhood and maturity, or any other extremes . . . a line has to be drawn [somewhere]."

In reversing Florida's Fourth District Court of Appeal, which had ruled against the enforcement of age restrictions, Florida's Supreme Court, for the most part, adopted Judge Lett's rationale. The Court noted:

"The urbanization of this country requiring substantial portions of our population to live closer together coupled with the desire for varying types of family units and recreational activities have brought about new concepts in living accommodations. These are residential units designed specifically for young adults, for families with young children, and

for senior citizens. The desires and demands of each category are different. Young adult units are predominantly one bedroom units with extensive recreational facilities designed for the young, including tennis and racquet ball courts, weight rooms, saunas, and even disco rooms. The units designed principally for families are two- to four-bedroom units with recreational facilities geared for children, including playgrounds and small children's swimming pools. Senior citizen units are limited to one- and two-bedroom units designed to provide the quiet atmosphere that most of our senior citizens desire. These units may provide extra wide doors throughout the complex to allow sufficient clearance for wheelchairs and walkers and recreational facilities such as card rooms and shuffleboard courts.... We cannot ignore the fact that some housing complexes are specifically designed for certain age groups. In our view, age restrictions are a reasonable means to identify and categorize the varying desires of our population."

In 1995 Congress adopted the Housing for Older Persons Act which formally made provision for senior retirement communities, free from families with small children. Congress recognized that the desire to live in a community geared towards a specific age group was not inherently discriminatory so long as the proper documentary restriction accompanies that desire.





CASENOTES

STICKS AND STONES

Directors, Officers, and managers (and sometimes simply unit or lot owners) occasionally want to investigate the possibility of obtaining a restraining order or injunction to stamp out harassing or combative behavior. Section 784.046, Florida Statutes, establishes a procedure by which any victim can immediately obtain a "protective injunction" upon "two incidents of violence or stalking," by submitting a sworn petition to a court alleging the two incidents of violence. This statute defines "violence" to mean any "assault ... battery ... or stalking."

In *Gianni v. Kerrigan*, 836 So.2d 1106 (2nd DCA 2003), Mr. Gianni had sought a protective injunction based upon the following two acts of alleged violence: 1) several telephone calls from Mr. Kerrigan verbally threatening violence on April 29, 2001; and 2) on May 3, 2001, Mr. Kerrigan's physical attack on Mr. Gianni. The court held that the telephone calls did not rise to the level of "violence" as defined in the above-referenced statute, and therefore, the necessary requirement for at least two acts of violence to support the issuance of a "protective injunction" was not satisfied.

Words, including words transmitted by telephone, can validly constitute an assault; therefore, given that the telephone calls threatening violence were actually followed up several days later by the accomplishment of such violence, the Court's holding might seem puzzling. The explanation of the Court's holding can be found in Mr. Gianni's testimony that the telephone calls did **not** place him in fear. That is, one necessary element of assault, a "well-founded fear that violence is **imminent**," was not created in Mr. Gianni's mind by Mr. Kerrigan's telephone calls. The moral of this story is that a verbal attack, threatening violence, will only be characterized as an assault for purposes of law if the party being attacked is legitimately put in imminent fear by the words being spoken.

SET IT BACK

In *Payne v. Cudjoe Gardens Property Owners Association, Inc.*, 28 FLW D1 (Fla. 3rd DCA 2002), the homeowners association brought suit against

defendant homeowners for injunctive relief, asserting that the defendants violated deed restriction set-back requirements in the construction of their home.

Summary judgment was initially granted in favor of the defendants, the court finding that the Association had waived the right to enforce the set-back requirements as a result of numerous variances granted to prior property owners. However, the judgment was vacated based upon allegations of defense counsel misconduct. The Association, thereafter, filed its own motion for summary judgment, asserting that the defendants, having failed to submit building plans for Association approval prior to construction, were barred from raising any affirmative defenses.

The court granted summary judgment in favor of the Association, refusing to consider the defendants' evidence of over sixty prior violations of the deed restrictions, and holding that the defendants lacked standing to challenge the deed restrictions due to their failure to submit the building plans for approval prior to construction.

On appeal, the Third District Court found that summary judgment in favor of the Association had been entered in error because the defendants had not yet received responses to their discovery requests. The discovery responses may have revealed other owners who, also having failed to timely submit building plans, were nonetheless granted waivers or variances by the Association.

The court further noted that the record clearly evidenced some 68 other violations of the set-back requirements. While some of the 68 non-conforming owners had received variances, it was unclear, absent responses to the outstanding discovery requests, how many had received their variances prior to commencing construction or thereafter. It could not be determined whether the defendants were precluded from raising any affirmative defenses against the Association's claims or whether the Association was enforcing the restrictive covenant arbitrarily and unreasonably. The court held that where discovery is not complete and the facts are therefore not sufficiently developed to enable the trial court to determine whether issues of material fact exist, entry of summary judgment is premature and constitutes reversible error. Thus, the summary judgment in favor of the Association was reversed.

CASENOTES