Vol. 37 • No. 3 • June 2019

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COMMON INTERESTS

The Importance of INSURANCE

INSIDE:

Price v. Cost of Insurance

Large Loss Insurance Claims

Protecting Your HOA Volunteers

Basic Necessities of HOA Insurance

Managers' Fiduciary Duties

And More!

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COMMON INTERESTS

IN THIS ISSUE

FEATURED

COLUMNS

President's Letter

DAVID GRAF
Chapter President
CAI-RMC

By now, most of you know that Governor Polis vetoed HB 1212, which was the proposed manager licensing bill "extension" that had successfully made its way through the state legislature. This means that the manager licensing statute in its entirety expired on June 30, 2019. As of July 1, 2019, community managers no longer need to be licensed by the state to practice their craft. This veto, to my knowledge, was a surprise to nearly all, if not all, community association industry stakeholders. The veto statement issued by Polis states, among other things, that "skill certification is best done by guilds, unions, and professional associations." CAI has proudly been the torch-bearer in elevating the community association industry since its founding in 1973. To that end, CAI and now independent certification organization CAMICB (the "Community Association Managers International Certification Board") developed and maintain the international baseline certification for management competence, the Certified Manager of Community Associations ("CMCA").

> **"As of July 1, 2019, community managers no longer need to be licensed by the state to practice their craft. "**

The Governor vetoed HB 1212 based on the claim that the manager licensing regime is too narrow and focused to adequately protect consumers from harm. The Governor has decided, through the veto and through the accompanying Executive Order that he issued on the same day, that the entire industry needs to be examined for the sake of consumer protection, decreased costs, and increased transparency. To that end, he has tasked the Department of Regulatory Agencies ("DORA") to review the industry and the applicable statutes and issue a report with its findings. Hopefully, the market uncertainty and potential future regulatory burdens do not further increase the cost to the consumer, contrary to the Governor's expressed desires when vetoing HB 1212. In any case, we look forward to participating in this process to further serve the community association industry and the people who volunteer for and live in communities.

COMMON INTERESTS

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Patricia A. Book

Position(s) Held: President
Association: Willow Springs Community Association
Association Size: 460 units

Community Achievement: Achievements that Willow Springs Community Association is particularly proud of, over and above our routine maintenance and care, are:

1. We established a Pond Management Committee engaging significant community expertise to plan for ongoing enhancement and maintenance of our pond that is not an aesthetic asset but used for both recreation and irrigation purposes;

2. We completed an inventory of the over 500 trees in our 33 acre green space as part of a tree management plan to include species, condition, and fertilization and treatment actions;

3. We upgraded our playground to safety standards with new equipment and ground resurfacing; and

4. We developed a community communication plan to discuss a five-year budget scenario that required a 20% assessment increase over our 6% ceiling. This plan was ratified overwhelmingly by our community. It was designed to improve our Reserve balance and with our community's support, we are accomplishing this goal.

If you're interested in sharing your community's achievements or spotlighting a homeowner leader, please email bridget@caddo-leadership.com. We'd love to hear from you. You may also nominate a homeowner leader by filling out the questions referenced above.

I have submitted a design review request to replace my roof with the same color shingles as other neighbors. The committee denied the request stating that the color was not approved. This is totally unfair. What action should I take?

The first thing you should do is look at your governing documents. Look in the Declaration and then look in the Guidelines or Rules to see what restrictions the association has placed on roofs and/or the color of shingles. Also, many associations have adopted color pallets that may also have approved shingle colors on them. If the Declaration states that only certain shingle colors will be approved, then those are the only shingle colors that can be approved. More than likely, the Declaration will not have specific shingle colors in it, but it will likely allow the board of directors or a committee to adopt Guidelines or Rules regarding something like shingle color. If the Guidelines or Rules specify certain colors of shingle that are approved, then again these are the only colors that can be approved. It is important to note that Guidelines and Rules can normally be changed without a homeowner vote, so it is possible that previous boards or committees have changed the Guidelines or Rules in the past and allowed different colored shingles. Just because your neighbor has a certain colored roof, does not mean that you are entitled to such a roof.

If you review your governing documents and can find no mention of specific shingle type or color that is approved, then you should request a hearing in front of the board or committee, whichever denied your request. You should ask that governing body to explain why they will not approve your specific roof when your neighbors have the same roof. The governing body should be able to explain to you the reasoning behind their decision and what provisions of the governing documents they are relying on to make such a decision. Generally, the governing documents provide a lot of discretion to the board or the committee when approving design requests, so if you challenge them in court, the association is likely to win unless they have abused their power in some way.

The best option to deal with design review issues, and with almost all issues regarding your association, is to have as much communication as possible with the board of directors. Ask for a hearing if your request is denied, and don't just rely on the community manager to relay your message. Also, attend board meetings and ask questions, get involved with a committee, and get involved with your community. The more involved you are with the board and the association, the better you will understand the reasoning behind their decisions.

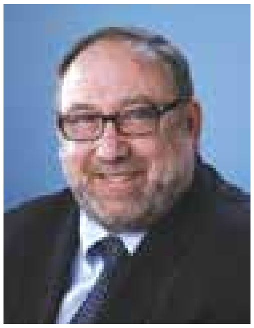
I feel like the board of directors isn't acting in my best interest. They seem to make financial decisions that aren't decisions me or my neighbors would ever make and it seems like they just love to spend our money. I want to make a complaint and have them removed! How do I do that?

This is a good question and something we hear from owners on a fairly regular basis. First, you may have heard (or read) about your board's fiduciary duty. What exactly does that mean? It simply means that the board has an ethical and legal obligation to make decisions in the best interest of the entire association, and not the interests of itself as individuals or individual members. Within fiduciary duty, there is the duty to exercise ordinary care, which means that board members must perform their duties in good faith and in a manner they believe to be in the best interest of the association, with such care as an ordinary prudent person in a similar position under similar circumstances would use. If you feel as though the board is acting in such a manner, the best thing to do is to start (if you aren't already) attending board meetings. Listen to the board's discussions about matters before they make their decisions, and engage with your opinion as a member of the community. Their job as board members is to help preserve, protect, and enhance the value of the properties in the community.

If you feel strongly about having board members removed, you'll want to consult your association's governing documents in order to ensure compliance with procedures set forth for your specific association. The Colorado Common Interest Ownership Act (CCIOA) also has provisions related to the recall and removal of board members, so you'll also want to make sure you review those provisions. Removing a board member can be extremely contentious and really should only be used where there has been a breach of fiduciary duty or some other egregious and/or unlawful behavior. My first recommendation would be to work towards getting on the board at the next election. Being a board member can be frustrating at times, but it may also be one of the most rewarding ways you'll find to volunteer your time. If you're interested in participating more in your community, contact your manager and/or any current board member.

The Price of Insurance vs. The Cost of Insurance

Pay an Amount Certain Now, or Be Surprised Later



Joel W. Meskin Esq., CIRMS, CCAL
The McGowan Companies

Community associations are creatures of budget. The primary purpose of a budget is to provide certainty and avoid surprises as the board complies with its obligation to protect, preserve, and enhance the association assets.

More often than not, board members primarily focus on "price" when purchasing insurance. However, "price" is only relevant if the options presented substantially provide the same coverage —apples for apples; or there are never any claims.

Caveat: Remember Not All Insurance is Created Equal!

The reality is most boards never make the ultimate insurance decision, because they defer this task to the CAM. Not only do they defer to the CAM for insurance decisions, they do not meet in person with the community association insurance professional. It is one thing to defer the insurance leg work to the CAM, however, it is another thing for the CAM to make the insurance purchase and maintenance decisions on their own. In my humble opinion, focusing primarily on the point of sale premium should be the last decision. The key obligation is to determine whether the insurance proposal is proper coverage to protect, preserve, and enhance the association assets.

CAUTION: Board Members Beware

More often than not, the management agreement with the Association requires that the association unilaterally indemnify the Management Company and the CAM for claims arising out of services provided.

The board is obligated to protect, preserve, and enhance the association assets. Primarily focusing on price in the insurance decision process is counterintuitive to this duty. Where in the governing documents does it provide that the board has a duty to save the association money when purchasing insurance? Nowhere! Rather, the duty is to determine what insurance will best protect the association assets.

Boards are authorized to seek counsel from professionals when an issue is beyond the knowledge of the average board member. Insurance is one of those issues. Moreover, why wouldn't a board always seek counsel from a community association professional? Why not obtain counsel from a community association insurance professional who does not charge?

The "cost of insurance" is not the same as the "point of sale premium." The "cost of insurance" is the total amount the association incurs at the time of a loss or claim plus the value of peace of mind that the association receives during the claims process. If the board made sure they purchased the best coverage for the association, the cost of insurance will have been a good deal. However, if the focus was the point of sale price as opposed to coverage, there is a very possible reality that the cost of insurance could be significantly higher than the price, because the association will be self-insured for the coverage that was sacrificed for the cheaper price.

Caveat: More important for associations than "point of sale insurance premiums" is not being surprised by uncovered claims!

CAUTION: CAMs Beware!

Many management agreements expressly provide that the CAMs assume the task of purchasing and maintaining the association's insurance program. In other situations, many management companies take on this role voluntarily and may involve preferred insurance business partners in the process.

This practice in and of itself is not necessarily a problem. However, there are a number of traps for the unwary, including who is ultimately responsible for any errors in the purchase and maintenance of insurance. The key individuals that should be most concerned here are management company "owner" and Boards.

1. Indemnification

Most management agreements have an indemnity provision that provides that if the CAM is sued for something it did for or on behalf of the association, the insured needs to provide the CAM defense and indemnity. Accordingly, the managed association must be able to fund that obligation. Many CAMs and Boards "assume" that this can be funded by the association's Directors and Officers policy where the CAM is almost certain to be added as an additional insured, or are included in the policy definition of insured. As a result, the funding of the obligation owed the CAM is by the association's assets, special assessments, or a loan.

It is also important that the Management Company or CAM understand the indemnity provisions of your state. Not all states will allow indemnification for someone's active negligence, and if they do allow indemnity for active negligence, that provision must be expressly set forth in the agreement, and in some states follow a certain formula.

2. Community Association D&O Policy

Most Boards, Management Companies, and CAMs "assume" that since the management company was working on behalf of the association, and since it is an additional insured on the D&O policy, that the CAM will be covered and that is how the insurance claim against the CAM, for whom the association agreed to provide defense and indemnity will be funded.

Unfortunately, virtually every D&O policy on the market "excludes" coverage for claims by the association against the management company or CAM. Even worse is that there are some D&O policies where the management company or CAM is not even covered under a policy.

3. Management Company/CAM Professional Liability Insurance

Virtually all CAM Professional Liability Insurance "expressly excludes" any claims arising out of insurance claims. This should make sense, because a professional liability policy is intended to cover the professional from its industry professional services. CAMs are not licensed insurance professionals.

4. Conflict of Interest

Some management companies or CAMs have their own preferred insurance professional who in turn has its own preferred insurance carrier. There are also some where the insurance is a division, affiliate, or subsidiary of a management company. These may in fact provide the best products to protect the association's assets. However, there are two key requirements. First, any such relationships must be expressly disclosed to the association board. Second, under this scenario, the management company or CAM must still conduct its due diligence as to the best available coverage, and not just the best price.

5. Business Good Will

There are "Good Will" issues that can arise from insurance issues. First, very often the management agreement has a unilateral indemnity agreement flowing from the association to the management company or CAM. Theoretically, if the CAM does not purchase and maintain the appropriate coverage, it is still protected, because the association must defend and indemnity the management company or CAM. Who will tell the board that the management company is being sued, but they have to defend them? If the management company is not concerned about losing the client, there is no problem. Does the management company and CAM have an obligation to disclose this to the association before the agreement is entered?

Second, what will the neighbor associations or other associations think when they hear about this? What will the impact be on the association property values?

6. Management Company CEOs Beware

One of the biggest mysteries I have encountered in my years in this industry is why there are management company CEOs, executives, and owners who do not make it one of the highest priorities to make sure the association's insurance program is the best. Management companies spend so much time making sure they are additional insureds on the association insurance policies, but they do not make sure the association's policy is the best. The management company and the CAM's coverage is only as good as the associations.

Take Aways

Community Association Insurance Professionals do not charge to meet, counsel, or present to your Board. Make the Insurance Professional's E&O on the line, not the Management Company or CAM. The Insurance Professional, not the CAM, is the licensed insurance expert.

Boards should exploit community association insurance professionals for two reasons. First, boards owe a fiduciary duty to the association, like relying on a licensed community association insurance professional. By doing so, the board develops a strong defense to a strong business judgment defense. Second, the counsel is free.

CAMS should never sign an application on behalf of an association. The association does not pay the Management Company or the CAM.

Always make the board review the application, make any changes they need, and have the appropriate board member sign the application.

Not all insurance coverage is equal.

Joel W. Meskin, Esq., has been Vice President – Community Association Insurance and Risk Management, McGowan & Company, Inc., since January, 2005. McGowan & Company, Inc., now known as McGowan Program Administrators is a leading provider of Community Association and Property Manager Insurance Products nationwide.

Match Game

Are Insurance Companies Required to Match Repairs to Existing Property?

Alyssa E. Chirlin
Smith Jaden
Johnson, PLLC

Hail season in Colorado is underway and if recent trends continue, there will be a significant amount of large hail again this year. In 2018, while the total number of severe hail reports was consistent with past years, the percentage of such reports with hail measuring more than 2" in diameter grew substantially. Larger hail means more extensive property damage, both in prevalence and in severity, and insurance companies will want to minimize payments on these increased claims.

One area where insurance companies limit coverage is in denying their obligation to match the replacement of storm-damaged materials to existing materials. When a storm damages only a portion of a building's exterior and matching material is unavailable, insurance companies may propose a repair with cosmetically inconsistent materials, creating a mismatch with the undamaged exterior. With aesthetics a high priority in many community associations, it is important to know whether a policyholder is entitled to repairs that preserve a building's uniform appearance and, inextricably, its market value.

Some states have passed legislation requiring insurance companies to reasonably match existing exteriors and even to replace undamaged property when necessary to maintain a structure's uniform appearance. And some insurance companies specifically offer ancillary coverage to avoid a material mismatch. This option, often called matching siding insurance, reimburses a policyholder for the costs of replacing undamaged siding in order to preserve an insured building's uniform exterior. But even in states without matching legislation, and in policies without explicit matching coverage, courts are finding matching requirements in common homeowner policy language. The Supreme Court of Minnesota recently ruled that policy language that requires repairs of a "comparable material and quality" in fact requires materials of a "reasonable color match."

Colorado has no statute or definitive case law regarding an insurance company's obligation to match repairs to existing materials, although there is persuasive authority that Colorado will follow the same rationale applied in Minnesota. In 2017, the district court in Hamlet Condominium Association v. American Family Mutual Insurance Co. found that an insurance policy that promised repairs "of comparable material and quality" must cover the cost of obtaining reasonable matching. The court further required the insurance company to pay for "skim-coating" to the undamaged exteriors in order to avoid visible repair patches.

In keeping with this finding and with other jurisdictions' recent decisions, the common policy phrases "comparable material and quality" and the similar "materials of like kind and quality" likely do not demand an exact color match, and may not cover matching for weathered or faded materials, but they probably do at least require replacement materials to reasonably match the color of existing materials. And when damaged materials are no longer manufactured and there is no available reasonable color match, these phrases may further require the replacement of even undamaged materials in order to ensure a building's uniform appearance.

A cosmetic mismatch among siding or roofing is a "direct, demonstrable, and physical alteration" that can affect a property's value and consequently the property as a whole can be considered to have sustained a "direct physical loss" when there is no reasonable match to the existing materials. This would trigger coverage under many homeowners policies and allow for the replacement of the entire exterior, even if only a portion of the property has sustained actual, physical damage.

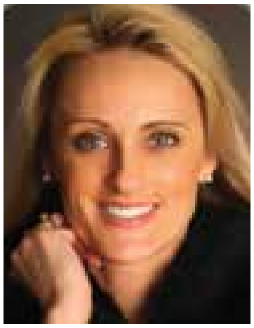
In Colorado, a policyholder's best claim to trigger this coverage is to gather evidence that, without matching materials, a repair would not result in a reasonably comparable appearance and the mismatch would leave the policyholder in a worse position than before the damage. Expert evidence that a patch repair could not possibly match can be very effective in persuading an insurance company to cover matching.

Ultimately, coverage depends on an individual policy's specific language. So with hail season here and the potential for property damage high, it is crucial to be prepared and informed about your property insurance. Read your policy, ask questions, and make sure that you are comfortable with the coverage your policy provides and that you are familiar with its exclusions. And if you do suffer property damage, know that you may not have to settle for repairs that create aesthetic abnormalities. If you have any questions about the coverage that your policy affords, consult an attorney today.

Alyssa E. Chirlin is an attorney at Smith Jadin Johnson, PLLC, a law firm specializing in the representation of HOAs in insurance claim disputes as well as general community association law. If you have insurance coverage questions, please call her at 720-550-7280.

Are Your Volunteers Protected by Your HOA's Current Insurance Policies?

Here's a Hint...Probably



Ella Washington
Ella Washington Agency, Inc.

Homeowner association boards face a lot of decisions when it comes to finances. Those decisions involve the responsibility of trying to keep their association within a reasonable budget.

With increased costs of doing business, common interest communities are seeking ways to save money. Having volunteers within their community is becoming more common. Often volunteers will perform services that the HOA would otherwise hire contractors for. Examples of volunteer acts within a community are: pulling weeds, removing snow, or planting a tree. Although volunteers in our homeowner association communities are an incredible asset, it can come with a severe price. Trying to save a little on labor costs can end up costing a community in the long run. Injuries to volunteers don't happen often, but when they do, they can be extremely costly to an association. According to CAIS*, below are recent claims from a National Workers Compensation program built specifically for common interest developments:

1. President volunteered to maintain light bulbs in a common area and fell from a 14-foot ladder - $65,000 paid claim.
2. Volunteer assisting in clubhouse renovation injured his back removing the old stove - $20,000 paid claim.
3. Volunteer fell while picking up trash in the community - $16,000 paid claim.

It is a common misconception amongst board members and association managers to think these kind of injuries are covered under the HOA's General Liability (GL) policy. CAIS* explains that "unfortunately a General Liability policy has specific exclusions for bodily injury to an 'employee' because by design, employee injuries are covered under a workers compensation policy. While some minor injuries to volunteers have been paid through the GL policy under 'guest medical coverage", it doesn't take much

Disposition From Court Report

'Heiman v. CA Workers' compensation Appeals Board (2007) 149 Cal.app.4th 724

"Hruby and Pegasus were dual employers of Aguilera that are jointly and serially liable for workers' compensation under the Labor Code. Pegasus was also the agent of the Association, which was a separate legal entity that is liable for workers' compensation as the principal. Pegasus and the Association were not owners or exempt employers under sections 3351(d) and 3352(h). The WCAB's decision awards Aguilera workers' compensation to be paid solely by the Pegasus. We reject that limited conclusion and hold that Hruby is jointly and severely liable with Pegasus and the Association is also liable as Pegasus' principal. To the extent that WCAB's decision is inconsistent with our conclusion, it is annulled. The award will otherwise be affirmed."

imagination to see where a GL carrier would use the 'employee' exclusion to decline a more serious injury to a volunteer."

Having volunteers in an HOA is not the only risk associations face. In 2007, a California Court of Appeals case: Heiman v. Workers Compensation Appeal Board, shed light on the potential liability that associations and their managers face when contracting for on-site service and repair. Below are the case details:

Pegasus Management (Heiman), the manager for the Montana Villas Homeowners Association, hired the Hruby Company on behalf of the association to install rain gutters on the association's common areas. An employee of Hruby was electrocuted and seriously injured on the job. Hruby was uninsured so the injured worker's case was referred to the CA Workers Compensation Appeals Board (WCAB). The absence of a policy to provide benefits for the injured worker left the Workers Compensation Appeals Board assigning payment obligation to the Management Company (Heiman). Heiman took the ruling to court and the disposition from the CA Court of Appeals is outlined below:

An important fact to consider, if the association carried its own workers compensation policy, it's likely that the Workers Comp Board would have assigned the benefits of that policy to Aguilera and the case would have most likely been settled.

A traditional workers compensation policy is meant to cover employees who are injured on the job. By definition a "volunteer" is a person who provides services without the expectation of compensation of any kind. Most carriers do not offer coverage for organizations without direct employees. The carriers that do offer the "if any" coverage (meaning no direct employees) typically will not offer coverage for volunteers. Ideally, associations really need to protect themselves from both "if any" and "volunteers" under one simple workers compensation policy.

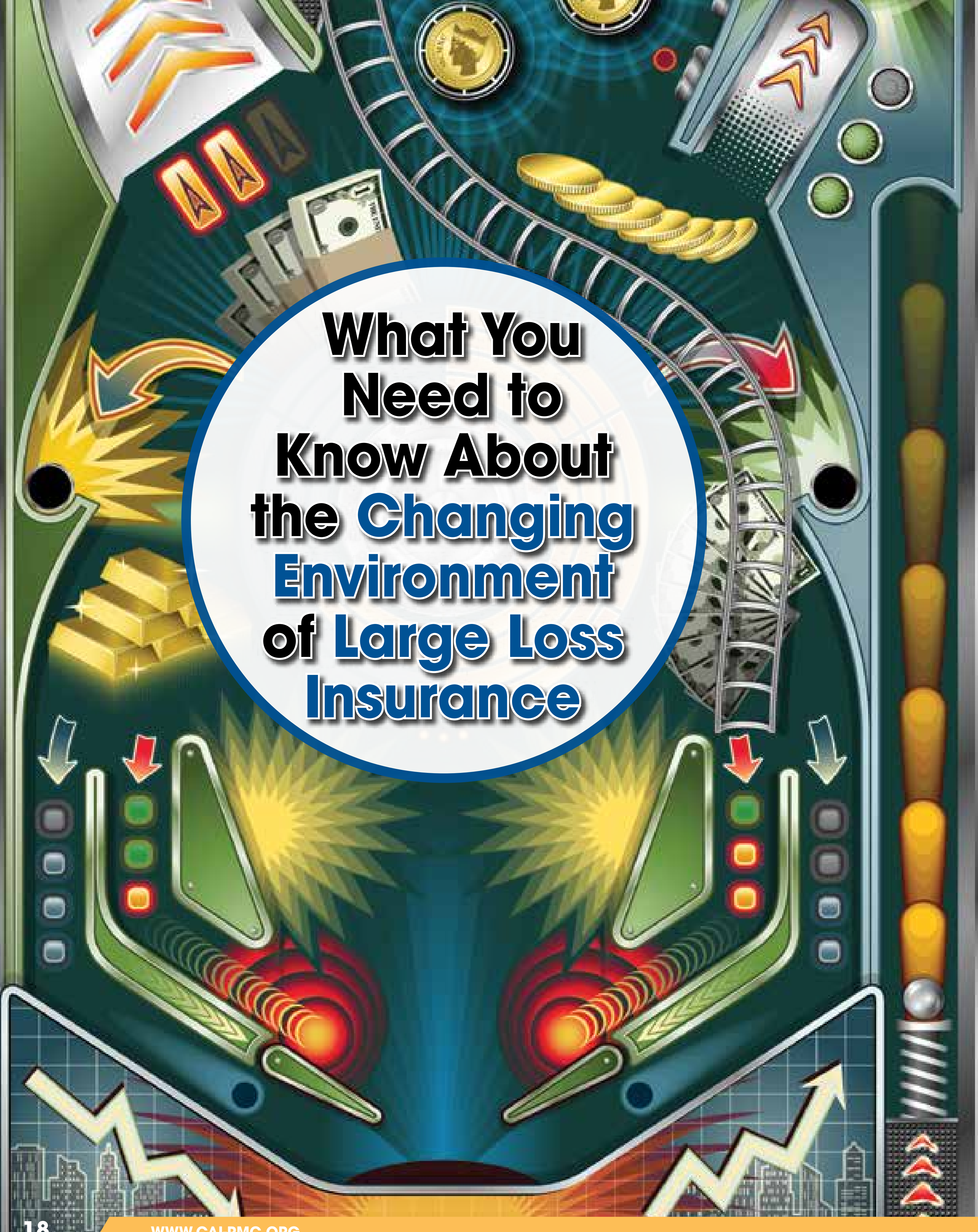
So how does an HOA protect themselves from such risks? Until recently, there were not many options of a workers' compensation policy for HOA communities that didn't hire 'direct employees'. CAIS* is a carrier that has designed such a policy. CAIS* mentions "it was truly a case of the insurance industry not understanding the niche and the risk associated with the class of business". The program CAIS* offers was the first of its kind to offer both "if any" and "coverage for volunteers" on a national basis. Local insurance agents offer this "Volunteer" Workers Compensation policy with premiums usually ranging from $350-$400 per year.

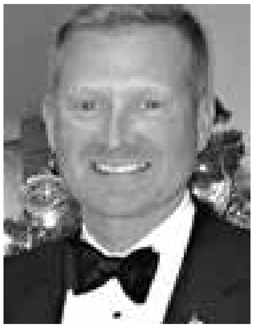
As an asset protection professional, it is my recommendation that every common interest community purchase this policy whether or not the CC&Rs require them. Any association that hires contractors for on-site repairs, or work within the community, or has any volunteers should consider this policy. This risk far outweighs the premiums. After all, the trip to an emergency room will well exceed the annual premium of this type of policy.

Ella is a 23 year veteran in the HOA Insurance industry. Her agency has access to over 35 insurance carriers. Ella's agency was established in 1996. Being an advocate to her HOA Board Members and Managers is always her top priority and is the foundation of her success. The Ella Washington Agency is a national agency insuring HOAs in 19 states.

**CAIS, LLC. helped co-write the information in this article. For more information about CAIS visit: www.canxlsystems.com.*

What You Need to Know About the Changing Environment of Large Loss Insurance





Clinton Dorris
(L2M) Large Loss Management, LLC

What you need to know about the changing environment of large loss insurance claims We all know that most, if not all, insurance policies for wind and hail are going to a percentage-based deductible accompanying more denials of coverage for Colorado. But did you realize that natural disaster costs doubled from $188 billion in 2016 to $306 billion in 2017 and continued to exceed the prior 10-year average at $155 billion for 2018[1]? Changes to our industry are here.

So, what does this mean to you and why should you (the HOA/owner/management company) care? In short, the insurance carriers stand to "lose" billions of dollars paying for claims well above those estimated/anticipated by their actuary tables for 2016, 2017, and 2018. This translates into a significant catalyst for insurance carriers needing to save money and raise rates. Higher deductibles and more complicated claims and construction processes are just the beginning. It is becoming commonplace for carriers to enforce the policy's statute of limitations for filing a claim and necessitating more detailed proof of loss while placing higher standards on the documentation required to recapture the recoverable depreciation. If you're saying to yourself, "this is the way it's always been," you aren't recognizing the half-trillion-dollar loss mentioned above.

Additionally, carriers are increasingly more focused on identifying fraud or conflicts of interest, especially in large claims. As an example, if funds from a contractor are paid to the HOA or the management company, it may be considered a deductible buyback, or fraud, and could provide the carrier the leverage to deny coverage or sue all involved[2].

The same influencers affecting premiums and claims also necessitate a new strategy to adequately compensate the HOA management company and community managers for their work conducting assessments and other incurred costs beyond their standard duties. Don't worry, there is an emerging carrier recognized method of getting those additional expenses paid, but not in the manner that some management companies and contractors have gone about it in the past.

Given the increase in carrier scrutiny, now is the time to make sure HOA boards and management companies are reducing their risk on large claims by recognizing a few things.

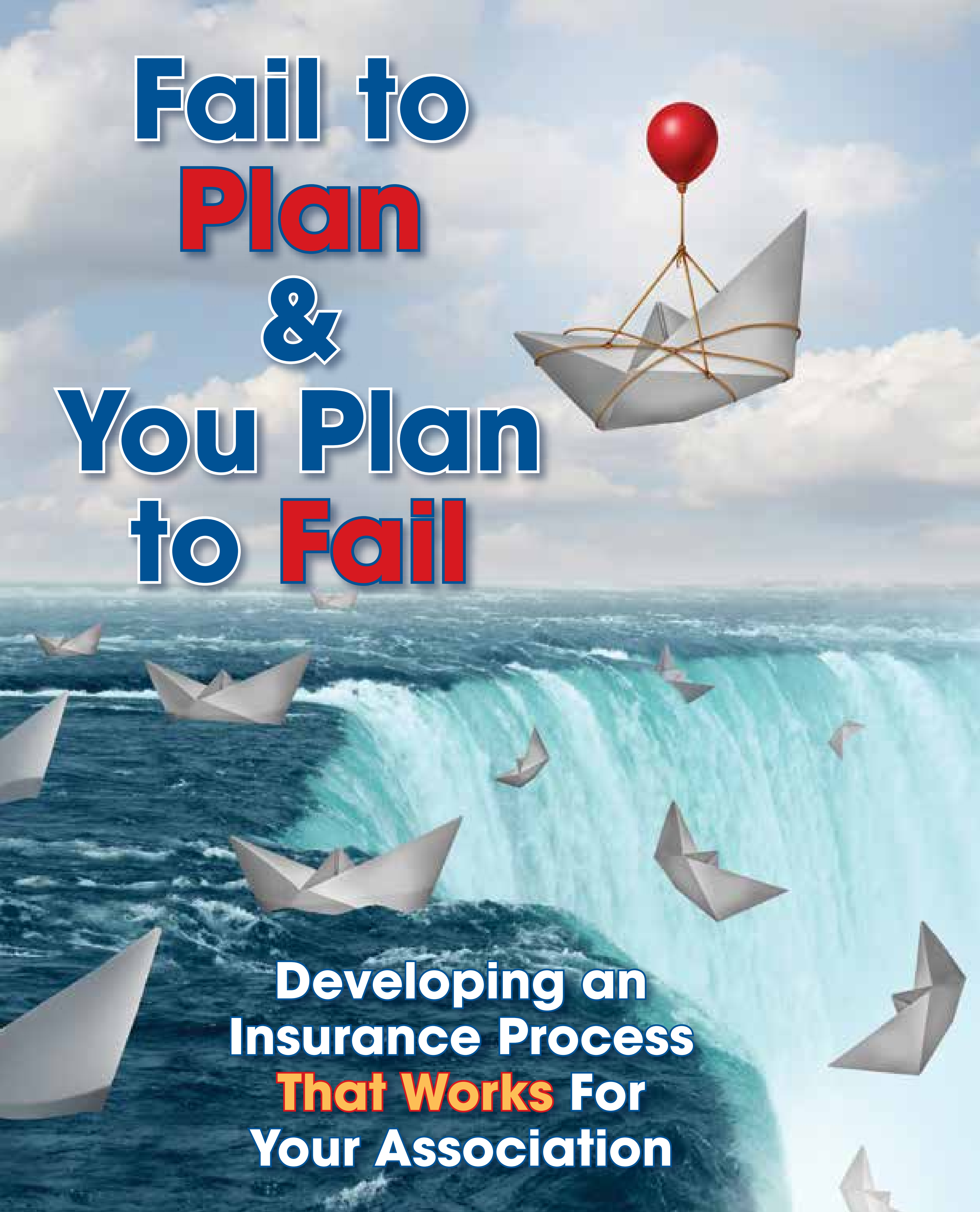
1. What worked yesterday for general contractors, HOA managers, HOA boards,and tradesman, won't necessarily work tomorrow.
   - Given the size of carrier losses across the country, the claims environmentis changing significantly and swiftly.
2. HOA boards and management companies accepting funds of any kind from contractors isnever a good idea.
   - If you wouldn't want to read about it in the Denver Post, don't do it.
3. Not filing a claim because of a high deductible is a bad strategy and works in the carrier'sfavor. It also doesn't prevent a premium increase.
   - Premiums are adjusted by the increase in claims based on a specific region, notbased on an individual property's claim history. In other words, a property's ratescan go up even if they don't file a claim.
   - There are multiple strategies to address high deductibles.
   - If you have damage and don't file, you put your property in a pre-existing conditionscenario, setting up an opportunity for a future denial.
   - Carriers have a statute of limitations on filing a claims which they are now standing behind.
4. A changing industry environment requires new perspectives and professionals that canmanage both the claim and the construction.
   - Management companies are experts at managing HOAs and conducting assessments, rarely are they experts at insurance claims and large construction.
   - Roofing companies are experts at roofing, rarely are they experts at identifying allthe damage, at negotiating with the carrier, or at construction management. If theyare the roofer and the "general contractor" on the same project, then they are conflicted by self-dealing.
5. Whomever you hire to manage the entire project should have a documented process that can withstand an audit.
   - If they can't produce a final documented deliverable with a third-party financialaudit, you should reconsider. A deliverable as stated is your greatest asset iflawyers happen to get involved later.
   - Insurance proceeds should not be commingled with other HOA funds and should be held in an escrow account that requires a dual signature for release (ownerand project manager signature).
   - Most significant issues with large loss claims revolve around the management ofthe funds.
6. Utilize trades that have been vetted.
   - Trades should be picked based on their relevant experience along with a currentunderstanding of their debt at the supply vendors, their reputation in thecommunity, if their subcontractors are being paid, and if there is pendinglitigation that they are involved in.
   - There is never a need to collect multiple bids from contractors on insurance-related work. If you save funds by picking the lowest bidder, the residual funds belong to the carrier, not the owner, unless that was agreed upon in a settlement.

The insurance carrier industry is making significant and swift adjustments to their process and procedures. Are you taking note? What are you doing to evolve with the changes?

Clinton Dorris has leveraged his two engineering degrees to manage billion-dollar programs for better than 20 years and is a managing director for (L2M) Large Loss Management, LLC. Please visit www.4L2M.com for more information or call to schedule a CE credit discussion on this topic and others.

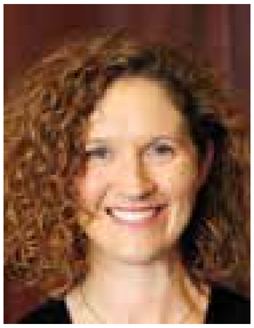
[1] Swiss Re https://www.swissre.com/media/news-releases/nr_20181218_sigma_estimates_for_2018.html

[2] Colorado State of https://leg.colorado.gov/sites/default/files/images/olls/2012a_sl_267.pdf



Fail to Plan & You Plan to Fail

Developing an Insurance Process That Works For Your Association



Tressa Bishop, MBA,CIC
CB Insurance

Let's face it, no one really "likes" insurance. Well, that is except those of us who consider ourselves insurance nerds and will take any opportunity to discuss the ins and outs of policies, exclusions, claims, etc., much to the chagrin of our audience, at times. Insurance is a necessary evil. Your association's governing documents require it, lenders require it, and our state statutes require it. Unfortunately, there is no getting away from having it. The worst possible case scenario is you have purchased insurance for your association, paid what you feel is way too much for it, and, come claim time, the carrier doesn't end up paying what you expected them to pay.

The old saying "A little knowledge is a dangerous thing" does not necessarily apply to insurance from the layman's perspective. While you're not expected to become an insurance agent, you are expected to gather enough knowledge, with your agent's expertise and guidance, to ensure your association's assets are properly protected in case of loss. Sticking your head in the sand and hoping everything is hunky dory is not a plan. Developing an insurance process and understanding the common exclusions and limitations within many policies can help along the way.

When to Start – Well before your association's policy expiration date (preferably shortly after renewal or mid-term).

What to Do – Review the governing documents for any information relating to Insurance. This includes the types of policies required, what coverages within those policies the Association is required to carry, deductibles (amounts allowed and who is responsible for payment/reimbursement at the time of loss), and owner insurance requirements.

Next, take out (or pull up on the computer, if you love trees) the association's insurance policies (the actual contractual policies, not policies and procedures) and organize a document as a sort of a cheat sheet.

Basic Information to Gather – List the policy type (Property, General Liability, Association Professional Liability/Directors & Officers Liability, Fidelity and Crime, Cyber Liability, Workers' Compensation, Umbrella/Excess Liability, Flood, etc.), carrier name, policy effective dates (start and end dates – yes, they are the same day of the month, one year apart), policy number, policy limits, policy deductibles (or retention amounts), and claims reporting information. For example:

Property: Carrier: Travelers Insurance Company
Effective Dates: 04/01/2019 – 04/01/2020
Policy Number: xxx-xxxx-xxxxx
Policy Limit: $32,705,000
Deductibles: $10,000 All Peril, 5% Wind/Hail
Claims Reporting: XYZ Agency, John Davis, 555-555-5555

Check the requirements of the governing documents for insurance against the policies to ensure there are no gaps. Also, check that the policies also comply with CCIOA (C.R.S. § 38.33.3-313). An insurance agent that specializes in HOA insurance should be doing this for you at each renewal and can assist here, if needed.

Although you aren't expected to be an insurance agent and should be utilizing an agent who specializes in community association insurance, there are common exclusions and limitations in most policies that you should be aware of. These can lead to big headaches, and potential assessments, after a loss (note: this list is not all-inclusive, and you should consult with the association's insurance agent for details on your association's specific policies).

Common Exclusions or Limitations in Many Insurance Policies:

Ordinance or Law — Coverage available by endorsement when a community has building ordinances that state when a building is damaged to a specific extent (typically more than 50%), it must be completely demolished and rebuilt in accordance with current building codes rather than repaired. There is very little automatic Ordinance and Law coverage in most property policies. Most governing documents require Ordinance and Law coverage, as well as FHA and many other lenders.

- ***Coverage A — Loss to Undamaged Portion of the Building***
  In some jurisdictions, ordinance or law requires that a building that is partially damaged be demolished (in other words, it becomes a total loss). Coverage A states that if such an ordinance is in place and is enforced by local authorities, the insurance policy will treat the claim as a total loss even though the building was only partially damaged.
- ***Coverage B — Increase Demolition Cost***
  This pays the increased cost to demolish and clear the site of the undamaged parts of the building.
- ***Coverage C — Increased Cost of Construction***
  This pays to repair or reconstruct damaged portions of the building and bring them up to current code. It also covers the cost to reconstruct or remodel undamaged portions of that building, regardless of whether demolition is required.

Limit Guidelines:

- ***Coverage A*** — should be included up to the Building limit. Some policies will show the dollar amount, but many will show "Included" as the limit for this coverage.
- ***Coverage B*** — 10% to 20% of the Building limit (general range, age of building, number of stories, etc. should be taken into consideration when setting this limit).
- ***Coverage C*** — 10% to 20% of the Building limit (general range, age of building, number of units per building, number of stories, etc. should be taken into consideration when setting this limit).

Debris Removal — This is the amount the carrier will pay following a covered loss to remove the damaged property from the site. Common amount included in most policies is 25% of covered loss plus a small amount ($10,000 or $25,000). Since the percentage amount is included within the building limit, if there is a total loss, there may only be the additional small amount since the building limit would be used up replacing the building. An additional amount should be added to the policy in case of a large or total loss to the community.

Sewer/Drain Backup — This coverage is for the resulting damage to covered property from a water or sewer backup event, including sump pump failure. Many policies include a small amount of coverage, usually $25,000 or less. Depending upon the type of interior unit coverage on the policy (All Inclusive or Original

Construction, for example – usually driven by the governing documents), this limit may not be adequate.

Limit Guidelines: $50,000-$100,000 per occurrence. Higher limits should be considered depending upon the number of units per building that may be affected in one loss situation, as well as the type of interior unit coverage the policy has.

Flood – Excluded in most property policies, this coverage may be required by lenders based on the association's location. When it is not required, an association may want to consider adding coverage since it covers water damage to covered property that does not originate on association property. This includes surface water, mudflow, and water under the ground surface.

Limit Guidelines: When required by lenders, the coverage limit should match the limit on Property policy. When not required, it is usually purchased through the property carrier. They will usually determine how much they are willing to offer (typical amounts are $1,000,000 to $5,000,000).

Earthquake – This coverage is used to provide protection for loss due to earth movement including earthquake shocks and volcanic eruption. It is available by endorsement or as a monoline separate policy. Note that is does not cover subsidence or earth movement.

Limit Guidelines: When purchased through the property carrier, they will usually determine how much they are willing to offer (typical amounts are $1,000,000 to $5,000,000).

Equipment/Mechanical Breakdown – This coverage is for loss caused by mechanical or electrical equipment breakdown, including damage to the equipment, damage to the other property of the insured, and damage to the property of others as specified in the policy form.

Many only think of this coverage for associations that have elevators, pools, or boilers, but the coverage includes damage due to electrical arcing, which is an exclusion on most property policies.

Limit Guidelines: Coverage limit should match the limit on Property policy, including the Business Income limit and Business Personal Property. It is often shown as "Included" when purchasing the coverage from the Property carrier.

The only time people really care about insurance is when they have to write a check for the premium and when they have to file a claim after a loss occurs. To make the claims process as smooth as possible from the start, be sure you are aware of the duties required under each policy.

Compliance with Policy Duties and Terms:

Each policy has a list of duties that the insured agrees to perform. Not performing these duties can have serious repercussions on any future claim. Some of the most common duties are:

- Prompt reporting of claims to the insurance company
- Cooperation with the investigation of the claim and reasonable requests from the insurer
- Allowing the insurer to inspect damaged and undamaged property
- Examination of books and records
- Submission of Proof of Loss (usually required within a specific timeline from the date requested by the insurer)
- Examination under oath

Policy Timelines:

- **Filing a claim:** often these involve a specific timeline to report a claim or require that claims are reported within a "reasonable time"
- **Proof of Loss:** many policies require this within 60 days from the date requested by the insurer

Legal action deadline: Can vary for each policy

By preparing beforehand and documenting the policy requirements for reporting claims, you can save time and possibly future headaches. Consult with your association's insurance agent while setting up your insurance process.

Acknowledgements: Peter O'Brien – Solutia Consultants, Jonah Hunt – Orten Cavanagh & Holmes, LLC. The information in this article does not constitute insurance guidance for any specific association. The terms, conditions, exclusions, and endorsements of policies will apply. Every policy and every claim is different.

Business Partner Vetting

Are you Exercising Due Diligence?

By the Editorial Committee

Finding a business partner who will perform quality work at a reasonable price can be a daunting task. Taking care to properly vet your community association's business partners (and potential business partners) can help avoid problems down the road. You should rely, at least to some extent on information and feedback from your community association manager (their relationships and opinions in the industry matter!). But what else should you be doing to protect yourself and your association? Aside from checking with the Better Business Bureau and licensing boards in Colorado, the following will provide a checklist of things your Board should be doing and considering when vetting business partners. These can help alert you to unscrupulous, inexperienced or financially troubled vendors who may deliver broken promises rather than professional results.

1. Review your association's governing documents. Your documents may have provisions which require business partners to possess certain levels of insurance (make sure their policies do!) and might also provide for other limitations on contract terms.
2. Beware of low bids. Price is absolutely an important consideration when selecting a vendor, but don't let a low price or a special deal blind you to a potential problem. A bid far lower than others may indicate that the vendor is not experienced enough to know the actual cost of the job or he/she never intends to finish the work. Disreputable vendors may bid low to secure a contract and then tack on extra work as the scope of work progresses.
3. Confirm insurance. Make sure that the business partner will identity the association (and its management company) as additional insured on the business partner's insurance policies. Confirm that there are no exclusions in the business partner's insurance which may prevent the policy from covering damage, claims, injuries or liabilities arising from the business partner's performance under the contract.
4. Take your time. If you are pressured during the bidding process by tactics such as "limited time offers," look for a different business partner. Hiring a business partner is not a split-second decision; in fact, hopefully it is the start of a long and beneficial relationship with your association. Review multiple bids and really understand all that is included in the scope of work requested by your Board and the costs/timelines to perform same.
5. Call references. Asking for business partner references and then never reaching out to speak to them is NOT due diligence. Make sure that you are reviewing the bids, references, AND reaching out to the references to discuss experiences with the business partners.
6. Have legal counsel review the bid and proposed contract. Occasionally, community associations will forego this legal review because it is believed that the goods and/or services to be provided are nominal and do not justify the cost of legal review. The legal review, among other things, is important in order to help your Board understand a contract's proposed indemnification provisions.

Taking these steps may not prevent future problems, but they can certainly help to minimize problems that could arise because of failure to perform basic due diligence when selecting business partners to perform work for your association!

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To enhance the community association management profession and provide a level of protection to homeowners living in community associations by recognizing people who have demonstrated a thorough understanding of the profession's defined body of knowledge.

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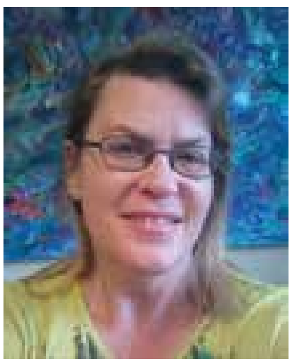
The CMCA® offers a level of protection to homeowners and their communities by offering a trusted credential awarded only to professional managers who have demonstrated competency of the defined body of knowledge of a community association manager.



Meet Amber McCurdy, CMCA, AMS, CAM

Colorado Property Management Group, AAMC

Obtained CMCA Designation: 2016
Philosophy of Community Management: Just Keep Swimming!
Why Get Your CMCA: I wanted to further my education so I would be the best manager possible for my communities.
Value of CMCA: I love this industry and having my CMCA shows that dedication to others, including by boards.
One of the Best Things About Being a CMCA: For me, one of the best advantages of having a CMCA is the amazing network of people and resources that you have access to, both locally and nationally.

Meet Leanne Shaw, CMCA, CAM

General Manager, Mountain Division ACCU, Inc.

Obtained CMCA Designation: 2014
Philosophy of Community Management: Teacher, student and juggler!
Why Get Your CMCA: I feel that studying and passing the CMCA exam added a higher level of education and insight to community management. It goes beyond the basics!
Value of CMCA: Having the CMCA credential in your signature gives an immediate indication that you've progressed further in your education and separates you from other peers with a CAM.
One of the Best Things About Being a CMCA: For me, the biggest reason I've remained in this role is because no two days are the same, I learn something new on a daily basis and I never clock watch. My favorite aspect of the job is definitely the capital projects, I get a huge sense of satisfaction bringing a project to completion and seeing how much the community has valued from it.

Mr. Gregory Bishop, CMCA	Maximum Property Management	Aurora	CMCA	03/18/2019
Ms. Christine Capizzo, CMCA, AMS	Onsite Property Management Services, Inc.	Fort Collins	AMS	05/08/2019
Mr. David Chase, CMCA, AMS	The Chase Group, Inc.	Golden	AMS	01/11/2019
Ms. Lisa M Drake, CMCA	The Colorado Property Management Specialists	Parker	CMCA	05/13/2019
Mr. Jeffrey Leonard Evans, CMCA, AMS	Montana Community Management Corp.	Bigfork	AMS	03/28/2019
Mr. Kevin Flewell, CMCA, AMS, PCAM	Resort Ventures West	Frisco	PCAM	01/08/2019
Ms. Catherine Louise Fraser, CMCA		Silverthorne	CMCA	04/02/2019
Ms. Anne Ilgenfritz, CMCA		Fort Collins	CMCA	02/05/2019
Mr. Damon Jawitz, CMCA	The Management Trust-PMA Colorado Division	Aurora	CMCA	03/07/2019
Mr. Thomas John Kaiser, CMCA	Touchstone Property Management, LLC	Fort Collins	CMCA	04/30/2019
Mr. John Thomas Krajewski, Jr., CMCA, AMS	CAP Management	Denver	AMS	05/08/2019
Miss Sabrina Ann Lopez, CMCA, AMS	Colorado Association Services	Denver	AMS	05/08/2019
Ms. Laura Miranowski, CMCA	Heritage Eagle Bend Master Association	Aurora	CMCA	02/13/2019
Mr. Cameron Davis Murray, CMCA	Frias Properties of Aspen, LLC	Carbondale	CMCA	01/22/2019
Mr. Andrew Perin, CMCA, AMS	Hammersmith Management, Inc.	Englewood	AMS	03/18/2019
Mrs. Emily C Ramirez, CMCA, AMS, PCAM	Associa Colorado Association	Windsor	PCAM	04/30/2019
Mr. Cesar Villalobos, CMCA	4 Seasons Management Group, LLC	Thornton	CMCA	03/07/2019
Ms. Elizabeth Ann Krieg Ward, CMCA, AMS	CCMC	Broomfield	AMS	05/01/2019
Mr. Joel Yust, CMCA, AMS	All Property Services, Inc.	Fort Collins	AMS	03/11/2019

May 2018 / May 2019 Professional Community Association Manager (PCAM) Recipients

The PCAM designation is the highest professional recognition available nationwide to managers who specialize in community association management.

The designation is given after the following prerequisites are met:

- **Five years of direct community association management experience.**
- **Successful completion of all six M-200 level courses (with the last PMDP course completed within the past five years).**
- **Successfully passed the CMCA examination administered by CAMICB**

The following candidates received the PCAM designation:

Amy Bazinet, PCAM — Neighborhood Management, Inc, Broomfield
Kevin Flewell, PCAM — Resort Ventures West, Frisco
Jonathan Jacobson, PCAM — Touchstone Property Management, LLC, Fort Collins
Susan Horton, PCAM — 5150 Community Management, Englewood
Emily Ramirez, PCAM — Associa Colorado Association, Windsor
Susan Santos, PCAM — CCMC, Broomfield
Christine Williams, PCAM — Westwind Management Group, LLC, Englewood

CAI-RMC is proud of the following managers who have received their PCAM designation over the past year. Our chapter is delighted to add these individuals to our extensive list of experienced manager members who demonstrate advanced skills and knowledge.

Congratulations!

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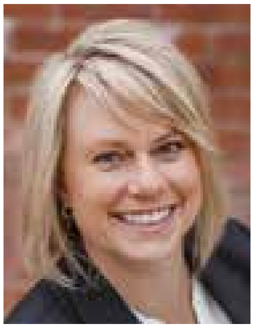
The Basic Necessities of HOA Insur



Meghan Wilson
Neil-Garing Insurance

This article is going to address the basic needs of insurance for community associations. They all apply regardless of the type of association. We will discuss the Governing Documents as they relate to insurance, common policy forms, exclusions, and what to pay attention to, along with risk management tools to be proactive with.

Governing Documents

When reviewing the insurance that an association should carry, it is critical to start with the coverages that are required by the Governing Documents. It is the fiduciary responsibility of the Board to adhere to the Governing Documents as they dictate how they should be governed and insured. The sections to pay attention to are the definitions and the insurance segments. The key items to pay particular attention to in the Governing Documents are below:

Types/Limits of coverage required

> **Property**

- Definitions—focusing on common elements, limited common elements, and units.
- Insuring Agreement—The association's insurance is responsible for either the common elements, limited common elements, and then units up to the bare walls, "as originally conveyed", or All-In. Based on the insuring agreement, the Board can then set the replacement cost for what the association is responsible to insure in the event of a loss. Regardless of what causes the loss, the insuring agreement will state who is responsible for covering the building, interior finishes, and personal property.
- Replacement Cost Appraisals—Many Governing Documents put a requirement for the Board to have a replacement cost appraisal completed. Even if the declarations do not address it, we strongly recommend this be done at least every 3 years.

> **Fidelity/Crime**

- The Declaration may just address the coverage, but it may also advise of a specific limit. For example, two months of assessments, plus all reserves.

> **Directors and Officers**

- This is intended to cover the directors and anyone making decisions on their behalf.

> **Flood**

- May state that this be required if in a flood zone.

> **Workers' Compensation**

- May state this is required if the association has employees.

> **Liability**

- May state a specific minimum limit that association and or unit owner must carry.

> **Other coverages the Declaration may address that the association needs.**

- Equipment Breakdown/Boiler
- Deductible—may state a maximum deductible allowed.
- Coinsurance/Agreed Value
- Building Ordinance or Law

It is the Board's fiduciary responsibility to make sure that the association has adequate coverage and has, at minimum, the required coverages in the Declaration.

Understanding Warranties, Exclusions, and Coverage Limitations

Not every insurance policy is created equal and certain policies can have warranties or coverage limitations. As the Board and community manager you will want to educate yourself to make sure you know what to ask. Here are a few of the warranties that we uncover when completing audits of policy forms:

Property

> **Extended Replacement Cost/Guaranteed Replacement Cost**—Often times these coverage enhancements come with a warranty if the association is not insured to replacement cost at the effective date of the policy.

> **Blanket building limit**—Community Associations with multiple buildings should be written with a blanket building limit.

> **Co-Insurance**—Can create a penalty for being underinsured at the time of loss.

> **Sub-limits on specific property coverages**—Limitations on Building Ordinance or Law (A, B, and C), Sewer Drain, and Back-up of water.

> **Building Ordinance or Law**—Having enough limits on B and C coverages is often overlooked.

- Coverage A—Provided coverage for the undamaged portion of the building if a government entity requires it be torn down and rebuilt.
- Coverage B—Covers the demolition cost and disposal of the undamaged portion if the government entity required it be demolished.
- Coverage C—Covers the cost to bring the building to current code in the event of either a partial or a total loss. For example, Coverage C would cover retrofitting sprinkler systems in a non-sprinklered building.

Directors and Officers

This is one line of coverage where not all policies are created equal and the limitations vary greatly from carrier to carrier. These are the items to pay close attention to:

> If there is a community manager does the coverage extend to them?

> **Defense limits**—Is the defense limit included in or outside of the aggregate limit? We have seen claims that all $1,000,000 of the aggregate limit was used on defense.

> **Retroactive dates**—Do you have coverage for the prior Board or community manager decisions? If there is a retroactive date, then decisions made before that date would be excluded.

> **Exclusions**—The most common two exclusions we find when auditing policy forms are non-monetary damages, and insured versus insured. Both exclusions present a significant gap in coverage for the Board or the community manager.

Fidelity

> There are limitations on this policy form depending on how the book-keeping processes handle the money. Adequate limits per state law are crucial.

Umbrella

> If the association has an umbrella, making sure it extends over the D&O policy is imperative.

Risk Management

The main purpose for insurance coverage is that in the event of a claim, the association will be restored to the condition prior to the loss. There are a few proactive items that community managers, Boards, and associations can do to help prevent claims. They include the following:

> Construction Activities—Associations should be collecting General Liability, Worker's Compensation, and auto certificates from all contractors for the association and unit owners, along with contractors hired on behalf of the community manager. It is important to be aware of the exclusions that are on the contractor's policy and what those exclusions do in terms of limiting coverage. The contractor doing the work has to have the correct coverage and limits. Contractors working on individual units or on behalf of the association need to endorse their policy to protect the association and unit owners.

> Facility Improvements—Associations should take a proactive approach to facility maintenance upkeep and/or upgrades. A checklist can be extremely helpful in this area.

> Vendor Contracts (Elevator maintenance, fire suppression services, landscaping, snow removal)—It is important to review vendor contracts before executing and making sure the association is protected by the contract.

Neil-Garing Insurance has been writing HOA insurance for the past 30+ years and currently insures over 700 HOAs in Western Colorado. If you have questions about any of the items mentioned above, please feel free to give us a call.

The Ins & Outs of a Manager's Fiduciary Duty

By the Editorial Committee

Fiduciary Duty. It's a phrase that is often heard in our industry; and we often field questions regarding exactly what that duty is and to whom it applies. Often, those questions are answered in relation to our boards. But does the duty extend to community association managers? Does it apply to others? In order to answer those questions, we need to first define what the phrase fiduciary duty means.

A fiduciary duty is a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person.

A person having duties involving good faith, trust, special confidence and candor towards another is a fiduciary. So, who are fiduciaries? Directors, officers (and committee members), community association managers and agents of an association all owe a fiduciary duty to the association.

It is well accepted that association directors and officers owe a duty of undivided loyalty to their association. This is because directors and officers exercise discretion on behalf of the association and are responsible for the money and property of others. As such, they are in a "fiduciary capacity" and are held to the highest standard with a duty to act for the benefit of others and not for themselves.

Additionally, community association managers are generally considered (and by their management agreement, are contractually

defined as) agents of an association, and therefore owe fiduciary duties to the association. Managers must 1) act in the interest of the association, 2) act in the same manner as fiduciaries who serve on the board or as an officer, and 3) must act only within the manager's scope of duties as recited within the management agreement.

Managers, like board members, must act in the interest of the association. This is generally regarded as the Duty of Loyalty (aka Duty of Good Faith). This means that the association's manager also has the obligation to act in good faith, fairly, and in the best interest of the entire association (and not the interests of individual homeowners). It also means that managers have the same restrictions regarding conflict of interest transactions, as well as upholding the duty to maintain confidences. Any information in the possession of the manager which is confidential in nature, must remain strictly confidential.

Finally, the manager has only the management authority delegated to it by the association's governing documents, by direct instruction of the board, or in its management contract. Actions taken by a manager outside of the scope of authority can bind an association. This is called apparent (ostensible) authority. An association can be held liable for the actions of its officers, directors, its manager or other agent, even when the association does not know about, approve of, or benefit from those actions, as long as the agent reasonably appears to outsiders to be acting with the association's approval.

"Managers must 1) act in the interest of the association, 2) act in the same manner as fiduciaries who serve on the board or as an officer, and 3) must act only within the manager's scope of duties as recited within the management agreement."

How can an association protect against apparent authority? The board should take reasonable steps to ensure that the scope of its agents' authority is clear to third parties and that agents are not able to hold themselves out to third parties as having authority beyond that which has been vested in them by the association.

Here is an example: A community association manager decides to enter into contracts on behalf of all of the associations within his portfolio to allow a waste management company to serve as the sole and exclusive agent on behalf of each association to negotiate, manage and advise the association on its agreements with solid waste and recycling services. The manager actually signed agreements for twelve different associations to contract with the company. The waste management company, having no reason to believe the manager could not sign contracts on behalf of the association, is now looking to each of the associations for a combined payment of over $50,000. The Boards are now asking how they could be contractually liable for the services when they never signed a contract. The answer is because of apparent authority.

In short, the existence of a fiduciary relationship means the fiduciary is required to act reasonably, prudently, and in the best interest of the association. It should go without saying (but will be said) that a fiduciary must not engage in activities which could be viewed as negligent or fraudulent. The concept of being a fiduciary can be difficult to fully understand. Certainly, it can be hard to see the distinction between the duties owed to the association versus those owed to the members. Always questioning whether you are or should be acting in a fiduciary capacity (you probably are!) will be to everyone's benefit.

It's All "Relative"

Handling Board Member Conflicts of Interest

By Lee Freedman,
Gravely Pearson Wollenweber Freedman, LLC

Budget Acres Condominium Association is desperately looking to hire a fencing contractor to redo the common element exterior fencing around the community. For Budget Acres, price is always a factor. You sit on its Board of Directors. Luckily, your brother-in-law happens to be a fencing contractor. You do not know how good he is, but you know he will give the Association a good price because he is "family" and he would be eternally grateful to you for the work. You convince your fellow Board members to stop looking because you have the perfect person. He cuts the Association a great deal, however, he does not provide a contract or even an itemized bid because, again, he is "family." What could go wrong?

These type of "sweetheart" deals are not uncommon in community associations throughout Colorado because they tend to provide associations cheap and quick labor. However, not only can these arrangements pose considerable legal exposure for Colorado communities if the work is done poorly or is not completed, they raise serious ethical concerns for associations, their board of directors, and the individual board members who may personally or whose family members may profit in some way from the deals.

The ethics concerning the selection of vendors/contractors is not complicated. Board members generally are not supposed to earn compensation in their roles as board members. They are volunteers. Their family members are not supposed to profit from their roles as board members either. Board members of community associations are required under Colorado law to discharge their duties as a board member: (1) in good faith; (2) with the care an ordinary prudent person in a like position would exercise under similar circumstances; and (3) in a manner the board member reasonably believes to be in the best interests of the community association. These are known as fiduciary duties. In discharging their duties, board members may rely on information or statements of other officers or employees of the association whom the board member reasonably believes is reliable and competent on the matters presented. This may come in the form of competent professionals, experts such as attorneys or public accountants, or a Board-appointed committee the board member is not on but which he or she reasonably believes merits confidence.

Under Colorado law, to comply with their fiduciary duties, board members must, at the very least, act with loyalty towards the community association and with an extreme measure of candor, unselfishness, and good faith. To ensure such compliance, community associations are required under the Colorado Common Interest Ownership Act (CCIOA) to adopt a policy governing the handling of board member conflicts of interest. Such a policy must, at least, define or describe the circumstances under which a conflict of interest exists and set forth procedures to follow when a conflict of interest exists, including, but not limited to, whether or not the board member must recuse himself or herself from voting on the issue.

Unless the conflict of interest policy states otherwise, board members with conflicts may, but are not required to, recuse themselves from any discussion or vote on the issue. However, a board may want to require such recusal in its community's conflict of interest policy to help reduce the appearance of impropriety in the board's decision-making process. Further, a board member is not prohibited from entering into a transaction with the community association so long as the transaction is fair as to the association.

Under the scenario with which we started, the board member must disclose to the other board members prior to any vote that the contractor is related to him or her. The board member must also disclose to the other board members any negative information about the transaction or the contractor known to the board member that would make reliance on the information about the transaction unwarranted. Basically, if the related board member knows that his or her brother-in-law does shoddy work, has been sued many times, or is otherwise unreliable, the board member must share that information.

If the related board member chooses to not recuse himself or herself and proceeds to participate in the discussion on or vote to approve the agreement, the board member must be honest and upfront with the other board members. The board member also must remove his or her personal relationship with the contractor (the brother-in-law) and make a determination solely on what he or she believes to be in the best interest of the community association and as any other person in his situation as a board member would do. This may include, if it is reasonably believed to be in the best interest of the community association, a requirement to have a written agreement with the brother-in-law, which contains express warranties.

"Board members generally are not supposed to earn compensation in their roles as board members. They are volunteers."

Failing to comply with these fiduciary duties could put a board member in jeopardy of facing extensive and expensive litigation and place their community association similarly at risk. Under Colorado law, the elements for a suit against any association for breach of fiduciary duties are really simple. A member of a community must only demonstrate that a board of directors has made an arbitrary or capricious decision, which is not reasonable under the circumstances and in the best interests of the given community. Hiring contractors for self-dealing purposes opens a door for an allegation of breach of fiduciary duty that no community wants to defend. Preventing these allegations is not hard if board members simply avoid conflicts of interest. Be upfront, candid, and unselfish in your role as a board member and you will avoid the risk.

Lee H. Freedman is a Partner in Gravely Pearson Wollenweber Freedman, LLC with nearly 19 years of legal representation of community associations. Lee represents community associations in general counsel and litigation matters to help communities through rough and difficult situations. If Lee can handle a 1500-pound buffalo, as a former Ralphie Handler at the University of Colorado, he can help your association's legal issues. GPWF is a unique Colorado community association law firm that provides high quality legal representation of community associations in general counsel and complex litigation matters including insurance recovery and construction defect cases.

CAI Adopts Policies on Sustainable Landscape Practices and Fair Debt Collections

By Dawn Bauman, CAE

The CAI Board of Trustees approved a new public policy on sustainable landscape practices and updated an existing public policy on fair debt collection practices at the CAI Annual Conference and Exposition in Orlando.

Sustainable landscaping practices. Drought conditions in the West and South and community association covenants have collided, creating legislation that provides for a more limited framework for associations to consider as they amend, draft, or enforce landscaping related covenants that cover types of plants/foliage/landscaping and requirements to maintain landscaping.

CAI supports legislation that permits the association to enact reasonable rules and regulations concerning landscaping requirements.

Community associations must maintain the ability to impose a monetary penalty for noncompliance with landscaping covenants. However, associations should refrain from imposing penalties on homeowners for failing to water during a government-declared drought. Water-use policies should focus on proven ways to reduce the need for watering while maintaining the level of aesthetics valued by the community.

Further, community associations should not adopt rules explicitly prohibiting xeriscaping or the use of drought-tolerant vegetative landscapes. Association guidelines should provide an accessible means for homeowners to seek landscaping variances, and committees or boards are encouraged to approve common sense requests that also maintain aesthetic standards. Covenants also should provide for adjustment during times of drought and protect homeowners who implement sustainable practices from adverse policy changes.

Sustainable landscaping practices are encouraged, especially in geographic areas with desert-like topography or prone to drought. Community associations should evaluate the amount of water used to sustain the landscaping.

Fair debt collection practices. Claims of Fair Debt Collections Practices Act (FDCPA) compliance-related issues against community association boards, managers, and their legal counsel became increasingly prevalent following the 2008 housing crisis. A subset of these claims was initiated by law firms seeking lawsuits and claims of potential ministerial non-compliance of the FDCPA when collecting community association assessments. During this time, federal legislation was introduced proposing changes to the FDCPA to exempt attorneys from the law. The CAI Federal Legislative Action Committee conducted a focus group of community association lawyers to discuss the issue and legislation.

CAI opposes duplicative legislation at the state level that imposes state penalties for violations that are already incorporated within the FDCPA.

CAI supports legislation that accomplishes any of the following:

- The exemption of association attorneys and community managers from the FDCPA or any similar state laws that impose unduly burdensome requirements in collecting monies owed to community associations.
- The elimination of penalties and attorneys' fees for technical or procedural violations that cause no damages to a debtor.
- The elimination of community association assessments as "consumer debt" under the FDCPA or any similar state laws.

Although courts have interpreted the language of the FDCPA to include assessment debt as consumer debt, CAI urges its members to educate legislators on the similarity of assessment debt to local governmental taxes and ultimately seek the statutory removal of association assessments as consumer debt under all relevant consumer debt protection laws.

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The Foundation for Community Association Research provides authoritative research and analysis on community association trends, issues and operations. Our mission is to inspire successful and sustainable communities.

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Common Interests Editorial Calendar

Issue	Topic	Article Due Date	Ad Due Date
August	Finance	06/15/2019	07/01/2019
October	Tech / Modernization	08/15/2019	09/01/2019
December	Planning Ahead / Goals / Community Vision	10/15/2019	11/01/2019

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JUNE	
28 Fri	**Annual Golf Tournament**
JULY	
9 Tue	**PCAM Member Forum**
23 Tue	**Board Leadership Development Workshop**
30 Tue	**Management Company Member Forum**

AUGUST	
6 Tue	**Business Partner Forum**
15 Thu	**Peak 2—Financials** Denver
22 Thu	**M320—High Rise Management** Denver
SEPTEMBER	
9 Mon	**CLAC Golf Tournament**

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Don’t forget to register for events as prices are significantly higher the day of the event.