Decoding HOA Internet Liability Exposure

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If an HOA has an internet presence does the Association's potential for liability exposure increase? If so, to what extent is insurance available to protect an Association (and its manager) against this exposure? Answers to these questions depend both on the content of the website and the nature and extent of insurance protection purchased by the Association. If the HOA has a "presence only" website – the equivalent of an online brochure – the exposure is minimal. However, if the web content is more robust there is increased potential for internet liability.

In today's climate, the commercial general liability coverage maintained by the Association is not likely to respond to most Internet-related liability claims. In December 2001, in response to carriers' growing concerns, the Insurance Service Office (ISO) implemented major changes to its general liability forms and endorsements. (Since 1971, the ISO has provided standardized policy language which is used by insurance carriers for building policy forms.)

Keep Chat Rooms Within Four Walls .

First, the new ISO form contains an outright exclusion for any liability arising out of virtual chat rooms or bulletin boards. As a result, it's safe to say that from a risk management standpoint, no homeowners association should host a chat room or bulletin board – regardless of how well intentioned they may be. Aside from vigilant, 24/7 monitoring, there is no way to safely administer a chat room or bulletin board in a way that would not expose the Association to significant liability.

Imitation May Be The Sincerest Form Of Flattery, But An HOA Must Be Careful.

An Association's concerns don't stop with chat rooms or bulletin boards. Other liability, particularly the potential for copyright and trademark infringement, must also be considered. To this end, the Association (and their webmaster), must be especially careful no logos and trademarks are posted to the site without the owner's written permission. Similarly, the Association should be certain to obtain releases on all articles and photographs used.

There are some limited circumstances where the ISO policy language may cover copyright, patent, trademark or trade secret infringement -- but ironically, this coverage is limited to those circumstances when such infringement is included in the Association's "advertisement." (Advertisement is defined as a notice that is broadcast or published to the general public about the Association's "goods, products or services" for the "purpose of attracting customers or supporters" and would apply to only those portions of the website that is about the Association's goods, products or services.) Aside from infringements related to an "advertisement," it would appear that the liability for copyright infringement exists.

Sticks and Stones May Break Bones But Words Could Get You Sued - - Emails and Website Content.

Historically, Commercial General Liability policies have always included a "personal injury and advertising injury" exclusion which would eliminate coverage for written material that slanders or libels a person or violates a person's right to privacy. In the aforementioned 2001 update, the ISO broadened that exclusion by embracing electronic media content. Since that date the personal injury and advertising injury exclusion rules out coverage for defamation, disparagement or violation of privacy in "any" form. Would that include a widely-distributed email drafted by a member of the Board which defames a member? How about copies of the minutes that are posted to a website which inadvertently violated an owner's right to privacy?

Directors & Officers Liability Policy to the Rescue?

Could a Directors & Officers Liability policy pickup the void? Unfortunately, due to the lack of uniformity in D&O Liability policies, it's impossible to make a general statement on whether or not coverage for such actions exists. Even the broader D&O forms, that are otherwise silent on the issues of copyright and trademark infringement, often still exclude libel, slander or invasion of privacy.

Board Members Who Blog

Bloggers may have the same potential for liability due to defamation, copyright/trademark, and invasion of privacy as any commercial publisher or broadcaster. And, despite what the average internet user might think, the author can't be certain of his/her anonymity. There have been cases where Internet Service Provider records have been subpoenaed to provide the name of a specific subscriber enabling the attorney representing the injured party to seek damages. Whether or not the board member has any "protection/indemnification" by the Association is unlikely unless it can be proven his/her blogging activities are part of their duties as board members. Was the board member representing the Association or

Board when they expressed their opinions? Or was the board member expressing personal and individual opinions? While there are certainly reasons to believe that such expressions are Constitutionally-protected "free speech," could a board member's blog cause the Association to be vicariously liable? These are questions that will, no doubt, be answered in the courts in the coming years and continue to shape the language of insurance policies for the next several decades.

The most conservative course of action would be to have the Association's website content regularly reviewed by the Association's legal counsel and, as would be the case with any documents distributed to the general membership, have the HOA's legal counsel similarly review any documents broadcast by email.

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