



## CC&Rs Inadvertently Create Exposure for Board of Directors

*Poorly drafted insurance requirements in CC&Rs can create more than just headaches for a Board of Directors – in some cases they can create a large uninsured exposure. For example, some CC&Rs require the Board to purchase a general liability policy which includes the individual unit owners as “insureds” under the HOA’s policy for a myriad of activities. While these insurance provisions are well intentioned, they can leave a Board of Directors with expansive obligations to purchase coverage well beyond that which is commercially available.*

It is common for the CC&Rs to require the purchase of a general liability policy which will extend coverage to an individual owner in circumstances where the owner is sued for a sort of vicarious liability because of something as simple as their proximity to a loss. For example, if a guest or invitee slips and falls on the walkway leading to an

owner’s front entry door, the attorney representing the injured party may sue BOTH the Association (since the incident occurred on common area) and the individual unit owner (whose premises the walkway serves).

Insurance policies written for condominium associations will typically contain language extending the definition of “insured” to the individual unit owner – but ONLY for liability related to the ownership, maintenance and repair of the common area. In the above example, the plaintiff’s lawyer likely has sued both the HOA and owner claiming both were liable because they failed to keep the area free of hazardous conditions. Most insurance policies would respond providing defense and indemnity for both the owner and the Association.



About twenty-years ago in Canyon Country, a resident was walking her dog in the common area of a condominium project. While on an Association-owned and maintained walkway, her dog attacked an elderly man who was on his way to his own condominium unit. The gentleman’s wounds were serious and paramedics were called. Shortly after being discharged from the hospital, the injured gentleman sued the resident. Unfortunately, the dog owner had no insurance coverage.

An attorney representing the dog owner reviewed a copy of the CC&Rs and discovered a provision which he felt could be helpful to his client. The CC&Rs contained the aforementioned requirement to name the owner as an insured. But instead of limiting the scope of that requirement to the ownership, maintenance and repair of the common area – this particular set inarticulately required the owner be protected for the “ownership, maintenance and use” of the common area.

“My client was using the common area,” the attorney argued. “Board of Directors, you had an obligation to buy a general liability policy which covered my client while using the common area.” The attorney filed a cross-complaint against the Board for breach of fiduciary duty. The Board had failed to meet the insurance requirements of their own documents.

The Board was astonished and angry and endless finger-pointing ensued. The Board blamed the manager for failing to obtain coverage in compliance with the documents. The manager blamed the insurance agent for failing to read the documents. When confronted, the insurance agent had no other alternative but to try (unconvincingly) to get his company to cover the resulting cross complaint and simultaneously put his own E&O carrier on notice.

The moral of the story?

Enlist the help of your insurance agent or broker. Whenever you go out to bid, provide your agent or broker with a set of CC&Rs and have him/her respond to you in writing if there are provisions for which coverage cannot be obtained. Buying insurance is complicated, but buying insurance coverage to meet archaic (and sometimes conflicting) CC&R language can sometimes be impossible. The goal of any board or manager should be to transfer this exposure over to your insurance professional.

Dog may be man’s best friend, but there must be some fairly unfriendly canines out there. State Farm, the country’s largest insurer of home owners, paid a whopping \$90,000,000 on some 3,500 dog bite claims last year. Amongst all insurance carriers nationwide, the Insurance Information Institute reports that insurers paid some \$412,000,000 in dog bite claims. For every man, woman or child that had a close encounter with a canine, the resulting bite was worth an average of \$26,166. Now that’s something to howl about.



By Timothy Cline, CIRMS

**Timothy Cline Insurance Agency, Inc.**

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