

MANN REPORT

A LESSON IN CONDOS & CO-OPS

RESIDENTIAL



Directors & Officers Liability Insurance For Co-op & Condominium Board Members—It's Not All The Same

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If you sit on the board of your condominium or co-op, are you aware that your financial security is at stake? Most board members aren't! Simply stated, if a lawsuit against the directors and officers of a co-op or condominium is not covered by insurance, then the board members are in financial jeopardy. They must hire an attorney with their own money to defend the lawsuit, no matter how frivolous it might be. It's always a rude awakening for people who devote their time and energy to help run their building to find that they are being sued for the decisions made by them and their fellow board members. It's most distressing when they realize the ramifications if the claim is denied by the directors and officers insurance carrier.

The first step in protecting yourself is to verify that the bylaws contain an Indemnification Clause. An Indemnification Clause will dictate that the condominium or co-op association must reimburse board members for uninsured legal fees incurred in their capacity as board members. Older condominiums or co-ops are particularly susceptible and may not have this clause in the bylaws. Consult with the building's attorney as soon as possible. Having an Indemnification Clause is critical. Legal fees can be exorbitant. Lawsuits against boards for discrimination (sex, race, religious, age) by rejected applicants of co-ops or terminated employees can take years to wind through the courts and amass legal fees in the hundreds of thousands of dollars.

The second step in protecting yourself is to verify that the condominium or co-op has comprehensive Directors & Officers Liability Insurance. There are generally significant differences in coverage between the comprehensive policy forms and the inadequate ones. The most common Directors and Officers Liability lawsuits lodged in New York are:

- Wrongful termination of an employee
- Discrimination because of race, religion, sex, or disability
- Defamation of character such as libel or slander
- Breach of contract by a third party vendor
- Renovations by the building or homeowner
- Noise by another homeowner, a contractor, or the buildings machinery
- Subletting guidelines and restrictions
- Pet guidelines and restrictions

Comprehensive Directors and Officers Liability policy forms are purchased on a stand-alone basis, whereas the inadequate ones are generally the ones embedded in the Commercial Package or General Liability policy. The comprehensive/stand alone policy will usually respond and provide coverage for the costs associated with the legal defense of these suits. This is important because most suits are settled well before they

ever reach a verdict. The claims are made up of defense fees, claim expenses, and litigation costs. The most common Directors & Officers Liability claims mentioned above rarely get to trial and even rarer result in a monetary damage payment.

Ten years ago there were only one or two companies that wrote comprehensive Directors & Officers Liability forms. Today there are at least five companies writing this coverage at premiums that are very modest. A 25-unit co-op or condominium can obtain \$1,000,000 of coverage for under \$1,000. A 100-unit co-op or condominium can obtain \$1,000,000 of coverage for under \$1,500. When you take into consideration that legal fees can easily reach six figures, comprehensive Directors & Officers Liability is not the area boards want to pinch pennies. The expression "you get what you pay for", applies more than ever to Directors and Officers Liability Insurance.

What makes a standalone policy more comprehensive? The standalone policy provides coverage for all persons such as elected or appointed directors, trustees, officers, employees, commit-tee members, and volunteers now or in the past. The Directors & Officers Liability embedded in the package policy usually only covers the directors and officers who are or will be—come directors or officers during the policy period. This alone should be enough of a reason to purchase the comprehensive policy. However, the board needs to be aware that most embedded D&O policies will not provide coverage for "big ticket" items such as:

- Discrimination because of race, disability, religion, employment, etc.
- Non-monetary damage lawsuits. Some instances that could result in non-monetary damage lawsuits include approval or rejection of contracts and the interpretation of bylaws.
- Personal injury lawsuits such as libel, slander, and defamation of character.
- The property management firm. This is critical because, in most instances, the contract the condominium or co-op has with the property management firm contains an Indemnification Clause in the property management firm's favor.

So remember the two steps to ensuring your financial security if you are a board member of a co-op or condominium:

- A well crafted Indemnification Clause to transfer legal fees of the Board to the co-op or condominium association. Consult with the co-op or condominium's attorney.
- A comprehensive Directors and Officers Liability Insurance to protect the board members and the co-op or condominium association. Consult with the co-op or condominium's insurance broker to verify the adequacy of the current policy. ■

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