



MANAGEMENT COMPANY LIABILITY PANEL

Panelists:

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INTRODUCTION



The Four Horsemen of Community Manager Liability

\$15 Million Lawsuit Against Management Company

- A Community Association employee is alleged to have raped an 11 year old girl.
- The management company hired, supervised and directed the employees work.
- The management company did the background search and did not discover the employee's prior felonies?

\$30.7 Million Judgment against Association and Management Company

- Three 10 year olds injured in an unfenced retention pond (one drowned, one brain damaged and one emotionally distraught)
- Jury angered by allegation that a sign for the retention pond was too expensive juxtaposed to numerous golf course stay off the grass signs.
- Association had a \$5MM umbrella and a \$1 Million general liability policy.

Massachusetts Attorney General Data Breach Investigation Results in \$15,000 Settlement with Property Management Firm

- Management company laptop stolen with info on 600 unit owners.
- Management company agreed to pay a **civil penalty** of \$15,000, and has further agreed that it will:
 - ensure that personal information is not unnecessarily stored on portable devices, including laptops
 - ensure that all personal information stored on portable devices is properly encrypted;
 - ensure that all portable devices containing personal information are stored in a secure location;
 - effectively train employees on the policies and procedures with respect to maintaining the security of personal information; and
 - perform an audit of its compliance with its Written Information Security Program at least annually

Management Company 65% Liable for \$12 Million Judgment

- 80 year old woman hit a 9 year old on a bike as the woman exits the driveway.
- The Management Company was 65% liable, the association was 25% and the woman 10%.
- The hedge violated the height regulations.

Management Company Principal Steals \$3.4 Million from 48 Associations

- Husband & Wife Management Company
- Wife takes a \$3.4 shopping spree
- Wife failed to obtain Fidelity/Crime coverage for the associations
- Management Company Fidelity/Crime policy was \$250K, but lapsed (and does not cover the PM Employer)
- Can you say Check & Balance (and divorce)

Community Managers

Mediator

Lawyer

Plant Manager

Accountant

Financier

Architect

Risk Manager

Real Estate Agent

Debt Collector

Insurance Agent

Banker

Psychologist

Landscaper



"Congratulations! You're now empowered to accept all the blame!"

The Teflon Myth

- The management agreement entered into with the community association contains a **hold harmless and indemnity agreement**.
- We are included within the definition of “Who Is An Insured” in the community association’s **General Liability policy**.
- The community associations **Director & Officers policy** includes us within the definition of Insured or added by endorsement.
- We are included within the definition of “Employee” or added as a “Designated Agent” in the community Associations **Fidelity/Crime Policy**.

Exposure: Parade of Horribles

- Construction Defects
 - Reserves and assessments
 - Lawyer Math: $\$2.00 \times 84 \text{ units} = \$13,000,000.00$
 - Knowledge of defects, responsibility to repair
 - Mold claim
- Financial accounting/tax records
- Budgets
- Statutory/Regulatory Compliance
- Payment of expenses, fees (even to self)
- Background checks, credit checks, judicial history
- Collections (FDCPA)
 - *Fontell v. The Management Group Associates, Norbeck Grove Community Association, et al, 13-2270, June 2014*
 - *Not liable because regularly collected assessments, not just when delinquent*
- Defamation, credit slander, libel
- Reporting insurance claims
- Personal injury (unsafe conditions)
 - Premises liability (invitee, trespasser, etc.)
- Contracts you enter into to service the Association

Indemnity Clause

- Read it and then read it again
 - What does your Indemnity Clause actually cover
 - Your conduct
 - Third-Parties conduct
 - What about Indemnity Clauses in contracts you enter into for the HOA's behalf or as part of your services
 - What type of conduct
 - Broad vs. Narrow

Indemnity Clause

- Buzz Words
 - Indemnify/Hold Harmless (save harmless)
 - Defend
- Scope of the obligation– 4:1 Highway
 - Owed to you
 - Anti-indemnity clauses
 - Owed by you
 - For What

Indemnify/Hold Harmless

- An obligation resting on a party to make good any loss another has incurred while acting at his request or for his benefit
- A right which inures to a person who has fulfilled an obligation owed by him but which as between himself and another person should have been discharged by the other.

Defen\$e

DEFENSE WINS CHAMPIONSHIPS

Defense— pays for your lawyer's exorbitant bills

- Without defense, you pay the freight and seek reimbursement from the community
 - Able to reimburse?
 - If not, willing to sue?

Sample– Narrow

- **One-Way (Narrow):** The Association shall indemnify and hold harmless Manager from damages, costs, and attorneys' fees incurred, arising solely from the Association's performance of its duties under this agreement.

How to Read It

- The **Association** [**WHO**] shall **indemnify** [**1st** **OBLIGATION**] and **hold harmless** [**2nd** **OBLIGATION**] **Manager** [**HOW IS MANAGER DEFINED**] **from** damages, costs, and attorneys' fees [**THE WHAT**] incurred, **arising solely** from the **Association's performance** of its duties under this agreement [**THE WHEN**].

More Indemnity Samples

- **Reciprocity Language:** Manager shall defend, indemnify and hold the Association harmless from all claims, actions, damages, costs, and attorneys' fees incurred arising from the Manager's performance of its duties under this Agreement, including, but not limited to, claims, actions, damages, costs, and attorneys' fees for personal injury, bodily damage, or property damage.

And More...

One-Way (Broad): Association shall defend, indemnify, and hold Manager harmless from any and all claims, actions, damages, costs, and attorney's fees relating in any way to the management of the Association property, including but not limited to, claims, actions, damages, costs and attorney's fees for, among other things, personal injury, bodily damage or property damage, which may be suffered by any employee, tenant, owner, Association member, or guest (??? vs. or any third party) upon Association property.

Optional: This obligation does not apply to the extent that such claims, actions, damages, etc. result from the gross negligence, willful misconduct, fraud, or malfeasance of the Manager.

Optional: To ensure compliance with this obligation, the Association shall obtain liability insurance in a commercially reasonable amount, naming both the Association and Manager as an insured thereunder.

Negotiations Points

- Scope of Indemnity
 - Negligence – (conduct below the standard of care)
- Sole Negligence
 - (if only your negligence, completely your fault, if you are indemnifying the HOA then “keep is narrow”)
- **Gross Negligence**
 - (a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act)
- **Willful and Wanton Conduct**
 - (a course of action which shows an actual or deliberate intention to injure or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others)
- Lawful in Your State?
 - Indemnify or Insure

Insurance: Additional Insured

Sample Additional Insured Language: Manager will obtain quotes for and secure general liability insurance for the Association and its Board in amounts upon commercially reasonable terms suitable for the Property and the Association. The insurance premiums shall be included in the Annual Budget and will name Manager (including its officers, members, managers, and employees) as an additional insured. If the Board obtains excess (umbrella) insurance, then the Manager will be listed as an additional insured on that policy as well. The policy must include coverage for claims and/or losses arising from the negligence of the Manager (including its officers, members, managers, and employees), for contractually assumed liability, and for completed operations. Such insurance must specify that its coverage is primary and noncontributory. The Association and the Board waive the right of subrogation. Such insurance may be obtained through a state approved “captive insurance company,” as approved by the Board. Manager shall carry a Commercial General Liability Policy (listing the Association as a co-insured), Workers Compensation Insurance, and will obtain suitable insurance for all of the Manager’s vehicles used in the maintenance and operation of the Property. The cost of the Manager’s insurance premium shall not be a direct charge to the Association.

Insurance

- CGL
- E&O / D&O
 - Are you covered
 - Wrongful Act
 - When it occurs
 - Excluded: bodily injury, property damage, intentional torts
- AI -- Certificates of Insurance (what if they don't procure?)

Community Association
Risk Management
Team

Board of Directors
Decides & Delegates

Community
Association
Manager

Contractual
Duties

Extra Contractual
Duties

Vendors

Attorneys

Accountants

Insurance Agents

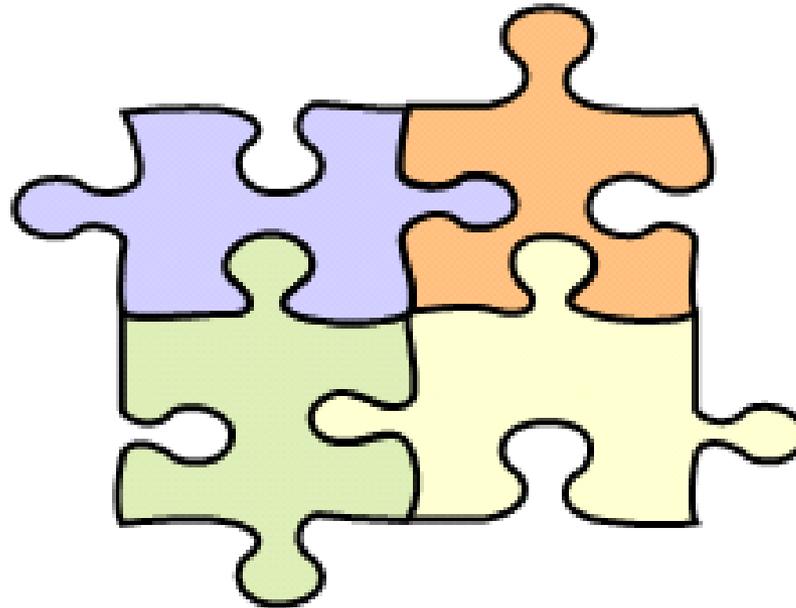
Reserve
Specialists

Bankers

Other
Professionals

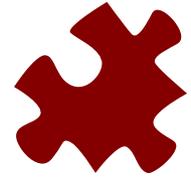
Volunteers

The Community Manager Risk Management Puzzle



Puzzle Piece No. 1

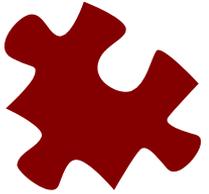
Entity Veil Protection



- **Entity Formation to Protect Personal Assets of the Principals**
 - Corporate Formation
 - Limited Liability Company
- **Advice of Professionals**
 - Lawyers
 - Accountants
 - Insurance Brokers

There Are No Shortcuts

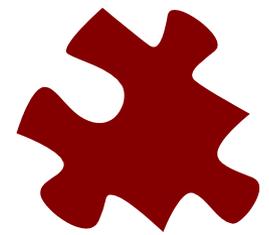
Puzzle Piece No. 2 – Written Management Agreement



- Written Management Agreement
- Attorney Prepared
- Services and responsibilities expressly articulated
- Changes, additions and deletions memorialized in writing
- Insurance requirements expressly articulated – **don't just require it, make sure it is done.**

No Surprises or Assumptions

Puzzle Piece No. 3

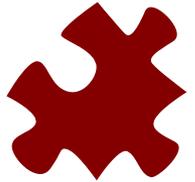


Hold Harmless/Indemnity Provision

- Attorney prepared – *Just say no to cut and paste*
 - Know your state(s) indemnity laws
 - Reconsider unilateral versus mutual indemnification
 - Not a substitute for an Errors & Omissions policy
 - Business considerations
- don't bite the hand that feeds you*

Puzzle Piece No. 4

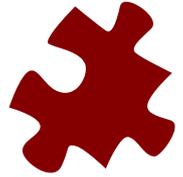
Community Manager General Liability Policy



- **Provides liability for manager's own premises**
 - **Bodily Injury**
 - **Property Damage**
- **Medical Payments**
- **Personal Injury Coverage**
 - **Defamation: libel & slander**
 - **Wrongful eviction**
 - **Invasion of right of privacy**
 - **False arrest**

Puzzle Piece No. 5

Community Manager Employment Practices Liability Policy



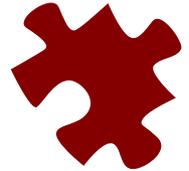
- **Wrongful Termination**
- **Sexual Harassment**
- **Hostile Work Environment**
- **Failure to Promote**
- **Discrimination**
- **Emotional Distress**



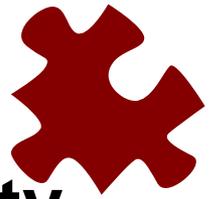
Puzzle Piece No. 6

Community Manager Fidelity/Crime Coverage

- **Definition of Employee**
- **Coverage for Principals**
- **Statutory requirements?**
- **Limits, limits and limits – sufficient to cover all funds handled for all associations managed**
- **Procedures**
 - **Checks and balances**
 - **Background checks**



Puzzle Piece No. 7

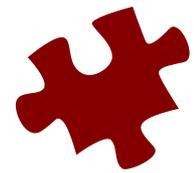


Community Association General Liability

Make sure the association's has

- **Sufficient limits**
- **Definition of insured to include the real estate manager**
- **Personal injury coverages**
- **Properly rated carrier**
- **Obtain a copy of the policy**

Your coverage is only as good as the associations coverage



Puzzle Piece No. 8

Community Association Director's & Officer's Liability

- **Stand Alone versus Imbedded endorsement**
- **Monetary and non-monetary**
- **Definition of insured include manager**
- **Defense of Breach of third party contract**
- **Defense of Failure to maintain or obtain insurance**
- **Personal injury coverage**
- **Emotional distress coverage**
- **Employment Practices liability**

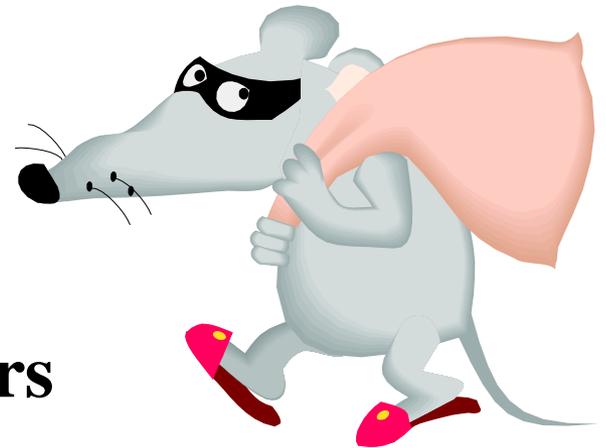


Puzzle Piece No. 9



Community Association Fidelity/Crime Coverage

- **Definition of “employee” does it include**
 - **Manager employees**
 - **Manager principals**
 - **Management entity**
 - **Director’s and Officers**
 - **Volunteers, committee members**
- **Appropriate limits**
- **Appropriate crime coverage Parts**



Puzzle Piece No. 10



Employee Handbook

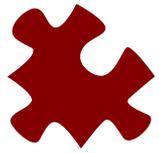
- **Should I or Shouldn't I have a hand book?**
- **Attorney consultation**
- **Training and continuing education**
- **If you have a handbook**
 - **Make sure it is read and understood**
 - **Make sure it is created for your business**
 - **Make sure it is followed**

Puzzle Piece No. 11

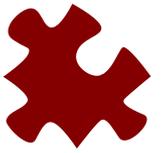


Management Company Errors & Omissions

- Why
- When the Community Association files suit against the Management Company
- Key Exclusions to be aware of



OTHER PUZZLE PIECES



- **Umbrella Liability Coverage**
- **Workers Compensation Coverage**
- **Automobile Liability Coverage**
- **Fiduciary Coverage (ERISA/Defined Benefit Plans)**
- **Corporate D&O**
- **LLC Management Liability**
- **Cyber/Data Breach Coverage**