

## Minimize Your Risk

by Joel W. Meskin, Esq., CIRMS ♦ Featured in Condo Media, November 2007

Today's community managers must be versed in multiple areas, including finance, insurance, real estate, landscaping, law and human resources. With this wide scope of responsibilities, it's often a daunting task to make sure the community manager is properly protected against claims, lawsuits and allegations of acts, errors and omissions that damage the clients and third parties. No matter how well educated, trained, experienced and careful community managers are, there's a high probability that one day they will be sued. And there's no way to insulate managers from all exposures. However, if managers take a methodical approach to their risk-management programs, protection can be maximized.

Many managers mistakenly believe they have adequately shifted all their risk to clients. When I ask community managers if they have errors and omissions (professional liability) coverage, they answer most often is that errors and omissions coverage is not necessary. They say it is unnecessary for three reasons:

The manager's management agreement with the client provides the manager with a "hold harmless" provision or an indemnity agreement.

The client's general liability policy provides coverage for incidents at the managed property.

If the client is a community association, the community association's directors' and officers' liability policy will provide coverage.

Managers should have these three forms of protection, but they aren't adequate to maximize coverage. The manager must add the best available errors and omissions coverage. In addition, managers must make sure that the association's general liability and director's and officer's liability policies provide state-of-the-art coverage.

### Pieces of the Risk Management Puzzle

*Corporate Entity Protection.* The protection that can be obtained through formalities of a corporate entity or a limited liability company must be evaluated by the individual community management company and principles.

*Written Management Agreement.* A professionally prepared management agreement is a keystone to the manager's risk-management program. By having it prepared by the attorney, the manager is, to a degree, spreading the risk to the attorney. It is most important that the attorney also have professional liability coverage.

*Hold Harmless and Indemnity Agreement.* The first problem with hold harmless or indemnity agreements is that they are just that: indemnity agreements. Indemnity provisions, unlike an errors and omissions liability policy, do not normally provide a defense obligation. The manager must pay out of pocket to defend a lawsuit or fight a claim. Assuming the manager pays \$5,000 to \$10,000 to extricate himself or herself from the lawsuit, he or she

can then seek reimbursement from the client.

Another problem with indemnity agreements is that in most cases they are "general indemnity" provisions. In many states, they will not extend to the manager's active negligence. Thus, managers without foolproof indemnity provision could end up liable for both defense and indemnity.

Although these are used with indemnification and hold harmless provisions, they should be part of the agreement. However, the manager should consider a mutual-indemnification agreement.

*Community Manager General Liability Policy.* Most management companies will have some form of office package policy or premises liability policy. Although this generally will not provide off-premises coverage, it is important. Many property managers do not consider whether the general liability policy also provides coverage for what is known as the "personal injury" offense. This generally provides coverage for claims of defamation, wrongful eviction, malicious prosecution, abuse of process, invasion of right of privacy, and discrimination. Many package policies issued to property managers may not provide this coverage. This is critical coverage to include.

*Community Manager Errors and Omissions Coverage.* With the exception of possible protection by an indemnity agreement, there is no coverage for the property manager under the managed-property policies when the association or the managed property owner sues the property manager for errors or omissions in providing services to the client. Even with the protection of an indemnity provision, manager could be confronted with having to provide their own defense and out-of-pocket legal fees.

*Community Manager Employment Practices Liability Policy.* A community-management company that has its own employees or hired independent contractors requires employment practices liability (EPL) coverage, which provides a defense and indemnification to the employer if it is sued for employment-related claims including wrongful termination, sexual harassment and discrimination.

Without an EPL policy, costs to defend this type of litigation could be crippling to a management firm. Moreover, if there are proven allegations, there could be an exposure of punitive or exemplary damages.

*Tenant Discrimination.* Tenant discrimination is sometimes offered within the errors and omissions coverage, or as an additional coverage or policy. As discrimination claims increase, this becomes a significant exposure. This may not be critical in community associations if there are no renters in the community, but if managers have portfolios that include apartment buildings or other commercial properties, this is a coverage that must be investigated.

*Community Manager Fidelity / Crime Coverage.* Fidelity coverage is also known as employee dishonesty coverage. The management company must have this coverage if it handles the funds and financial transactions of associations. Associations should demand that the management company carry enough coverage for all the monies of all the managed associations. The management company also should insist that each association have its own coverage.

In addition to fidelity coverage, there should be third-party crime coverage, which would offer protection if a non-employee steals from an association.

*Community Association General Liability.* The managed property's general liability policy is a critical piece of the manager's risk-management program. The general liability policy is a standard industry form that includes the "real estate" manager within the definition of insured. This is something that must be confirmed. If the manager is not the one obtaining the insurance and responsible for renewals and payments, it is important that the manager monitor and confirm payment and know what steps to take if the insured lets the policy lapse. It is also important for the manager to make sure the client has an excess liability policy for higher limits.

The key coverage provided by the general liability coverage will be for claims of bodily injury or property damage that results from the manager's work. This is probably the biggest area of claims against the association and the community manager. These claims are generally excluded under the errors and omissions policy and the community association director's and officer's policy. The manager should be protected under the association policy. Rarely will an insurer offer off-premises coverage for the manager under his or her management company's general liability policy. However, it is critical for the management company to have its own general liability policy.

The management must also determine if the association has personal-injury coverage that would extend to the association manager. This coverage provides protection from claims of defamation, wrongful eviction, invasion of privacy, abuse of process and false arrest.

*Community Association Fidelity / Crime Coverage.* The manager should make sure the association client obtains the most appropriate coverage. Make sure the association obtains a policy with a definition of "employee" that includes both the property management company and the property management employees. This is significant because the manager's policy will not cover the management company principals.

*Employee Handbook.* Have duties, obligations, rules and regulation set forth in a handbook. Do not assume the employees are trained or will use common sense. The more you train and educate your employees, the less exposure you will have.

There are significant resources available in this area that obviate expense as an excuse. Insurance carriers will provide counsel with employment law firms, as well as many forms, guidelines and manuals, for free.

*Workers' Compensation Insurance.* Workers' compensation coverage is required for any employer based on state requirements.

*Auto Liability Policy.* As with workers' compensation coverage, auto liability coverage is a mandated portion of the insurance puzzle.

*Umbrella Liability Coverage.* The manager should make sure the association has not only state-of-the-art primary coverage, but also a state-of-the-art umbrella policy that follows all the underlying policy coverages. It is not enough to purchase or recommend umbrella coverage. Endure that the coverages are complete. When the manager is an additional insured on the association policies, it is only as good as those coverages are.

Each manager's liability must be evaluated on a case-by-case basis. This is where calling upon professionals necessary.

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