Notice from Attorney Hawks Office, sent to the Board on 4/22/2020

Coronavirus and Community Associations Q&A

Questions answered by Joel W. Meskin, Esq., CIRMS, CCAL Fellow, MLIS, EBP

Meskin: *Preliminarily, I need to say that I cannot offer a legal opinion, especially in states where I am not a licensed attorney. Second, I cannot bind my carrier partners to a position. However, I can provide you with my best thoughts and guidance on these issues, which many in our industry are looking for guidance from industry professionals. These are new issues in unchartered times. We can only do what we can do qualifying that for which we do not have precedent.*

Q: What are the legal ramifications for associations that decide not to close their pool because of Coronavirus?

A: We believe at this time that pools, gyms, and clubhouses are all amenities that the board should close, *end of story!*

We are all wading through unchartered waters that seem to change each time we turn on the T.V. Who do we believe or rely on. In addition, our volunteer board members, as well as our community association managers, are not experts regarding Coronavirus, no matter how much they have read or heard. What do we know about the virus and its ability to survive in a pool or around a pool? The board's fiduciary duty, or duty of good faith, is to protect, preserve and enhance the assets of the association. There are both serious legal and insurance ramifications that could have a significant impact on the association's assets. Keep in mind that monetary assets of the association can be at risk based on decisions boards make that are contrary to community association professionals, or where no advice is sought. Also, as you may or may not know, the association's financial accounts are not immune from a judgment against the insured(s) based on board decision.

It is imperative that community association specialized counsel be consulted and provide a written position on this issue, specifically if the board is considering whether to keep the pool open. The legal consultation should include whether there are any federal, state or local regulations that are applicable and or governmental orders that address this issue. In a state with a lock down order, we would presume, although not assume, that it would be implied that closing the pool is included, even if not expressly stated. In addition, if the board would make the decision to keep the pool open, and they do not have a strong recommendation from a county, state or federal health agency official, I believe that there is a very strong claim for negligence. It may even rise to Gross Negligence, which is an exception to the association's indemnification obligation to board members in the governing documents.

From an insurance standpoint, we believe this would be excluded from the general liability policy for a few reasons that your insurance professional can share with you. The result of this is that the association, the board, and the independent management company would be self-insured for this action. Keep in mind, that although all these entities will be self-insured, the associations management agreement may require that the association defend and indemnity the independent management company.

The potential claim under a director and officer's (D&O) policy would be due to two reasons. First, a claim could allege that the board's allegedly committed a wrongful act for allowing the pool to remain open. If someone brings a claim because they became sick, there would be no coverage under the D&O policy which does not cover bodily injury claims. Again, the association would be self-insured for this which may deplete association funds, or give rise to a special assessment. If unit owners brought a suit against the board and association to compel them to close the pool, there may be a defense (a non-monetary claim) for the board's defense.

In our program, and probably in most D&O programs, if a board made a decision to keep the pool open, the association would be non-renewed at the end of the policy period. This decision demonstrates a very questionable board decision and conduct. What decisions might they make on other issues in the future? Like the recommendation from legal counsel, the board should obtain a written recommendation from the insurance professional that the carrier will provide coverage if the pool is left open. Without this opinion, the association would be at great risk as they would be self-insured for any such claims or suits. On the other hand, if they rely on advice of counsel or the insurance professional, that would be a strong element of the defense of the business judgment rule. If there happens to be a member who is an expert regarding Coronavirus or infectious diseases, the board should not rely on such expert. Again, there would be no coverage for that expert in the D&O policy, which could significantly impact the association's assets.

Finally, I believe that a board would be pretty safe in supporting a decision to close the pool for many reasons, just turn on the T.V. In conclusion — do not keep the pool open! There is a very good chance that your county or state health department has made that recommendation or order regarding pools. Also, even if the state or county permitted this decision, that does not eliminate a claim.

Q: What information must be, or should be shared with unit owners regarding Coronavirus?

A. In my humble opinion, the board does not have a duty to share any information regarding the coronavirus with the association. The board members are not experts on this issue and the management company is not an expert. The varied responses and advice from attorneys demonstrate that providing such information can significantly differ. Moreover, what information could the board provide that is not being provided 24/7 on television, radio and the internet? The greatest experts in the country on the

President's Task Force revise their opinions daily. However, if the board is adamant about providing information, they should not do it without a written advice of their attorney! You can refer unit owners to go onto the National CAI Website and review its information on Coronavirus. You can also go onto the local CAI Website. Finally, community association attorneys across the nation are providing this information on their websites.

The Board's primary "fiduciary duty" or "duty of good faith" is to protect, preserve and enhance the "assets" of the association. Providing information regarding Coronavirus does not fall within this duty, in my opinion. We admonish them to be extremely careful when considering to "assume a liability" that the association is not expressly obligated to assume. In my experience, there are always board members who know what the right thing is to do [at least in their mind], and they generally have the best of intentions. More often than not, however, these board members do not think this through before giving a knee-jerk response. Again, if the board is adamant about providing information, they should not do it without a written advice of their attorney!

Q: If the board sends communications that someone may or may not be infected with Coronavirus, and a unit owner decides to sue the board for having done so, will the board's actions be covered by their D&O?

A: As with any "Claim" or "Civil Action" — coverage is dependent on the allegations of the demand. I would anticipate that the unit owner, who I presume is the subject matter of the communication, sues, it will be a suit for a personal injury offense such as defamation, invasion of right of privacy or breach of the right of quiet enjoyment. Based on those allegations alone, or a general allegation of breach of fiduciary duty in those regards, I believe that a defense will be provided.

From a D&O insurance standpoint, there would be no coverage if the allegation included that someone got sick or died as a result of the board's alleged wrongful act. This is because we have an absolute bodily injury exclusion in the policy, and a defense would not even be provided. Whether this would fall under a general liability policy, is less clear. However, I would recommend that before they take on such activity, to contact their insurance professional and have the professional seek advice from the general liability carrier.

One of the reasons for obtaining the advice of counsel in my opinion — is that it will significantly support a business judgment rule defense.

Although people are already suing, such as suing one of the cruise lines, the newness of these allegations, along with the absence of an express duty, it seems highly unlikely that a board would not prevail in an action, if they failed to do something as you indicate in your question, especially where they act or do not act on the advice of counsel, as well as reliance of the variance County, State and Federal Health agencies.

I hope this is helpful. I believe our policies would provide a defense, but a more definitive answer could not be given without an actual claim.

In conclusion — do not assume a liability that the board does not have to assume and do not do anything under these circumstances without the advice of counsel.

Q: Has your firm considered issues related to liability exposure of community associations as it relates to how they handle cases of Coronavirus? For example, if a condominium has a resident with coronavirus and they engage a cleaning service, does that expose them to liability for protecting the residents?

A: The qualifications in the question above apply to this response as well. The brief answer is that we have not yet been presented with this issue. I anticipate the question will come in soon.

My first response to associations hits on your exact concern. I advise boards that their primary "fiduciary duty" or "duty of good faith" is to protect, preserve and enhance the "assets" of the association. Accordingly, we admonish them to be extremely careful when considering to "assume a liability" that the association is not expressly obligated to assume.

One issue to be concerned with is their state's "good Samaritan" statutes. States significantly differ on this issue, notwithstanding the assumption most people make that people are protected when they step up and help others. This came up from a very seasoned and experienced property management principal. Specifically, the issue was whether putting AED devices in common areas, such as the clubhouses or workout facilities gives rise to exposure for those individuals who use them when necessary but are not successful. As an attorney, I must use the primary response — "It Depends." The brief answer is that we have not yet been presented with this issue. I anticipate the question will come in soon.

The cleaning issue is somewhat different, but the admonition — I believe, that must be heeded — is whether they have the requisite experience, knowledge and training as to how the cleaning must be done and by whom. If they assume this cleaning task, and unit owners are relying on it, they could very well be assuming liability they did not previously have. I do not believe that a condo has an obligation to do this during these times, short of something in the governing documents or some other governmental mandates or statutes requiring this action. The management contract should be reviewed as well. A different scenario might be whether there is a hoarder in the building and smells, rodents, bed bugs and other creepy things are now moving around the building and into other units. That would be a call to the applicable health department. Like with most liability issues, if they assume the task that they are not otherwise required to assume, they MUST do it correctly.

They would be advised not only to seek expert advice, but also run this by their attorney. Great intentions often lead to not so great unexpected consequences.

From a D&O insurance standpoint, there are potential differing results. On the one hand, if someone still got sick and or died, in most of the standalone D&O policies there would be no coverage. This is because of the existence of an absolute bodily injury exclusion. On the other hand, if the matter included a written demand that the association do or not do something (i.e. non-monetary claim with no claim for bodily injury) there may very well be defense coverage. Many policies, however, do not provide coverage for non-monetary claims. Whether this would fall under a general liability policy, it may in the bodily injury case, but probably would not in the non-monetary claim where there is no bodily injury or property damage. Accordingly, submit to both carriers.

If the board absolutely wants to do the cleaning, they should hire a third party cleaning company. The association should also require that the association be added to the third parties general liability policy as an additional insured. Tip: Require delivery of the endorsement be delivered from the third party's own insurance professional.

Joel W. Meskin, Esq., CIRMS, CCAL Fellow, MLIS, EBP is Managing Director, Community Association Products, McGowan Program Administrators. He is a Fellow of the College of Community Association Lawyers (CCAL), Community Insurance and Risk Management Specialist (CIRMS), Management Liability Insurance Specialist (MLIS), holds a National Community Association Institute Educated Business Partner Distinction (EBP), is a Founding Member of the Foundation for Community Association Research (FCAR) Think Tank, Member National Community Association Institute Board of Trustees (2017-18); (2019-20), Chair National Community Association Institute Business Partner Council (2018) and CAI National Corporate Member