

# I am a Volunteer, so I am Protected, Right?: Understanding Director and Officer Liability Insurance for Community Associations

Written By **Adam M. Beaudoin** (amb@wardandsmith.com) and  
**Amy H. Wooten** (ahwooten@wardandsmith.com)

March 29, 2023



**Community associations ('Associations') act through their board members and officers, who are volunteers and are generally willing to serve because they care about their communities.**

Notwithstanding their status as volunteers of nonprofit corporations, board members can, and often are, targets of member lawsuits. A critical and recommended step that an Association can take to protect itself and its board members and officers in the face of that reality is to obtain director and officer liability insurance to cover the costs of defending their directors, officers, committee members, and volunteers against such lawsuits. Such insurance is commonly referred to in the insurance industry as "directors and officers" or "D&O" insurance, and it is payable to directors and officers of the Association, or to the Association itself, as indemnification for losses or advancement of defense costs in the event the Association suffers a loss as a result of legal action brought for alleged wrongful acts by its directors and/or officers taken in their capacity as directors and/or officers.

## **Associations' Purchasing Power**

The North Carolina Nonprofit Corporation Act, which can be found in Chapter 55A of the North Carolina General Statutes, specifically authorizes – but does not require – Associations to purchase insurance on behalf of an individual who is or was a director, officer, committee member, employee, or agent of the Association to protect against liability asserted against, or incurred by, the director or officer in the director's or officer's capacity or arising from their status as a representative of the Association. An Association may purchase this insurance coverage regardless of whether the Association's governing documents grant it the power to indemnify directors or officers and regardless of whether the Association otherwise has sufficient funds to indemnify against a particular liability. Like Chapter 55A, both Chapters 47C (the North Carolina Condominium Act) and Chapter 47F (the North Carolina Planned Community Act) permit but do not mandate the acquisition of D&O insurance by Associations.

## **Considerations to Bear in Mind When Shopping D&O Insurance**

Associations in the market for D&O insurance do themselves a service in being mindful that not all insurance

policies are created equal and not all policies cover every type of volunteer or every situation. Typically, the broader the coverage, the better protection the policy will afford the Association's directors and officers. However, carefully considering all options available and discussing the community's needs and nuances with the Association's insurance broker are important steps for the Association to take when obtaining this – and any other – type of insurance.

The following are important questions to ask as an Association when shopping for D&O insurance, and ideally, the answer the Association receives should be "yes" to all of them:

- Does the policy's definition of "insured" extend beyond the actual directors and officers (i.e., does it include committee members, volunteers, and employees)?
- Does the policy provide coverage for the Association's property manager if the Association is professionally managed?
- Does the Association have developer-appointed board members? If so, does the policy provide coverage for them?
- Does the definition of "insured" protect past, present, and future directors?
- Does the policy cover spouses of directors and officers?
- Does the policy provide a defense to claims and lawsuits (as opposed to just reimbursing for a judgment if one is eventually entered)? Even a successful defense can result in large attorney and court costs.
- Does the policy cover against defamation (i.e., libel and slander) claims?
- Does the policy provide a defense against claims seeking non-monetary remedies?

*A non-monetary, or non-pecuniary, claim is one in which the plaintiff is not seeking money but instead asks the court for a declaration that the director or officer has acted wrongly (i.e., a suit against the directors for not fulfilling their mission or challenging an unpopular decision of the directors or an officer). Lawsuits filed against Association volunteers are on the rise nationally, and many of these lawsuits do not involve monetary damages but rather challenge decisions made by the board of directors, such as architectural design and rules enforcement.*

- Does the policy cover claims for wrongful termination or other employer liability?
- Does the policy cover derivative lawsuits?

*A derivative action is a lawsuit brought by the members of a community association "in the name" of the association; in other words, the members who brought the action get to control the association for the limited purpose of pursuing the lawsuit. In the "for profit" context, there are strict requirements a shareholder must meet to bring a derivative action. Those requirements are much more relaxed in the community associations' context.*

- Does the policy defend against a claim or lawsuit for failure to maintain or obtain insurance?
- Does the policy cover claims of illegal forms of discrimination?
- Does the policy provide coverage for decisions directors/officers make in accepting or rejecting contracts?
- Does the insurer provide the nonprofit corporation with risk management advice?

### **An Endorsed Insurance Policy or a Standalone Insurance Policy?**

For most Associations, particularly those with amenities (i.e., pool, clubhouse, marina, etc.), insurance premiums are the greatest annual cost. Both 47F and 47C communities are required to carry general liability and property casualty insurance, and these insurance premiums are not inexpensive. In addition, most Associations also carry worker's compensation, and fidelity and crime insurance, all of which add to this expense.

As a result, many Associations are looking for ways to lessen their insurance expense burden, and do so by

adding additional coverages as endorsements to their liability and/or casualty policies as opposed to procuring a standalone policy. Endorsements add, remove, or alter the original scope of coverage. The downside of an endorsed policy is that too many claims against an endorsed policy will cause the premiums of the liability/property casualty coverage to increase, and sometimes dramatically. Remember, these premiums are already likely the Association's largest annual expense, so such increases are very unwelcome. There are other potential downsides to endorsed policies as well to discuss with the Association's broker, like how aggregate limits can come into play when there is more than one claim or more than one insured involved in a claim under the same policy/policy period.

Typically, only a standalone policy provides the types of coverage that allow an Association to answer "yes" to all 13 of the questions above. While it is true that standalone policies are likely more expensive than an endorsed policy, in our experience, standalone policies not only provide better coverage, they tend to save the Association money in the long run.

## **Summary**

Associations have the ability to, and should, obtain standalone D&O insurance. Before accepting a position as a director or committee member of an Association, you should obtain a copy of the Association's D&O insurance policy to assess the available coverage. Serving on an Association board can often be a thankless job, but fortunately, with proper D&O insurance coverage in place, community volunteers can focus on carrying out their duties in the best interests of the Association. Volunteer service to an Association should be a good deed that goes unpunished.

--

© 2024 Ward and Smith, P.A. For further information regarding the issues described above, please contact Adam M. Beaudoin or Amy H. Wooten.

*This article is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.*

*We are your established legal network with offices in Asheville, Greenville, New Bern, Raleigh, and Wilmington, NC.*