

## THINGS YOU NEED TO KNOW WHEN BUYING D&O

*By*

*Common Ground*

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As little as 15 years ago, most people who served on their community association boards had little knowledge of directors and officer's (D&O) insurance or why they needed the protection. Many directors felt that the indemnification provision in the association by-laws was adequate protection--the additional cost of a D&O policy seemed like an unnecessary expense. But as time went on, directors learned of cases where boards paid huge sums of money to defend and settle claims. In many cases, the amounts paid were far higher than what the community association could afford. Consequently, board members became more concerned about personal and corporate liability, and began to recognize the need for this additional protection.

As the number of associations in the United States has grown from around 10,000 in 1970 to approximately 150,000 today, millions of dollars are paid out each year in D&O claims. Typical claims include:

- \* Selective enforcement of association documents
- \* Breach of contract
- \* Wrongful termination
- \* Sexual harassment
- \* Discrimination
- \* Wrongful approval or denial of architectural plans
- \* Mismanagement of funds

High claims will continue as the market expands and running a community association becomes more complex. Here are some things to consider when buying D&O insurance.

### CHOOSING A CARRIER

D&O insurance, as defined by CAI's GAP Report #4, pays for the financial consequences of certain wrongful acts committed by a board of directors. The policy should cover any directors and officers--past and present--of the association. Coverage can be extended to include employees and other volunteers, such as committee members. Limits of coverage typically exclude bodily injury and property damage (covered under the General Liability package), intentional acts of dishonesty, and situations where the insured may have gained personal profit or advantages for which he or she was not legally entitled. Some policies may exclude sexual harassment, discrimination, and wrongful discharge suits.

Purchase a policy from a company that has a history of working with community associations. This is important--if you submit a claim under the policy, the claim adjuster and attorney assigned to your case will be properly experienced in protecting your interests and the interests of your association.

Also look for an insurance company with an A.M. Best rating of at least an "A" or higher. A.M Best is one of several private organizations--including Standard and Poor, Moody's Investors Service, and Duff and Phelps--that rates property and liability insurers. Make sure your insurance company has a high rating from one of these organizations.

Once you select a D&O program, stick with it. Don't switch carriers every year based on small variations in price. Your new carrier could deny your claim due to prior knowledge of a claim by a board member at the time the application was signed. Or, if your agent switches you to an occurrence policy (covers claims for alleged wrongful acts which occurred during the policy period) from a claims-made policy (covers claims for alleged wrongful acts when a claim is made and reported during the policy period), there could be a gap in coverage.

### PACKAGE POLICIES

A number of insurance companies offer all of the association's coverages in one package, including D&O. This is typically less expensive than buying an individual policy. And while package policies often provide excellent property and casualty protection, the D&O coverage does not compare to that offered by many of those companies who write it on a stand-alone basis.

An analysis of the market by Ian H. Graham, Inc., whose D&O program is endorsed by CAI, shows that coverage for wrongful acts for nonmonetary claims, discrimination, sexual harassment, failure to maintain insurance, and breach

of contract are excluded under many package programs. Also, many programs restrict the definition of "insured" to directors and officers only. They leave out the committee members and volunteers acting at the direction of the board, the association as an entity, and employees, including the on-site manager. This is a significant concern-- numerous claims are filed each year in these categories. Ultimately, the association could be denied coverage on a D&O claim that may have been picked up under a policy written through another program.

It is the board's obligation to discuss all coverage options with its insurance agent and property manager. If you receive a package quote that includes a D&O option, ask your agent to compare it to other stand-alone D&O policies. You will most likely find significant differences.

As mentioned, associations usually opt for the package D&O policy because it is less expensive. But even at a \$250 to \$1,000 per year savings, the board needs to ask itself: Is this too much to pay for the comprehensive coverage we need? If the broader policy is not selected, the agent may require the association to sign a release indicating that the broader coverage was presented but turned down. This way, the board and insurance agent will be on record if there is a problem.

The next time you evaluate your association's insurance package, apply the test on page 47 to the program your agent is recommending. If your D&O insurance falls short, make sure you at least obtain a quote under the more comprehensive program. You and your association will be thankful in the long run.

#### TAKE THE D&O TEST

Is your D&O policy as broad as it should be? Take the following test. If your policy does not offer the items listed below, look for a program that does.

- \* Insures past and present directors, officers, committee members, volunteers, trustees, and employees
- \* Insures the association named in the definition of insured
- \* Does not exclude prior acts
- \* Insures the builder/developer while serving on the board
- \* Defends nonmonetary damages
- \* Does not exclude sexual harassment, discrimination and wrongful discharge
- \* Does not exclude libel, slander and defamation of character
- \* Does not exclude publishers' liability and copyright infringement
- \* Provides a duty to defend
- \* Carries an A.M. Best rating of at least an "A"

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