

When Are You Not Covered By Your D&O Policy?

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Introduction:

The question being posed: “When Are You Not Covered By Your D&O² Policy” is really a multipart question.

- First, where does a community associations D&O policy fall within the entire insurance puzzle?
- Second, are all D&O policies created equal?
- Third, how does the community association maximize its coverage?

The reason association members ask these questions are because they want to know if the policy covers them for what they do in their volunteer work for the community association. For example, they want to know if they will be covered for the following type of situations:

Is Your Board Covered?	Covered	Not Covered
A vendor sues the board and the association for breach of contract?		
A unit owner sues to compel the board to purchase insurance?		
The community manager sues the association for slander seeking emotional distress damages?		
A unit owner's tenant sues the board for wrongful eviction?		
A unit owner sues because a volunteer sexually harasses a child at the pool?		
The association's doorman sues for wrongful termination?		
An outgoing board president sues to challenge the validity of an election?		
A unit owner sues to challenge an assessment for a new pool?		
A unit owner sues to prevent the removal of trees in common areas?		
The property manager is sued for an alleged unauthorized entry into a unit owner's condominium?		

From an underwriter's point of view, there are two motivations when producing an insurance product: write as many policies as possible and minimize the number of losses. In the community association context, the key is to attract the best and most talented people to serve as the volunteer board members. To motivate these individuals to volunteer it is imperative to provide them with insurance coverage to protect them from the decision making process that they are involved in making. This is what the focus of what the D&O policy should cover.

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² The D&O policy is a Director's and Officer's Liability policy with the primary intent to protect those governing a community association.

The Community Association Insurance Puzzle – What Doesn’t Your D&O Policy Cover?

The basic concept of insurance is to spread the risk of the consequences of life that are not contrary to public policy and which the insured can afford to pay the price of transferring the risk. For a community association, there are a number of puzzle pieces. The purpose of this article is not to provide details of all coverage, but to present the general puzzle to better understand what the D&O policy is intended to cover or **not cover**. The basic notion is that if something is covered under one policy, it generally, with few exceptions, is not covered or “excluded” under another policy.

General Liability coverage	Property Coverage	Directors & Officers Liability Coverage- Employment Practices Liability	Fidelity Coverage
Workers Compensation Coverage	Umbrella Coverage	Auto Liability Coverage	Crime Insurance
Earthquake Insurance	Fiduciary Coverage	Flood Insurance	Homeowners Policy

If you were to ask a D&O claim analyst or adjuster what is the number 1 most rejected claim, the answer would be claims seeking “bodily Injury and/or property damages.” The reason for this is twofold. First, “bodily injury” and “property damage” claims are normally covered under a general liability policy, subject to other terms and conditions of those policies. The most common misunderstanding of insureds is that if the damage is the result of a board decision or misconduct, it should be covered. However, if the damage is only bodily injury or property damage, they must look to the general liability policy. This can be exemplified as follows:

Board Decision	Damage or Demand	Potential Coverage
The board decides to install speed bumps throughout the association streets and the bumps are 2 inches higher than code.	Due to the height of the speed bump, one of the association members new Mercedes SL Coupe is damaged to the bottom.	The alleged property damage is possibly covered by the General Liability policy if the bump’s height is determined to be negligent. This would not be covered by the D&O, because of the Bodily Injury or Property Damage exclusion.
The board decides to install speed bumps throughout the association streets and the bumps are 2 inches higher than code.	A group of association members sue the board and the association to compel them to remove the speed bumps as allegedly being in violation of height requirements	The board will be defended by the D&O policy. However, if the board loses, the policy will not pay the cost to remediate the bump height. ³ This will not be covered under the GL policy, because the board’s decision was not an “occurrence” (unintentional or accidental act) and therefore not covered.

³ It should be noted that D&O policies that do not provide coverage for “non-monetary” claims will not provide coverage for this in any situation. This will be addressed in the Not All D&O is Created Equal section below.

The second reason that the bodily injury or property damage matter are the most commonly rejected claims is that community managers and insurance agents are of the position that it is better to be safe than sorry to submit this to every insurer and let the insurance companies deny the claim. On the one hand, this is understandable, on the other hand, what these professionals must understand is that every submission costs the insurer money to set up and investigate a submitted claim and the insurer is required to investigate and respond pursuant to most state insurance statutes. The purpose of this is not to tell insureds not to submit potential claims, but to consider the consequences of shot gunning a matter to all insurers. In the alternative, the insured can submit a matter as a notice of potential claim that they are making to preserve their rights pursuant to the terms of the policy, but that they believe that it is more likely covered under another policy within their insurance program.

Another matter that is not covered under the D&O policy is any action being brought “by” the board or the association against association members or third parties. The D&O policy is a liability policy where the insureds are going to be defended for their conduct. The policy does not fund an action by the insured against others. This is very often the case when the board or association wants to sue the developer. In a related matter, it should be noted that when a D&O policy provides coverage for a developer, it is “solely” in his or her capacity as a “board member” and not for any work done in his or her capacity as a developer.

One mistake many associations make is that they believe that when money is taken by a board member, employee or volunteer that coverage is available under a D&O policy. This is similar to the bodily injury/property damage situation discussed above. Coverage for this type of claim will be covered under a “fidelity” (otherwise known as employee dishonesty) policy or a “crime policy.” The key here is that the fidelity policy includes within the definition of “employee” the board members or others contemplated as an insured under the D&O policy. Another mistake that associations make is not to be sure they also have “crime” coverage which comes into play when money is taken by a non-“employee.”

Other types of “damage” that are not covered under the D&O policy are breach of contract damages or the coverage that the board failed to obtain when purchasing insurance. In the D&O context, something that is unique is that the policies will sometimes provide a defense for the board and other named insureds, but it will not provide coverage for the damages that the claimant has incurred as a result.

To provide coverage for those items would be what is known as a moral hazard. These can be exemplified as follows:

Claim	What is covered	What is not covered
The association fires the landscaper in year one of a 2 year contract due to incompetence. The landscaper sues the Board and the Association for breach of contract.	The D&O policy will provide defense fees and costs for the board and the association if the D&O policy provides coverage for breach of third party contracts.	If the board and/or the association are found to have breached the contract, the policy will not pay the breach of contract damages. To do so would encourage the board to breach contracts and look to the D&O to provide coverage.
The board of directors decides to buy a D&O policy that does not provide non-	The D&O policy will provide a defense fees and	If the board and/or the association are found to have

<p>monetary damage coverage to save money and because they have never had a D&O claim in the past. There was a challenge to an election of board members and the board spends \$10,000 to fight the claim. An association member sues the board for its failure to purchase a D&O policy that would have provided coverage for the failure to purchase this type of policy.</p>	<p>costs for the board and the association if the D&O policy provides coverage for failure to maintain or obtain insurance.</p>	<p>failed to obtain the appropriate coverage, the policy will not become the insurance coverage that the board failed to obtain. To do so would encourage the board to only purchase a D&O policy and nothing else.</p>
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Not All D&O Are Created Equal

Thus far, the article has been focusing on what is not covered that is covered elsewhere in the insurance puzzle. The bigger issue is whether the policy purchased provides the association with the coverage that it needs. One basic notion in life applies directly to insurance: “you get what you pay for.” The other side of that coin should include the adage: “don’t be pennywise and pound foolish.” One thing you can be guaranteed is that insurance companies do not give insureds anything for free. If you are paying for \$250 or \$350 for a D&O policy as opposed to an \$850 and \$1,000, do you truly believe you are getting similar coverage?

There are two types of D&O coverage in the industry. First, there are D&O coverages that are included in a package policy. These tend to be very bare bone policies by carriers that do not really have an interest or appetite to provide broad D&O coverage. On the other hand, there are carriers that issue “stand alone” policies that are tailored for the community association industry. The bottom line is how valuable is it to save \$500, \$700 or \$1,000 on the D&O policy. The key thing to keep in mind is that if the insurance policy does not provide coverage, the association will be responsible and probably through a “special assessment.” At the end of the day, someone has to pay. The increased cost of a valuable D&O policy is less than what each association member probably pays for their individual auto policy.

When you are looking at your current policy, the following are some questions to ask:

Exposure	Covered	Not Covered?
Non Monetary Claims		
Breach of Third Party Contracts		
Failure to Maintain or Obtain Insurance		
Emotional Distress Damages		
Wrongful Termination claims		
Sexual harassment claims		
Past, Present or Future Directors & Officers		
Committee Members		
Volunteers		
Leased employees		
Challenge to Architectural Review Committee decisions		
Challenges to board elections		
Discrimination Claims		
Challenge to assessments		

How Does the Association Maximize its D&O Coverage?

The first thing that the association must do is use “specialists.” We live in a complex world and it is imperative to use specialists. This is particularly the case where the board has a fiduciary obligation in the process of purchasing insurance. There are insurance professionals that specialize in community associations. The board should not go to a medical malpractice specialist to purchase community association insurance. Does the professional know the issues? Does the professional know the different products? How many associations does the professional insure?

The second step would be to make sure the association and the board has its own risk management program. Make sure the board understands its duties and obligations.

The final step is to not be pennywise and pound foolish. One non-covered claim will dwarf any savings that the board will save in buying a cheap policy.

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