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HOA UNIVERSITY 12-6-08

PROTECTING YOURSELF, AS A BOARD MEMBER, FROM PERSONAL LIABILITY

Agenda:

INTRODUCTION: Many board members feel that the indemnification provisions of their CCRs, Bylaws and their Non-Profit status adequately protected them for liability. However, this is only partially true. Associations have become liable (for Board actions) and have had to pay huge sums of money to defend and/or settle claims against Board members. In many cases, the amounts paid out in “indemnification costs” were far more than the Association could afford. D&O insurance has now become the tool to protect against this type of situation.

1. Examination of Common Types of Insurance Protection

- a. **Property/Casualty.** Covers the Association against unforeseen losses due to fire, lightning, vandalism and other structural damage. Earthquake and flood damage coverage is a optional type of coverage under a Property policy.
- b. **Liability.** Liability coverage is needed in case your Association is sued for something it “did” or “did not” do that resulted in damage to property or injury (tangible and intangible) to others. Classic example is a “slip and fall” on the common areas. Liability insurance is intended to cover the costs of defense of a lawsuit and any award of damages.
- c. **Fidelity.** Coverage against claims for mishandling or misappropriating funds of others (HOA assessments, etc.).
- d. **Owner Insurance.** Coverage for contents of “unit” or “lot” as defined in the CCRs.
- e. **Director & Officer.** Every director and officer of a homeowners association has personal responsibility for the “well-being” of the Association. By that, I mean that your job is to ensure that the Association’s covenants are enforced, its financials are sound, and owners are treated properly. The purpose of “D&O” insurance is to protect directors and officers from claims made against them (individually or as a group) because of alleged wrong-doing. General liability insurance will not protect directors and officers in the same way. Such insurance is to cover against 3rd party bodily injury and property damage. D&O is intended to cover against 3rd party financial damages or other claims not covered under the general liability policy.

MOST COMMON CLAIMS MADE AGAINST BOARDS:

- Breach of Fiduciary Duties
- Defamation (libel & slander)
- Mismanagement of HOA
- Self Dealing / Conflict of Interest
- Misappropriating HOA Funds; Embezzlement
- Selective Enforcement
- Improper Interpretation of CCRs and Bylaws
- Failure to Enforce
- Failure to Maintain and/or Produce HOA records

2. Examination of Typical Lawsuits Where Board Coverage Has Been Denied

See Attachments

3. What Does the Non-Profit Act state? What about the Bylaws / CCRs?

16-6a-907. Indemnification of officers, employees, fiduciaries, and agents.

Unless a nonprofit corporation's articles of incorporation provide otherwise:

- (1) to the same extent as a director, an officer of the nonprofit corporation is entitled to:
- (a) mandatory indemnification under Section **16-6a-903**; and
 - (b) apply for court-ordered indemnification under Section **16-6a-905**;

(2) a nonprofit corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent of the nonprofit corporation to the same extent as to a director; and

(3) a nonprofit corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent who is not a director to a greater extent if:

- (a) not inconsistent with public policy; and
- (b) provided for by:
 - (i) its articles of incorporation or bylaws;
 - (ii) general or specific action of its board of directors; or
 - (iii) contract.

~~16-6a-909.~~ Limitations on indemnification of directors.

(1) (a) A provision treating a nonprofit corporation's indemnification of, or advance for expenses to, directors that is contained in the following is valid only if and to the extent the provision is not inconsistent with this part:

- (i) the articles of incorporation or bylaws of the nonprofit corporation;
- (ii) a resolution of the nonprofit corporation's members or board of directors;
- (iii) a contract, except an insurance policy; or
- (iv) other writing.

(b) If the articles of incorporation limit indemnification or advance of expenses, indemnification and advance of expenses are valid only to the extent not inconsistent with the articles of incorporation.

(2) This part does not limit a nonprofit corporation's power to pay or reimburse expenses incurred by a director in connection with the director's appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent to the proceeding.

4. Tips for Obtaining the Proper Director and Officer Policy for you and your Association

Stand-Alone Policies versus Embedded Policies. **Always get a Stand-Alone D&O policy.**

TIP OF THE DAY: How a carrier responds to a notice of claim depends entirely on the facts of the particular claim. However, any decent “stand-alone” D&O policy has an exclusion for intentional acts committed by the Insured, but is worded such that a defense is provided under the policy until the allegations of intentional conduct are proven either “in fact” (the lesser standard) or after “final adjudication” (more coverage afforded) in a court. I cannot express how critical this type of language is.

A carrier offering a stand-alone D&O product designed specifically for community associations will generally accept tender of the claim with a reservation of rights and provide a defense to the Insured. Insurance packages containing D&O coverage via an endorsement or rider to the commercial general liability policy will generally exclude allegations of intentional conduct in its entirety.

COPY

FILED
JUDICIAL DISTRICT COURT
2007 OCT -4 AM 8:38
SALT LAKE COUNTY
BY _____
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

)	
)	COMPLAINT
Plaintiff,)	
vs.)	
)	Case No. _____
)	
Defendant.)	Judge _____

Plaintiff, complaining of Defendant, alleges:

GENERAL ALLEGATIONS

1. Plaintiff and Defendant are citizens of the United States of America and residents of Salt Lake County, State of Utah.
2. The acts alleged in this Complaint were committed in Salt Lake City, Salt Lake County, State of Utah.
3. The amount in controversy exceeds \$20,000, exclusive of costs.
4. On or about October 10, 2006, an incident occurred after a meeting of the Condominium Association at The Parc at _____ . The meeting took place in the community club room on _____ of the condominium complex.

1197

15. At this time, [redacted] walked up beside Plaintiff and told Defendant to leave [redacted] alone.

16. Defendant stepped up to [redacted], spitting and shouting, with elbows out in a threatening manner, saying [redacted]

17. Defendant's actions were totally unreasonable and unprovoked.

FIRST CAUSE OF ACTION
(Assault and Battery)

18. Plaintiff realleges and incorporates by reference paragraphs 1 through 17 of this Complaint as if fully set forth herein.

19. Defendant acted, intending to cause harmful or offensive contact with Plaintiff, or imminent apprehension of such contact.

20. As a result, Plaintiff was thereby put in imminent apprehension of physical harm.

21. Defendant's aggressive and intimidating actions were not only physically offensive, but caused untold fear and distress.

22. Plaintiff suffered injuries proximately caused by Defendant's actions.

23. The injuries include but are not limited to the actual spitting of Defendant upon Plaintiff, and the repeated threatening behavior as he got into her face in a violent, ranting, intimidating and attacking manner.

24. Plaintiff suffered undue fear and terror during the incident, since she felt for her physical safety. She continues to suffer fear and apprehension because Defendant still lives in their same condominium. She is still in fear for her safety and is afraid to be alone in the building, parking lot or other areas. She has suffered extreme emotional distress and anxiety associated with this incident.

25. Defendant, through his position of authority in the Condominium Association, has continued to exert undue pressure and influence upon Plaintiff and her daughter.

26. Defendant's actions were done willfully and maliciously or with reckless indifference for the rights of Plaintiff.

27. Defendant is responsible to Plaintiff for all damages, costs and attorney fees associated therewith.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief: Plaintiff prays for relief under her First Cause of Action against Defendant, as follows:

1. For an award of \$100,000 in compensatory damages or an amount to be proven at trial;
2. For an award of \$100,000 in punitive damages based upon Defendant's actions being done willfully and maliciously or with reckless indifference for the rights of Plaintiff;

COPY

Served
9-20-08

Attorney for Plaintiffs

IN THE FIFTH DISTRICT COURT
OF WASHINGTON COUNTY, STATE OF UTAH

COMPLAINT

Plaintiffs,

v.

Defendant.

Civil No.

Judge

Plaintiffs, by and through their attorney, . . . , complain and allege as follows:

JURISDICTION

1. Plaintiffs are the owners of real property located . . .
2. Defendant . . . is a resident of Washington County, State of Utah.

CLAIM

3. Plaintiffs moved into a rental home located at 385 W. 2500 S., Washington, Utah, in March of 2007. The property is part of the . . .
4. Defendant . . . is a resident and board member of the same HOA.

5. In the Spring or early Summer of the same year, Defendant came to Plaintiffs' home to discuss certain issues of concern.

6. On this occasion, Defendant told Plaintiffs that they could not park Plaintiffs' work truck, which weighed over 10,000 pounds, on the street. The next day, Defendant told Plaintiffs that they would be allowed to park the truck in their driveway.

7. On another occasion, Defendant noticed that Plaintiffs were mowing their lawn on a Sunday. Defendant told Plaintiffs that since members of the Church of Jesus Christ of Latter-day Saints were not allowed to mow their lawns on Sunday that Plaintiffs should not either.

8. Plaintiffs responded that they were not members of the aforementioned church and that they were not subject to their rules.

9. After these two incidents, Defendant would stop by Plaintiffs' home on a daily basis and slowly drive by their home in a manner to make his presence known to them.

10. On April 21, 2008, Defendant came to Plaintiff Tim Holley's place of employment with an off-duty police officer. The officer was wearing a visible side arm and a shirt denoting he was an officer of the law.

11. After entering the office in the aforementioned manner, Defendant proceeded to ask Plaintiff supervisor to restrict Plaintiff's right to drive the aforesaid work truck home.

12. On another occasion, Defendant stopped by Plaintiffs' residence and challenged Plaintiff to come out onto the street to fight Defendant. Plaintiff refused.

13. Defendant later told several of Plaintiffs' neighbors that Plaintiff had threatened Defendant with a gun. Plaintiffs do not even own a gun.

14. Before and since that time, Plaintiffs have observed other vehicles weighing over 10,000 pounds parked in the streets of the HOA. Plaintiffs have also confirmed with some of the owners of these vehicles that they have never been asked to remove them by Defendant.

CAUSES OF ACTION

VIOLATION OF UTAH FAIR HOUSING ACT (UCA Title 57, Chapter 21)

15. Defendant has changed the terms of Plaintiff's residence in the HOA, and held them to different standards than other HOA residents, on the basis of Plaintiff's religious beliefs.

LACK OF UNIFORM OPERATION OF LAW

(Constitution of Utah, Article 24)

16. Defendant, as an officer of the HOA, has denied Plaintiffs equal protection under the bylaws of the homeowner's association.

17. Specifically, Defendant has been selective as to whom he holds to those bylaws and whom he does not.

18. This selectivity is totally bereft of any reasonable and articulable standard such that Plaintiffs have no way of knowing whether they are in breach of the bylaws or not.

19. Defendant's application of the laws toward Plaintiffs is arbitrary, capricious and unreasonable.

ASSAULT

20. Defendant created in Plaintiffs a reasonable apprehension of harmful or offensive

contact.

21. The creation of this apprehension by Defendant was intentional.
22. The apprehension created in Plaintiffs was caused by Defendant.
23. Plaintiffs did not consent to Defendant's conduct.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

24. Defendant engaged in extreme conduct toward Plaintiffs.
25. Defendant intended to engage in this conduct.
26. Plaintiffs were damaged by this conduct in an amount to be proven at trial.
27. These aforementioned damages were caused by Defendant's conduct.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

28. Defendant engaged in extreme conduct toward Plaintiffs.
29. Defendant knew, or should have known, that this conduct would result in the damages pleaded herein.
30. Plaintiffs were damaged by this conduct in an amount to be proven at trial.
31. These aforementioned damages were caused by Defendant's conduct.

INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

32. Defendant employed the services of an off-duty police officer, wearing a side arm and clothing of an officer, to convince Plaintiff _____, employer to alter Plaintiff's employment terms to Plaintiff's detriment.
33. Defendant's actions regarding the same were intentional.
34. Defendant damaged Plaintiffs via the aforementioned conduct in an amount to be

proven at trial.

35. Aforesaid damages were caused by Defendant's conduct.

NEGLIGENT INTERFERENCE WITH ECONOMIC RELATIONS

36. Defendant employed the services of an off-duty police officer, wearing a side arm and clothing of an officer, to convince Plaintiff's employer to alter Plaintiff's employment terms to Plaintiff's detriment.

37. Defendant knew, or should have known, that these actions would cause Plaintiff the damages to be shown.

38. Defendant damaged Plaintiffs via the aforementioned conduct in an amount to be proven at trial.

39. Aforesaid damages were caused by Defendant's conduct.

BREACH OF FIDUCIARY DUTY

40. Defendant, through his status as member of the HOA governing board, owed Plaintiffs a duty of protection of their rights as members of the homeowner's association.

41. Defendant has breached this duty by failing to protect Plaintiffs' rights to quiet enjoyment of their property.

ABUSE OF PROCESS

42. Defendant has been afforded the privilege of using Utah contract law and principles to bind Plaintiffs and other parties within the HOA.

43. Defendant has abused this privilege by finding Plaintiffs in violation for what Defendant alleges are violations but which, in the end, are actually religious differences.

CHECK AND COMPARE YOUR CURRENT COVERAGE!

THERE IS A DIFFERENCE !

Policy Features

Travelers

Travelers Package Policy

Insured means Directors, Officers, and Volunteers	<input checked="" type="checkbox"/> yes	<input checked="" type="checkbox"/> yes <input type="checkbox"/> no
Insured includes the Entity	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Loss includes Punitive Damages (where permitted by law)	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Automatic Coverage for Management Company	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Spousal Liability Extension	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Definition of Wrongful Acts includes Employment Practices Coverages	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Coverage is included for discrimination wrongful discharge, sexual or workplace harassment	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Coverage includes non-money damages claims and criminal proceedings, where permitted by law	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Management Company coverage includes full prior acts coverage	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Defends Breach of Contract Claims for all insureds including the management company	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Management Company signs applications	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
No Libel, Slander, Defamation Exclusion	<input checked="" type="checkbox"/> yes	<input checked="" type="checkbox"/> yes <input type="checkbox"/> no
Waiver of Retention if Insured is exonerated	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Bi-lateral discovery option	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> yes <input checked="" type="checkbox"/> no

This comparison is for informational purposes only. All statements herein are subject to the provisions, exclusions and conditions of the applicable policy. Please consult your Travelers agent or local Bond representative for more specific information regarding the product(s) described in this brochure

Sample
Approved
Provision

Residents In the event of any conflict or inconsistency between the provisions of this Declaration and the Association Rules, the provisions of this Declaration shall prevail. The Association Rules shall be enforceable in the same manner and to the same extent as the covenants, conditions and restrictions set forth in this Declaration.

5.4 Personal Liability. No member of the Board or of any committee of the Association, no officer of the Association, and no manager or other employee of the Association shall be personally liable to any Member, or to any other person or entity, including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error, or negligence of the Association, the Board, the manager, any representative or employee of the Association, or any committee, committee member or officer of the Association; provided, however, the limitations set forth in this Section shall not apply to any person who has failed to act in good faith or has engaged in wilful or intentional misconduct.

5.5 Implied Rights. The Association may exercise any right or privilege given to the Association expressly by the Project Documents and every other right or privilege reasonably to be implied from the existence of any right or privilege given to the Association by the Project Documents or reasonably necessary to effectuate any such right or privilege.

5.6 Identity of Members. Membership in the Association shall be limited to Owners of Lots. An Owner of a Lot shall automatically, upon becoming the Owner thereof, be a Member of the Association and shall remain a Member of the Association until such time as his ownership ceases for any reason, at which time his membership in the Association shall automatically cease.

5.7 Classes of Members and Voting Rights. The Association shall have the following two classes of voting membership:

(1) Class A. Class A Members are all Owners, with the exception of the Declarant until the termination of the Class B membership, of Lots. Each Class A Member shall be entitled to one (1) vote for each Lot owned. Upon the termination of the Class B membership, the Declarant shall be a Class A Member so long as the Declarant owns any Lot.

(2) Class B. The Class B Member shall be the Declarant. The Class B Member shall be entitled to three (3) votes for each Lot owned. The Class B membership shall cease and be converted to Class A membership on the earliest of (i) the date on which the votes entitled to be cast by the Class A Members equals or exceeds the votes entitled to be cast by the Class B Member; (ii) the date which is seven (7) years after the Recording of this Declaration; or (iii) when the Declarant notifies the Association in writing that it relinquishes its Class B membership.

5.8 Voting Procedures. No change in the ownership of a Lot shall be effective for voting purposes unless and until the Board is given actual written notice of such change and is

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