MEMBERSHIP | CERTIFICATION | INFORMATION

Association of Condominium, Townhouse, and Homeowners Associations

ACTHANEWS

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December 2013/ January 2014

UPCOMING SEMINARS

Tues., Jan. 14, Frankfort: "Legal & Insurance Requirements for Associations"

Wed., Feb. 5, Chicago: "Legal Update & Selecting a Management Company"

Workers' Compensation Impact On Habitational Associations

Karyl Dicker Foray, CIRMS, CRIS of Rosenthal Bros.

Until the twentieth century, employees who were injured on the job were viewed the same as non-employees. If a non-employee slipped on the floor and was injured, the recourse was to sue the owner of the establishment. Likewise if an employee was injured, the same recourse was available, sue the owner. In 1911, the first Workers' Compensation laws were enacted in the United States.

Today, all 50 states have Workers' Compensation laws providing economic relief to both the employer and the employee in the event of an injury. Workers' Compensation involves a trade off. A worker receives compensation for medical expenses and lost income when injured on the job or affected by an occupational disease, with amounts paid specific by State law. It makes no difference who caused the injury or sickness. In return, the worker gives up the right to sue the employer. The Workers' Compensation benefits are the exclusive remedy.

Habitational risks (i.e. condominium, townhome and homeowner associations) pose an unusual situation in the world of Workers' Compensation insurance. Many associations are small and do not have any employees. They often question why they would need Workers' Compensation insurance coverage at all. What many associations do not realize is that in the eye of the courts, they ***DO*** have an exposure if they hire independent contractors or any other type of individual to work on association property. Even if Certificates of Insurance are obtained from the independent contractor an exposure still exists.

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The second category consists of rules and restrictions that are promulgated by an association's board of directors, but that are not contained in the association's declaration or amendments thereto. If a "category two" restriction is challenged, the Board must affirmatively show that the use it wishes to prohibit or restrict is ***antagonistic to the legitimate objectives of the condominium association.***

The strong presumption of validity that Illinois courts apply to restrictions in declarations was originally identified in 1995, when it was applied to a restriction in the declaration of a condominium association. *See*, Apple II Condominium Association v. Worth Bank and Trust Co., 277 Ill. App. 3d 345 (1st Dist. 1995). In 2002, the strong presumption of validity was extended to restrictions contained in the declarations of homeowners' associations. *See*, Scott v. York Woods Community Association, 329 Ill. App. 3d 492 (2d Dist. 2002). The strong presumption of validity has also been extended to restrictions contained in the declarations of townhouse associations.

In summary, associations have broad rule-making authority, including the authority to create rules that treat renters differently than owners. However, any rules and restrictions that treat renters differently than owners are susceptible to challenges in a court of law or equity. If the challenged rule or restriction is not contained in the declaration, the Association will be forced to affirmatively show that what it seeks to prohibit or restrict is ***"antagonistic to the legitimate objectives of the association."*** On the other hand, rules and restrictions that are contained in the association's declaration (or an amendment to the declaration) will be clothed in a very strong presumption of validity. If challenged, these rules and restrictions will be upheld unless they are ***arbitrary, against public policy or violate some fundamental constitutional right.***

TIP OF THE MONTH

Five Tips an Attorney Wishes for a Board

Remind owners the association is not required to have consensus. To do this, re-set expectations, create clear regulations and policies to establish uniformity of operation that works for your group, explain you are going to follow the operating documents, the law and best practices. Have an annual session for this purpose and lay it all out. If the owners understand what is happening and what is expected, many issues fall away. Remind them, if they want to know more or have more input they can sign up for a committee or run for the board.

Communication is key. No one likes to get blindsided. Members are more likely to accept changes when they are aware of them from the beginning, have an opportunity to become involved in a dialogue and understand the basis of the decision. While transparency is a best practice, the board should not release its internal discussions or opinions. State the issue, open it for discussion, have a second discussion (if needed) and then take a vote.

Just because the previous board did it, does not mean it is correct. When a transition occurs, the new board cannot escape it fiduciary duty be merely saying "That's the way we've always done it." A transition review of the state of the corporation and its operational systems is an exercise in best practices.

Review your operating documents now and revise if necessary, before an issue arises. Many associations' operating documents are outdated and/or contain provisions unfriendly to current circumstances. It is difficult to get enough votes to amend them when no issue exists and almost impossible when a community becomes divided over an issue.

There's something called the "Business Judgment" rule", rely on it. What does it mean? Hiring a professional for specialty specific work. A board is not expected to do all of the work—only oversee that the work being done is accurate. A board should have a financial expert (CPA) to consult and rely upon. With assets and liabilities that belong to everyone, the board should not play around. You can rely on your attorney's opinion. The rule protects boards that rely on legal advice given by their counsel. Board members should take advantage of this whenever possible. A board that understands and applies the Business Judgment Rules with their practices is a best practices board.

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A true independent contractor is not an employee of an association, but sometimes it is difficult to determine whether the independent contractor working on an association property is an employee or truly an independent contractor.

Independent contractors usually furnish their own materials and equipment and are paid in a lump sum for a job performed. They are not supervised by an association. In the event of a loss, the courts would carefully review the degree of control the association had over the contractor and then make a determination. If the courts determine that an injured worker is an employee rather than an independent contractor, the association's Workers' Compensation policy would be liable for payment of benefits whether or not the insurance company had ever collected premiums on the independent contractor's payroll. If no Workers' Compensation insurance is in place, the association can be held financially liable. Sometimes the courts would work their way up the chain and charge the Associations' management firm's workers' compensation policy with the loss.

For example – ABC Homeowners Association hired Perfect Management Company to manage their property. Perfect hired Hot Stuff Contractors - an uninsured and unlicensed contractor to install rain gutters on the Association's common areas. Hot Stuff's employee, Sam, performed the installation and unfortunately on the first day of the job, a rain gutter touched a high voltage electric wire, severely injuring Sam. Sam filed a claim for workers' compensation benefits against the Association and the management company. Since Hot Stuff was an unlicensed and uninsured contractor performing work for the Association the Court concluded that both the Association and its management company were the employers of the injured worker and both were liable to pay him workers' compensation benefits.

A Workers' Compensation policy premium is determined by payroll. At the beginning of the policy period, an insured pays a deposit premium based on anticipated payroll for the coming year. At the end of the policy term an audit is performed (either by mail or physically by a company auditor). If payroll is lower than anticipated a return premium is generated unless the premium is below the established minimum premium). Premiums are generally higher when an entity has to purchase their Workers' Compensation insurance from the Assigned Risk Pool. It should be remembered that those associations which purchase insurance form the Pool are not "bad" risks. They are normally just associations whose Workers' Compensation premiums are very low and thus undesirable to independent companies or direct writers. A small number of insurance carriers in Illinois do offer Workers' Compensation policies for smaller risks. All in all, Workers' Compensation is a coverage that should be purchased by associations to adequately protect themselves against possible losses where they might be considered an "employer." One item of note – be sure to request that the Workers' Compensation policy you are purchasing includes an endorsement called a Voluntary Compensation endorsement. This endorsement will extend benefits to those that are performing tasks at the direction of the Board without being paid (i.e. participants during a clean-up the common area event or organizers who set up for a Summer or Holiday party).

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CERTIFICATION FOR OWNERS

LEARN & LEAD: ACTHA's certification program for owners will be offered for six consecutive weeks beginning Thursday, February 13 in Wheeling. You may learn more and register online by going to www.actha.org/Certification. Once you start the program you will have two years to complete it. One may take the courses for certification or as stand-alone seminars.

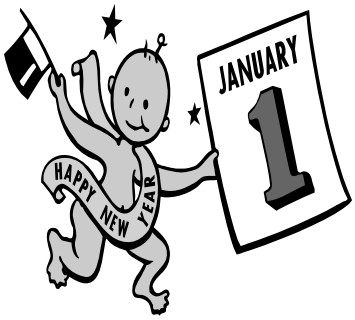
This six course program in the fundamentals of community association living focuses on "need to know" learning in the areas of governance, administration, meeting/elections, physical aspects, finance and insurance. While ACTHA encourages students to take the program in the classroom setting, we understand that this may not be the most convenient work method for everyone, so Learn & Lead is also offered online. Course make-up may also be facilitated through this method.

If taking Learn and Lead for certification purposes, the cost is $100 for ACTHA members; $150 for non-members.

ACTHA Sends Holiday Greetings &

ACTHA will be taking a Holiday Break
Beginning at Noon on Friday, December 21.
Our offices will re-open on
Thursday, January 2

Best Wishes For a New Year



WELCOME NEW ACTHA COMMERCIAL MEMBERS!

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Question of the Month

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Q. According to the Illinois Condominium Act, there is only one class of owners. All owners must be treated the same. The Association cannot pass rules that create multiple ownership tiers or iscriminate against any group of owners. I agree with this policy and it's clear. However, I am onfused to how this applies to renters. In particular, is a renter considered a member of the Asso- on and must the Association provide all rights and benefits to a renter? For example: Is a renter allowed to attend meetings? Can the association create rules that have different impact on renters such as restricting use of a common area workout room or party room? Can a renter be restricted from owning a dog?

A. Association meetings are generally reserved for "Members" of the Association. "Members" are typically defined by the association's declaration as "Unit Owners." Therefore, unless "renters" or "tenants" are included in the definition of "Members" contained in the association's declaration, they have no right to attend association membership meetings. Of course, the association has the authority to permit renters to attend meetings or to include renters within the definition of "Members" contained in the declaration (this would likely require an amendment to the declaration; see below)

As far as whether an Association may create rules that have a different impact on renters, the ultimate question presented is whether an Association may treat renters differently than owners. To answer this question, it is important to understand the different categories of rules and restrictions.

The first category consists of restrictions that are contained in the declaration or bylaws or in the amendments to these instruments. When a restriction is passed by the associations' membership and made part of the condominium declaration, a reviewing court will presume the restriction is valid and uphold it unless it is shown that the restriction is ***arbitrary, against public policy or violates some fundamental constitutional right***. Thus, a restriction contained in an amendment that is properly adopted in accordance with the declaration's amendment procedure is veiled in a very strong presumption of validity.

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