



BARKER · MARTIN

D & O Legal Rundown

Barker Martin Webinar
March 7, 2012

Dan Zimberoff
Barker Martin, P.S.
danzimberoff@barkermartin.com



Why--Protection from liability

- Volunteers
- Tort and contract liability – RCW 64.34.344
- Indemnification & hold harmless provisions in governing documents and many contracts
 - Funded by special assessment or D&O insurance

Context

- “Not for Profit Management Liability Wrongful Acts”
- One of several pieces of the insurance puzzle
- “First-party” vs. “Third-party”
- Stand-alone or endorsement



Common Denominator

- Non Monetary Claims—most D&O claims do not involve request for money damages

D & O vs. CGL

- Scenario #1: Board installs speed bumps that are 2 inches higher than code
 - Mercedes SL Coupe is damaged
 - Association members sue to compel removal of the bumps
- Scenario #2: Board decides not to remove a diseased tree at the advice of an arborist
 - Tree falls and injures child
 - Association members sue to compel removal of the tree



Most Common D&O Claims

- Failure to adhere to bylaws
- Challenges to elections
- Challenges to board authority
- Challenges to assessments
- Breach of third-party contracts
- Challenges to ARC decisions
- Board's failure to preserve common elements
- Defamation
- Selective enforcement
- Employment discrimination
- Violation of privacy laws



BARKER · MARTIN

Suggested Steps to Minimize D&O Claims

- Communication
- Transparency
- Inclusiveness
- Flexibility and adaptability
- Seriousness
- Collaboration

Community Association – Directors & Officers Coverage - The Fundamentals

**Duncan Kirk, CIRMS, CIC
The Unity Group**

800-339-9270 duncank@theunitygroup.com

The Unity Group

- The Unity Group is one of the largest employee owned independent insurance agencies in Washington State. We handle close to \$95,000,000 in annual premiums. The firm provides commercial, personal, life and health insurance.
- Condo Assure is a division of The Unity Group. The unit specializes in providing insurance & risk management solutions for community associations, the long-term objective of which is to control the costs of risk.

Duncan Kirk, CIRMS, CIC

- Duncan began his insurance career in Lloyd's of London. He joined The Unity Group in 1994 and is one of the senior partners of the firm.
- He specializes in habitational risks and heads up the Condo Assure division of The Unity Group. He is a Community Insurance Risk Management Specialist (CIRMS).
- Duncan is current State President of the Community Association's Institute (WSCAI) www.wscai.org.
- He lives in a townhouse condominium and is president of the association where he lives.
- duncank@theunitygroup.com, 800-339-9270

Directors & Officers (D & O) Insurance - Learning Objectives

- Who is covered by a D & O policy
- Key exclusions or considerations
- The policy period
- Claims reporting.
- Tips to avoid problems
- Questions & Answers
- Disclaimer – policies differ considerably!

Directors & Officers

- Should you serve on a board?
- Board's are indemnified in the governing documents. Protected by insurance or special assessment.
- Board should use professionals
- Board should follow and enforce the declaration, CC & R's, rules, and show fiduciary responsibility
- Be smart! Coverage over price any day!

Directors & Officers

- Insuring Agreement – The insurer shall pay all Loss resulting from any Claim first made against any Named Entity, Subsidiary, or Insured Person during the Policy Period or the Extended Reporting Period, if applicable, for a Wrongful Act committed, attempted, or allegedly committed or attempted, by such Named Entity Insured before or during the Policy Period.

Directors & Officers

- **Loss** – Damages, settlements, judgments, and defense costs.
- What is excluded?
- Are settlements within the limit of insurance or are some outside?

Directors & Officers

- Claim – Definition
- Written demand for monetary damages or non-monetary relief against a Named Entity Insured for a Wrongful Act.
- Civil, criminal, or administrative adjudicatory proceeding
- A proceeding from EEOC or similar agency. When would this apply?

Directors & Officers

- Named Entity or Insured Person – Very important
- Who might be an insured?
- Directors & Officers.
- Other volunteers?
- Trustees
- Employees – What kinds?
- Management firm – definition
- Developer?
- Who else?

Directors & Officers

- Policy Period
- Annual
- Claims Made policy – VERY important
- Extended Period of Indemnity
- Retroactive Date - Prior Acts

Directors & Officers

- Wrongful Act – definitions:
- Actual or alleged error, misstatement, act, omission, neglect or breach of duty committed or attempted
- Publisher's Wrongful Act
- Wrongful Employment Act
- Wrongful Personal Injury

Directors & Officers

Key Definitions and Considerations

- Applications – Statements & Representations
- Claim Reporting
- Subrogation & Recovery
- Self Insured Retention – When applicable

Directors & Officers

- Exclusions
- Construction Defect
- Bodily Injury & Property Damage
- Sickness, mental anguish, emotional distress, death
- Property Manager limitations
- Fungi

Directors & Officers

- Exclusions
- Failure to maintain or effect insurance
- Breach of Contract
- Insured gaining profit, fraud, dishonesty or criminal act.
- Insured verses Insured

Directors & Officers

- Key Points:
- Application
- Who is covered
- Premiums are small but differences are huge!