

CAI Northern Ohio Chapter

Quarterly Newsletter

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MESSAGE FROM THE PRESIDENT

Happy Fall, ya'll!

We had an excellent turn out for both the Reserve Study and the Landscaping Contract virtual seminars. Thank you to everyone who tuned in for one or both!

We are planning to have our Fall Trade Show this year on Friday, September 24th at the Embassy Suites on Rockside Boulevard in Independence. Additional information and registration information will be sent soon.

This year Craig Huntington from Alliance Association Bank will be doing a presentation on the Habits of Success. Craig has provided several great presentations to our Chapter in the past, and there is no doubt this will be exceptional as well.

I am hoping to see many of you at the Trade Show, it will be a great chance to see your peers and interact with vendors, in addition to hearing a great presentation.

Judy Valus, President
Northern Ohio Chapter
Community Associations Institute

THE ETHICAL DILEMMAS OF COMMUNITY ASSOCIATION INSURANCE

By Joel W. Meskin, Esq., CIRMS, CCAL Fellow, MLIS, EBP

The procurement and maintenance of Insurance in the community association industry is shrouded in unique ethical considerations that do not apply to individual insurance consumers. Enter the Community Association Board's ("Board") "fiduciary Duty." This process is imbued with inherent ethical considerations for not only Boards, but also Community Association Managers ("CAMs"), Community Association Attorneys, Community Association Insurance Professionals and other business partners.

*A fiduciary duty is the legal responsibility to act solely in the best interest of another party (i.e. "the community association"). Fiduciary duties include duties of undivided loyalty, due diligence and reasonable care, full disclosure of any conflicts of interest, and confidentiality. **While a fiduciary duty may be violated accidentally, it is still a breach of ethics.** Emphasis added.*

Ethics Unwrapped: <https://ethicsunwrapped.utexas.edu/glossary/fiduciary-duty>

A Board's fiduciary duty in the insurance procurement process differs from an individual insurance consumer. For example, a board president may want to use his insurance agent brother-in-law who does not have experience in community, the board president may not fully disclose his potential conflict of interest here. Whether the president perceives this as a conflict or not, failure to disclose is a breach of fiduciary duty and therefore an ethical violation. On the other hand, if an individual insurance consumer selects his brother-in-law, it would not be a breach of a fiduciary duty or ethics, but it could be a bad decision. As Forrest Gump says, "**stupid is as stupid does.**"

A board's fiduciary duty requires the board to *protect, preserve and enhance the assets of the association*. These assets are the common elements of the association, both tangible and intangible. The keystone to this duty is that **the board members must put the interest of the association above his or her own personal interests**. This can be counterintuitive for many board members. In fact, many board members seek to join the board for the primary purpose of protecting their personal assets or pursuing their own agenda. As we know, perception is reality. The president above may see this as a no harm no foul situation. On the other hand, others may very well perceive the act as a breach of its fiduciary duty. This misunderstanding by board members regarding their duty is directly or indirectly the genesis of many Director and Officer Liability Claims.

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The duty to place the association's interests above the personal interests of each board member can be subtle, obvious, or anywhere in between. The key reason that unit owners elect multiple board members to manage the association, at least theoretically, is as a check and balance insuring the various interests of the membership have a voice.

The By-Laws (the association's operating manual) and other applicable laws are in place to facilitate board fiduciary duties and ethical considerations. This is why it is generally required that board business be conducted during a properly noticed board meeting. Furthermore, most states, including Colorado, have Open Meeting Laws. This is a check and balance on the board's fiduciary duty avoiding decisions being made in smoky back rooms.

So what do fiduciary duties and ethics have to do with community association insurance? The board is the association's Risk Manager elected to protect, preserve and enhance the assets of the association. The fiduciary duty does not require that the board make the best decisions, or even a good decision. Rather, the board is required to act with a duty of loyalty by putting the association's interest above their own, act with due diligence and reasonable care, and to fully disclose any conflicts of interest.

The board is not expected to be professionals or experts that require special training. For these matters, the board is authorized to seek professionals and experts. Keep in mind that a directors and officers liability policy only provides coverage for board members in their capacity as a "board member" and not as professionals or experts.

For over 20 years I have asked Boards, CAMs and Insurance professionals what is the first question board members ask when considering insurance options? Without exception they all ask "**how much?**" The only time this is an acceptable as the first question is if all insurance, insurance companies and insurance professionals were the same. It never is! I have never seen any governing documents that requires a board save money when procuring insurance, yet that would appear to be the case based on decision makers' conduct. Yes, a board must be vigilant. The fiduciary duty, however, is to purchase the best insurance to protect the assets. Once the board has done its due diligence by listening to Community Association Insurance Professional presentations, than a cost benefit analysis can be done. Knowledge of price up front will influence your decision process and be a distraction.

Boards must understand that the association is fully insured for every risk! The question is: ***are they covered by an insurance policy, or will they be self-insured having to look to association assets, a special assessment or a bank loan to fund a claim or loss. At the end of the day, someone must pay.***

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Another problematic practice by many boards is to defer its due diligence to its independent CAM to procure and maintain insurance. This practice is inherently a breach of the fiduciary duty by the board as well as an unwitting professional error or omission by the CAM. What boards must understand is that no matter the CAM's insurance acumen, she or he is not covered for that E&O under their E&O as it is excluded and not under the D&O as they are not covered when the association sues the CAM.

The board must also keep in mind that if the board sues the CAM, the D&O policy will not defend or indemnify the CAM. To make this an even greater breach of fiduciary duty and ethical dilemma, is that the management agreement more likely than not includes an indemnification provision that would require the association to defend the CAM when the association sues the CAM for not procuring or maintaining the proper and sufficient insurance. Therefore not covered under the policy, but for all intents and purposes, covered pursuant to the indemnification agreement. This latter consequence is another reason the CAM should bring in the insurance professional.

Tip: *Insurance professionals do not charge the association for his or her time to present a proposal and answer all questions the board may have.* I am also often baffled why a CAM would not mandate that the insurance professional present the proposal(s) and answer all board questions. This is a win-win for a CAM's insurance dread and transfers the CAMs risk of E&O to the insurance professional.

Joel Meskin, Esq., CIRMS, CCAL Fellow, MLIS, EBP is the Managing Director of Community Association Products at McGowan Program Administrators. He has been a community association insurance expert for over 20 years, and is a prolific speaker and author nationwide.



ASSOCIATION IS NOT LIABLE FOR NATURAL ACCUMULATION OF ICE

By Community Association Law Reporter May 2000

Davis v. The Timbers Owners' Association, No. C-990409, Ohio App., January 21, 2000

Risk and Liabilities: Associations do not have a duty to remove from common areas natural accumulations of snow and ice that remained after the parking lot was plowed.

The rule of law in this case is straightforward. Associations, like owners and occupiers of businesses, do not have a duty to clear natural accumulations of snow and ice nor do they assume such a duty through the bylaws, declarations, and through past conduct or the routine maintenance of removing it from the property.

After Cheryl Davis slipped and fell on ice while walking through her condominium's parking lot, she sued The Timbers Owners' Association ("association"), the association's management company, and the snow plowing service hired to clear the parking lot on the grounds of negligent snow and ice removal. At trial, she maintained that her injuries resulted from her slipping on a layer of snow and ice that was left behind after the maintenance service plowed the parking lot negligently. The trial court ruled in favor of the association, the management company, and the snow plowing service and found no issue of fact supporting her negligence claims.

The appeals court affirmed the trial court's summary judgment ruling and briefly summarized the rule of law regarding snow and ice removal. Meteorologically speaking, snow and ice are facts of life in cold climes. From a legal standpoint, however, snow and ice are considered the natural accumulations of cold weather, unless it unnaturally accumulates as a result of someone's actions plus freezing temperatures. Examples of unnatural accumulations of snow and ice include a dripping canopy that creates a patch of ice or an "improperly maintained downspout that builds up and freezes."

The appeals court likened associations to owners or occupiers of business premises. Associations, like owners or occupiers of business premises, do not have a duty to remove the natural accumulation of snow and ice. Natural accumulations of snow and ice include the remnants of snow and ice left behind after an area has been snow plowed. Therefore, the court determined that Davis slipped on snow and ice that naturally accumulated after the condominium's parking lot had been plowed.

The Do's and Don'ts of Dealing With Your Landscaper

With:

Bob Ramser - Branch Manager



Turfscaper Inc.



Contract Specs - What to provide when sending out bid specs



Comparing Lawn Maintenance and Snow Bids between Contractors - Apples to Apples



Current pricing and cost increases -
Where we are as an industry

Communication and work orders - Email,
Software Systems, Point of Contact

Scheduling of additional work - What services get done when

Services that should be considered above the contract - Dormant Pruning - Aeration



The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the right side of the slide, creating a modern, layered effect. The rest of the slide is a plain white background.

Scheduling property walk through/inspections
- Time of year and expectations

No Touch List - What does it mean and how it works



Feel free to contact us for all your
landscape and ground maintenance needs!

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Turfscape Inc.

