

Condo Insights

#76 Directors & Officers Insurance

Director's & Officer's insurance ("D&O") is a specialized policy designed to protect the board members and officers of a condominium association from personal liability if they are sued for alleged wrongful acts while carrying out their duties. Condo directors and officers ("D&O") insurance protects the personal assets of board members from lawsuits alleging wrongful acts while managing the association.

For community associations to attract competent homeowners to the board, they have to ensure that board members won't be burdened with financial obligations arising from lawsuits and legal expenses for properly and legally carrying out their duties as board members. D&O insurance for condo associations covers legal defense costs, settlements, and damages awarded in lawsuits against board members.

A homeowner's or condo board member's fiduciary responsibility is to help the association succeed while adhering to the governing documents. Homeowners put their trust and confidence in board members to protect the community's quality of living, use funds wisely, and keep operations running smoothly.

Condo board members can face lawsuits from homeowners, employees, or other parties alleging breaches of fiduciary duty, discrimination, or other wrongful actions. Common allegations that can trigger a D&O claim include wrongful termination, discrimination, breach of contract, and failure to adhere to regulations. D&O insurance helps protect the personal assets of board members, allowing them to serve without fear of personal financial ruin. D&O insurance can be purchased as an endorsement to a master condo insurance policy or as a standalone policy.

D&O policies will almost always exclude coverage for losses related to criminal or deliberately fraudulent activities committed by board members or officers. Additionally, if an insured individual is sued for receiving illegal profits or remuneration to which they were not legally entitled, the policy will not cover them. A D&O insurer may not provide coverage for claims in event the condo board intentionally violated the law or acted in a manner that was not consistent with their fiduciary duty to the association.

Relevant to condo boards at this time, a condo board that intentionally and knowingly fails to comply with the New Jersey Structural Integrity Act could find itself sued by a seller or potential buyer for failing to maintain adequate reserve funds or failing to have regular structural inspections or capital reserve studies as required under the Act. Non-compliance can be considered a breach of an association's fiduciary duty, a breach of contract (the association's Master Deed) and a breach of statute, which can lead to legal action and other significant penalties. Under such scenarios, the D&O insurer would quite likely decline to provide coverage.

The NJ Structural Integrity Act imposes specific, mandatory duties on associations including conducting structural inspections by licensed professionals, performing capital reserve studies and maintaining adequate reserve funding; and making required repairs according to the inspection report timelines. Failing to meet these requirements can be framed as a breach of the board members' fiduciary duty to preserve the physical and financial well-being of the community, which might directly expose them and the association to lawsuits.

There are other things to be aware of. A condo board will not be protected by D&O insurance for a loss related to not having adequate insurance for other losses. In other words, if an association suffers a loss above existing coverage and association members or others sued the board for not maintaining adequate coverage, the D&O insurance would not protect the board. The reason for this is if the D&O did step in, it would be an incentive to be underinsured as the D&O would effectively provide the same economic protection that the proper insurance would have provided.

The cost of owning condos and operating a condominium association has gone up so much in recent years via insurance increases, inflation affecting maintenance costs, etc. The increased costs are straining some owners who are trying to get some relief by filing D&O claims. Filing D&O claims over such scenarios may actually backfire on the association and result in a situation where associations may find it harder to obtain D&O coverage in the future and would result in significantly higher D&O premiums.

Yet another concern: a local insurance agent noted that one of their client associations realized a short-term quadrupling of their D&O premiums as a result of frivolous claims filed against the board by a disgruntled unit owner.

Condo boards are best served to speak with the Association insurance agent to ensure they have adequate Directors & Officers insurance and prior to filing any claims against the D&O policy. We are not providing insurance advice and condo boards should refer to language in their specific policies and consult with their insurance agent/broker.

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