CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

Trouble in the Neighborhood: Impact of the Trayvon Martin Case and Other Exposures on Community Associations, Their Insurers and Outside Counsel

The focus on community association risk management continues to expand as the number of community associations nationwide grows yearly. The Trayvon Martin case has highlighted potential exposure to an association in connection with neighborhood watch programs and other protective measures taken on behalf of members. As the plaintiff's bar seeks to expand sources of recovery, insurers and defense counsel have been confronted with increasingly creative theories of liability against associations, their officers and directors arising from the criminal acts of third parties. What security measures must an association take, if any, to protect its residents, visitors and others? Who is responsible for supervision and enforcement of such measure? We will analyze the basis for any duties and/or obligations to provide security, whether founded in the common law, by statute, or in association governing documents. We will also address obligations, if any, to warn residents of potential criminal activity; the unit owners' abilities to take their own security measures when such conflict with the governing documents; civil litigation stemming from the failure to provide sufficient security; and the challenges facing defense counsel hired by the insurer in the face of reservation of rights and questionable coverage situations.

I. Does a Community Association Have a Duty and/or Obligation to Provide Security, and Does That Duty Differ From Retail/Business Establishments?

Despite the increasing creativity of plaintiff's counsel in drafting lawsuits to allege a breach of contract or fiduciary duty on the part of the association and association board members as a source to recover damages, most lawsuits (successful ones) have been grounded in actions for negligence. Unless common law, a statute or the association's governing documents include security on the list of association responsibilities, boards have no absolute obligation to hire security guards, install cameras and motion detectors, or implement any other specific high or low tech security measures. Of course, there are exceptions to every rule!

A. General Common Law Duties that May Apply to Community Associations.

Community associations exist in every state by reason of statute, and thus, their uniqueness in form and characteristic can be challenging from a premises liability perspective. Jurisdictions addressing premises liability standards in the context of community associations have often analogized the function of the association with that of a landlord. Similar to standards imposed upon landlords, security obligations on the part of community associations are generally limited to the physical maintenance of the community common areas or common elements, for instance, making sure lights, gates, and door locks are functioning properly. If an association's acts or omissions with respect to such maintenance foreseeably cause or enhance criminal activity on the premises, it may open the door to liability for negligence.

Like landlords in most jurisdictions, associations are not an insurer of the safety of unit owners and their guests. While the association functions as a landlord with respect to common areas, in most jurisdictions, this comparison alone does not impose upon an association a general duty to protect third parties and association members from criminal activity absent foreseeability of criminal activity, the approach used in the majority of jurisdictions. In terms of foreseeability, support can be found for almost any theory or position. Despite the differing jurisdictional standards on what is required to impose liability upon a community association for criminal activity, it can generally be agreed that a plaintiff must prove that the association had a duty to have provided security and failed to take reasonable actions to undertake security measures.

B. Special Relationship Theory of Liability

A minority of states follow a "special relationship" test reflected in the RESTATEMENT (SECOND) OF TORTS §314a and 315, which states that unless there is a special relationship which imposes a right of protection, there is no duty to control the actions of a third person to prevent them from harming another. At least with respect to the common areas, the majority of the courts addressing the imposition of liability based on the Restatement's special relationship test have expressly rejected the idea that the landlord-tenant relationship is a special one. Few courts have addressed that issue in the context of the community association and the unit owner. In those jurisdictions finding no special relationship in the context of landlord-tenant relationship, it is reasonable to conclude a similar result for community associations. A small number of jurisdictions have directly confronted the issue in the context of condominium associations and have stated that no special relationship exists between the association and the unit owner. Because case law has yet to catch up with statutory creature known as the community association, it is reasonable to anticipate that this theory of liability will continue to be tested in jurisdictions which have not addressed it.

C. Business Owner-Invitee Theory of Liability

Over time, community associations have transformed from traditional residential-only properties to mixed commercial-residential use properties. This changing demographic brings with it a special set of challenges in terms of the nature and extent of the associations' security obligations. One theory of liability being raised by the plaintiffs' bar in this context is premised upon the RESTATEMENT (SECOND) OF TORTS §344 which states that liability will be imposed upon a possessor of land when a member of the public is on the premises for a business purpose.

In the residential only association, tenants/owners do not live where the general public is invited to come. Thus, it would seem a stretch to argue that a community association might qualify as a possessor of land who holds it open to the public within the meaning of Section 344. While this potential basis for liability against a community association seems unlikely in the context of the residential only property, with the

increasing popularity of mixed residential/commercial use properties, we may see this theory of liability on the rise.

When the mixed use property includes a grocery store or a restaurant/bar, there is a stronger argument to be made that the public is expected or invited to be present in common areas of the association shared by residents and patrons of the commercial space. Application of this legal principal may also depend on whether the plaintiff injured by a criminal act on a mixed use property can persuade the court that the association is functionally the equivalent of a business. Do higher association dues paid by a commercial owner/tenant by virtue of a larger share of association property translate into an expectation that some amount of of association dues should be apportioned to protect the public invited or expected to be there by virtue of the commercial tenant's operations?

D. Voluntary Assumption

Whether a community association's obligations to maintain common areas encompasses a duty to make the premises safe from foreseeable criminal activity may also depend upon whether the association has assumed a duty of protection. Promising protections of security but failing to provide them opens up the association to liability. When the association has assumed some duty of protection, or acts in such a way that leads the tenant, owner, or guest to believe such protections exist, the voluntary assumption to do so may be ground for liability, even independent of foreseeability considerations, particularly if the failure to carry out the safety measure in an adequate manner was the factor in the perpetration of the crime.

For the purposes of this discussion, what is the impact a community association's voluntary assumption to protect owners and their guests from criminal activity by putting in place security measures such as cameras, security guards, and security lighting? Case law provides us with a wide range of scenarios that can lead to liability. The following reflect only a few of the many examples from these cases: (1) advertising a community as gated, but allowing a history of frequent malfunctioning of access and control gates, (2) a board's awareness of crimes on nearby/adjacent properties but failing to take steps to warn its own tenants, (3) hiring security guards, but reducing personnel due to budget constraints, and (4) establishing internal protocol for reporting incidents on the property but failing to follow them, thereby simply ignoring the risk.

E. Governing Documents as a Source of a Community Association's Security Obligations.

Some community association governing documents require certain security measures to be provided as a service to the unit owners. An association's security obligations may be established and defined in sources which commonly include the master deed (or declaration) including covenants and restrictions, bylaws, and resolutions by which specific rules and regulations are established. The association's board of directors have legal obligations in the exercise of their management powers, including to (1) obey the governing documents, (2) conduct activities with due diligence, and (3) effectively carry out their fiduciary duty to the association and its members. Based upon those legal obligations, community associations, including their boards and members, have commonly been sued for criminal acts of third parties on theories of (1) breach of a duty to provide adequate security, (2) breach of contract, and (3) misrepresentation. The board members must exercise due care to use their best judgment and care. The board's responsibilities are generally discharged under a standard of reasonableness, judged by whether a decision made was arbitrary or capricious, non-discriminatory, and made in good faith for the common welfare of the owners/tenants. In legal action against a board/association arising from criminal activity, if the board analyzed its obligations with legal counsel under the association governing documents and reviewed other factors such as the foreseeability of danger within the community, these actions can go a

long way towards establishing that the board/association acted in a reasonable and prudent fashion in carrying out any duty of protection it may have to the plaintiff under the circumstances.

Does the unit owner have the ability to take their own security measures if those actions conflict with the association's governing documents? Boards should take the owner/tenants security concerns seriously, and so long as the requested self-help measure is not strictly prohibited and create no nuisance/harm to other owners, not approving reasonable security measures may lead to liability. For example, in Frances T. v. Village Green Homeowners Association, 42 Cal.3d 490, 723 P.2d 573 (1986), a California court held an association liable for her assault and rape where the unit owner, concerned with a recent series of nearby criminal activity, was forced by the association to undue her self-help safety measure of installing additional external lighting around her unit because its installation and presence violated the community's covenants and restrictions.

On the other hand, the bounds of the governing documents provide protection to the board as demonstrated in a 1991 Massachusetts case, Hawkins et. al. v. Jamaicaway Place Condominiums. The court rejected the claim of negligence brought against the association by the unit owner after the board disapproved the owner's request to install bars on the outside of her windows. The request would have violated the association's architectural improvement provision, and the unit owner could not obtain the requisite approval of 75 percent of the other association owners to circumvent the restriction. Despite the subsequent rape of the plaintiff unit owner, the court ruled that she could have installed the bars on the inside of her windows at her own expense without having violated the association governing documents. What actions might also this association have taken to limit its exposure in this case?

II. Civil Litigation Stemming from Community Association Neighborhood Watch Groups and/or Failure to Provide Sufficient Security (25 Minutes)

A. Triggering Insurance Coverage

What policy forms are potentially triggered by claims arising due to inadequate security? As with any insurance analysis, the determination is premised on the claim presented and the damages sought. The Trayvon Martin case highlighted claims for bodily injury arising from the use of a neighborhood watch program. However, claims can arise both from the implementation of security measures, security measures gone awry, and the failure to implement any security. What coverages, if any, are implicated by the wayward security camera, or the nosy nightwatchman?

Further, as the damages increase, so does the creativity both of the Plaintiff's bar, and the insureds, in seeking insurance coverage. The General Liability Coverages for "bodily injury", "property damage" and "personal injury" are potentially triggered. There may be issues as to whether an "occurrence" is alleged, as well as whether there is a "bodily injury", depending on the particular's state's interpretation of that term.

What about possible D&O claims? In connection with the Trayvon Martin matter, Traveler's Casualty and Surety Company filed a Petition for Declaratory Judgment Relief in a Florida federal district court against the Retreat at Twin Lakes home owners' association and the personal representative of Trayvon Martin's estate. George Zimmerman was the designated neighborhood watch captain/coordinator for that community. Travelers had issued a directors and officers (D&O) coverage policy to the HOA. The personal representative of Martin's estate had made a claim against Traveler's policy. Traveler's asserted it had no duty to defend or indemnity the HOA, because coverage for the claim was excluded. Are plaintiffs really suing for something that is insurable?

B. The Insurance and Liability Investigation

With the tender of a security-related claim, the carrier will investigate on two fronts (1) coverage defenses and (2) liability defenses. Key to many security-related claims is an allegation that the insured, aware of prior criminal activity or security complaints, failed to act. The insurer will conduct an analysis of the notice conditions of the policy, and need to determine whether there was an issue in connection with reporting. In addition, many insurance applications ask questions concerning the use of security, including whether armed security are employed. The analysis may reveal misrepresentations in the application to be addressed.

Often, notice to the carrier is pre-litigation or even before the assertion of a claim by any apparent victim. The insured may not have counsel or even contemplate a full investigation. The steps taken by the carrier on this notice will often be key in a full analysis of the insured's exposure and possible resolution of the claim. The carrier will play a key role in the investigation, including documenting the alleged crime, identifying and interviewing witnesses. The insured's cooperation in connection with such investigation is key, and the failure to cooperate may impact the insurance coverage available.

A number of limitations may impact the coverage available, including any criminal acts exclusion, the expected or intended injury exclusion, and/or potential public policy limitations.

As part of this initial investigation, possible risk transfer opportunities must also be investigated. For example, if the insured employed a guard service for a gated community, or security services, is there the possibility for contractual indemnity and/or additional insured status to the benefit of the insured?

C. The Challenges of Representing and Defending Community Associations and Their Board Members, Counsel's Perspective

Defense counsel retained by the insurer in questionable coverage situations, particularly when the insurer has agreed to provide a defense to the claim under a reservation of rights, face special ethical challenges. Having multiple clients in the same transaction creates the possibility of a conflict of interest, particularly when one of the clients – the insurer – reserves its right to deny coverage. However, even in states where insurance defense counsel only represents the insured association, conflicts of interest can still arise, because the insurer that pays for and is contractually entitled to control the defense may have interests that are inconsistent with those of the policyholder. Counsel retained by an insurer to represent the insured association under a reservation of rights scenario face special challenges in determining what information can and cannot be shared with the insured in complying with the insured's litigation guidelines.

Counsel selected and retained by the association's insurer are commonly requested to comply with certain litigation guidelines and everyday practice responsibilities in the form of status reports discussing ongoing discovery in the litigation, cost containment policies, litigation guidelines and standardized billing procedures. What happens if the defense counsel informs the insurer of facts that take the claims out of coverage? Does this breach defense counsel's fiduciary duty to the insured? If there is a question of coverage under the policy and the only client is the insured association, then counsel may not reveal adverse confidential client information to the insurer concerning the discovery and litigation without explicit informed consent of the insured. Furthermore, if there is a question of coverage under the policy, and the insurer and insured association are co-clients, the lawyer may not act inconsistently with the interests of either one. The status of the relationship between insured association, its insurer and defense counsel is open to interpretation, and much debate exists about the proper conduct of counsel facing these potential or actual conflicts of interest.

Within the triangle of this special relationship, concerns relating to privilege of communications also arise. Federal common law and the vast majority of state jurisdictions do not recognize any type of insurer-insured privilege. The attorney-client relationship protects only those communications between a client and an attorney for the purpose of obtaining legal advice. Due to the nature of insurer's guidelines governing retained counsel, some of those communications between an insurer and the defense counsel retained for the association are not inherently protected from disclosure to third parties under the attorney-client privilege unless some exception exists such as the "joint defense" or "common interest" doctrines.

Whether such communications are protected from disclosure to outside parties depends upon a variety of factors including the insurer's coverage position. If the insurer is controlling the litigation and accepts a tender of defense without reservation, then most jurisdictions hold that tri-partite communications will most likely be protected. On the other hand, if an insurer never had a right to control the defense or if it relinquished that control to the insured, courts are reluctant to shield communications between the insured association, its counsel, and the insurer from production. After all, what common interest is shared between the insurer and the insured association as potential clients when the insurer is defending with a reservation of rights, much less when it denies having any duty to defend and indemnify?

II. Advising the Board Members About Their Security Measures and Voluntary Community Watch Organizations (10 Minutes)

The key question for association board members is what should they do or not do to reduce the risk of being sued and/or having a jury find that they acted negligently or breached a fiduciary duty with respect to their community's security needs? There is no "one size fits all" approach to every association's situation.

D. Neighborhood Watch Programs

Simply because a person purchases a home or condominium in a community association does not mean that their rights to police and fire department protection no long exist or that those public obligations are then transferred to their community association (unless of course, the association governing documents undertake to provide police force and fire department services!). Yet, increasing crime rates, association budget constraints and other factors have seen a rise in the formation of neighborhood watch programs within community associations. Advising the board on neighborhood watch programs in their communities, whether board sanctioned/established or not, is murky territory for the practitioner.

Scenario One: The community association does vote to form a board-sanctioned neighborhood watch program.

- Not every volunteer activity proves to be safe. Should the volunteers be required to sign a release protecting the association in the event they are injured or killed while undertaking their neighborhood watch duties? May give rise to a claim that the association who selected the members of the watch group breached its fiduciary duties if it did not vet the members properly.
- May give rise to a claim for negligence on the part of the board if the board allows a hot blooded resident or known gun carrier to become a member of the watch group. Should the volunteers be screened to ensure that they have not had problems with violence in the past?
- How much oversight from the board is required? May have negligence if the board doesn't monitor the watch group committee on a sufficiently regular basis. Should the association regularly monitor the activities of the neighborhood watch group and/or establish protocol for carrying it out?

Scenario Two: The community association declines to establish a neighborhood watch program.

- May give rise to a claim that the board breached its fiduciary duty by not establishing the program.
- An association often incurs greater liability risks by assuming and then eliminating or reducing a security-related service than by never having provided the service in the first place**.**
- It is advisable for an association to know about a volunteer activity, but take no responsibility for it by saying they are not endorsing it? If a dangerous activity, volunteer or otherwise, is taking place on property over which the association has authority or control, should the board get involved to either regulate or stop that activity?
- Firm counsel for community associations may encourage the association not to have a board sanctioned neighborhood watch group, but allow one to be formed with the help and guidance of the local police department programs.
- In such case, what can the board do to safely distance itself from having any official connection to the volunteer watch group? Decline to control or monitor volunteers? Not allow board members to serve on the watch group or its committees?
- Should the board take steps to regulate the watch group activities by establishing rules that prohibit volunteers from carrying weapons, badges, or wearing uniforms? Should it establish rules or regulations that enforce procedures established by local policy authorities such as "do-not-engage" or "observe and report policy?"

B. Cameras, surveillance versus security

Associations that do install cameras or other security devices should make sure they are working properly. They should also consider the intended purpose of the cameras, including whether they are being actively monitored or are for passive recording purposes only. It should be explained to owners that the cameras are for surveillance/recording purposes only and whether they are monitored. Why? Communicating the intended purpose of cameras as "security" and then allowing owners/tenants to believe cameras are actively monitored when they are not has been successfully argued as leading the owner/tenant to the belief that security cameras provide a measure of protection, creating a false sense of security and reduced vigilance by the individual for their own safety. If a crime occurs, the individual may falsely believe help is on its way.