

GET THE RIGHT INSURANCE TO PROTECT YOUR ASSOCIATION

It's time to replace your Association's roof and you are presented with a very official-looking contract by a contractor that has worked for the Association before. Everyone is anxious to get the roof work done and everything appears to be in order, so you guess there would be no problem with you simply signing...

AAGGGGHHHH....STOP!

Perhaps the least sexy task a manager or Board member has to perform and one that might be criticized for causing delay, is taking actions necessary to ensure that any contractor retained by the association has the right kind of insurance to provide the Association all the protections to which it is entitled. Verifying adequate Commercial General Liability, Automobile Liability and Workers' Compensation coverage, with no exclusions for association work, and the correct type of additional insured endorsement are absolutely essential. If you are like most people, right about now, your eyes have glazed over and you are thinking about what's for dinner. DO NOT STOP READING. Here are the basics that you need to know and follow to do your job.

Step One: Confirm the Contractor Has Coverage for Work on Common Interest Developments.

Most contractor liability policies contain endorsements that exclude work performed at homeowners associations...period. Others exclude work on common area (as opposed to an owner's separate interest unit or lot), and still others exclude any work done directly for an association, but not for a homeowner. Because there are so many different variations of this type of exclusion, you will need to review the specific policy/provision to be sure.

Getting information about a contractor's insurance policy can be difficult, and will probably require that you talk to the contractor's insurance broker directly. Your best bet is to tell the insurance broker what you are looking for, then ask, in writing, for a copy of the Declarations sheet and any endorsements excluding coverage for work at associations and/or multi-family homes.

Even if you feel comfortable reviewing the exclusions yourself, or if they appear clear (which is not often the case) it would be a good idea to rely on the Business Judgment Rule and consult the association's legal counsel or its insurance broker for assistance. Another option is to ask the contractor's insurance broker to provide you with a short letter assuring the Association that the policy in question does not contain an exclusion for work performed for an association. Seeking guidance from experts owing allegiance to the Association as opposed to the contractor, however, is the better course.

Step Two: Get the Correct Additional Insured Endorsement.

First, let's be clear. A "Certificate of Liability Insurance" is not the same thing as an Additional Insured endorsement, even though it may show the Association's name at the bottom left corner in the "Certificate Holder" box. What you are looking for is a very particular, separate endorsement, with the names of the additional insured specifically listed.

The gold standard of additional insured endorsements is known as form CG 20 10 (11/85). This endorsement extends direct coverage to the named insureds for any liability "arising out of" the contractor's work. This means that if the Association is sued because of work performed by a contractor, the association can go directly to the contractor's insurance carrier and demand to be defended. Without an additional endorsement, the Association would be forced to pay for its own attorney to defend against the complaint (depending on whether the contract called for defense and indemnity of the association by the contractor). Your association may be forced to sue the contractor that caused the incident in the first place for (implied) indemnity. At that point (i.e., once the contractor has been sued), the contractor's insurance carrier may, but probably will not, provide an attorney to defend the association. Obviously, it is in the association's best interest to be able to go directly to the contractor's insurance carrier for a defense, rather than having to expend its own funds on suing the contractor first.

Now, here's the wrinkle: obtaining a CG 20 10 (11/85) additional insured endorsement has become very difficult in California over the last several years because of the breadth of coverage provided by that endorsement. There are a number of other forms of endorsements that insurance brokers will try to provide instead, and that endorsement usually comes with an email that says, "this is equivalent to the CG 20 10 (11/85)," but *it is simply not true*. The coverage provided under most alternative forms is less than that provided under the CG 20 10 (11/85).

One of the most common alternative endorsements we see issued is the CG 20 10 (07/04). This form only provides coverage for ongoing work, and does not cover "completed operations." In other words, once the contractor has completed the job and left the job site, the additional insured coverage terminates. The other form we see frequently is the CG 20 37 (07/04), which provides coverage only for completed operations, and not for ongoing work. The other big difference is that these forms provide coverage for liability "caused by" the contractor's work, which is not as broad as the coverage provided by the CG 20 10 (11/85), which includes coverage for any liability "arising out of" the work.

Sometimes you will be able to obtain the CG 20 10 (11/85) endorsement. Other times, the contractor's insurance broker is simply unable to provide that endorsement because the insurance carrier will not allow them to issue it. In that case, the best thing alternative is to request the CG 20 10 (07/04) **AND** the CG 20 37 (07/04) so that additional insured coverage extends to both ongoing and completed operations. Regardless of the exact form of endorsement provided, it is critical that it specifically names the additional insureds, which (in most cases) should be, "the Association, its officers, directors, agents, employees, members and their tenants."

Many insurance companies now have their own forms that can provide similar coverage. To be sure you are getting the right kind of coverage to protect the Association, you should consult with your association's attorney and/or insurance broker.

Step Three: Make Sure the Contract Specifically Requires the Right Kind of Insurance.

In order to be provided the right types of insurance, with adequate coverage and the appropriate additional insured endorsement discussed in this article, you must make sure that the contract includes very specific language on these topics. In addition to providing details about the minimum amounts of insurance required (usually \$1,000,000 in Commercial General Liability Coverage per occurrence, although we have recently seen a number of associations requiring \$2,000,000 as a minimum), your contract should also state, “The required Additional Insured endorsement to the Commercial General Liability policy must be written on ISO Form CG 20 10 (11/85), or its equivalent.” Including this language will give the association (and the contractor) the leverage needed to demand the additional insured endorsement it bargained for in the contract.

Do not accept without review, hopefully by counsel, contracts presented to you by even the most reputable contractor. Clauses in the contract requiring specific insurance and *indemnity* are probably not present in standard contractor contracts. It is your job to make sure such protective language is included in the contract, and don't be reluctant to seek outside professional assistance to ensure that such language is added.

CONCLUSION

Ensuring that the association is adequately protected before a contractor commences work is a critical part of the fiduciary duty owed to all homeowners. The role of the attorney in reviewing every association contract is for another article, however, with the complexities of insurance policies and the safe haven provided by the Business Judgment Rule, seeking input from the association's counsel and insurance agent are strongly recommended whenever the association enters into contracts with third parties. Put in the time, consult experts, and do your due diligence by following the steps above, and you will have done your job well and protected your association.