ROBERTS MARKEL WEINBERG BUTLER HAILEY PC

AUGUST 2018 | COMMUNITY ASSOCIATION NEWSLETTER

The Texas State Bar: A Resource for Practicing Law in Texas

by Cherie Wilson

To practice law in the State of Texas an attorney is required to be a member of the State Bar. The State Bar assists attorneys with continuing education, offers a mentor service and helps attorneys become board certified in various areas of the law. All in all, it is an organization that works to insure its members can reach their fullest potential, as well as, providing sound legal advice to the public.

At RMWBH, attorneys are encouraged to attend and speak at State Bar Continuing Education Conferences related to their area of practice. Collaborating with one's peers to raise themselves to a higher level of success does not only benefit our attorneys personally but also professionally. Several attorneys from our Real Estate and Community Association practice areas recently were in attendance for the 40th Annual Advanced Real Estate Course. It is a privilege to attend such event, but it is an honor when one is invited to speak as part of the curriculum. At the year's event, Brady Ortego presented on Social Media and Property Owner Associations and Mia Lorick and Clint Brown presented A New Dawn for Short-term Rentals. In attendance as well were Marc Markel, Cliff Davis, Sipra Boyd, Jane Janecek and Tony Kuo. RMWBH is proud to support, collaborate and provide education in a peer setting allowing us to continue share education with other members of the bar.

IN THIS ISSUE:

4 Steps in Filing an Insurance Claim on Behalf of a Community Association

By Marc Markel and Cherie Wilson

In this article we will discuss the best practices and steps to filing an insurance claim. The average community association has an array of insurance policies providing coverages sufficient to protect the community from liability risk and property exposures. Policies should be written through insurance carriers that are admitted to practice in the state of Texas on policy forms that benefit the community association. The steps and discussion within this article are based on these factors.

1. When does a claim exist?

The definition of a claim can be the bone of contention. We suggest either reading the policy or do what I would do if I was a board member or a community manager and make no assumptions. If a threat of suit or an incident occurs in one of your communities take affirmative action, call your insurance agent. A board member or community manager receives a letter from a homeowner threatening suit as a result of the homeowner receiving a deed restriction enforcement letter, this is a claim. It should be reported as a notice of claim or a notice of a potential claim to the insurance agent. The board member or community manager becomes aware that someone has slipped and fallen at the community pool suffering an injury, this too is a potential claim and should be reported. In the back of your mind you might be thinking, this is the homeowner that is always making threats of a law suit and he never carries through on his threats. Therefore, this isn't worth worrying over…..WRONG. This may or may not be a claim, but the best practice and course of action is to turn in as notice of a potential claim to the insurance agent.

2. What makes turning in a claim so important?

There are some that may be under the impression that a formal letter of intent by an attorney or an actual law suit should be received before a claim is filed. There is also the impression that turning in a notice of a potential claim will raise the insurance rates. Neither of these are true. The moment a written notice of the intent to sue is received notice should be given to the insurance carrier. Written notice can be received via hand delivery, snail mail, or email from the upset party. The array of insurance policies and forms, previously mentioned, each have different requirements for timeliness of a claim being filed. A community has a general liability policy, covering the association for bodily injuries and property damages, is normally an occurrence policy. This means that the insurance policy is available to handle claims for events that occur during the policy period. A claim will be filed on the policy that reflects the date the claim took place, even if that is last year's policy. A directors and officers policy is almost always a claims made policy. This policy requires the claim to be filed within the policy

period and within 30 days of receiving the written notice of intent to sue, by not filing a notice of potential claim with the insurance carrier a community runs the risk of losing its available coverage. This is why you should always report all potential claims, as well as, claims that you are certain of.

3. Who should the claim be reported to?

Good question. First and foremost, you should report the claim to your professional insurance agent/broker. Give the agent/broker a call providing them with the details of the situation to report the notice of claim or potential claim to the appropriate insurance carriers. As a board member or community manger you should not be making a determination of which insurance carrier and policy to turn a claim into, as often it is not always obvious. Each insurance policy has a section for turning in a claim. The board and community manager could also read through the hundreds of pages of insurance policies to locate the claim reporting section, as it is specific to what is needed for reporting, which department and finally which address to mail the notice of potential claim. Let's just say this could slow the process down by not utilizing your insurance agent/broker. Let your agent do what they are trained to do on your behalf. By not turning in a claim properly it is quite possible that the insurance carrier could take the position that the claim was not properly reported and deny the claim.

4. Is your job complete now that the claim is filed?

Once the claim is filed are you finished and can go back to your Netflix subscription? NO. NO. NO. This is a potential for liability, as the board is responsible for operating the association with good business judgment. The board should, with the assistance of the community manager, monitor the claim. If a response is required, the association and the insurance company through an appointed attorney are going to provide a response. The claim will run much more smoothly when you are working with your insurance agent and attorney to mitigate any chance of contradictory responses. If the insurance carrier appoints counsel you should monitor the action of the defense counsel. The association is the client, not the insurance carrier, and the attorney should report to the board regularly. It is ultimately the board and management company's responsibility to make sure they are receiving up to date information on the claim status. Check in with your attorney every few weeks if you're not receiving updates.

Finally, a few tips of best practices to follow. When filing a notice of potential claim, it is important to stay in touch with the insurance carrier with any updates that could deem the notice to be a "non-claim". There should be no increase to the policy rate from a notice of potential claim. Lastly, it is times like this where a community finds itself "shopping" insurance policies. Before making any changes vet any potential claims with your insurance agent and make sure they are reported to the carrier. Failure to do this may in fact result in no insurance coverage if a claim subsequently arises after the current policy expires. The carrier will only defend covered claims made and reported during the policy period.

As you can see the claim process requires action by the board and the community manager. Be sure to consult with the association's insurance agent/broker and attorney so that no errors occur in this process.

Marc Markel

Marc is an equity shareholder with the firm's Real Estate section and is a leader of the Community Association Team. He has actively defended community associations and their volunteers in litigation and frequently assists developers through their due diligence process and creation of community process.

Cherie Wilson

Cherie Wilson is a graduate of the University of Mississippi. Over an extensive career in the insurance industry she has held an insurance license in multiple states, and currently holds a Texas insurance license. Cherie joined RMWBH as Marketing Manager in 2015. In 2017 Cherie was named Director of Marketing where she now works with the shareholders of the firm in its strategic planning efforts to assist our attorneys in providing legal services and education to our broad client base.

Security Cameras in Deed Restricted Communities

By Brady Ortego

The implementation of security cameras and surveillance systems by property owners' associations has been a point of controversy over the past few years. Many associations welcome the idea due to the marketed benefits cameras may provide, such as preserving common areas, discouraging vandalism, a sense of security for residents (possibly misplaced) and/or providing evidence of the failure of an entry gate operation. However, the legality relating to cameras has raised concerns and introduced new dilemmas for associations. This article focuses on the statutory issues surrounding security camera use in deed restricted communities and applies to both single-family homes and condominiums.

"Alarm System" Definition

The Texas Occupations Code offers a definition for alarm system that includes:

(A) electronic equipment and devices designed to detect or signal:

(i) an unauthorized entry or attempted entry of a person or object into a residence, business, or area monitored by the system; or

(ii) the occurrence of a robbery or other emergency;

(B) electronic equipment and devices using a computer or data processor designed to control the access of a person, vehicle, or object through a door, gate, or entrance into the controlled area of a residence or business; or

(C) a television camera or still camera system that:

(i) records or archives images of property or individuals in a public or private area of a residence or business; or

(ii) is monitored by security personnel or services (Tex. Occ. Code §1702.002(1)(A-C)).

The term "alarm system" does not include a telephone entry system, an operator for opening or closing a residential or commercial gate or door, or an accessory used only to activate a gate or door, if the system, operator, or accessory is not monitored by security personnel or a security service and does not send a signal to which law enforcement or emergency services respond (Tex. Occ. Code §1702.002(1-a)).

If an association wishes to obtain surveillance cameras for purposes such as to monitor ingress and egress in common areas of a community (i.e. pool recreation center), then it would appear that the camera system would fall under the definition of "alarm system" and the exceptions listed above would be inapplicable. Thus, it is likely an association's security camera system would be subject to Chapter 1702 of the Texas Occupations Code (the "Code").

Licensing

According to the Code, unless a person holds a license as a security services contractor, a person may not act

as an alarm system company or perform any services of an alarm systems company (Tex. Occ. Code §1702.102(a)(1-2)). The Code further states that a person acts as an alarm system company if he/she sells, installs, services, monitors or responds to an alarm system or detection device (Tex. Occ. Code §1702.105(a)(emphasis added)). The term "Person" is defined in Section 1702.002 and includes an individual, firm, association, company, partnership, corporation, nonprofit organization, institution, or similar entity (Tex. Occ. Code §1702.002(16)). The Code does not define the term "monitor".

If an association wishes to maintain private surveillance cameras which would allow board members to view foot traffic either live or via recordings and other activity within a neighborhood or on common areas, then it may be considered "monitoring" under the Code. If board members are "monitoring" cameras and are not licensed, as provided under the Code, then this activity may constitute a violation. This may also be the case if the association simply installs and services the security cameras.

Given that an association's security camera system is likely subject to the Code, it may be necessary for the association or its board members to obtain the requisite license in order to maintain the system without violating the Code. Alternatively, the association has the option of employing the services of a licensed security team to install, monitor and service the surveillance cameras.

Brady Ortego

Brady Ortego is a managing shareholder of the firm's San Antonio office and is a member of the Real Estate section as a leader of the Community Association Team. His practice areas include Community Association Law where he represents a variety of property owners' associations across the state of Texas. He is board Certified in Residential Real Estate Law by the Texas Board of Legal Specialization and a Fellow in the College of Community Association Lawyers. Brady graduated from South Texas College of Law in 2003.

Possible Exception

There is an exception noted under Chapter 1702 of the Texas Occupations Code. The provision states that the chapter does not apply to:

(1) a person who owns and installs a burglar detection or alarm device on the person's own property or, if the person does not charge for the device or the installation, installs the device for the protection of the person's personal property located on another person's property and does not, as a normal business practice, install the devices on the property of another (Tex. Occ. Code §1702.328(1)).

It could be argued that an association's surveillance camera system would be considered a "burglar detection or alarm device" that could be installed on its own property (i.e. the common areas). Therefore, the security system would not be subject to the Code. Nonetheless, it is unlikely that an association would be "installing" the cameras on its own as required by the provision above. Furthermore, the Code provides hefty penalties for violations of the provisions therein. Section 1702.381(a) provides that a person who violates the statute and does not have a license or license application pending may be fined up to $10,000 for each violation (Tex. Occ. Code §1702.381(a)).

Our firm has discussed this issue on multiple occasions with the Texas Department of Public Safety; however, we were never provided with a firm answer as to whether the exception above applies to property owners associations. Nonetheless, after speaking with the leadership of the private security department, we understand that both entities and individuals may obtain the requisite license. For more information, we recommend contacting the Texas Department of Public Safety, Regulatory Services Division/Private Security Department.

Considerations

There are many marketed benefits to the use of security cameras in a community. Security cameras may be utilized to help protect property, deter crime and monitor gate operation. Nonetheless, in addition to the penalties described herein, there may also be ethical concerns associated with security camera monitoring by the association and its board members if a license has not been acquired. Moreover, there may be community backlash over the idea that board members are watching owners' movement in common areas or other locations in the community. These issues should be considered before an association approves use of security cameras within a neighborhood. An association should also consider the issue of requests by owners to view the images captured by the cameras. The images may be an association record and subject to review by the membership as set forth in the Business Organizations Code as well as Chapter 209 of the Texas Property Code.

Conclusion

In summary, if an association wishes to install security/surveillance cameras on property, the association should have its attorney review the provisions under Chapter 1702 of the Texas Occupations Code beforehand. The definition of "alarm system" under the statute appears to encompass the traditional security camera technology most associations are seeking (i.e. video recording cameras that may be monitored). Although there is an argument that Chapter 1702 may not apply to an association's installation and monitoring of security cameras pursuant to Section 1702.328(1) provided above, it is unlikely that an association would install cameras itself without utilization of a contractor hired for such purpose. Ultimately, an association or its board members should obtain a license in accordance with the statute to ensure the association is not penalized in the future.

Don't Let Your Indemnity Hang You Out To Dry

By Rick Anderson

Whether it be a contract for something like lawn service, pool maintenance, or construction projects, community associations and community managers must exercise care before signing on the dotted line on contracts with vendors and service providers. A lot of associations and management companies simply sign the contract that is given to them by the vendor, which is usually a mistake, because the vendor creates a contract that benefits them. Just because the contract may be for a small amount of money, it doesn't mean it shouldn't be revised to include provisions that protect the management company and the community associations that they represent. Given the legal hurdle that exist, clauses that transfer risk should be given a careful look to see that it is in fact accomplishing the intended outcome. This article will address the common issues raised when parties attempt to contractually transfer risks.

1. A broad hold harmless provision is not enough.

An indemnification provision can be as important as contractual terms and payments. However, a hold harmless or indemnity agreement is only an agreement for reimbursement. Unlike a liability policy, an agreement to indemnify is not an agreement to provide a defense. Basically, after the community association or the management company spends its own money to defend an action, the indemnity agreement with the vendor only allows for going back to the vendor to request reimbursement. It is not an agreement to provide a defense.

Furthermore, indemnity agreements can be problematic because in most cases they are "general indemnity" provisions. If an indemnity provision is not sufficiently specific, a court may refuse to enforce the indemnity agreement for things like the indemnitee's own negligence or strict liability.

In Texas, the "express negligence" doctrine is followed by the courts. This means that an indemnification agreement is not enforceable to indemnify a party from the consequences of its own negligence unless it is specifically stated within the agreement. If the indemnification language is not specific when a vendor agrees to indemnify an association and management company, the indemnity clause will generally have limited enforceability where the negligence of the management company or community association causes the damages. Additionally, Texas courts have construed general indemnification agreements to not include indemnification for damages arising from the negligence of the party to be indemnified.

To have a vendor indemnify a community association and its management company for an act of their own negligence requires careful drafting. Such a clause must be clear and unequivocal and expressly state that liability for negligence or strict liability is attributed to the indemnitor. The clause must also be conspicuously presented where it appears in bold face font and conspicuous type—basically the clause needs to stand out.

Rick Anderson

Rick is a shareholder with the firm's litigation section. His practice focuses on complex commercial litigation, business litigation and professional liability. He is Board Certified in Consumer and Commercial Law by the Texas Board of Legal Specialization. Rick graduated from Baylor University School of Law in 2007.

2. Some indemnity provisions are prohibited by Texas law.

Despite having a well drafted indemnity clause, Texas law may still prevent the application and enforcement of an indemnity clause in certain scenarios. The most common anti-indemnity statue facing that community associations and management companies may face with vendors involve construction. This statue is known as the Texas Anti-Indemnity Act. The provisions of the Statute cannot be waived, and any provision in a contract is void to the extent that it requires one party to indemnify another for claims arising out of the fault of the indemnitee.

The Statute broadly applies to construction contracts and agreements entered on or after January 1, 2012, and it prohibits indemnification of someone for their own negligence. The Statute also impacts additional insureds by providing that an indemnitor cannot be required to purchase additional insured coverage if that additional insured coverage would be prohibited when examined considering the indemnification agreement.

There are some exceptions that exempt some agreements from the Texas Anti-Indemnity Act which include the following:

- Insurance agreements other than additional insured provisions
- Breach of contract warranty claims
- Loan and financing documents
- General agreements of indemnity required by bond sureties
- Workers compensation agreements
- Governmental immunity protections
- Agreements covered by Texas Oilfield Anti-Indemnity Act
- License or access agreements with railroad companies
- Indemnity provisions related to copyright infringement claims
- Construction contracts pertaining to single family homes, townhomes and duplexes
- Public works projects of municipalities
- Joint defense agreements made after a claim is made

Although not commonly applicable to community associations and management companies, there are other Anti-Indemnity acts that would void or prohibit indemnity clauses. Those additional acts are:

- **Oilfield Anti-Indemnity Act** - Provides that any "agreement pertaining to wells for oil, gas, or water or to a mine for a mineral" which purports to indemnify a person or entity against liability that (i) is caused by their sole or concurrent negligence and (ii) arises from personal injury or death; property injury; or any loss, damage or expense that arises from personal injury, death or property injury is void and unenforceable.
- **Architects & Licensed Engineers** - Voids any provision in a construction contract requiring a contractor to indemnify a registered architect or licensed engineer for liability relating to defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or negligence of the architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction plans, designs, or specifications that are part of the construction contract. This statue also voids provisions in a construction contract (other than a contract for a single family or multifamily residence) requiring a registered architect or licensed engineer to indemnify an owner for their own negligence.

3. Securing additional insured status.

Indemnification, is not necessarily "insurance" against liability, and that an "insurance indemnification provision" should be included in the contract language. For example, if a contracted roofing company drops a piece of equipment and in so doing damages the building or a unit owner's personal property, without an insurance indemnity clause, the building's insurance provider would likely have to fight the claim. You want the contractor whose work or presence on your property that caused the damage to occur to be the responsible for handling it – not the community association's insurance company.

When negotiating indemnity issues with a vendor, associations and management companies will want to seek additional insured status under the vendor's insurance policies. A benefit to being an additional insured is to have someone else's insurer pay the cost of repair as well as defense cost up front. The duty to defend under a policy is broader than the duty to indemnify. So, if a claim even potentially falls within the scope of coverage, the insurer's duty to defend is triggered. As a result, it's to the advantage of the additional insured to have this broad defense provided at the cost of the named insured's insurer.

Many general liability carriers offer endorsements addressing additional-insured status. These endorsements typically modify the underlying policy in circumstances where additional-insured status is regularly demanded, for example, in construction, vendor and other service agreements. But having the endorsement alone is not necessarily enough to secure additional-insured status. These policy modifications, and how they are interpreted between the insured(s) and the carrier have been the subject of countless lawsuits. To make sure that you have attained the status of an additional insured, you should check for the following:

- Request copies of the certificate of insurance as proof of additional insured coverage.
- Make sure that the certificate of insurance identifies the additional insured endorsement that was issued for the policy.
- Make sure that a copy of the issued certificate was forwarded to the insurer and that they are on notice of the certificate.
- Obtain a copy of the policy that the endorsement accompanies.

Finally, the use of the additional insured approach and the hold harmless clause approach without some other modifications to the Commercial General Liability policy can result in the risk being ineffectively transferred or not transferred at all, contrary to the expectations of the parties.

Since community associations and management companies generally have their own insurance, it is possible that both the vendor's policy and the policy of the community association or management company will be activated in the event of a claim. If the wrong party's insurance policy pays, it appears the hold harmless provision is violated, as the indemnitee was not held "harmless" by the indemnitor, also a result not intended by the parties.

Should a claim occur and the adjuster finds that one Commercial General Liability policy has a primary Other Insurance clause and the other an excess Other Insurance provision, the policy with the primary provision will apply without any sharing of the loss until the limits of liability are exhausted, regardless of what the parties originally intended. The insurance policies dictate which insurer pays and how much-not the contract between the two insureds.

To prevent the policy of the community association or management company from kicking in as primary, everyone will need to coordinate their Other Insurance clauses contained in their respective Commercial General Liability policies. Essentially, the vendor will need to ensure that their policy is treated at the primary policy for a loss that would trigger the indemnity agreement.

UPCOMING EVENTS:

Leading an Efficient Neighborhood Watch Program

August 15, 2018
4:00 p.m. – 6:00 p.m.

RMWBH Training Room
4630 N Loop 1604 West,
Suite 311
San Antonio, TX 78249

***Appetizers and drinks will be provided**

Register Here »

Don't Sign That Proposal

September 19, 2018
4:00 p.m. – 6:00 p.m.

RMWBH Training Room
4630 N Loop 1604 West,
Suite 311
San Antonio, TX 78249

***Appetizers and drinks will be provided**

Register Here »

2018 Annual Skeet & Sporting Clay Shoot

October 18, 2018
4:00 p.m. – 8:00 p.m.

Greater Houston Gun Club
6700 McHard Road
Houston, TX 77053

***Bar opens at 5:30 and band starts; Dinner served under the pavilion.**

Register Here »

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