

COVID-19 COVERAGE

COVID-19 COVERAGE UNDER YOUR ASSOCIATION MASTER POLICY

By Stan Heller

Over the past several months there have been more questions than answers regarding association master policy insurance coverage for COVID related claims. Insurance agents recommend calling the association attorney. Attorneys recommend calling their insurance agent. The claim managers for the insurance companies are non-committal as they are facing uncharted waters with respect to liability as COVID type claims and exposures are unique.

And now here comes the disclaimer part. I cannot give legal advice as I am not an attorney. I cannot give coverage opinion as I am not a claim adjuster or manager. With that being said, I will try to offer some insight.

WHERE TO LOOK FOR POSSIBLE COVERAGE

There are generally two types of liability policies carried by community associations. General Liability is a component of a package association policy. If you want to be a “do it yourselfer” you could look at your package policy form, which will be multiple pages. Look for the Liability Exclusion section and see if there is any specific reference to “communicable disease exclusions”. If this language is contained within your form, it may impact how the insurance company would respond to any claim. If you do not feel like digging into the policy wording, make a call to your agent. They will not give you a coverage opinion, but they should be able to tell you if your policy form contains any such language.

General liability responds to claims involving bodily injury and property damage. Contracting COVID-19 could possibly fall under the definition of bodily injury but a person that sustains alleged injury must bear the burden of proof that the association property was the proximate source of the virus transmission. This may be a tall order considering sources are potentially wide-spread. Please note that if your policy does contain any specific exclusions for communicable disease, this could impact your insurance company’s duty to defend. As mentioned previously, it doesn’t hurt to ask your agent about your policy exclusions.

Directors and Officers is a separate coverage and is incorporated into the package or is written on a stand-alone coverage form. As a general rule this coverage form is much shorter and easier to read. It sets forth specific exclusions,

and assuming that a claim does not fall within one of those listed items, there is potential for coverage.

CLAIM RESPONSE BY INSURANCE CARRIER

If a resident or visitor were to make such a claim it would be recommended to submit this notice to your association insurance carrier. Once they are put on notice, it is likely that they will do a fairly detailed investigation. It would be normal for the insurance company to proceed with the investigation under a “reservation of rights”. This will be followed up by a multi- page and potentially confusing letter from your insurance adjuster. Basically they will be telling you that they are on notice of potential claim and the fact that they are proceeding with an investigation of the facts. They will want to make it clear that they are not making any commitment with respect to coverage for the claim until they gather all the available information.

COVERAGE vs DEFENSE

Do not confuse coverage with legal defense. Under an insurance policy there is potential for a duty to defend by the insurance company, (example: retain attorney to represent the association) and a duty to indemnify. (example: pay damages to an injured party) If the association is formally being sued, it is possible that the insurance company will assign an attorney to represent the association, and file a response to the law-suit. Insurance companies in Wisconsin have a fairly broad duty to defend under their policies, however all potential claims and law suits are different and the wording within the legal complaint will likely be the determining factor in evaluating coverage and defense. The insurance company may proceed with a legal defense, but as the law suit works its way through the system, it may later be determined that there is no coverage under the insurance policy.

COVERAGE UNDER DIRECTORS AND OFFICERS

Directors and Officers Liability (D&O) is a coverage maintained by most associations. This is a separate from general liability and has a specific limit. A deductible may also apply to this coverage. D&O potentially responds to claims if negligence and mismanagement on behalf of the board of directors.



It generally covers actions of board appointed sub-committees. Any claim the injury or illness are generally excluded under this coverage form, so this is not where an association would generally look for coverage for COVID-19 injury type claims.

An example of a possible COVID-19 related claim that would be potentially covered under D&O would involve unit owners filing a claim against the board for failure to open a pool, exercise facility, or restricting access to common areas. You’ll note that these types of claims make no reference to illness or injury and should be submitted to the D&O carrier to evaluate coverage.

WHAT NOW?

Reduction of risk will be the key going forward. As association open common amenities, proceed under the current phase in guidelines. The best defense for an association it to be able to demonstrate they were in compliance with Department of Public Health Guidelines. It is also suggested that you follow specific cleaning protocol and document your efforts.

As we speak several states that already proposed legislation to limit civil liability for essential businesses. The specifics of the proposed legislation will vary by state, and we may see something develop in Wisconsin in the near future. The best advice under our current legal environment is to reduce risk, avoid association events that are inconsistent with social distancing requirements and be safe.

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