HOW TO LOSE YOUR CONDO/HOA INSURANCE COVERAGE IN ONE EASY STEP

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A California court allowed an HOA to be stripped of its insurance coverage in *Atain Specialty Insurance Co. v. Lake Lindero HOA, Lordon Enterprises, Inc. d/b/a/ Lordon Management* after the board failed to be truthful in its application about whether potential claims were bubbling up.

Here, we explain the case and ask our experts if there are other ways, they've seen condos and HOAs lose insurance coverage.

The Case and Its Outcome

Lake Lindero Homeowners Association is the HOA at the center of the case, and its opponent was its insurer. In a nutshell, in response to Question 19 on its insurance application asking about "any fact, circumstance or situation which may result in a claim against the Organization or any of its Directors . . . [or] Officers," the HOA board member who filled out the application made no disclosures.

But actually, the new board president had campaigned on the platform of terminating the HOA's contract with its management company, despite the fact that the contract had decades left before it ended on its own. It appears the management company was Lordon Management—it's a defendant in the case. But the company name appears nowhere else in the case other than in the caption identifying the parties.

Before that insurance renewal came up, the new board had sent the management company "at least eight notices alleging breach and threatening termination," according to the opinion. In addition, a member of the HOA had sent a written notice to the board that he would "personally take legal action" against the board if it terminated the management contract.

The HOA apparently argued that since there was no formal litigation pending at the time of the application, it didn't make a material omission in its answer to Question 19. The court wasn't persuaded: "These circumstances clearly presented risks that claims would be filed against LLHOA or its directors. It is irrelevant that these risks had not yet materialized; the question's purpose was to enable Atain to assess the risks it was underwriting."

The risk to the insurer was a lawsuit, which did, in fact, materialize. The management company sued the HOA in state court alleging a breach of contract.

The outcome: The insurer didn't have to pay to defend the HOA in the lawsuit. Under the HOA's policy it had an obligation to do so, but the court said, "We conclude that Atain is entitled to rescission of the policy and has no further duty to defend or indemnify LLHOA in the underlying state court litigation." The HOA was stuck footing the bill.

The irony: In its effort to get coverage for potential litigation as a result of a potential breach of contract claim, this HOA board incurred the cost of *additional* litigation.

Sort of a Slam Dunk Case

When she first heard of this case, Alessandra Stivelman, who is board-certified in condo and planned development law and a partner at Eisinger Law in Hollywood, Fla., assumed it was going to be a closer call than it was.

"I thought that maybe it was the management company that had filled out the insurance application," she says. "And maybe the manager didn't think the dispute was getting to that level."

Once she read the facts outlined in the case—eight notices and a threat from an owner to sue if the contract was terminated—Stivelman agreed with the court's decision.

It's not that there couldn't be cloudiness in this type of question, notes Todd J. Billy, CCAL, an attorney at The Community Association Lawyers in St. Louis, who is licensed in Missouri and Illinois and has more than 1,000 active condo and HOA clients. "The underlying problem I have with the question in the application is the depth to it," he explains. "An owner at a meeting three months ago might have complained about something. Is that a claim? The owner never said the word lawyer, but they're clearly upset.

"That's where it becomes tricky in filling out the forms," says Billy. "But the reason the court did what it did, and rightly so, is that this board knew what they were doing."

Billy sees a difference between two scenarios. Maybe you're updating your enforcement policies, and you're acting in good faith. Then you're sued over the new policy. That, in Billy's mind, is different from a second scenario—the one in this case, where there appears to be a lack of good faith in omitting information while filling out the insurance application.

"What I like about this case is that this board was clearly intentionally not providing information that they knew of that would get them a denial of coverage," he states. "But if you're running the association, of course you'll update policies every once in a while. If you're doing that in good faith, that's not a basis to deny coverage."

How Else Can You Lose Coverage?

What happened in *Atain* isn't common, in the experience of Daniel J. Miske, CCAL, an equity partner at Husch Blackwell in Milwaukee who represents 800 associations throughout Wisconsin at any given time. "Associations having left something off an insurance application inadvertently or intentionally—that's rare," he says. "Managers often fill out these forms and failing to fully disclose something puts the manager at risk. Why would a manager, who has no risk if they just tell the truth, fail to disclose stuff? In fact, managers more often over disclose than under disclose."

Stivelman has seen clients lose insurance coverage, but not for intentional misrepresentations. "I've seen it more with the failure to maintain the property," she explains. "There are so many different claims for roof leaks, and the association keeps patching and patching the roof. And the insurer says, 'Unless you do a complete reroof, we're not going to renew your coverage.'"

Julie McGhee Howard, co-founder and managing partner of NowackHoward LLC in Atlanta, who at any given time represents hundreds of condos and HOAs throughout Georgia, has seen similar situations in her practice. "I haven't seen a loss of coverage for intentional acts like in this case," she says. "But I have seen a loss of coverage when there were too many water-damage claims. This is really in high-rise or attached-unit townhomes. There have been multiple water claims, and maybe the association's deductible is too low, and the association loses coverage."

Insurers can also get tired of associations' repeated fights with tetchy homeowners. "I also see it with very litigious associations," notes Stivelman. "The insurer will make a full settlement in a case, but it refuses to take on future liability for a future related enforcement issue. Maybe an association has been dealing with the same troubled unit owner for years and it keeps getting challenged. The insurer will say, 'We're done.'

"In one case, a few board members were sued for allegedly violating an earlier settlement over litigation," recalls Stivelman. "When they filed the insurance claim for coverage of the new claim, the insurer essentially said, 'We made that clear; that was our full payout, and we're not covering this claim.'"