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HOLD HARMLESS CLAUSES IN MANAGEMENT AGREEMENTS

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Hold Harmless Clauses In Management Agreements

Traditionally, most management agreements contain a provision known as a “hold harmless” clause. Such clause generally indemnifies and holds harmless a manager from claims arising from situations he or she did not cause or were forced to participate in by virtue of his or her subservient role as agent of the association. Hold harmless clauses can be reciprocal and require the manager hold the association harmless for claims resulting from the unauthorized and/or wrongful actions of the manager. For many years, these clauses have not been invoked or challenged. Over time, however, hold harmless clauses have been revised to exclude gross negligence and willful or criminal conduct on the part of the manager. Accordingly, an association may be indemnifying managers in instances where the manager negligently performs his or her duties. This could lead to manager’s carte blanche inattentiveness to his or her responsibilities.

A conflict exists between the desires of the association and the desires of the management company for protection from alleged wrongs committed by the other. Initially, indemnification clauses were drafted to protect a party in limited situations and were mutual - managers and associations were both covered under similar terms. Now, whether through overzealousness or otherwise, some management contracts have completely eliminated indemnification and hold harmless clauses in favor of associations while broadening the protection afforded to management companies to include indemnification of a manager from his or her own wrongdoing (usually with the exception of gross negligence, willful wrongdoing, or criminal conduct). From a manager’s point of view, if you can get such protection, why not? Recently, however, experienced and sophisticated board members, as well as legal counsel, have begun challenging such one sided provisions. Often these provisions can be negotiated between the parties to ensure each party the same protections.

As hold harmless clauses have become more favorable to managers, it is important for boards to be aware of the exact language used in these clauses. Although it may be too late to rewrite an unfavorable clause in your current management agreement, this provision may be negotiated prior to renewal of the agreement or upon entering into a new agreement.

The key to fully protecting the association’s interests is good contract drafting and good insurance coverage. Ideally, if an association has good insurance coverage, it will be covered for most claims arising out of an action by a manager (except claims arising out of contracts and/or willful or criminal wrongdoing). Accordingly, the board should review its insurance policy in conjunction with the indemnification and hold harmless clauses in its management agreement and determine if there is adequate coverage for the manager. Additionally, the association should review the manager’s insurance policy to ensure he or she is adequately insured as well. Your insurance agent or legal counsel can and should assist you with this review.

If a manager is named as an additional insured on the association’s insurance policy, and the insurance policy contains appropriate coverage, the association should be adequately protected from negligent acts of the manager whether or not the management agreement contains broadly drafted hold harmless clause. Furthermore, if the association is named as an additional insured on the manager’s policy, and that policy contains appropriate coverage, the association should be adequately protected as well.

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With indemnification insurance, the following are examples of “hold harmless” language that may be used by associations and management companies in their management agreements:

The association agrees to indemnify and hold harmless manager of and from all claims, actions, causes of action, and losses, including reasonable attorney fees and court costs, arising out of or in any way related to any matter and/or endeavor undertaken by the manager under and/or pursuant to the terms of this agreement and/or in accordance with the direction of the Board of Directors to the extent such claims, actions, causes of action, and losses are not otherwise covered by a policy of insurance which actually defends and pays therefore and so long as such claims, actions, causes of action, and losses are not occasioned by the manager’s willful or criminal wrongdoing.

and:

Manager agrees to indemnify and hold association harmless of and from all claims, actions, causes of action, and losses, including reasonable attorney fees and court costs, arising out of or in conjunction with any matter and/or endeavor undertaken by the manager outside the scope and authority of the terms of this agreement and/or in violation of the direction of the Board of Directors to the extent that such claims, actions, causes of action, and losses are not otherwise covered by a policy of insurance which actually defends and pays therefore and so long as such claims, actions, causes of action, and losses are not occasioned by the association’s willful or criminal wrongdoing.

Prior to entering into a management agreement, it is important for the board to be aware of the following factors: 1) What are the exact terms of the hold harmless clause in the management agreement?; 2) Is the manager adequately covered by the association’s insurance policy?; and 3) Is the association adequately covered by the manager’s insurance policy?

Knowing the answers to these questions and ensuring adequate insurance coverage, will significantly reduce the association risk of exposure to liability for the actions of its manager.