

MANAGEMENT COMPANY FOUND LIABLE IN ASSOCIATION WORKERS' COMPENSATION CASE

Don't let the title fool you – this is not “*old news*”. Many of you are familiar with the recent California Court of Appeals case Heiman v. Workers Compensation Appeals Board. This article *IS NOT* intended to discuss that case.

The intent of this article is to assist Managers and Management Company Owners in “risk managing” the consequences of that Court decision.

In addition to the obvious conclusions that associations should hire only properly licensed and insured contractors *AND* that they should have their own “backstop” should the contractor's coverage fail, the case sheds new light on the potential liability association managers face when implementing decisions on behalf of their clients.

THE CASE

For those of you unfamiliar with the case detail, the “cliff notes” version is this – Pegasus Properties (Heiman), the managing agent for The Montana Villas Homeowners Association, hired the Hruby Company on behalf of the association to install rain gutters on the Association's common area. An employee of Hruby was electrocuted and seriously injured on the job. Hruby was uninsured (and unlicensed), so the injured worker pursued the Association *AND* its management company for workers' compensation benefits. The absence of a policy to provide benefits for the injured worker left the Workers' Compensation Appeals Board assigning payment obligation equally to the contractor (Hruby), the Association (Montana Villas), *and the management company* (Pegasus Properties). The management company took the Comp Board to court arguing they should be excused from liability because were merely acting as an “agent” on behalf of the Association. Unfortunately for Pegasus (and potentially all other Community Association Managers), the court upheld the Comp Board's findings and ruled that the management company could not escape liability simply because they were acting as the “agent” on behalf of the “principal” (Montana Villas). Davis-Stirling.com has published great information about this case in detail on their website.

That decision has far reaching implications. Many managers find themselves asking, “Will the protection that we thought we had via contract really protect us?” That is a question for your Corporate Counsel, as I'm not an attorney. However, I can address the question of how to regain protection from a workers' comp situation like the one Pegasus faced. Here is what you need to do to protect yourself from the same challenges.

PROTECTING THE MANAGER - Obvious Recommendations

I mentioned above that the first *obvious* recommendation is to hire *only* licensed and properly insured contractors. Do not allow your associations to award any type of contract for on-site services without *verification* (more on verification later) of proper licensing and appropriate insurance.

The second *obvious* recommendation is to insist that all of your clients, whether they have employees or not, carry the “backstop” of their own “if any” Workers' Compensation policy.

Many managers and association board members think that since their association does not have employees they do not need workers comp coverage. This case proves the point that associations that do not have direct employees still need a “backstop” should a contractor's policy fail.

PROTECTING THE MANAGER - Recommendations Beyond the Obvious

Below are a few of the *not so obvious* things to think through as a manager or management company owner when it comes to determining how *insistent* you should be regarding the second “obvious” recommendation from above – that ALL of your clients carry Workers’ Compensation coverage.

Their protection is your protection

It’s a true ‘win, win’. By encouraging your clients to protect themselves, you protect yourself and your company. While “if any” workers’ compensation would have certainly helped Montana Villas, it would likely have helped Pegasus too. The hidden benefit to Pegasus is that this case would have likely stopped at the Workers’ Comp Appeals Board if coverage was available for the injured employee. Imagine if Montana Villas had an “if any” policy in force. Upon the failure of the true employer (Hruby) to provide benefits to the injured employee, the next logical “employer” would likely have been the association. With coverage available for the injured worker, the Board would have assigned the benefit of that policy to him and likely closed the case right there. Pegasus would have escaped any “share” in the benefits, and would have never ended up in court.

Immediate offer

The first thing you should do to get your protection in motion is to get a qualified coverage offer to every client *immediately*. Sadly, until you do, you are exposed in the same way Pegasus was. Until your clients *buy coverage*, you are still exposed. However, since as a manager, you cannot force a purchase decision (except for the suggestion below regarding changing your contract), the first critical step in protecting yourself is to get the association a decision to make. Think about the position Pegasus could have been in if they were able to demonstrate that they had their local broker/agent offer coverage to every single client prior to this incident. Even if Montana Villas didn’t purchase coverage, the attitude of the court toward Pegasus would probably have been very different if Pegasus could have produced a signed rejection letter from Montana Villas’ Board of Directors. I’m not entirely convinced that the court would have excused them, but it certainly would have given their argument more basis in demonstrating that they should not be responsible for any benefits owed the injured worker.

So make the offer to all of your clients ASAP, as each day you have “workers” at any association you manage, you are exposed as Pegasus was. The mechanics of this group offer are quite simple. Your local broker/agent can have a quote for every one of your clients within a few days of receiving a very basic client list. We can assist you and your broker/agent in this process.

Amend your contract

Because of the potential “shield” this “if any” backstop provides for you as the manager, you might seriously consider rewriting your contract to *require* your clients to carry this coverage. Most management contracts that I’ve seen require the association to carry Directors and Officers (D&O) and General Liability (GL) insurance. Because of the far-reaching consequences of this case, Workers’ Compensation should be a required coverage in your management contract.

(NOTE: Additional insured - Many contracts also require that the manager be added as an "additional insured" on the D&O and GL policies. While you will likely have a hard time getting a Comp carrier to "add" another entity that has employees to an "if any" policy as it could create unintended coverage for the management company employees, you can and certainly should require the association to at least carry the coverage as a condition of their contract with you).

In California, the cost and availability of coverage should not impact your ability to compete. Besides, if a prospective or current client wants to go without coverage just to save the \$500, you should seriously think about walking that kind of business anyway. Easy for me to say.... but sometimes you have to weigh the "risk" associated with your entrepreneurial spirit.

Coverage for volunteers

In addition to the "if any" exposure addressed in this case, the Association and now potentially the management company are at risk of owing workers' compensation benefits to injured volunteers who perform "work" on behalf of the Association. Imagine these scenarios: An association member volunteering at a "Saturday Community Clean-up Day" is injured, or a Board Member slips and falls during a site inspection. While the General Liability policy provides "bodily injury" coverage, bodily injury to an "employee" is specifically excluded so the exposure can be pushed to a workers' compensation policy. A volunteer performing work on behalf of the Association could easily be construed as an "employee" by the GL carrier, especially if the injuries are significant. If the Association carries the right type of workers' compensation policy, this exposure can be covered too.

If they refuse to buy

Sometimes, good Boards make bad decisions. All they see is someone else (this time the insurance guy) sticking it to them for another \$575 to insure for some highly unlikely incident. Sadly that will be the perception of some of your clients. The best thing you can do is present the details of this case (available at Davis-Stirling.com or our website listed below), explain the coverage opportunity for the exposure, and recommend that they buy coverage. If all that fails to inspire them to buy coverage, and you are not in a position to send them packing, all you can do is *protect yourself* if they say "no". Every program that I have seen that offers this HOA specific workers' comp coverage requires a "refusal/rejection of coverage" letter if the client rejects coverage. If one of your clients rejects, make sure they sign the rejection letter for the broker/agent and make sure you keep a copy for your records.

Compliance Officer

O.K. so you've followed our recommendations: you hire only licensed and insured contractors; you've made your mandatory offer to your current clients and many have taken up coverage; you've documented those clients who have refused to buy coverage; you've rewritten your contract to require your clients to carry their own workers' comp insurance from this time forward; and you've verified coverage on all existing "regular" service providers. Now comes the important job of *continued compliance*. All of your efforts to verify current coverage and ensure the "backstops" are in place could all be for naught if you don't have a continued compliance plan. Due to the potential consequences if the job is left undone, we strongly recommend that each management company assign a "compliance officer" to monitor these items.

This person would be responsible to ensure that not only every Association client's policies are current, but also to verify that any contractors hired are properly licensed and insured. By centralizing responsibility, you eliminate the risk of a manager thinking an assistant or Board Member has done the verification, or vice versa, and, consequently, no verification is done. Verification is as simple as a phone call to the agent listed on the certificate. Our construction department issues certificates for our contractor clients all day long, and yet they rarely answer phone calls from folks calling to verify information on the cert.

COVERAGE AVAILABILITY

Until recently, this type of complete workers' compensation policy for common interest developments has been tough to come by. While some carriers offer coverage for the "if any" exposure, they do not offer coverage for volunteers. Other policies provide "if any" coverage and only offer coverage for Board Members, recommending that you simply extend the definition of "board" via appointed committee. It is important that the policy obtained offer coverage for both the "if any" exposure and *ALL* volunteers working at the direction of the Board.

CAIS, LLC, in cooperation with OneBeacon Insurance Group, has recently released a product at a very reasonable premium in a number of key states - California being one of them. The annual policy premium is \$575 and is available through your local broker/agent. For information on how to place this product for your clients, have your local broker/agent log on to our website at www.MGALive.com. Or, call me directly and I'll help you through the process.

SUMMARY

Heiman v. Workers' Compensation Appeals Board highlights several important issues for managers. One is that transferring the risk of "hiring" to the association via an "agency" contract is no longer enough. Even adding the important step of verification of insurance for any contractor that sets foot on the property is also not enough anymore. While those are by far the most important first steps to protect yourself as a manager and/or management company, this case clearly demonstrates that all of your association clients that do not have payroll still *must* carry their own workers' compensation policy. It further illustrates that until you make the offer to all of your clients, you are exposed to the same situation Pegasus Properties found themselves in. The right "if any" and volunteer policy can ensure that all workers' compensation-related risk is properly transferred to a policy of insurance and away from you and your clients.

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