

IHG RISK MANAGEMENT: Board Election Claim Scenarios

Board election disputes present a common driver for D&O claims faced by community associations. In-fighting, not adhering to governing documents, and inappropriate notice of elections are just some examples of issues that may lead to potential claims.

Here are two claim examples stemming from community association board elections.

1 An owner, Ms. Bailey, was very vocal about what she felt was mismanagement by the current board of directors (the Board) of her condominium association (the Association). Because of her criticism and argumentative nature, she was not favored by many of the Board members. She decided to run for a board position and won. However, some members of the Board were concerned about her serving so they investigated her background further and found an article online that indicated that she had been convicted of possession of illegal drugs. The Board then amended the Association's bylaws to state that no one who had been convicted of drug-related offenses could serve on the Board. When they advised Ms. Bailey of the amendment to the bylaws, she informed them that her conviction had been overturned on appeal and her record cleared. The Board refused to permit her to serve as a member of the Board.

Ms. Bailey sued the Board, claiming that she was entitled to take her seat on the Board as her conviction had been overturned. In addition, she alleged that the Board adopted the amendment to the bylaws to harass and intimidate her, causing her embarrassment and emotional distress, and excluding her from sitting on the Board. She also alleged that the Board's amendment to the bylaws was improper, as the Board failed to obtain the approval of 66% of the owners, as the bylaws required. Ms. Bailey sought declaratory and injunctive relief, damages, including emotional distress damages, and attorneys' fees.

Because the Association failed to obtain the requisite approval from the owners, as required by the bylaws, the matter was settled. The insurance carrier paid \$17,000 to Ms. Bailey, as well as \$23,000 in legal fees incurred by the Association, less their \$5,000 retention.

2 In 2018, Brutus Buck (BB) and his partner purchased a townhouse and moved into Mirror Lake Villas (MLV), which consisted of approximately 50 townhouses. The owners were members of the MLV Homeowners' Association (the Association). The MLV bylaws provided that each owner had the right to vote annually for the members of the board of directors (the Board). Additionally, the bylaws stated that annual meetings must be held during November of each calendar year, and that the election of a Board of Directors was permitted at an annual meeting.

In or about 2019, Biff Wolf (BW) was elected president of the Board of the Homeowner Association (the BW Board). In 2020, the BW Board did not hold annual elections, as required by the Association's bylaws. In fact, the BW Board did not hold annual elections for more than three years. In addition, the BW Board attempted to amend the Association's bylaws to state that annual meetings were not required to be held and that Board members would continue to serve unless they voluntarily resigned, leaving no means for owners to remove Board members.

After three years without elections, a number of owners banded together and sent the Board a notice demanding a meeting to elect directors. The BW Board rejected the notice of the special meeting and stated that, while the owners were permitted to call a special meeting, under the bylaws, the election of a Board of Directors was only permitted to occur at an annual meeting. The owners contended that a special meeting could be held for any purpose as long as the purpose of the meeting was included in the meeting. The special election took place and those owners who attended voted to elect BB and his slate to the Board (the BB Board). The BW Board refused to acknowledge the results of the special election,

refused to turn over records and accounts, and continued to hold themselves out as the Board. BB and the group of owners sued the BW Board, alleging that BW and the BW Board breached their fiduciary duties by failing to hold annual meetings with elections as required by the MLV bylaws. They further alleged that the BW Board breached their fiduciary duties by self-dealing when they revised the bylaws to make it more difficult for owners to remove Board members from their positions. After much contentious litigation, the matter settled for \$35,000. The insurance carrier paid the settlement amount, less the \$2,500 retention, as well as more than \$10,000 for attorneys' fees in defense of the BW Board.

Thought Corner: Elections are an essential component of the governance of a community, homeowner, condominium, or cooperative association and often involve complex issues that must be addressed. Because of this, ensuring compliance with the Association's governing documents, as well as any relevant laws and/or regulations, can help to mitigate the risk of costly claims.



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