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To Tender or Not to Tender?

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More often than Boards would like, homeowners who are the subject of an architectural enforcement or an assessment collection threaten to sue the Association. Faced with these threats, Boards must make the difficult decision of how to respond. One of the most difficult aspects of that response can be deciding whether to notify the Association's insurance company. Often times, Associations have gone years without feeling the need to tender any claims or to notify the carrier of potential claims and Boards feel pressure to maintain an unblemished record. Boards that have already tendered other claims to their insurers may be legitimately concerned about the effect that too many claims can have on their premiums. Other Boards may be so wrapped up in solving the dispute that it may never occur to them to tender a claim. Lastly, Boards may feel that the homeowner's claim is completely without merit, and that they should not have to tender frivolous claims.

These concerns must be balanced against insurance policy language, which contains provisions such as this:

If during the Policy Period the Insured shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against an Insured, the Insured shall give written notice to the Company of the circumstances and the reasons for anticipating such a Claim with full particulars as to dates and persons involved.

Not only do insurance policies require Associations to notify the insurer of lawsuits actually filed against them, but this type of language also requires notification of credible threats of litigation.

Failure to timely notify an insurer of a potential claim can have serious consequences in the event a homeowner follows through with a threat of litigation at a later date, as insurers may refuse to cover the claim because they were not notified on a timely basis. The Association would then be forced to spend its own money to defend a lawsuit and pay any resulting damages won by the homeowner.

The Board's decision on whether to notify an insurer can be a difficult one. However, the potential consequences of failing to timely notify must outweigh any concerns about the underlying merits of the potential claim or the potential cost of premiums. The Board must instead focus on evaluating whether the threat is likely to give rise to litigation, and err on the side of protecting the Association

from the cost of a lawsuit. The Association should notify its insurer about potential litigation if they receive a threat in writing, or from the homeowner's attorney. The Board should tender even if the claim seems frivolous, as we have often seen what seemed to be frivolous claims bog associations down in years of litigation. If the Board gets a threat of litigation, and is not sure whether to tender/notify, the Association's counsel can always help evaluate the situation.

Please contact Carrie Smith or any attorney in our office with questions on this topic.

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