SOUTH COAST HOMEOWNERS ASSOCIATION

P. O. BOX 1052, GOLETA, CALIFORNIA 93116
(805) 964-7806
www.southcoasthoa.org
gartzke@silcom.com

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Michael J. Gartzke, CPA, Editor

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UPCOMING SOUTH COAST HOA MEETING – MAY 18

For over 10 years, attorney Beth Grimm has come down to the South Coast and provided a common sense legal seminar on a wide range of topics that concern volunteer board members. Beth is known throughout California and nationally on her expertise on association governance and compliance with ever changing laws. Here are some topics under consideration for the program:

- An introduction to the enacted AB 805 and AB 806, the complete revision of the Davis-Stirling Act, effective January 1, 2014
- Board of Directors Ethics, Conflicts of Interest, Confidentiality of Executive Sessions
- How to get a dysfunctional board back on track
- Abuse of email directed at managers and boards by members. How many is too many?
- The purpose of your association bylaws and how many questions relating to meetings, elections and process can be answered in the bylaws.

Date – Saturday, May 18, 2013
Time – 10 AM – Light Refreshments at 9:45
Place – Encina Royale Clubhouse – 250 Moreton Bay Lane, Goleta (Fairview exit North from 101)

A limited number of *2013 Condominium Bluebooks* are available for $18/each, postpaid. Send your check to our address shown above.

LICENSED CONTRACTORS

By: Tom Fier, Esq.

Editor's Note: Mr. Fier is an attorney at law with a homeowners association practice in San Mateo, CA. This article appeared in the ECHO Journal in November 2012 and has been reproduced here with the author's permission. Mr. Fier can be reached at 650-572-1900.

In maintaining and repairing an HOA, you will repeatedly deal with contractors. This article will focus on the basics that you need to know in dealing with licensed contractors.

Definition of a Contractor

The Business & Professions Code §7026 defines a contractor as "synonymous with builder". It is any person who undertakes, or submits a bid, to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, road, parking facility, project development or improvement, or the cleaning of grounds or structures. "Contractor" also includes any subcontractor or specialty contractor.

Contractors Must Be Licensed

First, most contractors must be licensed. When in doubt, ask for his/her license number. Any question should be directed to the Contractors State License Board (CSLB), www.cslb.ca.gov. Any contractor's advertisements, business cards or bids must contain the contractor's state license number. You should check the license status. This can be done online or by calling (800) 321-CSLB(2752).

The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurances that all persons offering such services in California have the requisite skill and character, and know the rudiments of administering a contracting business. (*Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th 694).

Is There Insurance?

Next, verify that a contractor has workers' compensation and commercial liability insurance. If a contractor has employees, he/she is required to carry workers' compensation insurance. If a worker is injured and there is no insurance, the HOA could be held liable. Commercial general liability insurance is not a requirement, but should be available to relieve the HOA of any potential liability. Claims made against a HOA's insurance policy can lead to increased premiums and/or cancellation.

Who is Doing the Work?

Make sure that the contractor who claims to have the license is the same person or entity that is going to do the job. Contractors sometimes "borrow" another person's license. This usually means that the person who is doing the work is unlicensed. Do you want an unlicensed electrician working on your pool lights?

Bonds

A licensed contractor is required to have a contractor's license bond of $12,500.00. Another type of bond is a "contract bond" which guarantees the completion of the job and payment for all labor and materials.

Disclosure

Every contractor licensed under California law must include the following statement in all written contracts (there are a few exceptions):

> Contractors are required by law to be licensed and regulated by the Contractors State License Board which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within 10 years of the date of the alleged violation. Any questions concerning a contractor must be referred to the Registrar, Contractors State License Board, P.O. Box 26000, Sacramento, CA 95826.

Exception to License Law

An exception to the license law is for any work that is $500.00 or less, including labor and materials.

Extras/Change Orders

Ensure that all extras/change orders are **in writing**.

Use of Unlicensed Contractor

The penalty for use of an unlicensed contractor is that he or she probably will not have insurance, thereby exposing the HOA to damages. An unlicensed contractor cannot sue for any money owed him/her. Further, if it is discovered that at any time during performance of the contract that the contractor did not have a license, he or she cannot recover **any** compensation for work done. The contract to do the work is void (*California Chicks, Inc. v. Viebrock* (1967) 254 Cal.App.2d 638).

The penalties for a contractor are severe and can range from misdemeanor to felony charges, and fines from $200.00 to $18,000.00.

Further, the law (Business and Professions Code §7031) contains a forfeiture penalty. An unlicensed contractor may be sued by the person who used him for all the money paid to him/her.

Problems with Using Unlicensed Contractors

Problems with using unlicensed contractors: sometimes they perform shoddy work, disregard building codes, use deceptive business tactics, misrepresent their license status and/or engage in work for cash. If you suspect that you have been a victim of work by an unlicensed contractor, contact the local office of the Contractors State License Board.

License Controverted

If a license is disputed, the CSLB will issue a verified certificate of licensure.

Mechanic's Liens

Lack of a license bans actions to foreclose a mechanic's lien as well as actions to enforce stop notices and bond claims. If a mechanic's lien is filed and payment has not taken place, it is strongly suggested that you contact a lawyer to assist you with this process.

Bad Story #1

Day Laborer v. Naive HOA: HOA hires a day laborer to trim trees. Day laborer says he is licensed (but does not say which license - he meant a driver's license). He falls from a tree and sustains serious injuries. The HOA is sued for negligence. The tree trimmer is deemed the HOA's employee since he had no insurance. HOA has to pay thousands of dollars in settlement.

Bad Story #2

Material Man v. Trusting HOA: Unlicensed contractor was hired by HOA to clean up a creek and canyon on HOA common area. Materials supplied to unlicensed contractor by Material Man were rakes, shovels, small skip loader, and fence supplies. Material Man was never paid by unlicensed contractor for supplies. Material Man files a lien against the HOA for non-payment. HOA had to pay twice: once to the unlicensed contractor and again to the material supplier. Getting a cheap bid did not pay off.

Recommendations:

1. Only use a licensed contractor. It may be more expensive, but it will be cheaper in the long run.

2. Insist on insurance.

3. Document everything in ***writing*** (contract and change orders).

4. Be smart, not sorry.

True Story – Heiman v. Workers Compensation Appeals Board Court of Appeal, 2nd District, Division 3, California March 13, 2007

By: Michael J. Gartzke, CPA

The petitioner, a professional property manager, hired an unlicensed and uninsured contractor to install rain gutters on a condominium building, and an employee of the contractor was seriously injured on the first day of the job. The Workers' Compensation Appeals Board (WCAB) concluded that the property manager was the employer liable for workers compensation. The appeals court concluded that both the property manager and the unlicensed contractor were jointly and severally liable for workers compensation and since the property manager acted as the agent for the association, the association was also liable.

In recent months, several members posed questions and concerns about the use of unlicensed contractors for association work and the resulting liability for doing so. That's why when I found the article on unlicensed contractors reprinted above, I felt that this was a good basic analysis of the issues associated with the use of unlicensed contractors.

WATER, WATER EVERYWHERE!

By: Beth Grimm, Attorney at Law

Editor's Note: Beth will be our May 18 speaker. She has an extensive HOA law practice based in Pleasant Hill, CA and has contributed many programs and articles to our organization. Her contact information appears in the newsletter sponsor section at the end of the newsletter

Water intrusion issues are a hot and an important topic and I wanted to get it out of the way early this year. The next few months will be dedicated to covering the top 5 or 10 things you really need to know about the reorganized Davis Stirling Act so you will be ready as the year progresses to make a smooth transition. I will be putting out more than one newsletter a month to help you understand how best to cope without losing ground in rules, policies, and governing documents, how to prepare disclosures and head off problems in next year's elections. There are not a lot of major changes but certainly some changes that you should definitely be aware of and understand. On my website I will be providing links to conversion charts and sample forms. By June, we should all be well ahead of the curve. I have spent a lot of time checking out the new law and also what other attorneys are saying about it. I plan on providing you a well-rounded discussion on the high points. I will even tell you where to find it!

WATER, WATER EVERYWHERE!

A burning question for associations and owners is who is responsible to make repairs and restore property when there is a water leak that causes damage to a unit or units. It's not an easy question to answer because there are so many factors to consider.

Where did the water come from?

I've always advocated that it is critically important to properly identify the source of any reported leak, and document it, even if the association believes it is strictly the owner's responsibility! Why? There are at least two reasons: (1) you might be wrong and (2) even if you are right, the Board may have the responsibility to make sure the owner resolves the problem and negates any threat to the neighbor's property or common area. Thus an association board in any attached multi-unit housing units should stick their noses in at the very least to investigate and document the situation, even if the board believes the leak is not the association responsibility. It is the responsibility of the board to act prudently and turning a blind eye to water leaks and damage can backfire.

What Role do the Governing Documents Play?

Understanding what the governing documents say about responsibility is critical. Equally important is understanding that the language in the documents may not be the final determining factor in the question of exactly who holds responsibility to make the repairs or pay for losses. And the lack of language also provides direction - pointing to the next source of authority, which is California law. But one has to start with the document review of all provisions related to ownership of the areas damaged, maintenance obligations, insurance, and damage and destruction provisions to see what they say. Ownership does not always determine the maintenance or insurance obligations but the more information a board has

before it, the better able it is able to proceed rationally. For example, while the association's insurance policy may cover repairs or reconstruction of units in a casualty loss (such as a burst pipe), which could include replacement of commodes, common fixtures, cupboards, etc., while at the same time the governing documents obligate owners to maintain and replace these items as needed from general wear and tear. In these cases, if there is master coverage, the association cannot deny the owner the right to a remedy equivalent to that the coverage, if not the proceeds of a claim. (Some boards do not want to make a claim - more on that below.)

Again, it is possible that the owner would have the obligation to do the repairs if there was no master insurance coverage, but unless the actual policy aligns with that, there is a conflict, and the owner wins (because the insurance companies will not take the risk of being sued for wrongful denial of coverage).

California Law on the Subject:

Civil Code Section 1364 says: "Unless the Declaration [*which most commonly is the CC&Rs*] provides otherwise [*meaning they control if they provide a different scheme*], the association is responsible for repairs, necessary replacements and maintenance of the common areas in a CID, other than "exclusive use common areas", and the owner is responsible for maintaining his or her separate interest and "exclusive use common area". It is confusing to the extent of the "exclusive use common area" (see more below) but does set up a default scheme - i.e., if the Declaration defines responsibility, it controls, and if not, 1364 does.

Past Practice:

In a nutshell, past practice is important to the extent that if it is determined the board did not properly apply the documents and/or statute language to past similar situations, and a party paid that should not have, that can be a problem in enforcement of obligations in the current scenario, and legal counsel should be consulted as to what exactly "that" means.

What Is Important to Know About "Master" and "Individual" Coverage?

The CC&Rs or Bylaws probably require the association to purchase master coverage for repair or replacement of the common area and may require coverage for the buildings that house the owner's units. Some require coverage only to original building construction; some require insuring for Code upgrades, and some require coverage for Unit betterments and upgrades. Without the obligation to insure for upgrades, owners would be responsible. But if no one makes this clear for boards and/or owners, when the conflict arises, a lot of finger-pointing begins, and sometimes the delays while the battle rages on lead to bigger problems, like additional damage and/or mold!

Pay close attention to the document AND policy language!

While common area water and sewer pipes ultimately include a point of separate service to a unit; they often are still considered common area pipes. While some Boards would like to "designate" all pipes that serve a separate unit as "exclusive use" pipes and make them the owner's obligation, there is case law that says you cannot do that if the Declaration (CC&Rs) defines the pipes as common area. Left open is the point that if the CC&Rs define owner responsibility to begin from the point of separate service designating those pipes as "exclusive

use common area" pipes, the responsibility could be shifted to owner. At least that is the way I read the Dover Village vs. Jennison case. My full explanation can be found in the March 2011 E-newsletter which is available in the E-News archive:

http://www.californiacondoguru.com/CCNewsletter/CCNewsletters45.html

And, if the Board does not carefully review the insurance policy as well, it may miss language that abrogates the CC&Rs. Some policies contain language covering "exclusive use" common area pipes even with that designation, opting instead to avoid arguments by providing coverage simply because they are part of the common area property.

There Are Two Policies To Consider:

There are two policies involved in all condo and attached townhouse associations to be concerned with (although I've seen a few weird exceptions). The "master" coverage is what the association purchases to cover the real property it must insure and the owners' individual coverage is commonly known as an HO-6 policy. If an owner does not have an individual policy then he or she is likely to try and pressure the association to pay, justly or not. Thus, I believe it wise when updating governing documents to require owners to purchase individual HO-6 policies, but also to make it clear that associations are not responsible to police the purchase. A way to provide "incentive" without an enforcement "hammer" is to make it clear that no loss may be claimed against the association policy or the association itself that would have been covered by such a policy, had one been purchased.

Homeowners' association insurance is a complicated subject and carriers opinions about application do not always align with the Board's opinion, and that is why it is important to ask questions and seek clarification up front if there is any lack of understanding about what the policy covers, instead of waiting until "the" big loss occurs. Inundating owners with information about how they can get coverage for things like deductibles charged to the owner and replacement of furniture, wall and floor covering and personal property is the best way to help them understand as a responsible owner, they can be part of the solution to help their association avoid high risk premiums or loss of the ability to get coverage.

As to water damage, a "covered" event is generally associated with an immediate, direct, OR sudden and accidental discharge of water. A leak occurring because of a lack of maintenance is usually not covered. Seepage from the outside of the building is usually an exclusion because it requires "flood" coverage. So for example, if shingles and roof paper blew off the roof in a storm and there was water intrusion as a result, it would probably be covered. If the roof leaked because it was not maintained properly the property insurance company would likely deny coverage. One might make a breach of duty claim under the D&O policy for failure to maintain the roof, which lends itself better to the discussion of whether negligence was involved (see below). If someone overruns a tub it is negligence, and that might be covered under the association's policy, but should logically be covered under a homeowner's policy. This is an area where the owner's carrier sometimes pushes back, claiming that the damage is something an owner would expect would be covered under the master policy, arguing that since the owner pays a portion of the cost of master coverage he or she should be able to rely on it to cover accidents. Don't get me wrong. Sometimes it all works out as one would hope, but other times the parties have to "duke it out" and information is power, information gleaned

from understanding the situation, the governing documents, AND the insurance policies involved.

What About Negligence?

Negligence can be a factor. Clearly, if there is no insurance coverage available, and the documents do not clarify responsibility, or even if they do set the threshold standard, negligence may be a determining factor that sets or shifts responsibility. I cannot cover all possible scenarios here, but simply raise some pertinent questions. We are getting into an area that is complicated enough that you probably need a lawyer's help. Besides the fact that insurance coverage can override negligence as a factor, a layperson isn't generally able to determine negligence unless it's obvious. Heck, sometimes it's hard for an attorney. Take for example a tub overflow due to leaving the room. That is clearly negligence. But what about the failure of the seal under a toilet? Negligence is a cause of action that stems from breach of a duty (usual standard is that of a prudent person), that causes the identified damage. So in this last example, would a prudent person normally perform regular inspections to check or replace the seals? Probably not. But once there is a problem, and then everyone argues it is the other party's responsibility. Is there a duty on anyone's part to regularly remove a commode and look? Probably not. Can the average person tell if a seal is gone? I doubt I could. Are the seals part of the common area, or the Unit? Hard to tell. The brightest and best can argue about it. What if the board was privy to failure of seals being a common occurrence in units because of age or other factors? Would it have a responsibility to inspect or repair? To warn the owners? Probably would have a duty to do something with that knowledge. Would the association be responsible for the damages from a failed seal if it did? If it didn't? And after all, what do we purchase insurance for? Accidents? Negligence? Basically, it's for "calamities" which are synonyms for disasters, catastrophes, mishaps, tragedies and accidents, and sometimes simple carelessness, like ignoring a condition that could lead to disaster. The above questions can be better answered by a legal professional who can look at the facts and suggest actions, including pros and cons, costs, and risk considerations, than a board made up of lay volunteers, especially if those volunteers do not like or are suspicious of the owners(s) making the claim!

Does a Board Have to Report Every Claim to It's Carrier - Even Those That Do Not Exceed the Deductible of the Policy?

I know that there are readers that want to hear, "not always", "especially if there is a concern for a negative claims history". But alas, the "prudent" answer is usually "yes", absent a sustainable and prudent "self-insurance" plan and fund in place that would cover the loss. If a board fails to give the insurance company notice of a water damage loss that might actually be covered within a specified number of days after the event is discovered (commonly within 30 or 60 days of discovery), it gives the company grounds to deny the claim if/when it is later discovered that the damage was worse than first reported. And that can be a BIG, BIG PROBLEM! Let's says there is only a 1% chance of this "big" problem for an association. Do you as a board want to be that association? Denying owners access to coverage that is available or may be available is a breach of duty. If the association is self-insured and pays the loss out of pocket, that is maybe the one exception. But what if it "self-insures" for small claims and the matter moves from that category to a big claim or demand? Can you go back and then hit up the insurance company? Not likely. It is a risk-balance argument every time but boards

tend to forget that they have to consider all owners collectively, as a whole, rather than resting on what risks they would be willing to take as individuals.

According to insurance company professionals who speak at the industry seminars I have attended, a notice of potential claim that is less than the deductible or involves a non-covered event does not get counted as a "negative" on the association's claims history so there is no risk in giving notice. I believe the inclination of attorneys who practice HOA law and some Boards would argue with that general representation, and most would agree that it seems likely an underwriter would look at the whole picture, but a truth remains - there is considerable risk in withholding information about a potentially covered claim from the carrier. Boards can improve the association's position by raising deductibles substantially, and by amending their documents to clarify or redefine responsibilities and accountability, but trying to improve the position by sitting on or refusing to tender claims is pretty risky.

A Few Parting Points:

**There are agents or brokers well versed in HOA policies, but those that do not ask to see the CC&Rs and Bylaws to review when providing offers for coverage should be avoided. They need to know the insured's obligations.

**But even so, most are not writing creative policies -they are choosing from the boilerplate options that most closely fit the documents - and for master coverage that often means coverage to rebuild to original construction. Upgrade coverage (Code or betterment) is often an "add on". This factor is important if an association wants or needs FHA approval for financing because there is a requirement that upgrade coverage must be an obligation. Some argue it has to be the association's obligation but others read the regs as accepting of coverage where the association covers the original code and code upgrade coverage but owners are required to insure their betterments and upgrades.

**Many associations have been bitten by the realization (after the fact) that modifications or exclusions in the policies exclude something the board thought was covered, or cover something they thought was not covered. Case in point - real life example, tub overflow, owner's neglect, damage to unit, board position that owner was responsible and owner's policy was primary. Documents agreed. But the association policy contained a "modification" stating that the master policy "covers losses including unit fixtures, improvements, alterations and appliances in the unit regardless of ownership or whether the Condominium Association Agreement requires the association to cover it." The association's carrier paid to repair the damages - much to the chagrin of the association, whose documents clearly attributed responsibility for these things to the owners. And sometimes the association will direct the master carrier to try and subrogate against the owner's carrier, but many HOA and Condo master policies state outright that the company waives its right to recover payment from a unit owner (which includes his or her HO-6 carrier).

My PARTING Words:

I hope if you get nothing else from this article, you get that water leaks require a full analysis of the facts and pertinent policies and documents to determine responsibility and insurance coverage, if any. If a board takes a position without the information gathering and analysis it might end up with a concussion of various proportions.

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ACCOUNTANTS

Michael J. Gartzke, CPA
5669 Calle Real #A
Goleta, CA 93117
805-964-7806

James L. Hayes, CPA
2771 Santa Maria Way #A
Santa Maria, CA 93455
805-937-5637

Jimenez & Company, CPAs
Joyce Jimenez, CPA
P. O. Box 756
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www.mcfarlandfinancial.com

Debbie Quigley –
Accounting Services
P. O. Box 62157
Santa Barbara, CA 93160
805-967-8117
Debbie@debbiequigley.com

ATTORNEYS

Beth A. Grimm
3478 Buskirk #1000
Pleasant Hill, CA 94523
925-746-7177
www.californiacondoguru.com

James H. Smith
Grokenberger & Smith
1100 Santa Barbara St.
#202
Santa Barbara, CA 93101
805-965-7746

David A. Loewenthal
Loewenthal, Hillshafer &
Carter, LLP
15260 Ventura Blvd #1400
Sherman Oaks, CA 91403
866-474-5529

Steven McGuire/
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Price, Postel & Parma
200 East Carrillo, Suite 400
Santa Barbara, CA 93101
805-962-0011

Adrian Adams
Adams Kessler PLC
2566 Overland Ave #730
Los Angeles, CA 90064
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ASSOCIATION MANAGEMENT

Coast Community Property Management
Sandra G. Foehl, CCAM
P. O. Box 8152
Goleta, CA 93118
805-968-3435

St. John & Associates
Kristin St. John CCAM
3887 State Street #24
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Colin Anderson
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Ventura, CA 93001
805-535-0119

ORGANIZATIONS

Community Associations Institute (CAI) Channel Islands Chapter
P. O. Box 3575
Ventura, CA 93006
805-658-1438
www.cai-channelislands.org

Executive Council of Homeowners - ECHO
1602 The Alameda #101
San Jose, CA 95126
408-297-3246
www.echo-ca.org