



# COMMUNITY PROPERTY ADVISOR

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## A Discussion of the Merits and Drawbacks of Including the "Immunity Clause" in Association By-Laws

By Jules C. Frankel, CPA, MBA



*NOTE: I would like to acknowledge the extensive assistance of Debbie Pasquariello and Vincent Hager, both of whom provided their in-depth technical expertise to facilitate the development of this article.*

*Debbie Pasquariello is a Community Insurance & Risk Management Specialist, (CIRMS) and Certified Insurance Counselor with BHB Insurance. She has been active in CAI since 1985, and is a past Chair of CAI's National Insurance and Risk Management Committee; she currently serves as a Board Member of its NJ Chapter.*

*Vincent Hager, CIRMS, is a principal owner of Jacobson, Goldfarb & Scott (JGS) Insurance and has specialized in insuring Community Associations for the past 15 years. He is a Past President of CAI's NJ Chapter and has chaired CAI's National Insurance and Risk Management Committee.*

As far back as 1989, a New Jersey adult community needed to explore the rationale that allowed one of its unit owners to be able to sue the Association and derive financial benefits-despite the fact that the Association was not grossly negligent. The Association was troubled by the fact that the party suing it was a named insured on the Association's insurance policy. To limit the ability of residents, in essence, to "sue themselves", this Association worked in conjunction with its local legislators and *Immunity Clause* legislation was passed. Is it beneficial for Associations to utilize the *Immunity Clause* to better manage their financial risk and insurance costs? To inform Board Members about this important issue, this article will address:

- ◆ Background of the *Immunity Clause*
- ◆ Factors Impacting Associations' Insurance Premiums
- ◆ Potential Savings to Associations
- ◆ Implications/Advantages and "Downside" for Association members
- ◆ Steps Associations Can Take if They Wish to Utilize the *Immunity Clause*.

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## Background of the Immunity Clause

It is important to understand that this clause in-and of itself **does not** limit an Association's potential risk, or provide it with immunity from liability claims. It enables Community Associations to provide themselves with added protection from lawsuits and the associated inevitable increase in insurance premiums. That is, it offers a legal basis for the Association to adopt language, which will provide it with this liability protection.

Essentially, the *Immunity Clause* is a paragraph, which is added to an Association's by-laws, that limits a unit owner's right to sue except in cases of gross negligence. (See the *Sample Immunity Clause Language on page 4*) Interestingly, New Jersey is the only state in the country to afford Associations this potential protection.

An important point to remember is that most injury-related expenses, such as medical bills, are covered by the individual unit owner's health insurance, so the issue under consideration relates to whether or not a unit owner can receive compensation for damages in excess of their actual costs for treatment.

*The Immunity Clause requires unit owners to give up their right to sue their Association except in cases where gross and wanton negligence can be demonstrated.*

## Factors Impacting Associations' Insurance Premiums

For a variety of reasons, over the past several years, the number of liability insurance providers available to NJ Community Associations has shrunk by as much as 75%. Accordingly, the remaining providers can be much more selective with respect to the types of risks and liability they are willing to accept. When setting premiums, these companies consider, among other factors, an Association's:

- ◆ Loss history
- ◆ Procedural safeguards to minimize hazards and reduce the risk of injury
- ◆ Proactive posture at preventing future losses
- ◆ The current condition and consistency of proper maintenance of the Association's common elements.

Typically, insurers examine the Association's prior 5 years of operating history as it relates to these criteria, as well as, an evaluation of future loss potential. Therefore, it would appear that anything an Association can do to make itself legitimately "more appealing" as an underwriting risk, can only help with respect to limiting potential increases of the Association's insurance premiums.

## Potential Savings to Associations

Because of the limited number of liability insurers in the state, Associations that do not fit the carriers' "risk/reward" parameters will often face non-renewal of their coverage. Thus, an

Association considered by a provider to have a "severe loss history" could wind up purchasing coverage from a surplus lines carrier, at perhaps as much as 3-10 times the current cost of premiums. (NOTE: These are broad ranges used for the purpose of this article; for specific information regarding potential financial impacts of the *Immunity Clause* on a particular Association, we advise that Boards consult with their own insurance/professional advisors.)

## Implications/Advantages and "Downside" for Association Members

There are several potential monetary advantages for Associations that adopt the *Immunity Clause*:

1. Creating a greater degree of interest from prospective insurers. It may be too extreme to say that an insurer will not provide coverage if an Association has not adopted the *Immunity Clause*, but certainly an Association which utilizes such a clause would present a more attractive risk profile to potential insurers, which in turn, would be expected to result in lower insurance premiums to the Association
2. Reducing financial risk associated with potential unit-owner litigation against the Association
3. Minimizing the impact of transfer of these costs from the Association to individual unit owners in the form of increased maintenance or special assessments.

It would be unfair to present this as "all positive." Community Associations have engaged in spirited debate over whether or not utilizing the *Immunity Clause* is in fact a positive step. Why? It requires that unit owners give up their right to sue their own Association except in cases where gross and wanton negligence can be demonstrated. Since the majority of these incidents arise from slips/falls by residents on Association property, there is an understandable reluctance on the part of at least some unit owners to forego their right to sue. Additionally, it would appear that an increasing number of unit owners are utilizing the medical payments portion of the Association's liability insurance as their primary health care policy in such instances—whether or not the Association is truly at fault. (NOTE: **The Immunity Clause only applies to unit owners; it does not apply to the owners' family, guests or tenants—so these individuals retain their right to sue the Association.**)

## Step Associations Can Take if They Wish to Utilize the Immunity Clause

Associations who want to take advantage of the *Immunity Clause* must do so by formally amending their by-laws to include language similar to that in the legislation. This particular amendment must be voted on by the membership and ratified by a 2/3 majority—even if the Association's by-laws do not require such a majority for the adoption of other amendments. (The accompanying *Sample Immunity Clause* language is provided for reference purposes. Actual language, as applicable, should be drafted in consultation with the Association's legal counsel and insurance professional). Additionally, regardless of whether or not an Association elects to adopt the *Immunity Clause*, part of its "best practices" should include the following to help reduce potential liability/ financial exposure:

- ◆ Member education
- ◆ A review of all Association contracts to ensure they contain

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# Important Annual Report Reminder

By Donna Peskin, CPA

**H**ave you filed the *New Jersey Annual Report* this year (Schedule CAR-100)? All Condominium and Homeowners' Associations are required to file the annual report each year no later than the anniversary month of the Association's original incorporation in the State of New Jersey. The annual filing fee is \$50.00

**Filing the report has important implications for the Association;** it is this filing which documents that your Association is operating as, and wishes to continue to be recognized as, an active organization (business) in the State of New Jersey. Failure to file this report for two (2) consecutive years, allows the State to revoke the not-for-profit status of your Association. If this occurs, the State of New Jersey will send your Association a pending revocation notice. The Association will have sixty (60) days to file all outstanding annual reports with the total fees due. **Any Association that fails to respond to this notice will lose its active not-for-profit organization status along with the privilege of doing business in New Jersey.**

During 2004 and 2005, the State of New Jersey will be phasing in the capability for Associations to file annual reports online. The Association will receive notification of this change from the State of New Jersey. For a nominal charge, the Division of Revenue will provide upon request, a report which verifies the Association's compliance with filings, as well as its current operating status. Details are available on the internet at [www.accessnet.state.nj.us](http://www.accessnet.state.nj.us) or by calling the Division at 609-292-9292. If you have any further questions, please feel free to contact us or your Association's attorney.

**SCHEDULE CAR-100-M** (500)

**STATE OF NEW JERSEY ANNUAL REPORT**  
Include with your CBT Return  
(See Reverse Side For Instructions)

**A. BUSINESS INFORMATION**  
 CORPORATION TYPE: \_\_\_\_\_  
 NJ CORPORATION NUMBER: \_\_\_\_\_ FEIN: \_\_\_\_\_ FILING YEAR: \_\_\_\_\_

**B. BUSINESS ADDRESSES**  
 MAIN BUSINESS ADDRESS IN CONNECTION (REQUIRED)  
 STREET: \_\_\_\_\_ CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP CODE: \_\_\_\_\_  
 PRINCIPAL BUSINESS ADDRESS INFORMATION MUST BE A NJ ADDRESS  
 STREET: \_\_\_\_\_ CITY: \_\_\_\_\_ STATE: NJ ZIP CODE: \_\_\_\_\_

**C. OFFICERS/DIRECTORS (Required)**  
 NAME (LAST, FIRST, MIDDLE): \_\_\_\_\_ TITLE: \_\_\_\_\_  
 STREET: \_\_\_\_\_ CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP CODE: \_\_\_\_\_  
 NAME (FIRST, MIDDLE, LAST): \_\_\_\_\_ TITLE: \_\_\_\_\_  
 STREET: \_\_\_\_\_ CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP CODE: \_\_\_\_\_  
 NAME (FIRST, MIDDLE, LAST): \_\_\_\_\_ TITLE: \_\_\_\_\_  
 STREET: \_\_\_\_\_ CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP CODE: \_\_\_\_\_  
Check box if you have more than five (5) individuals. Attach a schedule.

**D. CHANGE OF REGISTERED AGENT/OFFICE (Use only if you are making a change)**  
 NAME: \_\_\_\_\_ STREET: \_\_\_\_\_ CITY: \_\_\_\_\_ STATE: NJ ZIP CODE: \_\_\_\_\_

**E. FEE AMOUNT**  
 REPORT FILING ANNUAL REPORT FEE OF \$50.00 PER FILING OFFICE. AGENT FILING CHARGE OF \$1.00 PER PAGE OF YOUR CBT-100 OR CBT-100S. NAME OF THE REGISTERED AGENT MUST BE PRINTED ON THE CBT-100 OR CBT-100S AS INSTRUCTIONS.

Signature of Secretary of the Board, President, Vice President, Registered Agent, General Partner or Authorized Representative: \_\_\_\_\_ Title: \_\_\_\_\_

## “Immunity Clause” (Continued from pg. 2)

proper language for the Association to receive all necessary and appropriate immunities/indemnification from its vendors and contractors (such as “hold harmless” clauses for all services rendered)

- ◆ Substantiation/Verification by vendors/contractors that they in fact, carry the requisite insurance to indemnify the Association for losses from **all** services provided (such as a landscape contractor who adds snow removal on behalf of the Association). This can be done by asking for copies of insurance certificates from vendors/contractors and inspecting them accordingly
- ◆ Conducting an evaluation of the benefit/viability of adding the Association as a “named insured” on contractor/vendor liability policies.

(We urge Associations to consult with their insurance professionals/attorneys to receive proper guidance during this process.) While not “foolproof”, this extensive review process can help to ensure that the Association's Board can be comfortable it has taken virtually all of the necessary steps to limit its liability and manage the associated financial risk.

## Summary

Accidents happen. There will be times when an Association, for whatever reason, could be at fault and a unit owner could bring a legitimate claim of gross negligence. However, given the increased costs of liability insurance, and the impact of accident-related costs on the Association as a whole, Boards should at a minimum become more familiar with the *Immunity Clause* and its specific “pros and cons” for their Association.

### Sample Immunity Clause Language

(Source: JGS Insurance)

Section \_\_\_\_\_. Except where there is a willful, wanton or grossly negligent act or omission by the Association, the Association shall not be liable in any civil action brought by or on behalf of a unit owner, or by or on behalf of the spouse of that person, to respond in damages as a result of bodily injury, including death resulting from bodily injury, to the unit owner or to the spouse of that person, occurring on Association premises, i.e., the community and recreational facilities owned by the Association.



## SPECIAL CONGRATULATIONS AND THANK YOU TO ANNETTE MURRAY

**W**&G offers special congratulations to Annette Murray, CPA, for 20 years of outstanding service to the firm. W&G Managing Shareholder Ed Guttenplan, CPA, MBA, is effusive in his praise: "Annette has been a crucial member



of our team from the day she joined us 20 years ago, contributing to our unique culture and ensuring that our work meets the firm's demanding standards for outstanding quality."

Annette joined us in 1984 with a B.A. from Rutgers University. Today she is a Principal with the firm, and the Director of our Accounting & Auditing department, as well as, the Firm's Quality Control department;

integral to these responsibilities is her direction of the Firm's peer review effort. Additionally, she coordinates the Firm's continuing professional education program.

Annette specializes in servicing closely-held businesses, not-for-profits and the real estate industry. She is Past Programs and Meetings Chairperson of the Middlesex/Somerset County Chapter of NJSCPA, and is a Member of the Industrial/ Commercial Real Estate Women of New Jersey (ICREW-NJ).

Everyone at W&G says, "Thank you, Annette—here's to 20 more years together!"



## NEWS AT THE FIRM

### ANNIVERSARIES (January–March)

Congratulations to the following W&G staffers celebrating anniversaries:

- |          |                         |         |                       |
|----------|-------------------------|---------|-----------------------|
| 19 years | <b>Sefi Silverstein</b> | 6 years | <b>Amanda Brady</b>   |
| 18 years | <b>Michael LoVerde</b>  |         | <b>Karen Davis</b>    |
| 17 years | <b>Kristine Flores</b>  |         | <b>Leonard Nitti</b>  |
| 12 years | <b>Carol Koransky</b>   | 5 years | <b>Patricia Pfaff</b> |
| 8 years  | <b>Brian Geissler</b>   |         |                       |
|          | <b>William McDevitt</b> |         |                       |

### APPOINTMENTS, COMMITTEES, PRESENTATIONS, PUBLICATIONS...

**Jules C. Frankel, Shareholder** has been appointed to College of New Jersey's School of Business Advisory Board.

**Vinay S. Navani, Principal** authored "What is a 'Metropolitan Area' for Transportation Purposes" in the Tax Adviser—*The Magazine of Planning, Trends & Techniques*.

Congratulations to **Maureen Mulherin** on passing the CPA Exam.

### UPCOMING ISSUES:

- Financial Implications of Reserve Studies
- What to Include in Your Association's Minutes
- Loan Documentation Checklist

This publication is prepared quarterly by Wilkin & Guttenplan, P.C. For further information or for complimentary copies or subscriptions, you may contact Jules C. Frankel at:

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