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September 4, 2013

Nikki Tate, President
Legend Oaks Homeowners Association 2, Inc.

Re: Lifeguards at Community Swimming Pool

Dear Nikki,

I am responding to your email of September 2 that posed several questions regarding the Association's transition away from having lifeguards during open pool hours. If handled properly, eliminating lifeguards is an acceptable risk.

Before making any final decision, I recommend that you contact your management company for its input. Goodwin manages dozens of associations, many of which have addressed this issue. Goodwin should be able to provide insight into how other associations have handled it.

There is no way to prevent a lawsuit when there is a serious injury. If the Association has lifeguards, the argument will be that the Association didn't monitor their performance adequately. If there are no lifeguards, the argument will be that the Association didn't do enough to monitor the pool and/or warn pool users of the risks. Either way, there will be a complaint that the Association's actions were deficient.

Hiring lifeguards from an independent company should add a layer of insurance protection, and can be used to show that the Association made an effort to provide a safer environment. On the other hand, providing a lifeguard may invite some complacency on the part of pool users, who may pay less attention to swimmers most in need of supervision.

Your idea of transitioning over a period of years is a good one. This should enable owners to get used to the pool not having a lifeguard. The Association should consult with its pool company about adding appropriate and conspicuous signage to the pool area. The signage should warn that no lifeguard is present and that the swimmers use the pool at their own risk.

The Association should perform a regular inventory of required safety devices (poles, flotation rings, emergency telephones, etc.), make arrangements for testing the water as required by regulations, and have a monitoring procedure to ensure that general rules are followed (no glass in the pool area, no babies without swim diapers, etc).

It's a good idea to have owners sign the waiver and release every year, but that will not be binding on minors and probably not on guests.

If there is a judgment in excess of the insurance policy, the judgment will be against the Association, not individual owners. With the advent of tort reform some years ago, there is a much reduced likelihood of a defendant suffering a verdict that would result in a catastrophic financial loss.

The system limits the types of damages that are recoverable, and creates a very high bar for recovery of punitive damages. The Texas Supreme Court seems inclined to reverse big dollar verdicts. Trial lawyers and judges have told me that jury damage awards are markedly less than they used to be.

In addition, it is the customary practice for plaintiffs to make a settlement demand within policy limits. If an insurance company unreasonably refuses to settle within policy limits, then the insurance company could be liable for damages in excess of policy limits.

In cases where the verdict exceeds available insurance, a plaintiff often agrees not to attempt to collect any excess funds from the defendant in return for an assignment to the plaintiff of defendant's right to sue its insurance company for failing to settle the claim.

If the plaintiff threatens to execute on the Association's property, the Association presumably could file for bankruptcy. Personal injury judgments are generally fully discharged in a bankruptcy filing.

The remedy that is most draconian (and has by far the lowest probability of occurring) would be for a plaintiff to ask the Court to appoint a receiver to manage the Association's business, and then petition the receiver to impose a special assessment on individual owners in order to pay the excess judgment. It's hard for me to imagine that turn of events occurring, especially if the plaintiff has collected several million dollars of insurance proceeds.

As indicated, these "worst case" scenarios are uncommon. Ample liability coverage should provide protection in all but the most unusual cases.

Sincerely,



PATRICE ARNOLD

PJA/rg

cc: Goodwin Management, Inc.