

Community Trends[®]



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LEGISLATIVE UPDATE

UPDATE ON COVID-19 IMMUNITY LEGISLATION FOR COMMON INTEREST COMMUNITIES

I am pleased to offer the following legislative update authored by **Ed San George, MPA, PCAM**, one of the members of our Legislative Action Committee. Ed is the President of INTEGRA Management Corporation, has closely followed the LAC's efforts to pass immunity legislation, and has spoken at our various webinars the past year on this important subject. Thanks to Ed for his efforts and for this update:

Each of us as professionals, vendors, practitioners and volunteers are acutely aware of the challenges that COVID-19 has presented to operating common facilities, most notably, swimming pools, and the mostly bold decisions by boards to not open pools in the 2020 summer season in NJ. We are also sensitive and acutely aware of the economic impact to pool operators, activity and amenity services providers and others who are valued members of CAI-NJ who are being adversely affected by restrictions to opening amenities. In fact our CAI-NJ board has approached CA-LAC to attempt to facilitate some form of legislation that will protect boards, management companies and service providers to operate without fear of legal jeopardy in the event that a COVID-19 claim is brought by an aggrieved owner, guest or service vendor.

We have proposed an immunity protection law that will be broad enough to cover our valued industry providers, our boards and the community association membership at large, but that will be limited to our specific industry. By narrowing the legislation to our industry

we are hopeful our legislators and Governor will recognize the particular issues of our non-profit community associations, our constituent membership in the industry, and the unique service requirements of community associations to offer recreational services and amenities — not as our only or primary service, or as a profit center, or as business providing a livelihood to business owners, but as an adjunct to the overall operations and governance of a common interest residential community.

In New Jersey, eleven different forms of immunity legislation have been introduced, affecting health care providers, active adult communities and other non-profit civic and sport organizations. The only legislation that passed and signed into the law is the health care protection law. Only six states nationwide have passed COVID-19 immunity legislation. Based on those numbers, we understand the challenge.

We crafted language amending Title 2A:53A-7 — Immunity From Liability For Negligence — by introducing



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ing “no cause of action” language in NJ Assembly bill **A4979**, as follows:

1. a. Any illness, injury, death, or other damages arising from, or related to, an exposure to, or transmission of COVID-19 on the premises of a planned real estate development shall not give rise to any cause of action.

b. The immunity provided pursuant to subsection a. of this section shall not apply to acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct.

Our thanks to Paul Raetsch, Homeowner Leader on the NJHAC, for facilitating the introduction of this bill in the Assembly by Assemblymen Vincent Mazzeo and John Armato, District 2 (Atlantic). As of this date, we are still seeking a senate sponsor for this bill.

We wish to temper expectations of how receptive the legislature may be to offer immunity in a dynamic of requiring adherence to health guidelines and public policy to control the spread of COVID-19, while not contradicting that direction and need by seemingly lowering the bar on adherence to the guidelines.

Furthermore, will immunity legislation truly be enough or will it lead to a false sense of security? Immunity will set up a barrier and definition of protection for the *proper* actions of a board, but it is only a defense to the action. Immunity does not stop a claim from being made and does not trig-

ger insurance protection. Immunity allows for an awareness of board protection and may stop some claims, but it's not a guarantee. As COVID-19 claims are not covered by either general liability or directors and officers liability policies, an association will still need to provide a legal defense to such a claim. Merely initiating a defense and presentation to a court of the immunity protection could cost thousands of dollars with no certainty of results. However, immunity protection is a form of risk management which should aid with board decision making and could have a beneficial effect on any lawsuit being defended and settled due to a COVID-19 claim.

We all agree that insurance coverage is the best defense but that it is not available and likely will not be. There has been discussion at the federal level of an OSHA program to protect workers (the Democrat plan) and broad immunity for governments, non-profits and business (the Republican plan). Neither of these were included in the most recent Federal Stimulus Plan.

I often see where New Jersey case law on the Business Judgment Rule applies to board decision making. This is truly a case in point. So, as our executive boards consider opening pools and other amenities this summer, please consult your professionals, weigh the pros and cons of the decision at hand and carefully document your decision in the board meeting minutes. Most importantly, communicate, communicate and communicate with your membership. ■