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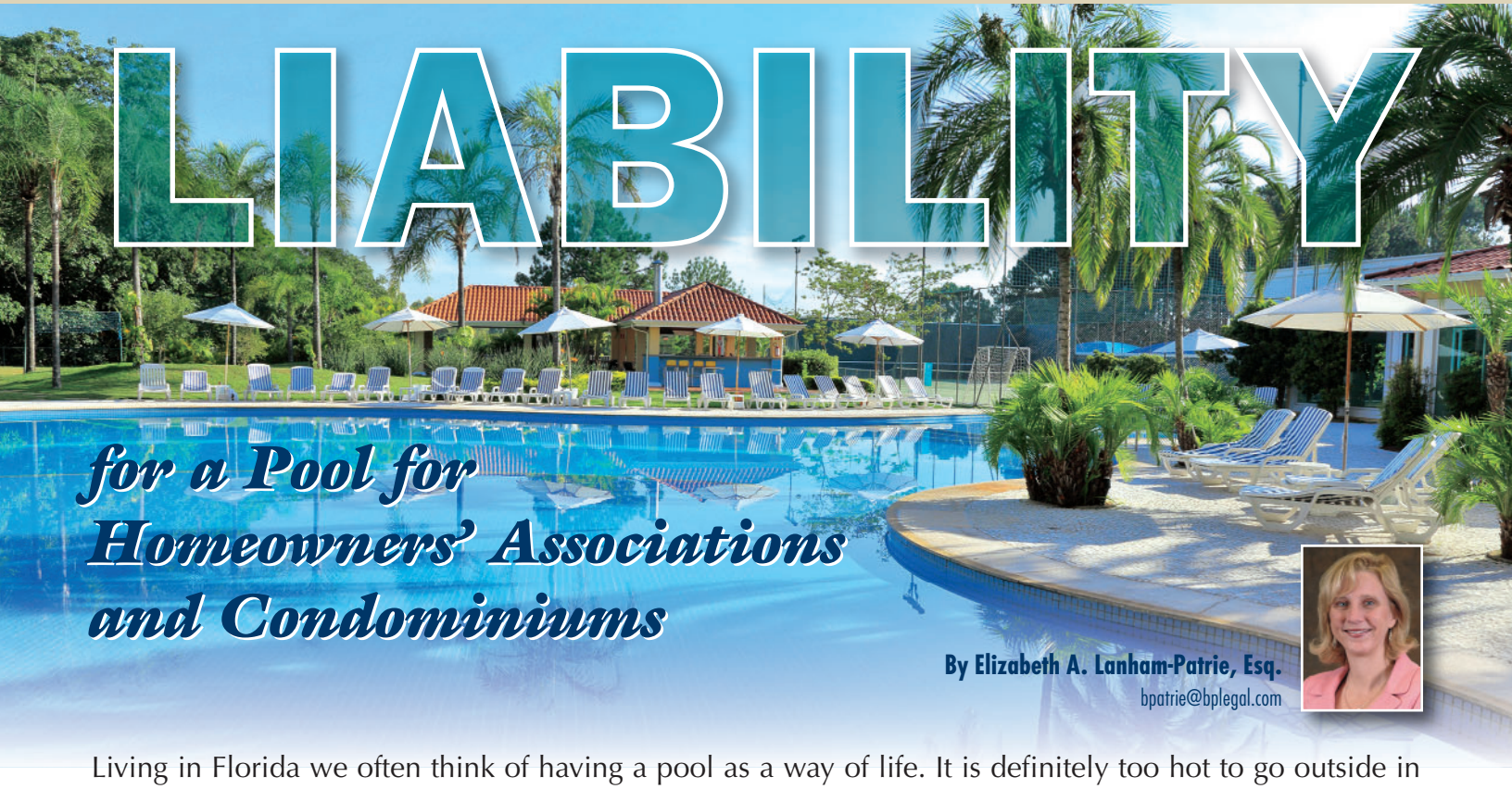
# COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980



# LIABILITY for a Pool for Homeowners' Associations and Condominiums

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Living in Florida we often think of having a pool as a way of life. It is definitely too hot to go outside in the Florida summers unless you are at the beach or in a pool. However, we often forget about the liability of having a pool. Many associations (both homeowners and condominium association) have pools, and there is a risk of liability that needs to be considered when operating, maintaining and repairing a pool.

The degree of care that an owner of real property owes to a person on the premises will depend on whether the person is an invitee, a licensee or a trespasser. In the case of both Members of the Association using the pool (or their children) and non-member tenants or guests using the pool, their status would be that of invitees. A property owner owes a higher duty of care to invitees. Generally, a property owner owes two (2) duties to an invitee:

(1) the duty to use reasonable care in maintaining the property in a reasonably safe condition; and

(2) the duty to warn of latent or concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care. Breach of the duty of care or the duty to warn may result in liability for negligence if the breach of duty is determined to be the proximate cause of the injury or damage sustained, and such damage was the foreseeable result of the breach of duty.

With regard to swimming pools or other natural or artificial bodies of water, the general rule in Florida is that there is no liability for someone drowning in a body of water, natural or artificial, unless there is some unusual danger not generally existing in similar bodies of water, or the water contains a dangerous condition constituting a "trap". Additionally, case law shows that an owner of a body of water is not liable

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merely because a child may be too young or of insufficient intelligence to the open and obvious danger of the water. Ultimately, the responsibility for the care of such children remains with their parents and caretakers. However, an association can be liable if:

1. it breaches a specific or a general duty imposed by the governing documents or an applicable statute, code, regulation or ordinance; or

2 if the body of water is considered an attractive nuisance to children. "Attractive nuisance" is not a separate cause of action or theory of liability; rather, it is a doctrine that imposes a greater duty upon a property owner toward trespassing children. The purpose of the doctrine is to recognize that trespassing children, unlike adults, may lack the capacity to perceive or avoid dangerous conditions. An association is not obligated to construct some barrier that is impenetrable by all children, but the association has a duty to ensure that the safety measures required by code are met in order to insulate the association from liability. Therefore, the association should always stay current with any maintenance on the pool fence, gate, locking mechanisms and other entrances into the pool area.

## MINIMIZING LIABILITY

If an association has a pool, the following are rules, policies, signs, etc. which would help to minimize the association's liability for any death, injury or damage that occurs at the pool. Please note that this list is not exhaustive.

1. Review the supervision and safety requirements of the Department of Health.
2. Check with your insurance carrier to confirm that there is adequate coverage in the event of death, injury, or damage. In this litigious society, an association can never completely eliminate its risk of liability. Therefore, the best line of defense is to make sure your association is properly insured. Many associations "layer" insurance coverage with "umbrella" coverage on top of their general liability policies. In this day and age, liability and protection in the three million ($3,000,000.00) to five million dollar ($5,000,000.00) range is not uncommon and Becker & Poliakoff has many clients who carry ten million dollars' ($10,000,000.00) worth of coverage (and some who carry substantially more than that). Some insurance companies also provide (often free of charge) "risk management" specialists who will come to view the premises and make recommendations to minimize liability. You may wish to consult with your agent as to whether your current carrier or carriers provide such a service.
3. Mount at least one lifesaving ring in a conspicuous place in the pool area.
4. Check the gate to ensure that it self-locks to keep out unintended users of the pool.
5. Make sure the floor around the pool is slip-proof.
6. Check the pool equipment such as pool pumps to ensure they are operating properly.
7. Make sure there are adequate water depth markers surrounding the pool.
8. Enforce all pool rules and regulations fairly and consistently.
9. Conduct maintenance checks regularly to ensure that the water has appropriate pH levels. Keep weekly or monthly logs of maintenance checks.
10. Maintain the pool in a good condition. There have been incidences of persons contracting Legionnaire's Disease from splash pools and hot tubs.
11. Close the pool when appropriate (i.e., when there is equipment failure, when levels of chlorine are not within approved ranges, or during inclement weather conditions).
12. Monitor the pool regularly.
13. Consider hiring qualified personnel (such as full-time lifeguards) to monitor the pool.

# NEWS

from our Collection & Foreclosures Pratice Group

### *Settlement works in favor of Association*

24 UNIT CONDOMINIUM ASSOCIATION/MAINTENANCE
APPROX. $5,700.00 MONTHLY/BROWARD COUNTY

Association authorized us to aggressively pursue foreclosure. The owners had been attempting to do a short sale of the property for several years. The day before the hearing on the Association's Motion for Summary Judgment the Association agreed to a partial settlement agreement to stay the action for 120 days in exchange for $30,000.00 toward the arrearage and another $1,000 to correct an existing plumbing leak and exterior nuisance. The Association was concerned not only with the delinquency but also with the covenant enforcement. By agreeing to the stay the Association resolved the covenant enforcement issue without filing a separate cause of action. In the interim, the owners sold the property and the **Association recovered over $103,000.00 representing 100% of its unpaid assessments, late fees, interest, costs, and legal fees.**

### *Court rules that Association entitled to collect legal fees*

238 UNIT CONDOMINIUM ASSOCIATION/MAINTENANCE
APPROX. $342.00 MONTHLY/MIAMI-DADE COUNTY

Unit owner refused to pay legal fees the Association incurred in defending itself in owner's two successive bank foreclosures. In February of 2014, at the hearing on the Association's Motion for Summary Judgment the Judge ruled the Association was entitled to collect not only the fees incurred in the Association's foreclosure action but also its legal fees incurred in the owner's bank foreclosures as they were incurred "incident to collection." The Court entered final judgment and scheduled the property for sale. Just prior to the foreclosure sale, the unit owner paid the Association in full. **The Association recovered over $30,000.00 representing 100% of its unpaid assessments, late fees, interest, costs, and legal fees.**

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construction contracts. This is so because often dangerous activities are taking place and the parties involved with the contract want to make sure prior to such activities occurring that the allocation of risk involved is clearly delineated.

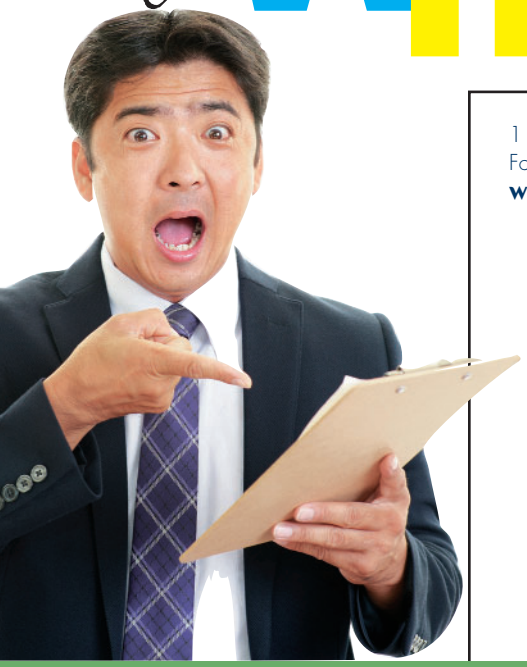
When evaluating an indemnity clause it is important to understand whether the obligation to indemnify arises even if the damage incurred was due to the negligent or otherwise wrongful act of the party who is to be indemnified. As the Florida Supreme Court has explained, indemnity provisions which create an obligation to indemnify even in the instances of wrongful conduct are disfavored. *See Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So.2d 487 (Fla. 1979)("With respect to the possibility of contractual indemnity, we take note that contracts of indemnification which attempt to indemnify a party against its own wrongful acts are viewed with disfavor in Florida."). That said, these types of indemnity clauses will be upheld if the contract expresses "an intent to indemnify against the indemnitee's own wrongful acts in clear and unequivocal terms." *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla.1973).



Indemnification clauses can be useful in many contractual relationships, but community association boards considering contracts which discuss indemnity issues need to be cognizant of scope of the indemnification sought, and be wary of any indemnity clause which seeks to force the association to be obligated to indemnify for the negligent or otherwise wrongful acts of the other party to the contract. As always, your association should consult with its attorney before signing any contract.

# My Association is Responsible

*for* What?????



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## THE GOOD, BAD, AND UGLY OF CONTRACTUAL INDEMNITY

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"Indemnity" is a legal term of art which stands for the right of a party to claim reimbursement for its loss, damage, or liability from another party who has such a duty. Ordinarily, the duty to indemnify arises through express contractual agreement. The recent adoption of section 468.4334, *Florida Statutes*, has brought a spotlight to the concept of indemnity in the community association world. The new statutory provision provides guidelines regarding acceptable indemnity provisions in contracts between a community association manager (or management firm) and community associations. The purpose of this article is to discuss appropriate and inappropriate scopes of indemnification clauses in contracts entered by your association.

At its most fundamental level a contract is nothing more than assignments of obligations and allocations of risks. Indemnification address both obligation and risk by stating that Party A is obligated to pay for any loss, damage, or liability suffered by Party B due to Party B's actions (or inactions) covered in the indemnification clause. Indemnity is not inherently a "bad" thing and serves very important purposes. For instance, many community associations' governing documents provide indemnity to officers and directors acting in their official capacity. This is good because it encourages volunteer owners to participate as directors of the association by assigning the association, as a corporate entity, the legal obligation to pay for any damage caused to the directors by acting in their official capacity. Another area where indemnity clauses are routinely contained is

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