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Samantha Joseph, Daily Business Review

Attorneys to Condo Associations: Zika Litigation Won't Bite



David Podein, partner at Haber Slade in Miami. Courtesy photo.

What are condo associations, homeowners' associations and other multifamily real estate boards to do as Zika spreads across South Florida? Not too much, according to real estate attorneys, who suggest caution but advise against creating liability where none exists.

Health officials reported 25 locally acquired cases of the mosquito-borne virus in South Florida Thursday, as some communities held emergency meetings. For boards weighing the risks in multifamily properties with pools, lakes and other potential mosquito breeding grounds, attorneys recommended sticking to spraying for insects and passing along information from the Centers for Disease Control and other government agencies regarding the virus.

Avoid draining pools, restricting access or taking other steps that might deprive residents of amenities and lay the groundwork for constructive-eviction lawsuits, said David Podein, partner at Haber Slade in Miami.

"It's one thing if the CDC makes a recommendation that it must be done," he said. "Absent that, even if the association is trying to be cautious, it sets a bad precedent."

In Zika-related litigation, attorneys said plaintiffs would struggle to prove where and how they contracted the disease, making it difficult to show legal liability and prove negligence by associations.

"Ask the average community association resident whether or not the association board has a duty to protect him or her from foreseeable risk inside the community and the answer is likely to be a resounding, 'Of course,'" said Becker & Poliakoff shareholder Donna DiMaggio Berger, a member of the national College of Community Association Lawyers.

But in the case of the Zika virus, "The reality is there isn't a whole lot an association can and is expected to do with regard to the natural environment and animals that are part of that environment," said Becker & Poliakoff community association practice group chair Ken Direktor.

'Being Prudent'

Podein recommended against associations assuming special risk-reduction roles. "An association doesn't have an independent or specific duty to seek out and provide information to the unit owners and residents," Podein said, adding that while it makes sense to provide government advisory information to residents, telling residents they can call the board if they need assistance complying with those advisories could be problematic.

"The responsibility is to the larger group," said Podein, who focuses on complex real estate litigation. "Don't open it up to creating the appearance that you can help on an individual basis, because then you're taking on a duty that's not there."

Heed government safety warnings on mosquito control, share advisories alerting residents of Zika-related risks in pregnancy and relay information about infection zones, suggested Glen Waldman of Heller Waldman in Coconut Grove. Balance the association's actions with its limited liability.

Associations typically have explicit provisions in their declarations or governing documents that shield them from responsibility for unit owners' health. "But everybody knows that doesn't mean that someone won't sue," Waldman said. "What do you do? It goes back to being prudent."

Also prudent, said Podein, is being mindful of third-party contracts and relationships that could give rise to litigation with nonresidents.

For larger communities that hire property managers, review contracts to avoid breaching provisions for workers' health and safety. Alert property managers to the risk of infection, consider accommodations for pregnant women and others at risk, and consult with legal counsel.

"Some management companies' contracts might even provide the company with the right to remove its employees from the condominium property if the work environment is not safe," Podein said. "What kind of situation does that put condo association in? There might be some difficult issues, but generally people should work together to come up with what is applicable and safe."