Community Association Management Insider®

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INSIDE THIS ISSUE

Tennessee Association Sues Blogger-Member

A condominium association in Gatlinburg, Tenn., has filed a $1 million lawsuit against one of its members who it alleges has been using a blog to criticize the association's general manager and board for violating state law. The member says that he has made numerous requests to get copies of or view the association's books, but claims the association has refused to show him the paperwork.

The member also claims that the board is violating the association's bylaws. The member has sent a press release to several hundred local and national media outlets. In it, the member notes that the association's lawsuit alleges that the member is guilty of "defamation, libel, slander, and false light invasion of privacy" and wants him to remove the negative content from his blog. He states that "the $1 million lawsuit is simply a preemptive attempt at intimidation to quash my own lawsuit against the HOA and its board members."

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FEATURE

Construction Defect Claims: Understanding Main Players' Roles

One of the more difficult issues that an association and its manager deals with is what to do when construction defects are discovered in the community. Construction defect claims can be complex, time consuming, and expensive.

A construction defect is almost any condition resulting from improper construction that reduces the value of a home, condominium, or common area. Courts throughout the United States have recognized two primary categories of defects for which damages are recoverable by a homeowner or a homeowners association. These categories include defects in design, workmanship, or materials, and soil or settlement problems.

Defects in design, workmanship, and materials include dry rot, water seepage, faulty drainage, improper landscaping and irrigation, termite infestation, improper materials, structural failure or collapse, defective plumbing, faulty electrical wiring, inadequate environmen-

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BEST PRACTICES

Conduct Legal Checkup of Swimming Pools to Avoid Liability

With summer here, it's time to make sure that your community swimming pools are ready for action by checking their safety, insurance coverage, and legal compliance. Many associations do not conduct legal checkups, which is risky considering the number of lawsuits and regulations that exist.

The following is a list of things your association should check to ensure that the community avoids unnecessary risks and weathers any legal storm should an unfortunate accident occur at the pool this summer.

❑ Review Pool Rules and Regulations

Associations should be sure to eliminate all rules that discriminate against children or in some manner single them out for spe-

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tal controls, defective lighting or security, insufficient insulation and poor sound protection, inadequate firewalls or equipment, and many others.

Soil and earth settlement problems include movement in the home caused by expansive soils, underground water or streams, ancient landslides, vertical settlement, horizontal movement, land sloughing or sliding, surficial failures, improper compaction, inadequate grading, and poor drainage.

Structural failures can result from these problems, with both personal injury and substantial property damage exposure. Soil and settlement conditions may result in the collapse of roofs; cracks in slabs, walls, foundations, and ceilings; disturbance of public or private utilities; or a complete undermining of the structure.

In this article, we'll look at the role of the different players involved in the process of pursuing a construction defect claim against a developer or homebuilder. The players involved include the manager, qualified experts who have the necessary training to give testimony in court as to the cause of a defect, the board, and the association attorney.

Don't Forgo Legal Counsel

When faced with construction defects in the community, many association boards are tempted to take shortcuts in order to save money. Boards may act on its members' behalf to resolve the construction defect without legal counsel or hire an engineer or architect to evaluate construction defects rather than letting counsel engage that person or firm.

If a board arranges for an expert evaluation, there is a greater risk that the association does not hire the most credible expert. "More important, the engineer or expert's drafts and notes all fall under the work product exception to discovery requests when experts are hired by counsel instead of the association," says Maryland attorney Michael Nagle. It is in the association's interest to preserve the confidentiality of these reports until the final report is turned over to the developer.

Instead of hiring an attorney, the association may attempt to utilize its property manager to negotiate a settlement. There are profound risks to both the association and the property manager in doing so. As fiduciaries of the members of the association, board members are at risk of liability if an otherwise viable claim for defective construction is impaired or lost through their neglect.

Construction defect claims are complicated both from a legal and an engineering point of view. And being untrained in the law and often inexperienced in claims negotiation, an association manager is at a serious disadvantage when dealing with a seasoned builder or

insurance adjuster who is receiving advice of counsel behind the scenes.

Also, regardless of his training or experience, the manager who undertakes to negotiate a resolution of the legal claims of the association is engaging in the unauthorized practice of law. Therefore, he will have no insurance policy insuring against his acts or omissions while engaging in the unauthorized practice of law. Moreover, because the resolution of a construction defect case is outside the scope of the management agreement, there may be no insurance to protect either him or the association, which may be harmed by his error.

Role of the Association Manager

The manager is stuck in the middle between the developer and the association. Oftentimes, the manager was originally hired by the developer and his contract renewed after the developer turned control of the association over to the members.

According to Virginia attorney Robert Diamond, "Managers' job should always be to look at the realities of the situation. Their job is to play it straight, right down the middle. If there is a valid warranty claim or defect, they make sure it gets taken care of correctly."

Another conflict of interest for the manager that Diamond points out is that defects may arise because a manager has not properly maintained the property. This is a problem because if an association brings maintenance issues to the developer, citing them as warranty claims, this reduces the credibility of any true structural defects in the community. From the developer's point of view, construction defect claims from this association will be seen as not only trying to get the developer to fix structural defects but also handle all their deferred maintenance.

One of the primary responsibilities of the manager is to maintain the property during the warranty period. The manager should utilize the money in the budget that has been set aside for maintenance. For example, let's consider a situation where there is money in the budget to paint wood trim. The management may forgo painting wood trim and, as a result, the wood rots and the association makes a claim against the developer. And the developer's response is to ask when the manager last painted it. If the management properly maintained the wood trim, this would not be an issue.

Having an active manager who properly maintains the community during the warranty period makes it easier to separate maintenance issues from warranty defects. If a manager doesn't perform proper maintenance, he is just giving the developer defenses against construction defect claims.

Role of the Expert

An association does not need a very sophisticated inspector to look at stick-built townhouses. However, an association for a high-rise building with multiple central systems will need a fairly sophisticated engineer to evaluate any problems. For example, many of these buildings have complicated electrical components for their fire control systems and air conditioning compressors that need a high level of expertise for any sort of evaluation.

In working with an expert, it is important to give him a clear request for proposal or clear statement about the services you require. If an association asks an engineer in general terms what is wrong with a building, then for the sake of his own liability that engineer will report on everything that is wrong. Experts are not able to separate what is legally a structural defect from problems that aren't.

Diamond says that experts should separate out maintenance from construction defect claims. If experts are not able to identify structural defects that are covered by a warranty, they need to work with an attorney. A draft report may have items on one side of a line, and the attorney will be able to say whether or not an item is a warranty defect. This process will produce a final engineer's report with input from counsel that will be taken seriously by developers.

Engineering reports should be thorough, and reasonable claims should be inferred from them. To reduce the cost of an engineering report, boards frequently want just a basic sampling. They will look at only a few units, and because they found something in a few units they will extrapolate from this information that the problem exists everywhere. This isn't necessarily the case. For example, a carpenter or the caulking subcontractor may have had a bad day, so there may be a few bad windows, but this does not mean that all the

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windows in the community are defective. Categorical statements to the developer make it more difficult to reach a settlement. The engineer has to make a representative sampling, and the association should not always extrapolate immediately but rather look for evidence that a problem exists elsewhere.

Role of the Association Attorney

An organized report by type of defect, location, and categories such as plumbing, electrical, or structural will most likely garner a more meaningful response from the developer and make it easier to negotiate a reasonable settlement. As a result, it should be the responsibility of the association's attorney to get a fair and thorough engineering report that highlights those defects covered under warranty.

The attorney also has to look at and evaluate the potential avenues of recovery for the association. Before filing any lawsuit, the attorney will help the association make an early determination as to whether a lawsuit is economically feasible. The association must carefully balance the cost of litigation against the amount of the possible recovery.

Unfortunately, the builder is not always still around when the defects start showing up. The unscrupulous builder may create a new corporation for the construction project. After construction is completed but before the problems start to appear, the corporation is then dissolved, leaving the association with the difficult task of finding someone to sue. In other situations, the builder may have filed for bankruptcy, which may effectively bar subsequent suits by homeowners.

In some cases, if the developer exists, an attorney will be able to find out if its insurer provides coverage for the types of defect your association may claim. Even if the developer is bankrupt or out of business, the insurer may still be responsible to that developer, and may have to pay claims based upon negligence, strict liability, or breach of warranty.

The insurance in effect when the damage is first noticed may be a source for payment of the defect claim. Sometimes a developer's attorney may work with an association's attorney to characterize a defect to be, for example, consequential damages because consequential damages are covered under certain builders' risk policies where a structural defect may not be covered. In one such case, Diamond says that the builder did not have any money for recovery but wanted to assist the association in getting the problem resolved.

Insider Sources

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Search Our Web Site by Key Words: construction defect claim; developer; engineering report; association attorney

RECENT COURT RULINGS

➤ Association's Arbitration Clause Ruled Valid

Facts: Shortly before a member purchased his condominium, the association filed an amendment to the declaration with the county recorder's office. The amendment prohibited members from leasing their condominiums unless certain exceptions apply. The member applied for a hardship exception to the no-leasing rule, but the association denied his application.

The member decided that the amendment was defective and invalid. He concluded that the amendment changed the fundamental purpose of his unit and, therefore, required a vote of 100 percent of members. Because only 75 percent of members approved the amendment, he decided to lease his condominium. The association responded with a written notice to the member that it intended to evict his tenants. The member sued the association.

The association asked the court to postpone the lawsuit pending arbitration. The trial court granted the association's request. And the member appealed this decision.

Ruling: An Ohio appeals court agreed with the lower court's decision to allow the dispute to go to arbitration.

Reasoning: The court ruled that the member's claims essentially involved contract interpretation with respect to the amendment to the governing documents. Because they did not involve title or possession of real estate, the Ohio statutory exceptions to arbitration do not apply. The court also ruled that the arbitration clause in the governing documents was fair and reasonable.

- Murtha v. Ravines of McNaughton Condo. Assn., March 2010

➤ Further Trial Needed Against Developer

Facts: A community suffered property damage to various common areas and homes after a ditch overflowed as a result of heavy rains. The association filed a complaint against the city, the company that developed the community, and the individual partners of the company.

Except for the company, everybody else named in the lawsuit answered the association's complaint and are actively defending the lawsuit. The association asked the court for a default judgment against the developer company in its favor for failing to defend the claims against it.

Ruling: An Indiana district court denied the association's request.

Reasoning: A court is allowed to consider a number of factors when deciding a request for a default judgment. In this situation, the association filed a six-count complaint against both the partners and their company. Because the partners answered the complaint properly, the court stated that in the course of defending the claims there is a possibility that they may demonstrate that no liability properly lies with them or the company or that the amount of damages is other than claimed in the default judgment request. Therefore, this possibility that a default judgment against the company may ultimately be inconsistent with the ruling in the claim against the partners individually prevents the court from allowing the association's request.

The other consideration was the amount of money involved in the judgment request. Even when a default judgment is warranted based on a party's failure to defend against a claim, the association would still have to prove the amount of damages suffered. The association sought $2.7 million. The court found this amount of money to be substantial enough to merit caution and not award a default judgment award without a trial.

- Stillwater of Crown Pt. Homeowner's Assn., Inc. v. Kovich, April 2010

➤ Member Not Required to Sue Other Members in Parking Space Dispute

Facts: A member was assigned a parking space in an association's covered garage after he purchased his condominium in 1979. A few years later, the member purchased another parking space in the garage. Then in 1993, the member received a letter from the association informing him that his assigned parking space would be converted to a guest space.

In 2005, the member asked that the guest space be given back to him, and the association president reassigned the parking space to the member. However, at a subsequent board meeting, the board decided that the assignment of the parking space back to the member had been improper and, once again, designated the space as a guest parking space.

The member sued the association. The association asked the court for a judgment without a trial on the basis that the member is required to join all of the other members in the community in his lawsuit because the lawsuit concerned a common area that affected all of the members. The trial court agreed and dismissed the member's complaint unless the member attached all the other members in the community in the lawsuit. The member appealed.

Ruling: A Florida appeals court ruled in favor of the member.

Reasoning: The appeals court found that requiring all the other members to join the lawsuit was not required. There had been no allegation that the parking space at issue has been paid for or assigned to another association member, and therefore, the judgment the suing member seeks affected the common property of the association and not the property rights of another individual. Therefore, the member could sue the association as the representative of all condominium unit owners.

- Tedeschi v. Surf Side Tower Condo. Assoc., March 2010

Q & A

The INSIDER *welcomes questions and comments from subscribers. You can submit your questions through the "Ask the Insider" feature of our Web site,* www.communityassociationinsider.com.

Using Power of Attorney to Run for the Board

Q Can a member give a nonmember or non-owner the power of attorney to engage in association business, such as access to association records or running for the board?

A Maybe. A power of attorney is a legal instrument that is used to delegate legal authority to another. In the community association context, an owner may give a power of attorney to a non-owner to assert certain membership rights or otherwise act on behalf of the owner. The most common types of non-owners claiming membership rights through a power of attorney are spouses or relatives of owners, attorneys, real estate brokers, and certain financial entities.

As to which rights and privileges may be designated to a nonmember through the use of a power of attorney depends on your state's law and your governing documents. Some states allow nonmembers with the power of attorney to examine financial and other records of the association that are otherwise available to owners. Some states require that all regular and special meetings of the association's executive board be open to all members or their representatives.

For the specific question of whether a non-owner can run for the board, it depends on your association's governing documents. Many governing documents allow any "member" to run for the board of directors and more often than not, "member" is defined as the "record title owner" of a unit. Thus, an individual who is not the "record title owner" may not serve on the board of directors regardless of whether such individual has a power of attorney.

The most common example occurs when a non-owner spouse wishes to run for the board of directors, but the spouse is not named on the deed. If the governing documents restrict board membership to "record title owners," then the spouse may not be elected to the board. A power of attorney may not be used to contravene the specific language of the governing documents.

Be sure to check carefully because some governing documents do not limit board or committee membership to owners. In those cases, an owner may give a power of attorney to a non-owner to run for the board or committee. Keep in mind, however, that there may be other "collateral" requirements in the governing documents that prevent non-owners from being on the board or committee, such as requirements that a board member be a resident in good standing and not in violation of the covenants.

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Best Practices (continued from p. 1)

cial treatment. Since children are most vulnerable to pool accidents and so have the potential to be a source of liability for you, you may be tempted to ban them from your pool.

However, by doing so, you could be accused of discrimination and ordered to pay a damage award, points out fair housing expert Nadeen Green. Instead of banning young children from using your pool, Green suggests requiring adult supervision of children under a certain age. Fourteen is a reasonable cutoff age that shouldn't lead to any complaints, says Green. Anything higher, though, might lead to complaints. After all, the Red Cross certifies 15- and 16-year-olds as lifeguards.

Along with reviewing the safety rules for discrimination,

make sure there is adequate signage. It does little good to establish pool rules if those rules are not written in an understandable manner and posted in an area everyone can see.

❑ Review Pool Maintenance Contract

In addition to the standard "boilerplate" language that should be included to protect the association, the contract should also require the contractor to indemnify and hold harmless the association in the event of injury or damage resulting from the negligence of the contractor.

It's also important that your pool maintenance contract require the contractor's insurance to be primary to the association's insurance, says Texas attorney Marc Markel. If something happens and a claim is filed, the contractor's insurance will be used before the association's insurance is used, he explains. Without this protection, you could end up with claims being filed on the association's policy, which could lead to higher rates. This is a fair protection to request, since the contractor—and not the association—is in the best position to make sure the pool, pool area, and pool equipment are safe.

❑ Conduct an Insurance Inspection

Your association should also inspect the pool area with a representative from the association's insurer, if one is available and willing to visit. This person may be able to advise you of ways to reduce the association's exposure to liability, such as having a telephone that is immediately accessible in the event of an emergency.

At this time, you should also review your liability insurance. It is difficult to determine how much liability is sufficient to protect associations against pool-related incidents such as slips and falls and drownings, but input from your association's insurance agent will be helpful. With the input, the board can consider whether to raise the limits of liability.

❑ Physically Inspect Gates, Locks, and Fences

This should be done with your maintenance personnel to ensure they are in proper working order. In addition to making sure that these function correctly, examine them against your municipal and county ordinances and regulations. Most municipalities and counties regulate fences and gates surrounding pools. But the type of fence and requirements regarding height and spacing vary from jurisdiction to jurisdiction.

❑ Review Safety Procedures and Equipment

If your association employs lifeguards, review and verify their training. Be certain they are familiar with your association's pool, equipment, rules, and safety procedures. Also, make sure your association abides by labor laws if you have lifeguards on staff. This should include checking workers compensation coverage, minimum wage laws, required breaks, overtime, and other employment-related issues if you have employees or independent contractors.

❑ Comply with Virginia Graeme Baker Pool and Spa Safety Act

Ensure that your pool complies with the federal Virginia Graeme Baker Pool and Safety Act. The law applies to all public pools and spas in the United States. "The act defines 'public' broadly," says Carvin DiGiovanni, senior technical director of The Association of Pool and Spa Professionals. It includes any facility open to the public, whether the pool or spa charges a fee for use or is free, and multiple family residential facilities such as community associations.

The law requires certain types of safety drain covers and suction entrapment prevention devices. Consult your pool maintenance company to ensure your pool complies.

Insider Sources

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