Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

NOVEMBER 2018

FEATURE

How you respond to a mold condition may determine your association's liability for a member's mold-related illness.

IN THIS ISSUE

Take Steps to Protect Association from Mold Claims, Lawsuits

Mold in any property can present multiple serious health issues. It has been a controversial issue at residential properties in particular, because it can cause serious health problems and be expensive to remediate. Mold prevention techniques and effective remediation of existing mold should be high on your list of maintenance and safety concerns. But perhaps the biggest concern for the community association is the issue of responsibility for mold-related problems.

It's not uncommon for a member who finds mold in his unit to claim that the mold has caused health problems. And that member could threaten to sue the association for damages. If your association's governing documents have a clause that provides that the association isn't liable to any member for damage or injury resulting from a leak—with water damage being a cause of mold—you might think that you're off the hook for damages. But in some cases, associations are liable for members' mold-related injuries notwithstanding the clause.

Take these additional steps to protect the association from mold claims and lawsuits.

Negligence Creates Vulnerability

Even if your governing documents state that the association isn't liable, a member who suffers a mold-related illness could win a claim against the association depending on how the association responded to the mold problem. If the clause in your governing documents states that the association isn't liable to any member for damage or injury—namely, mold-related illness—resulting from a leak provided the association acted in "good faith" in fixing it, you could still be in trouble if your good faith efforts are inadequate or fail and you don't pursue remedying the problem. For example, hiring an unlicensed contractor to repair leaking pipes and remove mold from affected walls may not be a "good faith" effort that would protect you from liability.

And if subpar remediation efforts fail and you don't either find a more qualified remediation service or allow the member to pay for her choice of remediation measures and reimburse her for the cost, a court could find that you're responsible for her injuries. That's

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Mold Claims

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because, at that point, the member's injuries didn't arise directly from the leak—they arose from the association's negligent conduct in remediating and repairing the member's unit. But cooperation from members in preventing mold in their units can help you avoid this situation.

Also, be aware that most association insurance policies don't cover mold-related damage and claims. To check your association's coverage, look in the "Exclusions" section of the policy to see if mold coverage is capped or excluded. If the association is willing to pay the price, it may be able to buy a special policy—called a "special pollution insurance policy"—that will cover mold.

Ask Members to Perform Simple Maintenance Tasks

Although your association is responsible for many aspects regarding the homes in your community, members can and should participate in keeping their properties safe. This includes conditions that can cause mold—namely those having to do with water. Members can do their part to ensure that rainwater drains properly from their windows, outdoor balconies, or patios. Because they're in their units on a daily basis, they have the first opportunity to stop a mold problem before it gets out of hand. It's important for them to know that they can prevent mold problems using simple maintenance tasks. This should bring peace of mind to the association and homeowners. And many of these measures are fairly easy to take. For example:

- Members can periodically vacuum their window tracks, which, like rooftops, have their own drainage systems. In sliding windows, drain holes are located at the bottom corner joints. Debris can obstruct these exits,

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causing leaks into members' units. Sometimes members or associations assume that leaks from windows indicate a much bigger leak problem, when simply clearing out the bottom window tracks will do.

- Advise members to keep their decks clear of debris. Patio and deck drains are small, and a deck with misplaced plants or stray leaves can obstruct the drains, resulting in leaks into their own or neighboring homes.

Like our *Model Letter: Instruct Members About Mold Prevention Tactics,* the one you draft to give to members should provide detailed maintenance tips.

Preemptive Strike Goes a Long Way

As with any maintenance issue, preventive measures are key, and it's no different in avoiding mold from forming. First, ensure proper drainage, which requires that excess water be correctly carried away or diverted from sensitive areas on roofs. For sloped roofs, sensitive areas are at the valleys where one sloped roof meets another, and other areas where water is channeled during rains. Any debris caught in the valleys essentially creates a dam, which can direct the moisture sideways and under roof shingles.

Sitting water on flat roofs can cause the roofing felt—that is, rolled paper-like material used for waterproofing—to break down. To prevent this from occurring, have a qualified service provider or maintenance worker remove all

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MODEL LETTER

Instruct Members About Mold Prevention Tactics

You can send a letter like ours periodically to remind members that they can prevent mold problems using simple maintenance tasks. Mark your calendar so that you remember to send it once, or even twice, a year. If your community is in a part of the country that experiences a rainy season, or a wet season due to melting snow, send the reminder shortly before the season begins.

Dear Members:

Shady Acres Community Association would like to remind you about several simple maintenance tasks that can minimize mold problems in the community. We would like to offer two tips that will help keep your home comfortable and dry.

First, we recommend that you keep window sills clear of dirt and debris. Windows often have a simple drainage, or "weep," system designed right into the product. These water drainage pathways must be kept clear and clean for the window or door to operate correctly. Also, we ask that you check that rainwater will have clear access to unclogged [*insert patio or balcony*] drains. We know that members' [*insert patios or balconies*] sometimes get cluttered. Ensuring that nothing obstructs your exterior drains will help keep your home and your neighbors' homes dry. It's important for us to make sure you are comfortable, that the buildings are well maintained, and that no one's property gets damaged.

Please help us by keeping these tasks in mind the next time you clean or organize your home.

Sincerely yours,
Jane Manager

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leaves and debris from rooftops at least twice a year, or more frequently, if there's a lot of greenery above the roofline.

Prompt Response to Complaint Alleviates Liability

After a mold problem is discovered, promptly take care of it. You'll have to decide on who should do the cleanup. This depends on a number of factors. One consideration is the size of the mold problem. If the moldy area is less than about 10 square feet, according to the Environmental Protection Agency (EPA), the job can be handled by a maintenance worker. But if the moldy area is larger than 10 square feet or there's a lot of water damage, the EPA recommends hiring an experienced contractor do this type of cleanup.

Keep in mind that you shouldn't use your own maintenance workers for larger areas or other cleanup responsibilities that they aren't specifically trained for. For example, take extra caution when water or mold damage was caused by sewage or other contaminated water. Rather than using maintenance workers or a general mold remediation service, the association should call in a professional who has experience cleaning and fixing buildings damaged by contaminated water.

Health concerns take center stage when mold is a problem, so consulting a health professional can also benefit the association while minimizing fears of members and protecting them. Consulting a health professional before starting cleanup can go a long way in letting members know you have everyone's best interests—not just property damage—in mind. ♦

RECENT COURT RULINGS

➤ Homeowners Required to Pay Association to Maintain Shared Easement Road

FACTS: A homeowners association was formed in 2013 to govern several homes, which then became a planned community. The association began to charge a yearly fee of $300 to its members, which was used to maintain and repair the only common areas in the association—a road and a gate installed on the roadway. The homeowners were made aware of the $300 per year assessment fee via a hand-delivered letter and a mailed letter. None of the homeowners responded with an objection immediately.

Because the homes had been built by various developers over a period of time, and became part of the association several years later, there wasn't a typical "subdivision map indicating where the subdivision begins and when it was laid out." However, the homeowners' deeds indicated that the owner shall have "a right-of-way for ingress, egress and regress…from the main road to the premises over a fifty-foot wide roadway."

Several of the homeowners denied that their homes were part of the association and refused to pay the fees. The association asserted that these homes were, in fact, part of the association and, therefore, subject to the fee. The association

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Recent Court Rulings

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alternately argued that the homeowners had a common law obligation to pay for the maintenance of the shared easement, if the court found that they weren't part of the association.

The homeowners sued the association, claiming that they shouldn't have to pay for maintenance for the road easement. A Pennsylvania trial court ruled in favor of the homeowners. It said that the homeowners were not required to pay the association to maintain the road used to access their properties. The trial court made this determination because a subdivision map wasn't admitted into evidence, so the court couldn't determine whether the homeowners were part of a planned residential community.

The association appealed.

DECISION: The appeals court reversed the trial court's decision and sent the case back to the lower court for a calculation of the prorated share of costs.

REASONING: On appeal, the association argued that the homeowners should pay it to maintain the shared easement used to access their properties. The appeals court agreed. It determined that the trial court erred in denying the association's request for payment "due to the failure to show that the property owners were part of a planned residential community." The appeals court noted that, because the association was the successor in interest to the original owner of the area who granted the easement many years before, and their properties undisputedly benefitted from the easement, the homeowners were required to pay for maintenance of the road. ♦

- Wag-Myr Woodlands Homeowners Assn. v. Guiswite, October 2018

DEALING WITH MEMBERS

Reduce Assessment Delinquencies with 'Acceleration' Policy

The financial health of an association depends in large part on monthly payments from members. Those payments are integral because they pay for the services and amenities the members expect and are entitled to. Unfortunately, whether it's because of financial difficulties or a dispute, sometimes you'll encounter a member who doesn't make his monthly payment of assessments. While it seems like just one member failing to contribute is a minor issue, in reality, he harms the entire community. If you're wondering what you can do to cut assessment delinquencies, try setting a late fee policy. But consider using an additional strategy: Set an "acceleration" policy, under which if a member hasn't paid his assessment—typically for at least 30 days—the association may have the right to declare that all of that fiscal year's monthly assessments are due immediately.

Although some may consider this a tough measure, it's likely to motivate members to pay. And it will have the effect of reducing the number of times the

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association's attorneys have to get involved. Here's how you can implement an acceleration policy at your community, which includes adding language to your governing documents.

Ensure Right to Use Strategy

Before you adopt an acceleration policy, check the language of your declaration to see if your association has the right to accelerate assessment payments. For your association to be able to accelerate assessments, the declaration must structure assessments as an annual expense that's paid in increments (for practical purposes, usually monthly increments). This is because what you're accelerating is the time frame within which the annual assessment is due.

Some community associations designate the assessments as monthly dues or monthly maintenance fees, which limits the association's flexibility. Since an association can't legally force a member to pay a monthly expense months before it's due, assessments structured this way can't be accelerated unless you amend your declaration. The ideal language that would give the association the right to accelerate assessment payments would read: "The board shall levy an annual common expense assessment, which members shall be obligated to pay in such increments as the board shall determine."

If your declaration structures assessments as a monthly fee, you can still adopt an acceleration policy, but first you'll have to amend the declaration to structure assessments as an annual fee.

If your declaration says nothing about whether assessments are an annual or monthly expense, it's not clear whether you can adopt an acceleration policy without amending the declaration. Make sure to check your own state law and speak with your association's attorney for more guidance, though.

Put Policy to Work

It's best to include your acceleration policy in your association's declaration. A community association's declaration is the governing document with the most authority, and because declarations are recorded in the real estate records, anyone buying a unit in the community will know that acceleration might result if he fails to make his required payments. It's advisable to provide new members with notice of the acceleration policy, since acceleration is a severe step to take.

If you think your members won't support a vote to amend the declaration to include an acceleration policy, you can put the policy into your policies or rules, as long as it doesn't contradict the declaration. Try putting the policy into the bylaws in states where bylaws are recorded.

Like our *Model Policy: Use Tough Acceleration Policy to Keep Members Current,* yours should:

Explain what triggers acceleration. Your acceleration policy should explain what events will trigger acceleration. For most associations, the trigger will be the failure to make a monthly payment after a period of time—typically, at least 30 days.

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Dealing with Members

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Give board discretion in deciding whether or not to accelerate. Though you should establish clear guidelines for what triggers acceleration, it's also smart to give the board discretion to decide whether to actually accelerate in each individual case. The fact that a member has been chronically late with payments shouldn't compel the board to accelerate his debt. For example, if the member is on the verge of bankruptcy, the association might not decide to push him over the brink by accelerating payments. That wouldn't necessarily help either the association or the member.

Another time the association might choose not to accelerate assessments is toward the end of a fiscal year. If acceleration will make only a month or two of assessments immediately due, it might not be worth it.

Your board should have discretion in this matter for another reason: Acceleration is a severe step to take against a delinquent member. Acceleration is appropriate only for extreme cases. However, the more time that elapses and the greater the amount of money owed grows, the harder it becomes for the member to come up with the money in some cases.

It's a good idea to document your reasons for not enforcing the policy (such as the member's bankruptcy or its being the fiscal year-end), to defend yourself from accusations that you selectively enforce your policy for illegally discriminatory reasons—for example, by enforcing it against Hispanic members but not white members.

Set notice requirements. Your association should give the delinquent member notice before accelerating his monthly payments. Some states' laws require associations to give members notice before accelerating assessments. Other states'

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MODEL POLICY

Use Tough Acceleration Policy to Keep Members Current

An acceleration policy can be very effective for cutting assessment delinquencies, but it should be drafted carefully. Keep in mind that your governing documents and state law will influence what you can and can't put in your policy. Ask your attorney about adapting this policy for use at your community.

ACCELERATION

In the event that any Member's assessment, charge, or fee provided for in the declaration, or any monthly or other installment thereof, remains unpaid for more than thirty (30) days of the due date thereof, the Board of [*insert community association name*] may, in its discretion, and in addition to any other remedies that may exist with respect to such delinquency, declare the entire remaining balance of such Member's annual assessment for that fiscal year immediately due and payable upon [*insert #, e.g., 30*] days' written notice to the Member to that effect. The Board may, in its sole discretion, by providing [*insert #, e.g., 30*] days' written notice of the same to the Member, unilaterally reverse its prior action under this section, thereby returning to the original payment schedule, at which point the Member's annual assessment for that fiscal year shall no longer be immediately due and payable.

Dealing with Members

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laws might not include a notice requirement, but the association's governing documents might. Check with your attorney to see if your state law or governing documents set a notice requirement—such as 30 days—and if they do, make sure your association policy mirrors that requirement.

Even if neither your state's laws nor your governing documents include a notice requirement, consider giving it. Giving reasonable notice is fair. And if the dispute with the member leads to a lawsuit, you'll be able to show the court that the association gave him fair notice and an opportunity to make his payments before it accelerated his debt.

Give association right to "decelerate" debt. One of the most important things to include in your acceleration policy is the association's right to "decelerate" the debt after it has been accelerated. To decelerate the debt means to return to the original payment schedule.

This right is important because if the member declares bankruptcy, he might be able to have all of his existing debts eliminated. This is called discharging the debt. But the court will discharge only existing debts. So an assessment not yet due wouldn't be discharged. But if the association had accelerated the entire fiscal year's assessments, that whole amount becomes a current debt, and the member could eliminate his entire year of assessments by filing for bankruptcy. By reserving the right to decelerate the assessment payments, you can avoid this costly mistake. ♦

IN THE NEWS

➤ FCAR Report: HOA Satisfaction Remains High Across Country

There's good news for community association managers across the country: For the seventh time in 13 years, Americans living in homeowners associations (HOAs) and condominiums say they're satisfied in their communities. According to the 2018 Homeowner Satisfaction Survey, conducted by Zogby Analytics for the Foundation for Community Association Research (FCAR), the majority of survey respondents say their association's rules protect and enhance their property values. Eighty-four percent of those surveyed expressed that neighbors elected to the governing board "absolutely" or "for the most part" serve the best interests of their communities.

Nationwide, 63 percent of surveyed homeowners and condominium association members live in single-family homes, followed by 17 percent who live in condominiums, and 14 percent who live in townhomes. Zogby, the independent polling and research firm, used random sampling to identify association residents and asked them to rate their homeowners association experience on a scale of one to five, with one being very bad and five being very good. Sixty-three percent say they are "very" or "somewhat" satisfied, with 22 percent reporting a neutral response.

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In the News

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Community association residents commented on other association benefits:

- Nearly 73 percent of residents said their community managers provide value and support to residents and their associations.
- Most common monthly assessments are in the $100 to $300 range, with condominium assessments slightly higher than homeowners association fees (17 percent are more than $500 per month).
- In addition, more than half of respondents nationwide (54 percent) feel they are paying just the right amount in assessments.
- Two-thirds of surveyed homeowners and condominium association owners have, at some point, attended their community association board meetings—with the majority attending four board meetings per year.
- More than 60 percent of respondents believe that associations should insist that all homeowners pay their assessments, and attorneys should be involved, if necessary, when homeowners are delinquent in paying their assessments.

"Community associations remain an essential component of the U.S. housing market, and—once again—a large majority of Americans who live in community associations report that they are happy and satisfied in their communities," said Community Associations Institute (CAI) Chief Executive Officer Thomas Skiba, CAE. "The most recent survey validates that the majority of homeowners believe their boards are serving their community, that their fees fall within a reasonable range, and that being a part of their community association enhances and protects their property values."

Today, 69 million Americans live in 342,000 common-interest communities, according to the 2016 National and State Statistical Review for Community Association Data. From city-sized, master-planned communities and multi-building condominium complexes to urban cooperatives and small homeowners associations built into small tracks of open suburban spaces, the new survey findings also show that homeowners want to see less—or at least not more—government oversight and control of community associations.

➤ Miami HOA Member Uses Art to Draw Attention to Community Danger

Aside from paint colors, maintenance, or hotly contested board elections, planned communities in various parts of Florida have an additional concern compared to those that are land-locked: rising sea levels.

A Miami artist who is a member in a planned community has come up with a helpful measure that associations can take. Xavier Cortada, who is an artist-in-residence at his association, is working on a new project: an "Underwater Homeowners Association," in partnership with his community. Six thousand households will be invited to participate by putting up special markers—yard signs with their homes' elevations—during Miami's Art Basel week in December.

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In the News

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Cortada says that the important part isn't just creating the marker; the important part is having citizens proactively decide that they're going to put a marker in their home. It's an art project, but the art-making is the community-making, he notes.

The first meeting of the Underwater Homeowners Association is scheduled for Jan. 9, 2019. The group will work on preparing their homes for rising seas, and will create task forces to look at issues that affect all of South Florida—for example, saltwater contamination of the aquifer that provides drinking water to more than six million people there.

"To have that kind of robust engagement by citizens is only going to make those people that we elect more accountable, because they can't sugarcoat the issue. They can't just fake it," Cortada said. To reach a younger audience, Cortada will also be working with high school students to paint elevation markers on four intersections in the community.

➤ Association Cuts Down Two Trees to Remove Provocative Banner

A Florida homeowners association cut down two palm trees to remove a pro-Donald Trump campaign sign after a homeowner refused to take it down. After the sign was removed and the trees were cut down, the homeowner responded by hanging additional signs and Trump flags on his home.

He told local media that he is "putting this up to support our president, and they don't have the right to take it down." But the association has strict rules about how homeowners can decorate their properties. The homeowners association doesn't allow campaign signs and campaign flags.

The front lawns of the properties also are maintained by the association, and the trees and other foliage in front of the homes in the community are in common areas owned by the association.

Neighbors complained about the initial sign, which read, "Trump 2020: No More Bulls---," calling it "vulgar."

Town police officers were also present, but the department said the officers were there only to keep the peace and didn't take part in the removal of the sign. The homeowner also claimed to the media that he was "forced to stay out of the way while the sign was removed." He was captured on video stating that he intends to put the sign back up. He claimed that if the dispute over the sign isn't about politics and just about the rules, he should be fined or taken to court.

➤ Election Season Reveals New Lawn Sign Law

A law allowing political signs in planned communities has come as a surprise to some Columbia, Mo., homeowners living in neighborhoods run by associations. The law prohibits bans on political yard signs, which is in sharp contrast to widely accepted sign bans.

Now, members of associations are calling community managers to inform them of the legislation so they can post signs.

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In the News

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But a new battle between homeowners is ensuing now, with some members saying that people should be able to show political views and support candidates, while others feel that political signs will ruin the aesthetic of neighborhoods.

Some homeowners have noted that they haven't received any information from their association's leadership about the law.

The president of one association has said that it's up to each association to place restrictions on when and how long a resident can display a political sign in his or her yard, but it cannot completely ban the sign. He said he liked the earlier ban, because it kept the "political garbage" out of his neighborhood.

One community that has allowed political signs for years has run into problems with larger political signs, which have caused issues when posted along roads because they can be distracting and even obstruct views for drivers.

The law overturning the ban was signed by the governor in June and went into effect in August. Rep. Kurt Bahr, R-St. Charles, sponsored the measure and said in a press release that it all comes down to First Amendment rights.

➤ Mayoral Candidate at Center of HOA Kickback Scandal

A Florida homeowners association has sued a mayoral candidate, accusing him of authorizing a company to perform maintenance projects in the community, setting the prices, and then receiving kickbacks from the company while he served on a landscaping committee as part of his tenure on the association board.

The association is seeking at least $2,500 in damages from the former association board member, who's now running for office, according to the civil lawsuit filed in circuit court. However, after a recent investigation by the local police department, state prosecutors determined that no money was fraudulently taken from the homeowners group.

All services appeared to have been done at below market value and to the satisfaction of the association and its members, according to a statement released by the State Attorney's Office. It said that the evidence determined the homeowners approved of the projects and were pleased with the results. There was no evidence that the fees charged were inflated or padded to compensate for the commission paid to mayoral candidate.

The office added that state law prohibits state or county officers from similar arrangements, but it's not applicable to HOA board members.

The mayoral candidate, who served as a member of the association's board of directors and chairman of the association's landscaping and maintenance committee from 2011 through 2017, faces the incumbent mayor in the Nov. 6 general election. He said the allegations are politically driven, calling them "false claims fueled by my opponent and pure dirty politics in Winter Springs."

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In the News

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In February 2013, the neighborhood, a subdivision of roughly 200 homes, hired the landscaping company to do general maintenance and repairs of the association's property. The association also set up a separate fund to pay the company for any extra work not specified in its contract, according to the lawsuit, which was filed Aug. 17.

The association claims in the suit that the mayoral candidate approved, without the association's knowledge, special projects for the company to do and then directed the company a price to invoice the association. After the association paid, the maintenance company would turn over to the mayoral candidate the money demanded by him, the lawsuit says.

According to the suit, the candidate received kickbacks ranging from $25 to $500 for several projects he directed the company to perform between 2014 and 2017. According to a July 3, 2014, email included in the suit, for example, he directed the company to remove a decorative boat that was floating "half sunk" in a neighborhood pond and "charge the HOA $200, but throw me $50 when you get paid." Other emails with similar demands have been produced.

The mayoral candidate contends that the emails are fake and presented two versions of the emails to show that they were doctored with the statements he never made.

The attorney representing the association in its lawsuit said the candidate clearly violated the association's rules and his fiduciary responsibility by using his position on the board to benefit himself.

When the board members became aware of the mayoral candidate's actions in August 2017 after being alerted by the company's owner, they notified the police department. The attorney said the association is still tabulating the total amount of money received in kickbacks or commissions. ♦