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**HOMEOWNERS SUITS
AGAINST COMMUNITY
ASSOCIATIONS:
WHAT RIGHTS DOES A
HOMEOWNER HAVE?**

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**HOMEOWNER SUITS AGAINST COMMUNITY ASSOCIATION:
WHAT RIGHTS DOES A HOMEOWNER HAVE?**

The relationship between a homeowner and their community association has been increasingly defined in litigation in recent years, due to the rapid growth of common interest communities and the issues being presented to the courts. The community association is usually an incorporated entity operating under corporate nonprofit status. The community association was created by the developer/declarant for the purpose of managing the common interest community. The community association is funded by dues or assessments contributed by the individual unit owners (or members) and is run by an Executive Board, Board of Managers, Trustees or a Board of Directors composed of unit owners who typically serve as volunteers. The community association is a separate legal identity and may sue and be sued independent of its members. Courts have held that even unincorporated community associations may be sued by homeowners. See *Murphy v. Yacht Cove Homeowners' Association*, 345 S.E.2d 709 (S.C. 1986).

Prevailing law in most states views the relationship between a community association and a homeowner as being analogous to the relationship between a landlord and tenant. Like a landlord, the community association is held responsible for the maintenance of those areas over which it exercises dominion and control. In a common interest community, these areas will usually be the "common areas," "common elements" or those areas outside of the individual units but within the common interest community.

The purpose of this presentation is to identify and set forth several areas where homeowner rights have been recognized by various appellate courts from across the country, and to note some recent statutory developments. Significantly, the cases reviewed and summarized in this paper generally involve the community association's management and performance of its assigned functions.

I. Breach of covenant by the community association

Homeowners have a basis for an action for breach of covenant against their community association where the association fails to fulfill any of the duties it expressly agreed to perform in the community's legal documents. See *Murphy v. Yacht Cove Homeowners' Association*, 345 S.E. 2d 709 (S.C. 1986). The duties of a community association typically include management and control of the common areas, including landscaped areas and common recreational facilities, and maintenance and repair of the exterior building surfaces and roofs. Failure to fulfill any of these duties could subject a community association to a breach of covenant claim brought by a unit owner or occupant.

In *Schoondyke v. Heil, Heil, Smart and Golee, Inc.*, 411 N.E.2d 1168 (Ill. App. 1980), the court held that where the community association "voluntarily" covenants or assumes a duty in derogation of those imposed upon it by common law, the association may be held liable for breach of that covenant. Specifically, when there was no common law duty to remove snow accumulations, but the community association agreed to do so in the legal documents, the association was bound to remove snow and liable for breach of covenant if it failed to. See also, *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984).

II. Breach of the fiduciary duty owed to homeowners by community associations

Homeowners have the right to have the community association exercise ordinary care, in reasonable and good faith manner in the performance of its duties. For breach of these fiduciary duties, an association may be held liable by an owner. Breach of fiduciary duty actions may lie where actions or duties not expressly stated in the community's legal documents are fairly implied by the scope of the duties set forth in the legal documents. This would include adequate funding or improper management of financial reserves to pay for repair, replacement and maintenance expenses. Other actions possible to be brought by a unit owner on these grounds may include breach of fiduciary duty due to the failure of the association to sue the developer, declarant or general contractor for construction defects where the units were improperly constructed.

III. Association director liability

Homeowners have the right to have directors act within their fiduciary duties. Homeowners may bring an action against a director of a community association on the grounds of breach of fiduciary duty of the director. Directors, also sometimes referred to as Managers, Trustees, Administrators or the Executive Board, owe fiduciary duties of care to homeowners to exercise ordinary care in performing their duties, to act reasonably and in good faith in their performance of their duties as members of the governing body of the community association.

Directors must exercise reasonable diligence in following through and carrying out the responsibilities assumed by or assigned to them under the governing legal documents. Generally, directors must remain informed about the community association's business at all times, be knowledgeable about the legal documents governing the affairs of the association, and attend and participate in the association meetings. Directors may be held responsible for obtaining and reading the minutes of those association meetings the director was unable to attend. Directors must also vote against actions taken or adopted by the Board of Directors that they are in disagreement with and record their disagreement in the meeting minutes. Failure to perform any of these duties in a reasonably diligent and prudent manner could expose the director to liability to homeowners for breach of fiduciary duty.

Homeowners do not have a right or guarantee that the decisions of the directors will be successful, because directors are protected by the "business judgment rule." The policy behind this rule is to allow leeway for a director's business judgment in business decisions, while discouraging the court from stepping into the director's shoes to analyze the soundness of business decisions. So long as the decision was made in good faith, the director will be protected from homeowner suits by the business judgment rule. See *Schwarzmann v. Association of Apartment Owners*, 33 Wash. App. 397, 655 P.2d 1177 (1982).

Homeowners have the right to expect directors to bring all corporate opportunities to the community association. If they don't, directors may be held liable for the usurpation of a corporate opportunity. Specifically, a director may not appropriate to his or her own use a business opportunity that belongs to the community association. See *Kirtley v. McClelland*, 562 N.E.2d 27 (Ind. App. 1991).

Homeowners have the right to have the directors be loyal to just the interests of the common interest community, and not to the self interests of the director. Where a conflict of interest arises, a director is responsible for notifying the Board of the conflict and removing himself from participation in any decisions regarding the subject matter of the conflict. If a director fails to do so, homeowners may bring a derivative action for lost profits.

IV. Negligence of the community association

A. Failure to perform duties in a reasonably safe and prudent manner

Homeowners have the right to expect the community association to exercise ordinary care. If it does not, homeowners can bring actions in negligence against their community association for its failure to perform any of its functions in a reasonably safe and prudent manner. Injuries suffered by unit owners due to association negligence are generally recoverable against the association and not against individual owners. Typical lawsuits include suits for injuries from tripping over a protruding sprinkler head and slipping and falling on snow-covered parking lots and sidewalks. In each case the community association had a duty to maintain those areas where the injuries occurred. See *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Repr. 259 (1971) on negligent maintenance of water sprinklers and *Murphy v. Yacht Cove Homeowners' Association*, 345 S.E. 2d 709 (S.C. 1982) and *Schoondyke v. Heil, Heil, Smart and Golee, Inc.*, 411 N.E. 2d 1168 (Ill. App. 1980) on negligent snow removal.

B. Liability for negligent actions of employees

Homeowners have the right to expect employees of the community association to exercise ordinary care. If employees breach the applicable standard of care, the community association can be liable under general agency principles. This would include negligence committed on the project grounds by a management company engaged by the community association to maintain the common grounds, as well as by other employees employed for more specific maintenance or repair work entrusted to the association in the governing legal documents.

C. Products liability for products distributed by the community association

If a community association distributes food, beverages or other goods of consumption or dispenses such goods through vending machines owned and operated by the association, unit owners have the right to expect that these products are free from defects. If they are not, an injured owner could maintain actions in tort against the community association for injuries caused by defective products under the chain of distribution theory.

D. Failure to adequately guard against foreseeable crimes.

Homeowners have the right to be protected from foreseeable crimes. One of the more well-known cases dealing with negligence for foreseeable crimes is the case of *Frances T. v. Village Green Homeowners Association*, 42 Cal.3d 490, 723 P.2d 573 (1986). This California case dealt with community association liability to an owner for foreseeable crimes. Essentially, the case arose out of the negligent maintenance of common areas.

The unit owner, Frances T., was assaulted by a third party who broke into her unit. She alleged that prior crimes in the area, including at her unit, and poor lighting in the greenbelt surrounding her unit created a dangerous condition on the premises which allowed the third party to successfully enter her unit and perpetrate criminal acts. The victim-owner successfully argued that the community association was negligent when it knew of the dangerous conditions and failed to take appropriate remedial action to correct the situation. The owner's unit had previously been burglarized and the association was made aware of that crime. In addition, the unit owner had made repeated attempts to have the association improve the lighting around her unit. External lighting fell within the domain and control of the association. When the unit owner became frustrated with the association, she took the matter into her own hands and had additional external lighting connected to lighting already in place. The association then requested that the unit owner remove the additional lighting and stop using the additional lighting until it was removed since its installation and presence violated the community's covenants and restrictions. Unfortunately, the additional external lighting was connected to the same circuitry that supplied power to the original lighting, so that the unit owner, in complying with the association's request, was deprived of the benefit of any external lighting whatsoever. The same day the owner complied with the association's request, she was raped and assaulted in her unit.

In the Village Green case, the owner's unit had been burglarized within the previous month and she had reported that as well as her complaints of the insufficiency of the greenbelt lighting to the association. In failing to respond to the unit owner's requests of additional lighting and in ordering her to remove the additional lighting she had improperly erected, the Court held that the association violated the standard of due care owed.

Homeowner rights in this area arise out of the foreseeability of criminal acts in the community and whether the association has acted with due care in attempting to reduce the likelihood of such acts. The fact that the crime occurs inside an owner's unit does not relieve the association from liability where the foreseeability of the crime arises out of a failure to provide reasonable safety measures in the common areas. See *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So.2d 98, (Fla. App. 1980).

In determining the element of foreseeability, courts have held that foreseeability of criminal activity was present where there have been repeated criminal incidents in the immediate neighborhood [See *Newell v. Best Security Systems, Inc.*, 560 So.2d 395 (Fla.App. 1990)] and where there have been repeated criminal incidents within the community itself. Such activity should put the community association on notice that criminal activity in the community is likely. In *Village Green*, the community association argued that foreseeability of the precise type of criminal activity committed was required in order for the association to be put on notice of the type of standard of care owed. The Court held, however, that prior crimes need not be identical to the crime at issue. Rather, all that was required was the possibility that a particular type of harm might arise out of the dangerous condition for the association to be liable. In *Newell v. Best Security Systems, Inc.*, the court allowed testimony of a deputy sheriff that the neighborhood in which the common interest community in question was located had experienced a rash of prior residential burglaries.

From the rulings in *Newell* and *Village Green*, there appears to be a duty on the part of the community association to investigate the history of criminal activity in and around the community and then to take appropriate precautions for the benefit of the unit owners if crime is foreseeable. Correspondingly, homeowners appear to have the right to have the community association investigate and stay abreast of crime in the area, and then to take reasonable safety measures if crime is foreseeable. Failure to take such measures could give homeowners cause for a negligence action against the association.

Yet, homeowners are not entitled to hold the community association to a standard of guaranteeing the unit owners' safety. In *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984), the Court refused to extend liability after residents were assaulted by third parties in the parking lot. The Court held that the landlord should not be held to the standard of an insurer of a tenant's safety. However, it should be noted that the victim-residents in *Feld* made no allegations that the community association was or should have been on notice of a particularly dangerous condition on the premises, nor that the criminal act in question was particularly foreseeable in light of past criminal activity in the area.

Homeowners have the right to the community association's exercise of ordinary care in providing safety if the association voluntarily assumes to provide safety. In *Feld*, the Court did find that a community association may incur an obligation to provide a general duty of safety on the premises, independent of any duty arising from the foreseeability of criminal activity, where the association voluntarily undertakes to provide such safety. Where a community association represents or undertakes to secure those areas falling under its control and encourages residents to rely on these actions or representations, the association may incur liability where failure to provide adequate safety measures was a factor in the perpetration of a crime on the premises by a third party. See also *Scott v. Watson*, 359 A.2d 548 (Md. App. 1976).

V. Liability for trespass

Homeowners have the right to exclusive possession of their unit as well as to certain limited common elements appurtenant thereto. Homeowners can maintain an action against their community association for unauthorized entry onto the owner's premises or limited common elements. An action in trespass appears to lie for entry without permission to any areas in actual or constructive possession of a unit owner. In *Plotkin v. Club Valencia Condominium Association*, 717 P.2d 1027 (Colo. App. 1986), the community association entered a unit and relocated a storage locker on the balcony of the unit. The balcony was defined as a "limited common element" by the condominium declaration and was restricted to the exclusive use of the unit owner. The owner objected to the relocation of the storage locker because the relocated locker blocked the panoramic view from the balcony. The owner succeeded in their action against their community association on the basis the association entered the unit without invitation or permission.

VI. Defamation

Homeowners have the right to some degree of privacy regarding their financial standing vis-a-vis their community. A homeowner may be able to bring an action against their community association in defamation or for invasion of privacy where the association publishes the name of the homeowners as being delinquent in payment of assessments. Publication of delinquencies in an association newsletter probably would not give grounds for such an action under the Federal Fair Debt Collection Practices Act (FDCPA), so long as distribution of the newsletter is confined to the homeowners in the community. Under the FDCPA, a debt collector or collection agency would violate fair practices by such a publication. However, if the community association itself is attempting to collect assessments owed to it, it is exempt from inclusion within the FDCPA. Outcomes may vary from jurisdiction to jurisdiction, as some state laws impose stricter requirements in this regard than does the FDCPA. Where the publication of delinquent owners occurs in a more public setting, such as a common bulletin board, the owner's chances of success on a defamation action would be greater.

VII. Breach of Statutory Duty

An owner may assert an action for breach of statutory duty against the community association where standards of operation binding the association have been codified into law, and the association fails to comply with those standards. An example includes California Civil Code Section 1365.5, which imposes procedures on the association directors for periodic review of certain financial matters. This statute protects owners against the mismanagement of community association funds and helps ensure adequate funds for maintenance and repair costs of the common areas. California Civil Code Section 1365.5 provides as follows:

- (a) Unless the governing documents impose more stringent standards, the board of directors of the association shall do all of the following:
 - (1) Review a current reconciliation of the association's operating accounts on at least a quarterly basis.
 - (2) Review a current reconciliation of the association's reserve accounts on at least a quarterly basis.
 - (3) Review, on at least a quarterly basis, the current year's actual reserve revenue and expenses compared to the current year's budget.
 - (4) Review the latest account statements prepared by the financial institutions where the association has its operating and reserve accounts.
 - (5) Review an income and expense statement for the association's operating and reserve accounts on at least a quarterly basis.
- (b) The signatures of at least two persons, who shall be members of the association's board of directors or, one officer who is not a member of the board of directors and one member of the board of directors, shall be required for withdrawal of monies from the association's reserve accounts.
- (c) As used in this section, "reserve accounts" means monies that the association's board of directors has identified, from its annual budget, for use to defray the future repair or replacement of, or additions to, those major components which the association is obligated to maintain.
- (d) This section does not apply to an association that does not have a "common area" as defined in Section 1351.

Another example includes provisions in the Colorado Common Interest Ownership Act (CCIOA), effective July 1, 1992. CCIOA lays out a statutory scheme for the operation of certain community associations existing as of June 30, 1992 and a broader scheme for associations in communities to be formed after that date. See Colorado Revised Statutes Section 38-33.3-101, et. seq. CCIOA contains modified versions of parts 1, 2 and 3 of the Uniform Common Interest Ownership Act (UCIOA) and excludes parts 4 and 5 (on consumer protection and creation of a new regulatory scheme). Under CCIOA, homeowners in Colorado common interest communities existing on June 30, 1992, have the right to require their community association to prepare an annual budget at least annually, the right to request and receive statements of account in a timely manner, and the right not to be fined, except for reasonable fines imposed after notice and a hearing. In addition, Colorado homeowners have a right to seek their attorney fees from their community association on their claim that the association has not complied with CCIOA, or on their claim that the association has not complied with the community's legal documents. Section 123 of the CCIOA sets forth this right to attorney fees provides as follows:

Enforcement. If any person subject to the provisions of this article fails to comply with any of its provisions or any provision of the declaration, bylaws, articles, or rules and regulations, any person or class of persons adversely affected by the failure to comply may require reimbursement for collection costs and reasonable attorney fees and costs incurred as a result of such failure to comply, without the necessity of commencing a legal proceeding. For each claim, including but not limited to counter-claims, cross-claims, and third-party claims, in any legal proceeding to enforce the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award to the party prevailing on such claim the prevailing party's reasonable collection costs and attorney fees and costs incurred in asserting or defending the claim.

VIII. Conclusion

Homeowner rights in a common interest community against their community association arise out of the community's legal documents and the conduct of the association in carrying out the duties and functions assigned to it in those documents, by state statutes and common law. While the most clearly defined rights that a homeowner possesses lie in the areas of breach of covenant, simple negligence, and liability for trespass, more complex legal questions are posed by the extent of association liability for the protection of owners from foreseeable crimes and breach of statutory duties. While the outcomes vary from jurisdiction to jurisdiction, there continues to be an expansion of owner rights and community association liability. As community associations are increasingly being recognized as quasi-governmental entities with powers greater than a mere landlord, the exact nature of the legal relationship between the homeowner and their community association is in the process of being more clearly defined. In any event, educated homeowners with expanding legal rights will help ensure the smooth operation of the community by the community association.

IX. Table of Cases

Murphy v. Yacht Cove Homeowners' Association, 345 S.E.2d 709 (S.C. 1986).
Schoondyke v. Heil, Heil, Smart and Golee, Inc., 411 N.E.2d 1168 (Ill. App. 1980).
Schwarzmann v. Association of Apartment Owners, 33 Wash. App. 397, 655 P.2d 1177 (1982).
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