HOA LAW

Best Practices for Surviving Legal Trouble

By Sandra L. Gottlieb, Esq., CCAL

Unfortunately, in this line of work, lawsuits are bound to happen. People take issue with any limitation on their free use of property and push the limits hard. Sometimes, they use a lawsuit as a tactic to get their community association board to back down. You're too smart for these bullish tactics. But, the nerve of the homeowner suing can be disheartening, maybe even angering, even if the lawsuit is meritless or frivolous.

Understanding how to limit your association's exposure to lawsuits can decrease the possibility of lawsuits, thereby eliminating the stress of a lawsuit, and the financial harm it might cause. The most common types of homeowners association lawsuits, other than construction defect lawsuits, are a breach of contract (aka CC&Rs), slip-and-fall accidents, premises liability, claims of discrimination and harassment, and labor issues.

Take action to limit these suits by engaging an attorney to review your association's contracts, employment agreements, policies, procedures, and operating practices to identify areas or actions to reduce the likelihood that the association will be subject to lawsuits in the future.

For example, harassment and discrimination suits are increasingly frequent in community association litigation. Board and manager education, zero-tolerance policies, review of rules and restrictions to remove any discriminatory language, and follow through on addressing offending actions within the association reduce the risk for a discrimination claim.

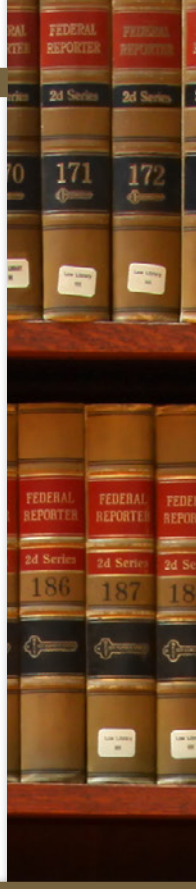
Community associations are a fruitful target for attorneys representing homeowners in a suit against the association. These attorneys frequently either take the case on contingency and/or front load their legal work with significant amounts of discovery because, in most cases, the homeowner will be entitled to attorney fees if they are deemed the prevailing party in the litigation. So, when the homeowner retains counsel on a contingency basis they are not spending money out of their pocket paying attorney fees to sue the association. It makes the decision for the homeowner to bring a suit easier becoming indifferent to the notion that the owner is, for all intents and purposes, suing themselves. Prior to taking these cases, these attorneys presumably perform a case evaluation to determine if they will likely prevail in litigation or if the association is likely to settle instead of going to trial. Unfortunately, the homeowner may be more interested in recovering a payout from the association than being neighborly.

After a lawsuit has been filed, the association will still need to act responsibly and consider settlement as an option. Talking about settlement, for associations that carry the required insurance policies, the insurance company appointed attorney (defense attorney) will usually settle the case to limit the insurance carrier's risk even when the association and its board did absolutely nothing wrong! Frequently carriers will settle, even when the association could win the claim because the cost to take the case to trial could be more expensive than the settlement. Taking a case to trial can end up costing into the $100,000s when you start adding up attorney fees, court costs, deposition costs, expert costs, etc. In comparison, if cases can settle for less than that, carrier's adopt the nuisance claim mentality in the interest of just getting rid of the lawsuit. In this regard, the association's counsel should consider whether a cross-complaint should be filed to not only preserve all rights and remedies available to the association, but also put the association in a more controlled position if the insurance carrier desires to settle the case.

Hopefully, it is something you never have to deal with, but for those that do, preparation and knowing what to do when your association has been sued is critical. The following is a list of suggestions to prepare you to defend a lawsuit. Litigation is usually a long process. Doing these things as soon as you receive the complaint will put your best foot forward when the day comes.

1. Do not call the person suing the association/management or their attorney – Your first instinct may be to call and give this person a piece of your mind. But, don't. As the adage goes, anything you say can be used against you and probably will be. Instead, use this energy to write down all of the reasons they are wrong and then provide this to the association's attorney when you contact them.
2. Don't Delay – Civil court procedures have strict timelines that defendants must respond within. If you let the complaint sit on your desk for weeks, you're limiting the amount of time the attorney has to prepare for the association, its board and yes, the managers response or worse yet the delay could result in the plaintiff taking a default against the association for failing to respond within the statutory time frame. The only day that is worse than the day you were served with the lawsuit is the day that you receive notice of a motion for default, which generally can be easily avoided.

3. Call your insurance agent to see if liability and/or D&O coverages apply – If insurance applies and the policies have a duty to defend clause that covers this claim, the insurance company will provide an insurance defense attorney to represent the association and its interested parties such as board members and the managing agent. Whether or not this is the best counsel for the association, or if the management company is included in the suit, it should be considered if the same attorney should represent both the association and management due to potential conflict of interest issue.
4. Hire the right attorney – Not all lawyers are created equal. Just because you know a lawyer doesn't mean that they specialize in the type of case the association faces. Ensure that the attorney you retain or is assigned by the insurance company has handled similar cases in the past and what their success rate has been.
5. Call your association's legal counsel and be honest and upfront about the details of the suit - If an insurance policy does not cover the claim, even with a reservation of rights, or if the association would like to obtain a second opinion, contact legal counsel right away.
6. Listen to your attorney – Whoever is assigned or selected as the attorney to represent the association and the other defendants, follow their advice. Ask the attorney how to handle communications with the plaintiff (the person suing the association/ management company) outside of the lawsuit's scope. Listen, even if it is something you do not want to hear. Attorneys are bound to do what is best for their clients. If your attorney tells you bad news or something you don't want to hear, it is in your best interest to follow their advice. There are many reasons to do so, not the least of which is being able to rely on the advice of experts, including legal counsel, if sued for breach of fiduciary duty claims etc.
7. Gather and organize all written communications about the matter – Put together a copy of all letters, emails, phone call notes on the matter, and organize them in chronological order. If you want to be really helpful, create a summary of all items and prior actions, including relying on minutes that should be provided to counsel if the issue(s) with the owner were discussed in executive session meetings of the board. If any actions were taken in response to the communications that are not represented in the written communications, write down what action was taken and on what date. This should be easy for you, because you practice good record keeping.
8. Do not destroy any information relating to the matter in dispute or the party suing the association. You have a duty to preserve evidence. The evidence required could include more than just the relevant communications to the matter. Cases can be lost for failing to preserve evidence; do not be that person that allows that to happen.
9. Write down what you remember or know about the matter to complete the record for the attorney, write on this document "attorney-client privilege" stating on the document that this information was compiled and submitted to legal counsel at their request.
10. Then, keep quiet about the case. Attorney-client privilege can be broken if you disclose anything to anyone that is not your/the association's attorney. So, don't talk to your best friend, parents, or the dog walker about the case.



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11. Ensure that everyone on the board or management company employees who might work with the association, such as escrow or accounting, are equally aware of the need not to comment on the case or the matter involved in the case. The best response to inquiries is to refer them to the attorney handling the case.
12. Work with the association's attorney to prepare any required litigation and/or insurance disclosures.

Once everything has been submitted to the appropriate attorneys, it is a waiting game. Lawsuits can take two to three years to conclude [pre-pandemic], and that is if there is no appeal. For the reasons stated above, litigation is a common occurrence in the community association industry. So, try not to take it personally even when attacked and stay focused on your other business. This too shall pass.

Sandra L. Gottlieb, Esq., CCAL is a founding and senior partner in the law firm of SwedelsonGottlieb that limits its practice and specializes in the representation of community associations throughout California.