

## Association/Property Management Liability - You're Not Immune!

As we progress into the millennium, it is becoming evident that the role and responsibilities of both community association board members and professional association managers are evolving, expanding and changing. Not only is the Arizona legislature considering enacting new legislative requirements with which board members and managers must comply, but recent court rulings illustrate how these added responsibilities can expose the association and property management companies to liability.

### **Associations Have a Duty to Respond to and Promptly Investigate Homeowner Complaints**

Recently, a California jury awarded \$500,000 to a resident of a complex. Specifically, the resident claimed that the association had long neglected to repair water damage to her unit. The resident complained to the association about water seeping through the plaster of her bedroom walls. According to the resident, the association consistently failed to repair or investigate the nature of the problems. Ultimately, the situation was so severe that the homeowner suffered allergies from mold and mildew and had to move out of her bedroom.

The jury ordered the association to pay the homeowner \$500,000. This included funds to effect repairs and earmarked \$150,000 of the total of \$500,000 for emotional distress damages caused to the homeowner from the associations' delay and disregard of her complaints. This case illustrates the need for associations and their managers to respond to and promptly investigate homeowner complaints.

### **Associations Have a Duty to Enforce CC&Rs**

In November, 1998, the Arizona Court of Appeal made a landmark decision regarding an association's affirmative duty to enforce the requirements of their CC&Rs in *Gfellar v. The Scottsdale Vista North Townhomes Association*. In 1990, the Gfellars discovered that their backyard would flood during heavy rains. Occasionally, rainwater would accumulate on their patio flooding the interior of their home. The Gfellars discovered that the flooding was caused by modifications made by neighbors on an adjacent property. The Gfellars attempted to resolve the problem with their neighbors and the association, but the parties could not come to an agreement.

The association's CC&Rs stated that the association was required to maintain common areas and exteriors and to fulfill other functions. The Gfellars sued the association claiming that the CC&Rs obligated the association to enforce drainage rules against the owners of the adjacent lot and to correct the drainage problem. The primary issue of the case was whether the association had an affirmative duty to enforce the drainage rules or merely the "right" to enforce the drainage rules. The Arizona Court of Appeals found in favor of the Gfellars and held that the association had an affirmative duty to enforce the association's drainage rules.

This case illustrates that Arizona associations have an affirmative duty to enforce the requirements of the association's CC&Rs or bear the risk of liability for failure to do so.

### **Property Management Companies Must Adhere to the Requirements of their Management Contracts**

In July, 2000, in *Waterpointe J Property Owners Association, Inc. v. Paragon, Inc.*, the association sued the former property management company for breach of the management contract and for failure to renew the flood insurance for the association. In this case, the property manager overspent the association's budget and spent the previous year's reserve of \$45,000.00 without board approval. In addition, after hurricane Hugo hit Myrtle Beach, the board discovered (for the first time) that the association did not have flood insurance to cover much of hurricane Hugo's damage (estimated at \$126,000.00).

The South Carolina Court of Appeals held that the management company had the duty to care for, preserve and maintain the property and to insure that proper insurance coverages were in place to care for and preserve the property pursuant to the management contract and the direct instructions of the board. The Court held that the management company breached that duty and should be responsible for the insurable items which would have been covered by the flood insurance policy. In addition, the management contract explicitly required the property management company to obtain board approval for any expenditure over \$1,000.00 and gave the association the right to prioritize and select large expenditures. The Court held that the property manager overspent the budget and used reserve fund money without informing the board.

In conclusion, the Court found the association's property management company liable for \$79,703.86 for the property manager's failure to renew flood insurance and \$25,490.00 for a breach of contract claim. This case illustrates the need for property management companies to strictly adhere to the requirements of the management contract and to be diligent in reviewing association insurance policies and other contracts for services. Failure to do this will result in financial liability for the property management company. Finally, this case also illustrates the importance of having a board closely scrutinize the performance and practices of its property manager and property management company.

### **Conclusion**

The above case law clearly demonstrates the increasing risks associations are facing in the new millennium. Association boards and property management companies/professional association managers need to be cognizant of the liability issues associated with their failure to act on complaints raised by members of the association, failure to enforce CC&R's and failure to abide by the terms of the management contract. Decision makers, both boards and professional association managers, should seriously consider the implications of their acts and take precautions to limit their liability.

*Authors: Ritchie Lipson, Esq. & Beth Mulcahy, Esq.*

*Ritchie Lipson is a partner with the construction defect law firm of Dicks & Coglianese, which has offices in Southern California, Phoenix, and Las Vegas. He can be reached at (602) 254-4222 or [rlipson@hoadefectlawyers.com](mailto:rlipson@hoadefectlawyers.com). For additional information visit the Dicks & Coglianese website at [hoadefectlawyers.com](http://hoadefectlawyers.com).*

*Beth Mulcahy is the principal in the Mulcahy Law Firm, P.C. She can be reached at (602) 241-1093.*