2020 Legislation and Anticipated 2021 Legislation
CACM Law Seminars

Bills enacted in 2020:

AB 2345 (Gonzalez) – Density Bonus Law

This bill revises the Density Bonus Law to increase the maximum allowable density and the number of concessions and incentives a developer can seek. Because the Density Bonus Law has failed to draw enough interest to developers, this bill seeks to make it more appealing in order to increase affordable and market-rate housing, including in common interest developments.

AB 3088 (Chiu) – Eviction Protection

AB 3088 was one of the main housing bills intended to respond to COVID-19. According to the author, it is intended to "provide renters a chance to get back on their feet without the fear of losing their home, while also giving landlords a path to be made whole without having to resort to immediate evictions." The bill establishes a moratorium on evictions for non-payment of rent or other charges due to COVID-19 financial hardship, subject to numerous conditions, until January 31, 2021. Eviction cases then proceed in phases, starting with the most lawful causes other than the non-payment of rent then proceeding to cases for non-payment. AB 3088 permits landlords to sue tenants for unpaid COVID-19 rental debt beginning March 1, 2021 and removes certain limits on small claims jurisdiction to facilitate collection of this debt. Additionally, the bill requires a mortgage servicer that denies a borrower's request for forbearance on mortgage payments for a property consisting of no more than four residential units to provide the borrower with a written explanation of the denial. The bill sunsets no later than February 1, 2025.

AB 3182 (Ting) – Rental Restrictions in CIDs

This bill is of particular concern for the common interest development industry. It prohibits common interest developments (CIDs) from restricting the rental or lease of separate interests to less than 25% and requires them to amend their governing documents accordingly by December 31, 2021. The author has stated, "We must marshal all available resources to address the housing and homelessness crisis. There are millions of homes across the state that have the potential to be rented to Californians in need of housing but that are prohibited from being leased under outdated homeowners' association (HOA) rules. AB 3182 prohibits rental bans in HOAs to allow homeowners who want to rent out their homes."

The bill also clarifies that ADUs and JADUs are not counted toward the cap and the cap does not change the right of an individual owner who was renting their unit out prior to the effective date of the bill to continue renting it out. AB 3182 provides that a CID is liable for a civil penalty of up to $1,000 for a violation and removes the exemption for pre-2012 rental prohibitions and replaces it with the 25% cap for all. The bill also removes the ability for owners to expressly consent to being subject to a prohibition. Lastly, it specifies that the bill's provisions do not

prohibit a CID from adopting a short-term rental restriction of 30 days or less but there are concerns about how this provision will be interpreted in light of the elimination of both the grandfathering of 2012 rental restrictions, as well as the outright prohibition of rental bans.

SB 872 (Dodd) – Residential Property Insurance

This bill deals with states of emergency and expands several consumer protections related to additional living expenses (ALE), time to collect replacement value, contents coverage, and relocation after a loss. The bill provides that policy coverage for ALE may not limit the right to recovery if the home is rendered uninhabitable by a covered peril and requires it to provide at least two weeks of ALE when a state of emergency and an order by a civil authority related to a covered peril restricts access to the home. The bill also provides additional two-week extensions available for good cause, prohibits a deduction for the value of land when a home is rebuilt at a different location, and delays implementation of certain aspects of the bill to July 1, 2021.

SB 908 (Wieckowski) – Debt Collection

This bill creates a new licensing law applicable to debt collectors and debt buyers, administered by the Department of Business Oversight (DBO), effective January 1, 2022. According to the Senate Banking committee, with only minor exceptions, this bill does not add any new requirements on debt collectors or debt buyers; instead, it adds a layer of regulatory oversight over debt collectors and debt buyers already subject to state law, but not currently subject to licensure. The author's logic is that by layering a licensing and examination framework over existing state law requirements, the state will be better able to ensure that debt collectors and debt buyers comply with existing law. SB 908 contains a limited set of administrative remedies, including desist and refrain authority, the ability to order ancillary relief, and the ability to suspend and revoke licenses.

SB 1079 (Skinner) – Foreclosures

This bill proposes a number of provisions intended to mitigate against blight, vacancy, and the transfer of residential property ownership from owner-occupants to corporate landlords in the event that California experiences a wave of foreclosures due to the pandemic. SB 1079 forbids a foreclosure trustee from bundling properties for sale at a foreclosure auction, instead requiring that each property be bid on separately. The bill allows an eligible bidder, 45 days after a home foreclosure auction, to make an offer for the home that exceeds the highest bid. SB 1079 defines "eligible bidder" to include: an eligible tenant, prospective owner-occupant, nonprofit, community land trust or limited-equity housing cooperative, the state, the University of California, a county, city, district, public authority or public agency or any other political subdivision or public corporation in the state. SB 1079 increases the civil fine that a governmental entity can impose on an owner for failing to maintain a property purchased at foreclosure sale, in exchange for providing the owner detailed notice of alleged violations and additional time to remedy them. The bill sunsets on January 1, 2026.

Newly Introduced Bills in 2021*:

SB 9 (Atkins) – Housing Developments: Approval

This bill is a reprise of last year's SB 1120, which was considered one of the highest priority affordable housing bills of 2020 and was intended to increase the number of units in residential areas. However, due to an interhouse scuffle, it failed to make it out of the Legislature on the last night of session. The Pro Tem has brought it back in SB 9. The bill would require a proposed housing development containing 2 residential units within a single-family residential zone and urban lot splits to be considered ministerially, without discretionary review or hearing, if the proposed housing development meets certain requirements, including, but not limited to, that the proposed housing development would not require demolition or alteration of housing that is subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income. Also imposes restrictions on demolition (e.g., that the proposed housing development does not allow for the demolition of more than 25% of the existing exterior structural walls, except as provided, and that the development is not located within a historic district), among other things.

SB 60 (Glazer) - Local Ordinances and Short-Term Rentals

This bill would raise the maximum fines for violation of an ordinance relating to a residential short-term rental that is an infraction and poses a threat to health or safety, to $1,500 for a first violation, $3,000 for a 2nd violation of the same ordinance within one year, and $5,000 for each additional violation of the same ordinance within one year of the first violation. The bill would make these violations subject to the process for granting a hardship waiver. "Short-term rental" is defined as a residential dwelling, or any portion thereof, that is rented for 30 days or less. "Residential dwelling" is defined as a private structure designed and available for use and occupancy as a residence and does not include a hotel, motel, bed and breakfast or time-share.

* Newly introduced bills are those introduced as of the writing of this report (January 8, 2021). More bills will be introduced up until the bill introduction deadline of February 19, 2021.

Anticipated Bills in 2021:

AB 2227 (Irwin – funds: insurance) redux – While the bill number will change, we anticipate this bill will be reintroduced. Sponsored by CAI-CLAC, it is their cleanup of their AB 2912 from 2018. AB 2227 proposed to require that the bank, savings association, or credit union that the managing agent deposits funds into on behalf of the association be insured by the Federal Deposit Insurance Corporation, National Credit Union Administration Insurance Fund, or the Securities Investor Protection Corporation. The bill also amended existing law that requires prior written board approval for electronic transfers by making it required for amounts greater than $10,000 but would eliminate the latter part of the provision "*or 5% of an association's total combined reserve and operating account deposits.*" Lastly, the bill specifically required the association to maintain crime insurance, employee dishonesty coverage, and fidelity bond coverage, and fidelity bond

coverage, or the equivalent, for the association and the association's managing agent or management company and would require the protection against computer and funds transfer fraud to be in an equal amount.

SB 969 (Wieckowski – SB 323 cleanup) redux – The final contents of this bill were never finalized given that it stalled early in the year (the "spot" language included in the bill just added to the list of disqualifications a board member being termed out). However, things being discussed for inclusion in the bill included expanding the voting by acclamation provisions to all associations, as well as expanding some of the language related to what kinds of insurance would trigger an association's ability to utilize a criminal conviction disqualification from board elections.

SB 981 (Archuleta – document delivery and websites) redux – This bill was sponsored by the California Association of Realtors and proposed to require an association to deliver documents via email unless the member had not provided a valid email address or had revoked consent to electronic delivery. The bill also proposed to require an association that has at least 50 separate interests to maintain an internet website to provide general information to members and would authorize an association to satisfy a general delivery requirement by posting the document on that internet website. An association could be exempted from the website requirement if 2/3 of the members approve.

California Law Revision Commission Project re Emergency Measures in CIDs – this study is being done at the CLRC to allow for teleconference meetings during states of emergency or disaster. After months' long discussion and stakeholder input, the project allows meetings to be conducted entirely by teleconference without any physical location needed as long as certain requirements are met. These requirements include notices providing clear technical instructions, the contact information for a person who can provide technical assistance before and during the teleconference and any person allowed to participate also be given a phone option. This study is intended to be proposed as legislation in 2021.

2020 Case Law Summary

The Prevailing Party

Alexander v. Singletary **(January 21, 2020, D075943) [2020 WL 289204] [nonpub. opn.]**

Issue: Whether the prevailing parties are able to recover attorneys' fees under Civil Code § 5975 when the basis of the complaint was a request to declare the CC&Rs unenforceable against the Owner.

Facts: Owner sought relief to allow him to partition his lot and share of the common area out of the Association and to declare the terms of the CC&Rs unenforceable. Owner filed this lawsuit in the hopes that the court would determine the CC&Rs were unenforceable, and thus allow him to partition his share of the common area without permission of the Association. The trial court held that the CC&Rs were valid, but because this was not a lawsuit to enforce the CC&Rs, the prevailing party was not entitled to attorneys' fees. The Owner appealed this holding relating to attorneys' fees.

Holding: Civil Code § 5975's attorneys' fees provision applies in this matter. Because the "gravamen" of the Owner's lawsuit placed into question the enforceability of the CC&Rs, it entitled the prevailing party to attorneys' fees. The purpose of the attorneys' fees clause was designed to allow mutuality of costs and by allowing the way a plaintiff phrased their complaint to exclude the lawsuit from § 5975 would result in inappropriate and unreasonable actions by disputing parties.

Takeaway: If a dispute is, in any way, connected with the legitimacy of the CC&Rs, expect the attorneys' fees clause to apply.

How to Avoid/Manage Risk: Understand that any lawsuit seeking an interpretation of the CC&Rs will entitle the prevailing party to attorneys' fees.

***Gallian v. Gragnano* (September 15, 2020, G057198) [2020 WL 5523744] [nonpub. opn.]**

Issue: Whether the trial court's extension of the period to file a request for attorneys' fee was an abuse of discretion. Whether an owner's cross-complaint against individual directors, in response to an association's lawsuit to enforce the governing documents, is considered an action seeking to enforce governing documents under Civil Code § 5975, which entitles the prevailing party to their attorneys' fees.

Facts: Association filed a lawsuit against the Owner seeking to enforce the Association's governing documents after the Owner installed a patio, air conditioning unit, and landscaping in violation of the governing documents. The Owner responded to the lawsuit by filing a cross-complaint against the individual Directors on the Association's Board. Prior to entering an oral, on the record settlement agreement—which did not award attorneys' fees—between the Association and Owner, the Directors were dismissed from the case. The Directors thought they were subject to the settlement agreement, but the Owner disagreed. The trial court determined the settlement agreement was unenforceable because there was not at "meeting of the minds" as to who was bound by the agreement. After the settlement agreement was held unenforceable, the Directors filed a motion requesting their attorneys' fees because they successfully were dismissed from the lawsuit. This motion was filed months after the sixty-day timeframe in which these motions may be filed, but the court found good cause to grant an exception to the sixty-day deadline and granted the Directors attorneys' fees under Civil Code § 5975.

Holding: On appeal, the court's decision to grant an exception to the sixty-day filing deadline was not appropriate. In this situation, where a party that had been dismissed from a lawsuit was engaging in good-faith discussions to settle a dispute, it would undermine settlement agreements to require parties that had been dismissed from a lawsuit, but who are still parties to a dispute, to file a motion for attorneys' fees during settlement negotiations. Therefore, the court properly granted an extension to the sixty-day deadline.

Finally, Civil Code § 5975 properly applied to the Owner's cross-complaint. The Association's complaint against the Owner expressly sought to enforce the provisions of the governing documents and the Owner's cross-complaint sought indemnification from the Directors for any

liability the Owner may incur because of the Association's lawsuit. This connection is considered a lawsuit seeking to enforce the governing documents.

Takeaway: As with many legal matters, the problem that arose was inconsistent understanding of who was bound by the oral settlement agreement. When forming contracts, especially settlement agreements, it is essential to clearly identify the parties that are bound by any promises, contract, or agreement.

How to Avoid/Manage Risk: Properly identifying the parties in the settlement agreement would have avoided this entire appeal. This is because the settlement agreement would have resolved the issue of whether the Directors were entitled to attorneys' fees.

Architectural and CC&Rs Violation Matters

***Carmichael Canterbury Village Owners Assn. v. Joseph* (January 30, 2020, C077981) [2020 WL 501527] [nonpub. opn.]**

Issue: Did an association violate an owner's due process rights when it conducted a disciplinary hearing regarding a nonapproved architectural modification?

Facts: Owner was performing modifications to their residence in an effort to "flip" the house. The Owner's adjacent neighbors were the president and vice president of the Association. After a history of architectural changes and meetings about different requests for modifications to the residence, and after failing to comply with the approved architectural plans, the Board called the Owner to a hearing, as provided for in Civil Code § 5855. Owner objected to the presence of the Association's attorney and to the fact that he was not made aware of each item of evidence used to show his violation of the governing documents. In addition, Owner rejected Association's offer to mediate the matter prior to litigation. Owner filed this lawsuit alleging the Association denied him due process when it took disciplinary action against him.

Holding: Owner was not able to prove any due process violation. Because the Owner failed to show that he availed himself of any other method to resolve the dispute with the Association, including internal and alternative dispute resolution, he is unable to show any due process violation. Basically, because the Owner failed to invoke internal or alternative dispute resolution processes that were available to him, his claim of due process violations was fatally flawed.

Takeaway: Carefully follow each step of the disciplinary and enforcement process established under the Davis-Stirling Act. Here, even though there may have been some inappropriate justification as to why the Association denied many of the Owner's architectural modification requests, the fact that the Association followed the process of resolving disputes was highly persuasive to the court.

How to Avoid/Manage Risk: Do not rush disciplinary action. This process should be done carefully and correctly.

Maravich v. Dover Shores Community Assn. **(March 5, 2020, G056965) [2020 WL 1061065] [nonpub. opn.]**

Issue: Did an association have discretion to allow trees to remain in the Development that impeded an owner's view?

Facts: CC&Rs establish that no tree may exceed fourteen (14) feet in height if it ***blocks*** the natural view from another lot without the approval of the Association. The Board adopted operating rules establishing that the Association may require an owner to take action if a tree ***detracts*** from the view from another lot. Maravich sued Association arguing that the rules were inconsistent with the CC&Rs and requested the court to order the Association to take action to force owners to remove all trees greater than fourteen (14) feet in height from lots in the Development.

Rule: Whenever a provision in the CC&Rs and operating rules are inconsistent, the inconsistent language in the CC&Rs prevails over the inconsistent provision in the rules. But, merely being different does not render the documents or provisions inconsistent.

Holding: The differences between the CC&Rs and rules are to be understood simply as a policy statement affirming that the Association will consistently exercise its discretion to permit trees that impede but do not detract from a lot's view. This is the Association exercising the discretionary power granted to the Association in the CC&Rs.

Takeaway: Discretionary provisions in the governing documents confer a significant amount of governing authority to the Association. Here, if the CC&Rs did not include the reference to the Association having the authority to grant exceptions to the fourteen (14) foot restriction, the Association would be compelled to prohibit any tree that is in excess of fourteen (14) feet until the members of the Association banded together to amend the CC&Rs.

How to Avoid/Manage Risk: A concern in these matters where an association is given the task of exercising discretion over these types of matters is the need to equally apply the restrictions. Associations should maintain records explaining why it either approved or denied requests for the association to exercise discretion in matters. This record would be used to protect the association from arguments that the Association discriminated against owners.

Association Torts (Negligence, Nuisance, etc.) & General Contract Breach

****Auburn Woods I Homeowners Ass'n v. State Farm Gen. Ins. Co*. (2020) _ 56 Cal.App.5th 717**

Issue: Did the Association's insurance company owe a duty to defend the Association and management company under the directors and officers' policy.

Facts: The contract between the Association and its management company obligated the Association to name the management company as an additional insured under the liability and directors and officers insurance policies. A homeowner brought two lawsuits against the Association, its management company and others contesting collection efforts for delinquent

assessments and seeking to set aside a foreclosure sale of her home. The first lawsuit sought declaratory relief, injunctive relief and an accounting in an effort to stop the foreclosure. That lawsuit was concluded after the trial court sustained demurrers to the complaint. The second lawsuit sought to set aside the foreclosure sale, cancel the trustee's deed and quiet title, and for an accounting. The Association and management tendered the lawsuits to State Farm, the Association's insurance company. State Farm did not offer a policy that included a property manager under the optional directors and officers' policy. On the first lawsuit, State Farm denied coverage and the tender of defense. On the second lawsuit, State Farm defended the Association, but not the management company. Both lawsuits brought by the homeowner were eventually dismissed following successful demurrers.

The Association and the management company sued State Farm and the Association's insurance agent for breach of contract, breach of the covenant of good faith and fair dealing, and other causes of action, based on the tenders of defense for the first and second homeowner lawsuits. Following a bench trial (no jury), the trial court issued a statement of decision and entered judgment in favor of State Farm and the insurance agent. The Association and its management company appealed.

Holding: State Farm did not have an obligation to defend the Association and its management company in the first lawsuit because the complaint did not seek damages that were covered under the policy. State Farm did not have an obligation to defend the management company in the second lawsuit because it was not an insured under the policy. State Farm and its agent did not breach the implied covenant of good faith and fair dealing by not listing the management company as an additional insured on the Association's policy and not providing coverage under the directors and officers policy. There was no contract with State Farm that obligated it to cover the management company.

Takeaway: If the management agreement requires that it be named as an additional insured, make sure the Association's insurance company offers that option and, if so, be sure to obtain documentation that such designation has been made. Such documentation needs to be an endorsement, not just the declarations page of the insurance policies.

How to Avoid/Manage Risk: Have regular meetings with the association's insurance agent to understand the policies and what situations will be covered, and whether any additional insureds need to be named.

***Butler v. Fifteen Morton LLC* (July 24, 2020, B299135) [2020 WL 4251362] [nonpub. opn.]**

Issue: When the Association amended its CC&Rs to remove a First Amendment indemnifying owners for liability associated with a third-party parking easement, did the Association breach a contract and breach a warranty agreement?

Procedural Posture: Plaintiffs are appealing a trial court's decision to accept the Developer's demurrer dismissing the case for failing to state a claim. Upon appeal of a demurrer, as it relates to interpreting contracts, a court must reverse a demurrer if the Plaintiffs can plausibly allege the

Developer breached an agreement. At this stage in the litigation, a court cannot dismiss a cause of action involving the interpretation of a contract if the Plaintiff can allege an interpretation of the contract that is reasonable, and which, if true, would show a breach.

Facts: Plaintiffs were in contract to purchase a home from the Developer. At this time, the Developer controlled the Association that governed the home that is the subject of the contract. While in contract, Plaintiffs discovered that a third-party neighbor had a parking easement over the subject property. The easement agreement established that the Plaintiffs would incur premises liability obligations as it related to the parking agreement if they acquired the property. The Plaintiffs informed the Developer that if the Plaintiffs could not avoid the premises liability, they would cancel the contract and not purchase the home. To address this condition, the Developer adopted an amendment to the Association's CC&Rs completely indemnifying all owners for premises liability claims associated with the easement, which also was present on other lots in the development. Developers also amended the purchase agreement to provide a separate warranty stating the Association would be responsible for indemnifying the Plaintiffs for any premise's liability claim associated with the easement. These two provisions satisfied the Plaintiffs, who acquired the home. Later, the Association revoked the amendment and then the easement owner damaged Plaintiff's property.

Holding: Based upon the Plaintiff's factual allegations, as outlined above, the court determined that the Plaintiffs presented sufficient facts to show a reasonable interpretation of the contract to show that the Developer promised and warranted that the Association would indemnify the Plaintiffs for premises liability claims associated with the easement. Despite the fact that the Association would no longer be under the Developer's control and that the Association had the power to amend the CC&Rs, the warranty agreement the parties reached could reasonably be interpreted as an agreement for the Association to indemnify the Plaintiffs for premises liability in perpetuity, despite the fact that the Association had the power to amend the CC&Rs.

Takeaway: Despite the procedural posture of this case at this stage of litigation being very much in favor of the Plaintiffs, this case does show that promises made by a developer can harm an association. Here, the Association may be required to be involved in litigation if the court agrees to hold the Association liable for the warranty the developer made to the Plaintiffs.

How to Avoid/Manage Risk: This situation could have been fully avoided by the Developer if it entered into a recorded agreement with the Plaintiffs. This would have bound the Developer and their successors-in-interest to the promise. This also would have avoided the situation where the Association could be at risk of litigation for lawfully exercising its power to amend the CC&Rs.

*****Kashani v. Wilshire House Association*** **(October 28, 2020 No. B296976) [2020 WL 6304943] [nonpub. opn.]**

Issue: Whether the Association breached the CC&Rs by failing to hold a drawing on a right of first refusal to purchase a Unit.

Facts: The Association's CC&Rs grants each condominium owner a "right of first refusal" to purchase any condominium when an owner elects to sell. When a unit goes up for sale, the Board mails each owner written notice of the potential sale and the third party's offer to purchase. The mailing triggers the running of a refusal period that concludes at 11:59 p.m. on the 15th day from the mailing. During the refusal period, the Board or any owner may exercise their right of first refusal. The CC&Rs set forth the specific procedure for an owner or the Board to submit a fully executed written offer to purchase the unit, including that all exhibits referred. The CC&Rs also stated that any owner's offer must be identical in all respects to the offer contained in the offer notice, except for the name of the owner making the offer. The CC&Rs further state that if the Board receives more than one offer prior to the expiration of the refusal period, it shall determine by random drawing the offer that constitutes the sole right of first refusal. If no offer is made before the expiration of the refusal period, the seller may sell the unit to the third party.

In May, 2014, the Association, through its manager, sent letters to all owners informing them of an intended sale of a condominium. The letter reminded owners of their right of first refusal and included the deadline when any offers needed to be made. The Association received an offer before the expiration of the deadline from one of the owners. The Association also received an offer from Mr. Kashani. Mr. Kashani's offer was not identical because it changed the name of the seller's and buyer's agent. Mr. Kashani delivered his offer to the Association's manager.

The Association's legal counsel reviewed both offers and determined that Mr. Kashani's did not comply with the CC&Rs and the other owner's offer did comply. The other owner purchased the unit.

Mr. Kashani initially filed suit against the Association, the other owner, the seller and manager. Eventually, he only had causes of action against the Association for breach of the CC&Rs and fraud. He sought damages in the amount of $700,000.00. His fraud claim alleged the manager falsely represented how to submit a proper right of first refusal. The Association prevailed on its motion for summary judgment and Mr. Kashani appealed.

Holding: The Association did not breach the CC&Rs in not holding a drawing for the unit because Mr. Kashani's offer did not comply with the CC&R requirements. Mr. Kashani was also unable to show that the Association's allegedly fraudulent acts caused his damages.

Takeaway: Managers do not provide decisions or guidance as to whether an owner is in compliance with CC&Rs.

How to Avoid/Manage Risk: Be clear in communicating that managers do not have decision making authority. Have legal counsel review to determine whether an owner has complied with the CC&Rs. Save all written communication, they can become relevant.

*****Lopez v. Lake Forest Keys* (October 26, 2020 No. G058550) [2020 WL 6266735] [nonpub. opn.]**

Issue: Whether a homeowner's repeated violations of the CC&Rs constitutes an action for nuisance.

Facts: Owner Lopez habitually violated the Association's CC&Rs by failing to maintain her balcony, constructed unauthorized modifications, storing trash and debris on her property and failing to maintain her yard. Lopez also did not get along with her neighbors, the Alfords. Lopez threw trash, food and other debris onto the Alford's deck and her plants obstructed their view of the community lake. The Alfords trimmed the plants at the common fence and had a process server enter Lopez's backyard to serve her with a summons and complaint.

The Association approved an application for Ms. Lopez's neighbor on the other side to build four second story windows facing Lopez's property, three security cameras from which Lopez's courtyard could be viewed.

The Association sued Lopez for breach of the governing documents, nuisance and declaratory relief. Lopez filed a cross-complaint against the Association for nuisance, and the Alfords for trespass. After a bench trial, the trial court awarded injunctive and declaratory relieve in favor of the Association and Alfords and awarded the Alfords $10,000.00 for diminution in property value. The trial court also denied Lopez's cross-complaint. Lopez appealed the denial of her cross-complaint.

Holding: The alleged trespass actions did not result in damage to Lopez. Lopez has not shown the trial court issued an advisory opinion when it ruled that Lopez's nuisance theory based on the Sutcliff installations lacked merit.

Takeaway: While this case is largely procedural, the Association did succeed in its complaint against owner Lopez for her long-standing record of unauthorized construction, improper maintenance, and nuisance activity.

How to Avoid/Manage Risk: Document all instances of breach of the CC&Rs to present a strong case for habitual violators.

Corporate Status & Fiduciary Duties

***Coley v. Eskaton* (2020) 51 Cal.App.5th 943

Issue: Whether Directors violated their fiduciary duties when they acted in their own financial benefit that was different than the interests of the Association. If the Directors violated their fiduciary duties, whether they were subject to liability in their personal capacities.

Facts: Association is controlled by a Developer that owns 137 of the lots in the Development, whereas only 130 lots are privately owned. This means the Developer controls a majority of the Board. Two of the three "Developer Directors" were high ranking officers with the Developer who had a direct financial interest in ensuring that the Developer's costs were reduced as it relates to paying assessments for the Developer-owned lots in the Development. Any reductions in cost and

the resulting increase in profits enjoyed by the developer were passed onto the Developer Directors according to their compensation arrangement for their work on behalf of the Developer.

There are three situations of concern in this case. First, the Board voted to shift 83.3% of assessments dedicated to providing security throughout the entire Development onto the privately owned lots, while only 16.7% of the assessments were levied on the Developer-owned lots. Second, during the lawsuit, the Developer Directors disclosed attorney-client information held by the Association to the Developer's leadership. Third, in order to fund the lawsuit, the Board voted to levy assessments only against lots the Developer did not own.

Rules: In general, to be protected by business judgment deference and not subject to personal liability, a director must act: (1) in good faith, (2) in a manner the director believes to be in the best interest of the Association, and (3) with care that would be exercised by an ordinarily prudent person. However, a director cannot receive business judgment protection when acting with a **material conflict of interest**.

A material conflict of interest occurs when a director has a material financial interest that is unrelated to an association's own interest. The statutory conflict of interest rules, as established in Corporations Code § 7233, only apply to transactions between a corporation and one or more of its directors or between two corporations where a director has a material financial interest. In order to prove that a conflicted director has met their fiduciary duties, the director must prove that the action was **"just and reasonable"** as to the association at the time the action was authorized. If an interested director cannot meet this test, then they have breached their fiduciary duty to the association.

The common law conflict of interest rules on interested directors must be met whenever a director's material conflict of interest is ***distinct*** from the association's interests, which is also viewed as director self-dealing. This test is referred to as the **"even more exacting scrutiny" test**. In order for a conflicted director with divided loyalties to show they met their fiduciary duties; the conflicted director must prove that the transaction they participated in was "fair and reasonable." Fair and reasonable requires the conflicted director to: (1) prove they acted with the **utmost good faith** and (2) show they acted with the **"most scrupulous inherent fairness"** from the perspective of the association in all transactions where the director's personal interest was distinct from the association's interest. If a director cannot meet this test, then they have breached their fiduciary duty to the association.

Directors can be held **personally liable** for their actions while on the board if: (1) the director had a fiduciary duty to the plaintiff, (2) the director breached that duty while operating under a material conflict of interest, and (3) the plaintiff suffered damages as a result.

Holding: The court determined that the Developer Directors had a material financial interest in the actions they made because they directly impacted the costs the Developer, of whom they were high ranking officials, would have to bear. The greater the cost on the Developer meant the less income the Developer Directors received from the Developer. This conflict of interest removed

them from the business judgment rule's protections. In addition, this conflict of interest was subject to the stricter common law test to prove no fiduciary duty breach had occurred because the Developer-Director's conflict of interest was distinct from the interests of the Association and the private owners in the Association. The Developer Directors failed to meet the "even more exacting scrutiny" test required of conflicted directors with divided loyalties, which established they breached their fiduciary duties. The Plaintiffs proved the final prong of the personal liability for conflicted directors test when they showed they suffered damages in higher assessments because of the Directors' actions.

Takeaway: When operating in a situation where a director has a material conflict of interest, the board and the director should take all precautions necessary to ensure that the conflicted director is not involved in the decisions where a conflict is present. This only applies to situations where a director would receive a financial interest that is distinct from the Association's interest in the matter.

How to Avoid/Manage Risk: Whenever adopting a policy or transaction, directors should be equally subject to any burdens the policy places on other owners or residents. It appears that the fundamental flaw that happened here was when the Developer Directors took action to benefit themselves and hurt other members by levying a lower assessment on properties the Developer owned to their personal financial benefit, while levying higher assessments on lots in which they did not have a personal interest. Even if the reason for taking this action was reasonable, such as the idea that the Developer lots were located in a location that required less security while the privately owned lots disproportionately needed and/or benefitted from the security, the conflicted Developer Directors would nevertheless be required to prove that they meet the "even more exacting scrutiny" test. This would be true even if there were absolutely no bad faith motivations in the minds of the Developer Directors.

Assessment Collection/ Foreclosure/ Bankruptcy

*****Bennett v. Cielo Homeowners Assn*. (S.D. Cal. 2020) [2020 WL 2126161]**

Issue: Whether an association is covered under the Federal Debt Collection Practices Act (the "FDCPA") and what type of harm an owner must show if they want to proceed with a FDCPA lawsuit.

Facts: Owner asserted that the Association violated the FDCPA when the Association sought to collect a debt owed to the Association. This debt was confirmed by a California court. Owner claims the Association misrepresented their claims to the court and that the Association acted without lawful authority to try and collect the Owner's debt.

Holding: The three holdings in this case that are particularly relevant that each, on their own, find in favor of the Association. First, for purposes of collecting assessments, Associations are not considered debt collectors under the FDCPA, but are rather considered creditors, which places the Association outside the scope of the FDCPA. Second, the Association could not have violated the

FDCPA because the statute required the Owner to prove actual harm. Here, the Owner could not point to any evidence showing they suffered any actual harm because of the Association's efforts to collect the outstanding assessments owed to the Association. Finally, under the FDCPA, in order for a debt collector to be liable for the actions of their employees, both the debt collector and their employee must be considered a debt collector under the FDCPA. This claim failed because the Association is not a debt collector under the FDCPA.

Takeaway: When attempting to collect delinquent payments from owners, an association is considered a creditor and is not subject to the additional restrictions under the FDCPA.

How to Avoid/Manage Risk: Whenever attempting to collect delinquent payments from owners, associations should prioritize maintaining clear and accurate records describing the different steps taken and interactions with the owner in connection with the debt. This prevents challenges based upon what was said versus what was written down.

Granlund v. Burbank Hill Community Association **(C.D. Cal 2020) [2020 WL 5498075] [nonpub. opn.]**

Issue: Whether an Association's legal counsel acted as a debt collector under the Fair Debt Collections Practices Act.

Facts: Owner Granlund became delinquent in the payment of assessments to the Association. The Association's legal counsel is the sole owner of Alterra, a company that performs collection services and is also a minority shareholder and managing partner of a separate entity law firm, TLG. The attorney signs debt collection letters on behalf of Alterra. The Association had contracts with both Alterra and TLG.

On behalf of the Association, Alterra sent letters to owner Granlund that were signed by the attorney seeking to recover unpaid assessments, late fees, interest, collection costs and attorneys' fees. Granlund filed suit, claiming that the letters violated the FDCPA on several grounds.

Holding: Most of the grounds were disposed of in granting Defendants' motions for summary judgment. However, the court analyzed whether the attorney and TLG were debt collectors under the FDCPA. The court found that the attorney was a debt collector under the FDCPA because the debt collection letters evidence that he continually engaged in attempting to collect debts. The court found that TLG was not a debt collector because it did not author the letters and that Alterra is an affiliate of TLG.

Takeaway: Any entity that engages in activity in attempting to collect debts will be deemed a debt collector and subject to the FDCPA.

How to Avoid/Manage Risk: Management companies that send intent to lien letters and/or record liens or engage in other debt collection activities are debt collectors. Be sure you are trained in the appropriate procedures and timelines to avoid or defend FDCPA violation allegations.

***In re Adams* (2020) 796 Fed.Appx. 439**

Issue: Whether an Association's attorneys' fees awarded were discharged in a homeowner's bankruptcy case.

Facts: Owner Kristine Adams and the Newport Crest Homeowners Association had been engaged in state court litigation since 2005 regarding enforcement of a settlement agreement with a provision providing for attorney's fees to the prevailing party. During the litigation, Ms. Adams went through bankruptcy and obtained a discharge. After the bankruptcy case was closed, the Association prevailed in one part of the state court action and sought attorney's fees.

The Association reopened Ms. Adams's bankruptcy seeking a determination of whether the attorney's fees awards were discharged as part of Ms. Adams's bankruptcy. The bankruptcy court held that the Association's attorney's fees were not discharged.

Holding: The Association's claims for attorney's fees were discharged in Ms. Adams' bankruptcy case. Claims to attorney's fees that have not yet been incurred can be contingent claims that are discharged in bankruptcy. Because the state court litigation commenced before the bankruptcy case, the Association could "fairly and reasonably contemplate" the existence of a contingent claim to attorney's fees.

Takeaway: While this case involves a technical issue, associations that are in litigation with an owner where there is a prevailing party attorney's fees provision should be aware that the attorney's fees could be discharged if the owner files bankruptcy during the lawsuit.

How to Avoid/Manage Risk: Understand the impact that bankruptcy can have on all claims that arose before the bankruptcy was filed.

***In re Gold Strike Heights Assn. (Indian Village Estates, LLC v. Community Assessment Recovery Services* (2020) [2020 WL 5640595]**

Issue: Whether a nonjudicial foreclosure against an owner because of delinquent assessments was a wrongful foreclosure under California law when the association that initiated the foreclosure incorrectly used a defunct name.

Facts: The Owner, who is an agent of Indian Village Estates, LLC (IVE), which is the actual owner of the property that was foreclosed upon by the Association, alleges that the Association violated California law when it foreclosed upon the Owner's property for failure to pay assessments. The name issue arose when the Owner acquired property in the development. The Owner, along with other owners in the Development, properly created a new entity that became the Association to succeed the prior association that had been suspended by the state Franchise Tax Board for failing

to properly file corporate paperwork and disclosures. The Association became the successor-in-interest to the original association and the name of the Association differed from the original association in that the Association's name includes "Homeowners" in the name.

The Owner ended up being voted off the Board and IVE stopped paying its assessments. To justify not making these assessment payments, IVE and the Owner asserted that the Association was financially mismanaged. The Association contracted with a collection agency to collect IVE's delinquent assessments. The collection process proceeded through nonjudicial foreclosure, which resulted in the Association acquiring title to all of IVE's lots. At no point did IVE or the Owner assert that they did not owe money to the Association. The only challenge they asserted was that the name the collection agency used when trying to collect the debt was the name of the original association.

Holding: There was no violation of the state's nonjudicial foreclosure law. Incorrectly using the name of the original association did not violate the nonjudicial foreclosure law. This name error was made even less persuasive because the Association was the successor-in-interest to the original association and the Owner knew this fact and also knew that the Association was collecting the debt.

Takeaway: Courts will often see through these types of process arguments. Often an error, such as the one the Owner asserted in this case, can be quickly corrected by correcting the error. But, if there is a substantive challenge, such as an owner claiming that there was no debt at all, a quick fix may not be an option.

How to Avoid/Manage Risk: To reduce the chance of an owner challenging any action that an association takes against them; an association should strive to use its legal name. This means that even if an association has a name that it is commonly referred to as that differs from the name on file with the California Secretary of State, notices and enforcement documents should include a statement identifying the association by its legal name.

Strategic Lawsuits Against Public Participation (SLAPP)/ Anti-SLAPP Motions

Cross Creek Village Homeowners Assn. v. Brunner (January 7, 2020, B295069) [2020 WL 64109] [nonpub. opn.]

Issue: Whether an owner's crossclaims in a lawsuit filed by an association are subject to a special motion to strike as an attempt to stop or impede the association's right to petition for relief.

Facts: Association filed a lawsuit against the Owner after he made disparaging remarks about the Association to the Association's banks. These remarks caused the bank to stop doing business with the Association. The Owner filed a crossclaim against the Association for wasting homeowner funds, filing frivolous lawsuits, seeking to harass and intimidate the Owner through the use of an expensive lawsuit, among other claims. The Association filed a special motion under California's anti-SLAPP law (Civ.Proc. Code § 425.16). The trial court denied the Association's motion to strike the Owner's crossclaims as a strategic lawsuit against public participation (SLAPP).

Rule: Courts evaluate a special motion to strike under Code of Civil Procedure § 425.16 through a two-step process. First, the party moving to have claims dismissed must show that the claims they seek to have dismissed arise from protected activity in which the moving party has engaged. Second, if the movant satisfies the first step, then the non-moving party must demonstrate that its claims have minimal merit beyond mere reliance on their pleading.

Holding: As an initial matter, the Owner tried to assert that Civil Code § 5975 authorizes him, as an Owner, to bring a lawsuit to enforce an Association's governing documents and places his crossclaim outside the scope of the anti-SLAPP law. The Court declared that the anti-SLAPP law applies in lawsuits between an Association and an owner. Next, the allegation in the Owner's crossclaim that the Association spent money on frivolous lawsuits constitutes a protected activity under the anti-SLAPP law. The Owner failed to prove the specific claim regarding frivolous lawsuits had minimal merit because the affidavit he submitted failed to address how he would receive a favorable judgment in his claim against the Association. This means the Owner's lawsuit was dismissed because he failed to show any evidence to support his crossclaims.

Takeaway: In a matter in which an owner files frivolous lawsuit that would try to prevent the Association from being able to seek relief by a court may be struck down if the association can prove the two-step rule of the anti-SLAPP statute.

How to Avoid/Manage Risk: Use of the anti-SLAPP statute can help associations dismiss frivolous claims early in the litigation process.

De Groot v. Essex House Marina Del Rey Homeowners Assn. **(July 30, 2020, B291986) [2020 WL 4364632] [nonpub. opn.]**

Issue: Whether actions taken by a board are considered protected activities under the anti-SLAPP statute. Whether actions taken by individual directors are considered protected activities under the anti-SLAPP statute.

Facts: This case ultimately arises from a dispute between the Board and an owner. The Owner alleged the Board refused to repair damaged pipes near the Owner's condominium. According to the Owner, the Board responded to these requests by treating this Owner worse than other Owners in an effort to force the Owner to leave the community. The Board responded to these claims by asserting that the Owner violated the governing documents by performing work without the necessary approvals from the Board and that the Owner's unlawful marijuana growing operation was a violation of the law and governing documents.

Rule: In general, a board action, such as voting to not authorize repairs, is not considered a protected activity under the anti-SLAPP statute. However, an individual director's conduct, such as calling law enforcement, is a protected activity.

Holding: The Owner's claims asserting that the Board breached its fiduciary duties, failed to act in accordance with the governing documents, and failed to properly maintain fixtures are not protected speech or activities that place the Association under anti-SLAPP protection. But, an

individual director's actions to call the police about perceived unlawful behavior is protected. A director calling the police meets the first prong of an anti-SLAPP motion. Because the Owner failed to provide any evidence to support their claim that calling the police was a false complaint, shows the Association met the second prong of the anti-SLAPP motion. It satisfied the second prong because the Owner failed to show a likelihood of prevailing on the underlying cause of action.

Takeaway: The actions of a board are not going to be protected activities, but the anti-SLAPP statute provides individuals directors some protections to encourage an honest debate about a subject without fear of the individual director being subject to litigation for their protected speech.

How to Avoid/Manage Risk: Do not target individual owners. Treat all owners equally and maintain records to support the notion that the Board does not show favoritism towards any particular owners.

***Doe v. Alma Del Pueblo Owners Assn.* (July 20, 2020, B301277) [2020 WL 4047115] [nonpub. opn.]**

Issue: Whether an association failed to timely file an anti-SLAPP motion to strike a complaint.

Facts: This case arises from a dispute surrounding the way the Association handled a commercial owner's petition for an alcohol license, a letter to members from the Association disclosing that the Owner filed a fair housing complaint against the Association, and the Association removing Owner's attorney from a board meeting. The Owner filed a complaint against the Association and its legal counsel. Upon receiving the complaint, the Association's legal counsel filed a motion to strike the complaint against the legal counsel under the anti-SLAPP statute and the Association filed a motion to join the legal counsel's motion to strike. Upon considering the motions, the court accepted the legal counsel's motion to strike but failed to make a ruling on the Association's joinder motion. Owner proceeded to file an amended complaint against the Association, and the Association filed a motion to strike this new complaint. The court denied the motion on the procedural basis that it was too late for the Association to file such a motion.

Rule: A motion to strike a complaint under the anti-SLAPP statute should be filed within sixty days after the first complaint alleging a cause of action that is subject to the anti-SLAPP statute, but the court still retains discretion to grant motions to strike if it deems proper. The reason for this timeliness requirement is based in the purpose of the anti-SLAPP statute. The purpose of the anti-SLAPP statute is to terminate lawsuits that are filed to chill the constitutional rights of free speech and petition to redress grievances at an early stage in the litigation. Terminating these lawsuits at an early stage is designed to protect the rights of defendants whose constitutional rights are infringed upon by SLAPP lawsuits.

Holding: This matter is decided entirely on a procedural basis without ever getting to the merits of the Association's motion to strike the Owner's complaint. The trial court errored in failing to rule on the Association's motion to join the legal counsel's motion to strike. The failure to rule on the

joinder motion forced the Association to exist in a state of limbo where it could not file an immediate motion for rehearing while also needing to prepare for the Owner's eventual amended complaint. Because the court's error amounted to an abuse of discretion, the court of appeal ordered the trial court to reconsider the merits of the Association's motion to strike that was previously denied as untimely.

Takeaway: The timeline to file a motion to strike in response to a lawsuit alleging claims that may be subject to early termination under the anti-SLAPP statute is short. Once the first complaint alleging a SLAPP claim is filed, an association typically has only sixty days to prepare a response and factual record to terminate the litigation.

How to Avoid/Manage Risk: Work closely with legal counsel to fully understand what motions have been filed and the result of each motion.

*****Jeppson v. Ley (2020)* 44 Cal.App.5th 845**

Issue: Whether an owner's post to "Nextdoor" about the character of another owner is considered a matter of public interest for purposes of anti-SLAPP.

Facts: Prior to the incident that is the subject of this case, the owners, Ley and Jeppson, had entered into a settlement agreement to resolve a prior dispute and it included a "mutual Non-Disparagement" provision. Here, Ley "felt compelled to warn the community" about Jeppson and posted a negative comment about Jeppson on Nextdoor. The post alleged that Jeppson was a violent person that threatened neighbors with violence and that Jeppson had been ordered to relinquish all of their firearms to the county because Jeppson was a dangerous person. Jeppson sued Ley for breach of the prior settlement agreement. Ley filed an anti-SLAPP motion attempting to dismiss the complaint because they alleged that their conduct was a matter of public interest and protected by the anti-SLAPP statute.

Rule: Courts evaluate a special motion to strike under Code of Civil Procedure § 425.16 through a two-step process. First, the party moving to have claims dismissed using an anti-SLAPP motion must show that the claims they seek to have dismissed arise from **protected activity** in which the moving party has engaged. Second, if the movant satisfies the first step, then the non-moving party must demonstrate that its claims have minimal merit beyond mere reliance on their pleading.

Protected activities, as it relates to the anti-SLAPP statute, include "any written or oral statement or writing made in a place open to the public or a public forum, in connection with an issue of public interest." The public interest is broken into three types of categories: (1) the statement or conduct concerns a person or entity in the public eye, (2) conduct that could directly affect a large number of people, and (3) topic of widespread public interest.

Holding: Ley's Nextdoor post was not a protected activity and the court denied Ley's anti-SLAPP motion. Using the "public interest" factors outlined above, the court determined that just because speech may be seen by a large number of people on a social media platform does not make it a matter of public interest. Based on recent changes to the law limiting what is considered public

interest, the court determined that the number of people that actually read or cared about the post did not rise to the level to be of public interest. Ley could not make a private matter—a dispute with a single neighbor—a matter of public interest just by having the dispute in the public forum of Nextdoor.

Takeaway: Under the legal framework regarding anti-SLAPP speech and conduct, neighbor to neighbor disputes that take place in public are still private disputes.

How to Avoid/Manage Risk: Associations should avoid all involvement with disputes that take place on social media and Nextdoor.

Pruchnik v. Salpietra **(October 16, 2020 No. D075216) [2020 WL 6110999] [nonpub. opn.]**

Issue: Whether statements made by the Association's attorney to a homeowner regarding a dispute concerning roof maintenance were protected under the Anti-SLAPP statute.

Facts: Homeowner Robert Pruchnik disputed the Association's plan to replace the roof of his condominium. His attorney and defendant Richard Salpietra, the Association's attorney, wrote several letters back and forth concerning the roof repairs, Mr. Pruchnik's desire to replace the roof tile and install a solar energy system, and the Association's requirement that a maintenance and indemnity agreement be entered into for the solar energy system on the roof. In these communications, litigation had been threatened in communications between Mr. Pruchnik's attorneys, the Association's prior legal counsel and Mr. Salpietra. Before the matter was resolved, the Association began the roof repairs.

The day after the roof repairs began, Mr. Pruchnik filed this lawsuit against the Association, its president, its property manager, and Attorney Salpietra. The complaint alleged causes of action for unfair business practices, intentional and negligent infliction of emotional distress, defamation, financial elder abuse, and "aiding and abetting." The allegations against Attorney Salpietra were that two false statements were made about Mr. Pruchnik's conduct in blocking his driveway to prevent a scheduled roof repair and the color of the roof tile chosen. Mr. Pruchnik also alleged that Attorney Salpietra improperly changed the terms of the proposed maintenance and indemnity agreement concerning the scope of maintenance to be performed by Mr. Pruchnik. Attorney

Salpietra filed an anti-SLAPP motion, claiming that Mr. Pruchnik's claims against him all stem from litigation-related communications with Mr. Pruchnik's attorney to try to resolve the dispute. The trial court granted the anti-SLAPP motion, finding that Attorney Salpietra's communications were made when litigation was imminent and were also protected by the litigation privilege so that Mr. Pruchnik could not show a probability of prevailing on his claims.

Holding: Statements or writings made in connection with litigation in the civil courts is a category of protected activity under the anti-SLAPP statute and does not require any showing that the matter being litigated concerns a matter of public interest. All communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute. Additionally, communications

with "some relation" to judicial proceedings are immune from tort liability by the litigation privilege.

Takeaway: If litigation is seriously contemplated between an association and owner, communications between the parties concerning the dispute will be protected.

How to Avoid/Manage Risk: Make sure facts are accurately stated in written communications to owners concerning violations or disputes with the association.

Sanderson v. Woodbridge Village Assn. **(March 24, 2020, G056684) [2020 WL 1429322] [nonpub. opn.]**

Issue: Whether a board's decision to not move a firepit after owners complained of adverse health effects is protected by the anti-SLAPP statute. Also, whether the vote taken by individual directors on the matter are protected.

Facts: This case ultimately arises from a dispute between the Board and a single owner. The Owner filed a lawsuit against both the Board and the individual Directors alleging claims of negligence, private nuisance, and trespass as a result of the Board's decision to not remove wood-burning fire places from the Association's clubhouse, which was adjacent to the Owner's property. Owner is a doctor and claimed that their health conditions were caused by the Association keeping wood burning fireplaces outside the clubhouse. The Board and individual Directors sought to have the complaint dismissed under the anti-SLAPP statute arguing that the Board's actions were protected.

Rule: In general, a board action, such as voting to not authorize repairs, is not considered a protected activity under the anti-SLAPP statute. However, an individual director's conduct is a protected activity. Courts may proceed to the second prong of the test and avoid having to address whether a defendant's activity was protected if it is clear the Plaintiff has demonstrated a probability of prevailing on the merits of their claim. This is a relatively low bar to meet and is met if the Plaintiff can show a prima facie case using evidence that is likely to be admissible in court. The court is not to make a credibility evaluation of the evidence at this stage in litigation.

Holding: The Association's anti-SLAPP motion was denied. First, the actions of the Board to not move the firepits are not considered protected activities for purposes of the anti-SLAPP statute. Second, as to the claims asserted against the individual Directors and their role in the decision, the Owners were able to show they have a probability of prevailing on the merits of their claim. This meant that the court did not need to address whether the director's actions were protected. Because the Owner showed disputed facts using evidence that was likely to be admissible in court establishing that they had a prima facie case, the anti-SLAPP motion had to be denied.

Takeaway: The anti-SLAPP statute was adopted to end meritless strategic lawsuits against public participation (SLAPP) early in litigation without great cost to the target of the lawsuit, not to abort potentially meritorious claims because of a lack of discovery.

How to Avoid/Manage Risk: Make sure that any complaints submitted to the Board about negative health consequences because of the Association of Board action like this are reasonably investigated by the Board. Any investigation must be noted in writing in meeting minutes.

***Third Laguna Hills Mutual v. Joslin* (2020) 49 Cal.App.5th 366**

Issue: Whether an owner's crossclaims in a lawsuit filed by an association to enforce CC&Rs rental restrictions is covered by the anti-SLAPP statute.

Facts: Association filed a lawsuit against Owner for failing to follow the age restrictions for residents in the age-restricted development. Owner responded to the lawsuit with crossclaims relating to alleged torts the Association committed while trying to enforce the CC&Rs. The Association asserts that the Owner's crossclaims were filed in retaliation of the Association filing the lawsuit.

Rule: Courts evaluate a special motion to strike under Code of Civil Procedure § 425.16 through a two-step process. First, the party moving to have claims dismissed using an anti-SLAPP motion must show that the claims they seek to have dismissed **arise** from protected activity in which the moving party has engaged. Second, if the movant satisfies the first step, then the non-moving party must demonstrate that its claims have minimal merit beyond mere reliance on their pleading.

Holding: A crossclaim may be subject to dismissal under an anti-SLAPP motion. The crossclaim the Owner filed is most likely in direct response and motivated by the Association's lawsuit, but the key fact is whether the claims asserted in the cross-complaint arise from the Association's protected conduct—filing a lawsuit—or whether the claims arise from the underlying conduct of the Association that is the subject of the complaint. Here, the court determined that the claims the Owner asserts in the crossclaim arose from the Association's conduct relating to the Owner's condominium rather than the Association filing this lawsuit. The anti-SLAPP motion was denied based upon this rationale.

Takeaway: Courts now acknowledge that crossclaims can be motivated by a plaintiff's lawsuit, but are nonetheless protected activities as long as the subject of the cross-complaint can be justified beyond the explanation that the defendant is trying to file a frivolous lawsuit in an effort to prevent the plaintiff from seeking judicial recourse for the alleged wrongs caused by the defendant.

How to Avoid/Manage Risk: It is important for an association to consider whether the conduct of an owner is a protected free speech activity prior to filing a lawsuit to challenge that activity.

*****Vanderkallen v. Glen Ivy Recreational Vehicle Park Owners Assn. (September 30, 2020, E072622) [2020 WL 5808017] [nonpub. opn.]***

Issue: Whether an owners' lawsuit alleging a board acted in violation of the governing documents when it acted to expel owners from the stock cooperative is an action that can be dismissed under the anti-SLAPP statute.

Facts: In response to a violent altercation that occurred in a recreational vehicle development that is organized as a stock cooperative, the Board acted to expel some of the Owners that were involved in the incident. In response to the Board's decision to expel them, the Owners filed a lawsuit alleging, among others, that the Board failed to comply with the provisions in the Association's governing documents. In response to the Owners' lawsuit, the Board filed a motion to dismiss the Owners' lawsuit challenging the Board's decision to expel them from the development through the anti-SLAPP statute.

Rule: Courts evaluate a special motion to strike under Code of Civil Procedure § 425.16 through a two-step process, the first of which is addressed in this case. The first step requires, the party moving to have a lawsuit dismissed using an anti-SLAPP motion must show that the claims they seek to have dismissed arise from protected activity in which the moving party has engaged. The ultimate decision of a governing body is not protected by the anti-SLAPP statute, but the decisions and statements by individual members of a governing body may be protected by the anti-SLAPP statute. Also, the subjective intent of a party filing a complaint, which is then challenged by the opposing party under the anti-SLAPP statute, is irrelevant in determining whether a case falls within the anti-SLAPP statute.

Holding: In general, a decision by the Board is not a protected activity. If the Owners' filed their lawsuit against individual Directors, because of the votes or statements made by those individual Directors, then those Directors may have a valid anti-SLAPP claim. But, here the Owners' file their lawsuit because of the decision of the Board, and because the ultimate decision of the Board to expel the Owners is not protected under the anti-SLAPP statute, the Board's motion to dismiss the lawsuit is denied.

Takeaway: Courts now acknowledge that crossclaims can be motivated by a plaintiff's lawsuit, but are nonetheless protected activities as long as the subject of the cross-complaint can be justified beyond the explanation that the defendant is trying to file a frivolous lawsuit in an effort to prevent the plaintiff from seeking judicial recourse for the alleged wrongs caused by the defendant.

How to Avoid/Manage Risk: It is important for an association to consider whether the conduct of an owner is a protected free speech activity prior to filing a lawsuit to challenge that activity.

Discrimination

***Davis v. Echo Valley Condominium Assn.* (6th Cir. 2019) 945 F.3d 483

Issue: Whether an association's denial of a request that the association prohibit smoking in the condominium building as an accommodation to mitigate the symptoms of a resident's asthma was reasonable under the federal Fair Housing Act (the "FHA").

Facts: Owner has asthma and other breathing issues. Other residents in her condominium building smoke in their individual units, but the smell and odor from the cigarettes enters her unit and aggravates the Owner's asthma and breathing issues. In response to the Owner's complaints about the smoke and odor entering her unit and smoke and odor that are present in the common area, the

Association installed, at its expense, a fresh-air system to increase the intake of clean air through her furnace and into the Owner's unit. According to the Owner, this system did not fully address her asthma and breathing issues. The Owner then requested the Association adopt a no smoking policy as an accommodation under the FHA. After the Association declined to implement the no smoking policy as requested, the Owner filed a lawsuit claiming, among other items, that the Association discriminated against her because of her disability by not granting her requested accommodation that the Board adopt a smoking ban.

Rules: Under the FHA, a reasonable accommodation is a moderate adjustment to a challenged policy; not a fundamental change in a policy. Determining what is considered a reasonable accommodation is a balancing test weighing the costs and benefits of a requested accommodation.

Holding: As a matter of law, requesting a complete ban on smoking in a residential development as an accommodation is not reasonable. The Owner's request that the Association ban smoking in the development would fundamentally alter the Association's position on allowing residents to smoke in their private residences. One of the factors the court took into consideration in this matter was the fact that the Owner's request was a fundamental change in the ability of other residents to engage in an activity in their residence that they were otherwise lawfully allowed to engage in, instead of a modest adjustment to a policy.

Takeaway: Under the FHA, a resident cannot use their claimed disability to require an association to adopt a no-smoking ban throughout a development, because, under federal law, this is an unreasonable accommodations request. But, this case was decided using a cost/benefit analysis of what is accepted behavior in Michigan rather than California. It is foreseeable that the benefits of requiring the Association in this case, if it were decided in California, to adopt a no smoking policy may outweigh the costs of depriving a resident the right to smoke in their private residence. But, this case does allow an association to start with the presumption that no smoking bans are unreasonable, and then proceed into the interactive process to find a less burdensome accommodation.

How to Avoid/Manage Risk: Even if an owner or resident with a qualifying disability makes an unreasonable accommodations request, an association must engage in an interactive process with the resident to fully meet the Association's responsibilities to the resident with the qualifying disability.

Additional Cases to Consider

Aldea Dos Vientos v. CalAtlantic Group (2020) 44 Cal.App.5th 1073

Issue: Whether a CC&Rs provision requiring member approval prior to filing a lawsuit against the developer, or risk forever losing the right to file a lawsuit against developer, is unreasonable.

Facts: Association sought to file a lawsuit against the Developer for construction defects. A provision in the CC&Rs required the Association to get the vote of at least 51% of the members

of the Association prior to filing a lawsuit against the Developer. The Association filed a lawsuit and admitted to not conducting the member vote required under the CC&Rs.

Holding: This CC&Rs provision requiring the Association to seek a member vote prior to filing a lawsuit is unreasonable under Civil Code § 5975(a) and therefore did not bind the Association. As a matter of law, it is unreasonable for the Developer to create this language in the CC&Rs to allow the Developer to veto the ability of the Association to file a lawsuit against it.

Takeaway: This expressly overrules *Branches Neighborhood Corp. v. CalAtlantic Group, Inc.* (2019) 26 Cal.App.5th 743.

How to Avoid/Manage Risk: When proceeding to file a lawsuit, work with legal counsel to try and identify any procedural requirements that must be satisfied prior to filing the lawsuit.

***Morin v. Barrios* (October 9, 2020 No. B300647 B300648) [2020 WL 6018588] [nonpub. opn.]**

Issue: Whether the denial of a civil harassment restraining order filed by one homeowner against another homeowner was improper.

Facts: During an Association's meeting, Mr. Morin and Mrs. Barrios engaged in a verbal argument. After the meeting, there was an altercation in the guest parking lot between Mr. Morin and Mr. and Mrs. Barrios. During the altercation, Mrs. Barios had a bat and Mr. Morin brandished his Sherriff's Department badge and gun. Mr. Morin sought a civil harassment restraining order against Mr. and Mrs. Barrios. The trial court denied the restraining order, claiming that Mr. Morin had not met his burden, that a restraining order wasn't warranted, and that Mr. Morin caused the interaction.

Holding: The trial court did not abuse its discretion in not allowing Mr. Morin to directly cross-examine Mrs. Barrios during the hearing.

Takeaway: To obtain a civil harassment restraining order, the evidence must clearly and convincingly demonstrate that there is a course of conduct of harassment towards the person seeking the order. Under Code of Civil Procedure §527.6, "harassment" is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner.

How to Avoid/Manage Risk: Actions seeking civil harassment restraining orders due to disputes between homeowners and disputes between homeowners and directors have been increasing. Make sure to document any alleged harassment in case a restraining order becomes necessary.

*****Parnell v. Shih* (March 25, 2020, D074805) [2020 WL 1451931] [nonpub. opn.]**

Issue: Whether a permanent restraining order preventing a resident from contacting another resident because of harassing conduct was lawful.

Facts: Shih and the Parnells are residents in the same development. Shih sent hundreds of emails to the Parnells, the Association, and Mr. Parnell's employer (the U.S. Marine Corps.); and sent multiple open letters to the members of the Association over the course of seven months, regarding Shih's perception of the Parnells' wrongs.

Rule: Civil harassment, as established in Code of Civil Procedure § 527.6, is a knowing or willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. This conduct must cause a reasonable person to suffer substantial emotional distress and must actually cause the person substantial emotional distress. A court must issue a restraining order if it determines, by clear and convincing evidence, that unlawful harassment, as defined above, exists. An injunction is authorized only when harassment is likely to occur in the future.

Holding: Shih engaged in a level of unhealthy obsession in monitoring almost every movement and action the Parnells took and clearly invaded the Parnells' privacy through stalking, harassment, and the filing of unwarranted complaints with the Association and Mr. Parnell's employer, the U.S. Marine Corps. The Association had no clear duty to act in this matter.

Takeaway: One item that hurt Shih in their appeal is that they consented to not having a court reporter present during the trial court hearings on this case. This limited the ability of the court of appeal to review a trial court record when hearing this case on appeal.

How to Avoid/Manage Risk: Associations should comply with court orders. If a resident is subject to a restraining order, the association should not take action that could violate the order, such as passing along communications. But, the association is under no obligation to enforce a court order or to honor the terms of a court order unless it has reason to believe a court order exists.

Sutton Place of Santa Clara Cnty. Owners Assn. v. Queen **(January 30, 2020, H045422) [2020 WL 500172] [nonpub. opn.]**

Issue: Whether the ten-year statute of repose for latent construction defect claims under Code of Civil Procedure § 337.15 applies to claims against a window contractor that operated in the gray area between a supplier and a builder.

Facts: The Defendant operated as a supplier for a windows manufacturer and worked at the development which would become the Association to provide custom ordered windows. The Defendant maintained a strong presence in the subdivision throughout construction. Defendant was present at the construction site to accept shipments of windows and was involved in discussions addressing problems with the windows before, during, and after their installation.

Rule: Code of Civil Procedure § 337.15 is a protection provided to construction companies to address perpetual exposure to lawsuits based upon work that was completed more than ten years

ago. This prevents lawsuits for latent construction defects from construction companies after ten years of substantial completion of construction, **even if the defect is still unknown**. Entities not covered by this section are subject to the normal defects statute of limitation that lasts a few years after the **discovery** of the defect, depending upon the type of defect.

Holding: Defendant falls under the protections of § 337.15. Their conduct was more akin to the conduct of a construction company that the Legislature intended to include within the statute's protection rather than merely a supplier. The key fact that the court found persuasive was that the Defendant did more than just supply windows. Instead, the Defendant planned and tested the construction and installation of the windows once supplied. Also, for purposes of construction defect, windows are considered an integral part of the structure of a home and is subject to § 337.15's protections.

Takeaway: The ten-year construction defect time restriction applies to more than just licensed contractors. Determination of whether a contractor falls within this protection is a determination made based upon the individual facts of each situation.

How to Avoid/Manage Risk: Do not delay if there appears to be a likelihood of a latent construction defect because delays in filing a lawsuit may prevent any recovery of damages.