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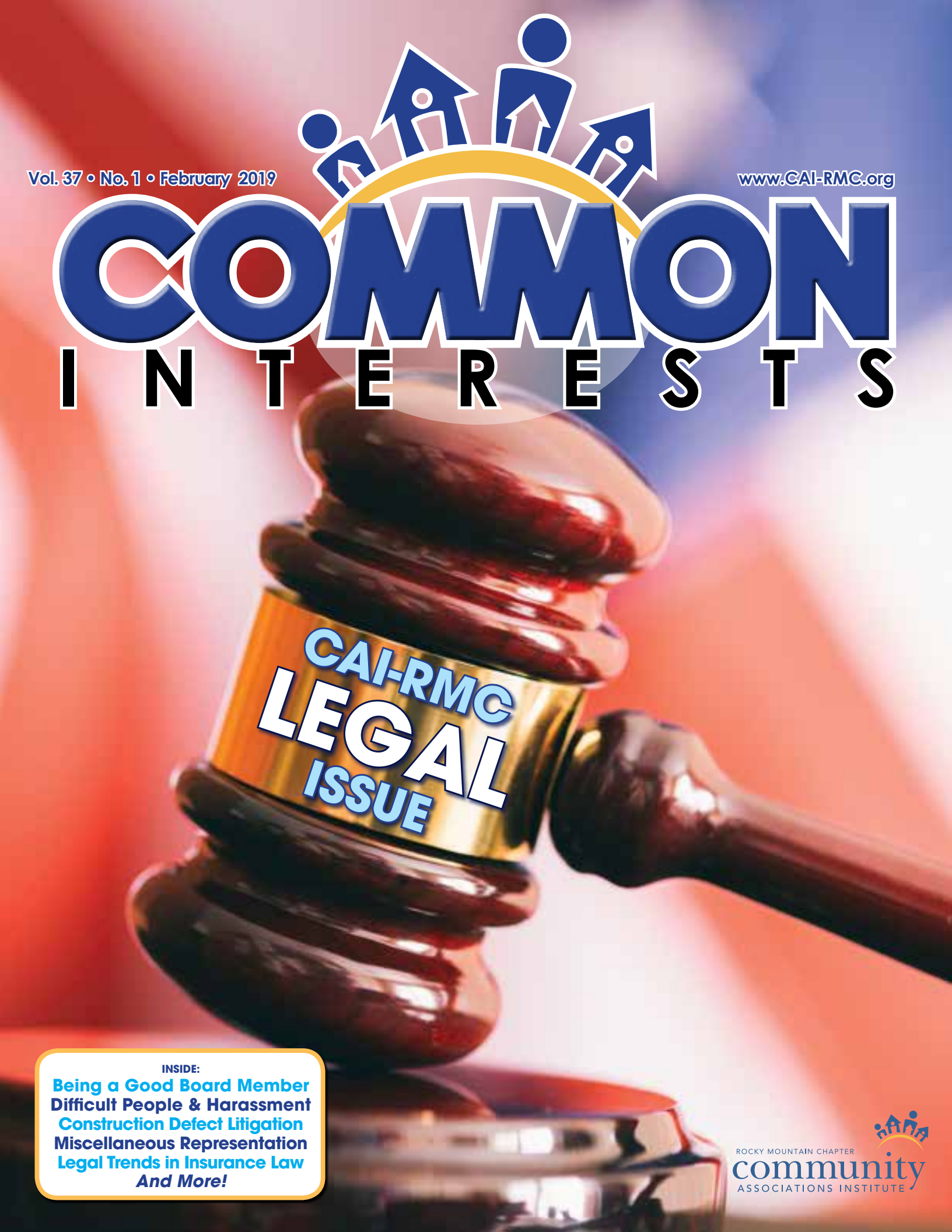
COMMON INTERESTS



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COMMON INTERESTS

IN THIS ISSUE

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DEPARTMENTS

President's Letter

DAVID GRAF
President
CAI-RMC

Good day. As your new president, I am excited to build upon the success path charted by outgoing president Denise Haas and the previous board. Denise's vision was for a renewed emphasis on the people in our chapter and in our industry. The Rocky Mountain Chapter does not exist without the tremendous people who give their valuable time to volunteer and without those who attend the programs and events put on by the Chapter. 2019 promises to be a year of continued connection with our membership as we host outreach Summits (for CEOs, PCAMs, managers and business partners); we host three Peak educational "track" classes at no charge to attendees; we redouble our efforts with the Board Leadership Development Workshop to provide training to Homeowner Leaders; and, as we put on bowling, clay shooting, and other events designed to build lasting friendships among industry professionals. Additionally, the Spring Showcase promises to be an exciting event with multiple educational opportunities that have been requested based on feedback from previous showcase attendees.

The Board of Directors is working with CAI's national office to better educate the public about the advantages of professional management, particularly those with AMS and PCAM designations. These are industry professionals who have voluntarily distinguished themselves to be the best in the industry, with education and experience that is far beyond the minimum standard of the state manager licensure test. Speaking of the state licensure test, it is set to expire ("sunset") on June 30 of this year unless the legislature adopts a bill that will continue the licensure regime for another few years. Please stay tuned as the legislative session continues and new developments with respect to manager licensing arise.

Meetings of the Chapter's Board of Directors are open to all members, and are held on the fourth Thursday of each month just east of I-25 on Arapahoe Road. We look forward to seeing you at an upcoming Board meeting or at a Chapter event in the near future.

COMMON INTERESTS

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EDITORIAL STAFF

Bridget Nichols
(303) 585-0367
bridget@caddo-leadership.com

Dan Schwab
Eidolon
Design & Layout
info@eidolondesign.com

EDITORIAL COMMITTEE

Justin Bayer—jbayer@caretakerinc.com

Nic Brooks—nic@assetpreservationgroup.net

Bryan Farley—bfarley@reservestudy.com

Ashley Nichols—ashley.nichols@yourcornerstoneteam.com

Jeffrey Smith—jsmith@altitude.law

Lindsay Thompson—lthompson@bensonpc.com

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ROCKY MOUNTAIN CHAPTER OFFICE

CAI Rocky Mountain Chapter
11001 W 120th Ave, Suite 400
Broomfield, CO 80021
(303) 585-0367 • www.CAI-RMC.org

CAI SOUTHERN COLORADO

7187 W 79th Drive, Arvada, CO 80003
719-432-9960
info@caisoco.org • www.caisoco.org

NATIONAL OFFICE

6402 Arlington Blvd, Suite 500
Falls Church, VA 22042
Toll Free (888) 224-4321 • www.caionline.org

Bankruptcy Automatic Stay Provision

Amanda K. Ashley
Altitude
Community Law

Bankruptcy is one of those mystical creatures that we've all heard of but hope we don't run across. If your association hasn't yet dealt with an owner who filed or is in an active bankruptcy, don't worry—you will! In fact, bankruptcy is frequently used by owners to prevent further collection action, stop a foreclosure, or otherwise restructure or assist with ongoing financial obligations that are no longer affordable.

When an owner files bankruptcy, the "automatic stay" becomes effective immediately upon filing of the bankruptcy petition. (11 USC § 362). The stay is in essence an injunction against creditors from pursuing further collection action, including foreclosure, garnishment, or eviction. The automatic stay is generally in effect throughout the course of the bankruptcy, which can be a significant length of time in a Chapter 13 bankruptcy since the Chapter 13 bankruptcy can continue for up to five years.

"The stay is in essence an injunction against creditors from pursuing further collection action, including foreclosure, garnishment, or eviction."

Most creditors, including associations, are aware of the automatic stay provisions regarding general collection action such as filing lawsuits, attempting wage garnishments, or other legal action. But what many associations are not aware of are the other actions it takes that may violate the automatic stay provision, such as continuing to prohibit an owner from using the association's amenities (e.g. the swimming pool) once an owner files bankruptcy. While an association can prohibit an owner from using its amenities due to the owner's delinquent account (assuming the association is acting pursuant to its collection policy, of course), once that owner files bankruptcy, the association must cease all collection action. In other words, if the association does not unlock the amenities for that owner, the owner will likely have a strong case that the association has violated the automatic stay provision since the lockout is likely a type of collection action utilized by an association to prompt an owner to become current on an account.

An association's recourse then, in light of a bankruptcy filing, is to file a motion for relief from the automatic stay since the association is a secured creditor and can petition the court for relief from the stay for cause under § 362.

Failure to obtain relief from the stay or failure to cease all collection action can result in significant penalties for violating the stay, so tread carefully associations! If a creditor is found to have violated the automatic stay, penalties including sanctions as well as punitive damages can be assessed. Additionally, damages may also be awarded for emotional distress. Keep in mind that whether a creditor intended to violate the stay order is not a consideration in determining whether there was a violation of the automatic stay; rather, the issue generally becomes whether the creditor intended to collect or continue collection in violation of the stay order.

Of course, every situation is different. There are exceptions to the application of the automatic stay which is why each bankruptcy filing should be reviewed individually. This article is purely meant as a starting point and should not be construed as legal advice.

Amanda K. Ashley is an attorney at Altitude Community Law, a law firm specializing in community association law. She works primarily in the Debt Recovery department.

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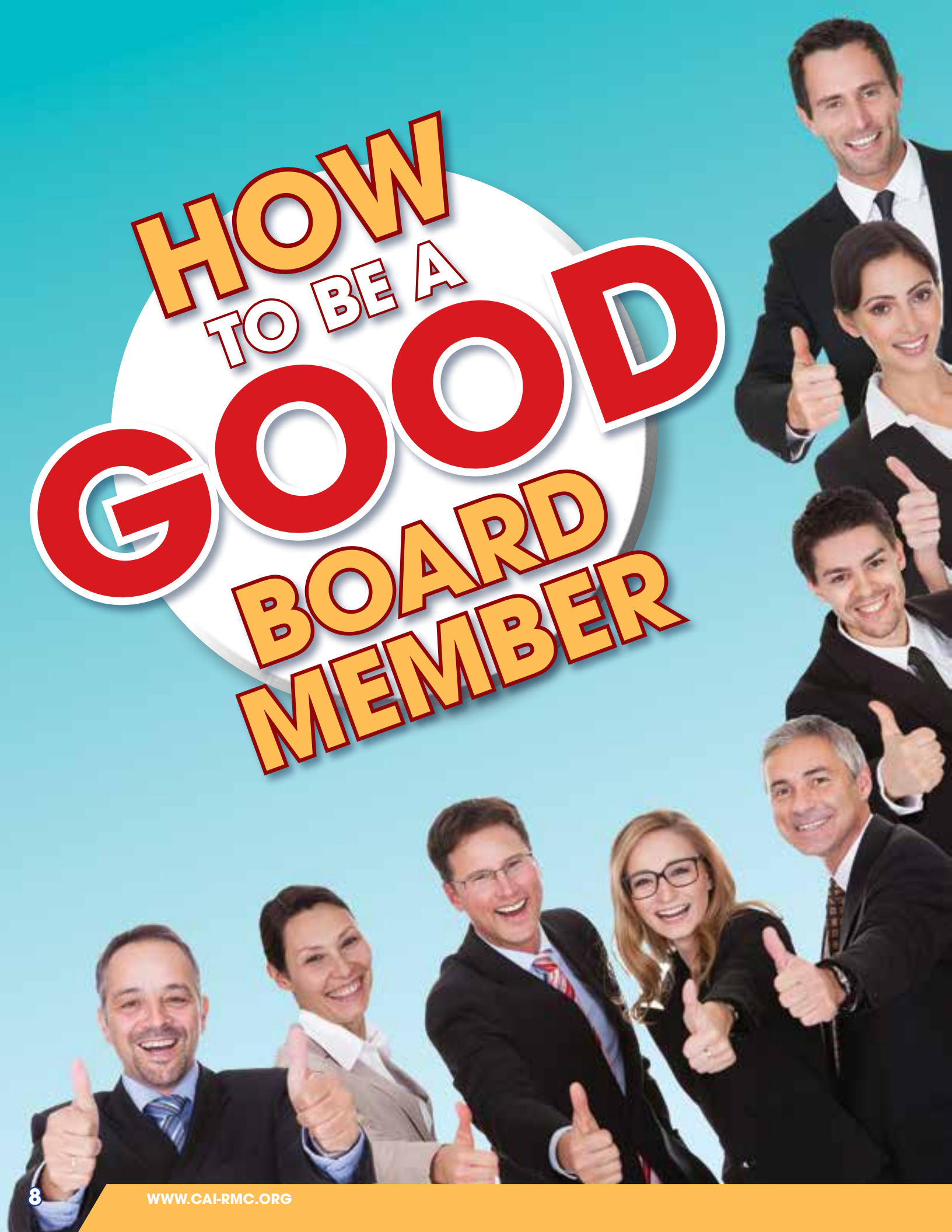
HOW TO BE A GOOD BOARD MEMBER



Damien Bielli
Vial Fotheringham LLP

The annual meeting has concluded, and you find yourself on the Board of Directors of your community association. What now? Hopefully, the association has an orientation process in place to help new board members assimilate into a governing role in the community. If not, here are some helpful tips for board members.

If an association email address is not provided to a board member, create one. A separate and distinguishable email address for community association business is necessary for continuity of board communication and protection of personal email content.

Read and know your governing documents. The origin of association authority, its limitations, and permissible conduct comes directly from the association's governing documents and applicable state and federal law. CCIOA (Colorado Common Interest Ownership Act) provides the statutory guidance for many associations with restrictions on governance that must be taken into consideration by acting board members.

The importance of knowing your governing documents cannot be understated. Board members should understand the hierarchy of governing documents and laws that regulate the association. At the highest level, the association must act in accordance with federal and state law. However, usually the most important and most relevant tool for governing an association is the declaration. A declaration, also known as the CC&Rs, is the primary governing document that creates the rights and obligations of owners in a homeowner's association. This document provides a blueprint for the authority granted to the association, as well as its obligations to homeowners. As a board member, it is imperative that you are familiar with the declaration's contents. Bylaws govern the operations of the association. Items such as board elections, meetings, voting and board member responsibilities are a few of the items bylaws may govern. Board members should be familiar with how the association is run so its operation does not run afoul of the stated procedures within the bylaws.

Board members also must remain knowledgeable of all aspects of association finances, including reserves, expenditures, assets, and budgets. As soon as is practicable, a new board member should request to review the finances and request clarification if necessary. This ensures that the new board member is speaking, acting, and voting from an informed position.

It is also wise to for board members to continually educate themselves about issues occurring outside the meeting room by walking the property, talking to members, talking to the manager, and participating in all meetings. This gives each board member an opportunity to see, hear, and discover issues within the community before they become a problem.

Finally, document, document, document. Failure to document is an association's and, similarly, a board member's Achilles' heel. While a board member may have acted promptly, prudently, and in accordance with the governing documents, failure to produce documentation to that effect is difficult to explain and usually results in trouble for the association. Any documentation received by the association, especially opinions of experts (attorneys, contractors, accountants, etc.) should be shared with every board member and retained and filed where easily accessible. The board is entitled to rely on the opinion of experts in its decision-making and, therefore, should retain the opinion as evidence of good faith.

Having the right tools can ensure that being a Board member can be a rewarding and beneficial experience.

Dealing with DIFFICULT PE&

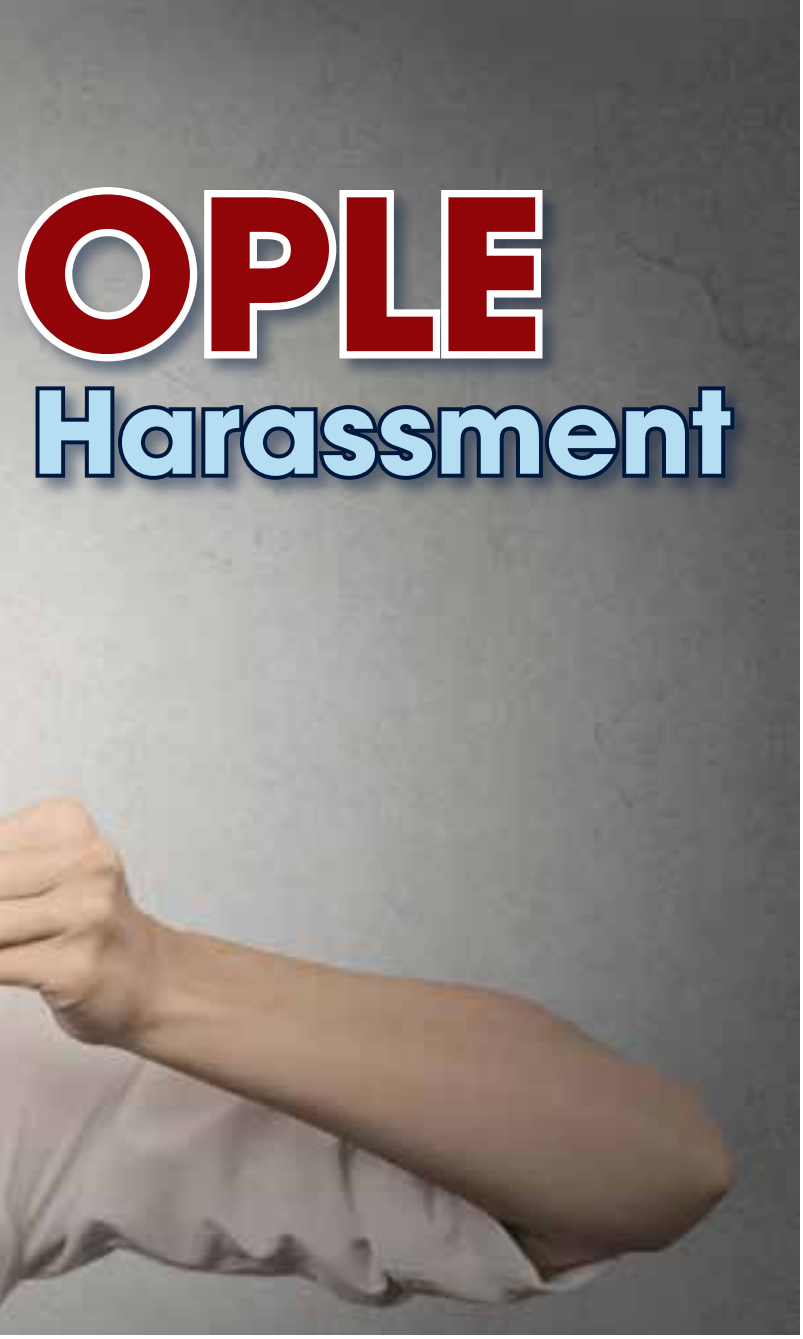
Tim Moeller
Moeller Graf, P.C.

One of the beautiful things about living in a community is the different perspectives, life experiences, and attitudes that the residents bring, which can contribute greatly to the quality of life for all. However, sometimes it is these differences that tear us apart. Within most communities, there will be one or more individuals who may not share the common goals of the community at large. Some of these types of individuals will actively seek out confrontation and negativity. These difficult individuals seem to thrive on pushing and invading reasonable boundaries and are typically very outspoken regarding their view of the management of the association. While not experts in civility, these individuals are experts at criticizing and pinpointing the errors of others, especially the Board and/or the manager. They will interrupt and make personal attacks and unfounded allegations.

By now, you may be picturing in your mind an individual that has checked all of the boxes of poor behavior mentioned above. So how do we best deal with these individuals to avoid unnecessary conflict and disruption to association business?

Here are some suggestions for dealing with the difficult homeowner:

1. **Update your policy regarding conduct of meetings.** You may announce the meeting procedures at the outset of meetings as well as by notifying members ahead of time in a newsletter or in the meeting notice for member meetings.
2. **Enforce the conduct of meetings policy uniformly for all members, not just against the difficult individual.** Let them know that their behavior will not be tolerated, but make sure that the rule deals with similar conduct in a similar manner.



3. **Host a homeowner forum at the meetings with an established and enforced time limitation for speaking on any matter.** When the speaker's time is up, don't start screaming at them to sit down and shut up, but rather, nicely inform them that they have reached their time limit and that they need to wrap up their statement. If they continue to ignore the time limit, kindly remind them that they are taking time from other members and that you will now have to move on to other homeowners. If you don't have to enforce a time limit because there isn't any significant time constraint, try to allow the person reasonable latitude to speak freely and make their points.
4. **Establish control such that individuals are not allowed to interrupt board meetings by speaking out of turn and personally attacking others.**
5. **Respond in a regulated manner without yelling.** Refrain from trading insults and allegations. Don't carry on the battle over social media.
6. **Utilize basic parliamentary control by knowing how and when you may table a motion or refer a matter to a committee.** Also, recognize that parliamentary rules are not to be used as weapons to disrupt free debate but are to be used to provide a fair process for all attendees.

Unfortunately, it is common for our office to be contacted about homeowners who are "harassing" one or more board members or the community manager. In fact, this seems to be more and more commonplace. At what point does lousy behavior rise to the level of harassment? After all, it is not against the law to act poorly or to have bad manners.

Colorado law defines criminal harassment in C.R.S. §18-9-111. For harassment under this statute to exist, there must be "intent to harass, annoy or alarm" another person in certain ways, including, but not limited to i) touching (striking) them; or ii) in public, directing obscene language or making obscene gestures to another person; or iii) following a person in or about a public place; or initiating communication by telephone, text, email, or other means in a manner intended to harass or threaten bodily injury or property damage, or iv) making any comment, request, suggestion, or proposal that is obscene; or v) repeatedly insulting, taunting, challenging, or making communications in offensive coarse language to another in a manner likely to provoke a violent or disorderly response.

Harassment as set forth above is a class 3 misdemeanor (unless the harassment pertains to race, color, religion, national origin or disability, which is a class 1 misdemeanor). So, while the association may contact law enforcement should it deem that the behavior of the individual has risen to criminal harassment, there may also be other ways to head-off the problem using the association's existing governing documents.

Most covenants contain provisions pertaining to nuisances. While we can agree that bullies and difficult people seem to be a nuisance to all who come in contact with their abhorrent behavior, a legal nuisance is typically considered an activity which arises from unreasonable, unwarranted or unlawful use by a person of his/her own property, working obstruction or injury to the right of another such as smoke, odors, noise, or vibration.

Therefore, we may look to whether there exists more specific language in the covenants regarding harassing behavior. Short of amending your covenants to contain such language, broad language often exists in the covenants pertaining to "quiet enjoyment" which has nothing to do with noise but can pertain to harassment. Sometimes, a strong letter from the association's attorney will be enough of a check on the bad behavior to alleviate some of the issues. This may escalate to the levy of fines or other specific sanctions. If this doesn't work, the Board may discuss with its legal counsel the possibility of obtaining a civil restraining order in court or an injunction against their bad acts.

Ultimately, if you spend enough time as a manager or board member, you will eventually run into an individual who exhibits bad behavior. Do all that you can to diffuse the problem, but don't let the issue get out of your control. Take whatever reasonable action is necessary to maintain control of the association and attempt to promote civility for the benefit of the homeowners that truly appreciate your time and effort spent on behalf of the community.

DON'T GET SINGLED OUT

Colorado's Single-Family HOAs Have the Same Right to Sue for Construction Defects Under CCIOA as HOAs serving Condos or Townhomes

Shane Fleener
Hearn & Fleener, LLC

Most homeowners and community managers know that Colorado's Common Interest Ownership Act ("CCIOA") gives homeowner associations ("HOAs") the right to assert a construction defect claim on behalf of the HOA and/or the community's homeowners. However, there is a common assumption that this right only belongs to HOAs consisting of multi-family units (such as townhomes, row homes or condominiums). That assumption is incorrect. Single-family home HOAs have the same rights under CCIOA as any other HOA. This includes the ability to assert claims for defects impacting the single-family homes and lots that are otherwise owned and maintained by the homeowners.

The misconception that multi-family HOAs, but not single-family HOAs, have standing under CCIOA likely stems from the assumption that HOAs only have standing for common elements, or those portions of the community that the HOA otherwise owns or maintains. After all (when compared to their multi-family HOA counterparts), single-family home communities generally have fewer common elements that are owned and maintained by the HOA, and more lots/homes that are owned and maintained by the individual homeowners. However, none of this has any bearing on whether an HOA has standing under CCIOA. While some other states make exceptions for single-family home communities, Colorado is not one of them.

CCIOA states that an HOA has the power to assert claims "in its own name on behalf of itself or two or more-unit owners on matters affecting the common interest community." C.R.S. § 38-33.3-302(1)(d). This is the only limitation to an HOA's standing. Therefore, the question becomes: what is a "matter affecting the common interest community?"

First, common elements are not the only things that constitute a "matter affecting the common interest community," as individual homes/units are also included. CCIOA defines a "unit" as "a physical portion of the common interest community which is designated for separate ownership or occupancy." As a result, multiple courts have confirmed that defects impacting individual units are "matters affecting the common interest community" under CCIOA. Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating, 94 P.3d 1177, 1179 (Colo. App. 2003). Detached single-family homes are "units" under CCIOA in the same way as condos and townhomes.

Second, the fact that an HOA might not own the unit (or any other area of the community impacted by defects) is irrelevant to an HOA's standing under CCIOA. In fact, the Uniform Act (upon which CCIOA is based) expressly states that an "association can sue or defend suits even though the suit may involve only units as to which the association has no ownership interest." For this and other reasons, Colorado courts have confirmed that HOAs have the right "to pursue damage claims on behalf of two or more units' owners with respect to matters affecting their individual units." Id. at 1180.

Third, the manner in which a community's governing documents happen to allocate repair and maintenance obligations between the HOA and the individual homeowners is irrelevant. As articulated by one court: "Provisions stating that the Association and individual owners have separate maintenance duties under the Declaration have no bearing on the Association's standing under the CCIOA." Heritage Vill. Owners Ass'n, Inc. v. Golden Heritage Inv'rs, Ltd., 89 P.3d 513, 515 (Colo. App. 2004).

The result of all this: Single-family home HOAs have the right under CCIOA to sue builders for construction defects impacting any portion of the common interest community, regardless of whether those defects are impacting individual homes or common elements and regardless of whether the HOA owns and/or is responsible for repairing and maintaining the impacted improvements. It is important that single-family home HOAs, and the community managers that work with them, be aware of these rights.

Shane Fleener is a partner and litigator at Hearn & Fleener, LLC located in Denver, Colorado. Hearn & Fleener is a plaintiff's law firm focused on housing and construction defect issues. For more information about Shane and his law firm, please check out their website www.HearnFleener.com

6 Things You Need to Know About Construction Defe

Jennifer Siedman, Esq.
Burg Simpson Eldredge Hersh & Jardine, P.C.

Colorado is outpacing national trends for new apartment construction and, as the influx of new residents continues, developers continue to build. Those familiar with the real estate market predict that rental apartments will be converted to for-sale condominiums. Our firm's construction defect attorneys know that complicated issues arise when construction problems are discovered in condo conversations. Here are six things you should know about construction defects in condo conversions:

1. **It's Still Mostly the Wild West Here.** There are very few Colorado laws or court decisions that regulate condominium conversions. As a result, the discovery of defects in a condo conversion may raise questions that do not have clear answers.

2. **Beauty May Only be Skin Deep.** The conversion process may involve renovations that increase an older apartment building's aesthetic appeal, but the components beneath the façade may have already lost a significant part of their useful life and may contain construction defects. If a report on the building's condition was generated during the conversion process, as some municipalities require and many new building owners obtain, request a copy. Consider having a professional inspect the property to identify any construction defects and useful life concerns. Also, evaluate whether the monthly assessments are appropriate. Because high monthly assessments are unattractive, a condo converter may set assessments at an artificially low number to generate initial sales and profits.

3. **There May be Growing Pains.** Sometimes, the converter will retain ownership of units to rent. When occupants are a mix of owners and renters, and when the landlord is the converter, complications can arise. Some of these issues can be addressed through amendments to a community's governing documents, if the converter does not prevent such efforts.

4. **The Clock May Be Ticking.** Attorneys who represent

"Conversions raise complicated issues relating to who is responsible for investigating an already-constructed building and who is responsible for identifying problems and repairing them or fully disclosing their existence."

cts in Condo Conversions

builders and developers have recently suggested that an ideal time to convert an apartment building to a condominium building is eight years after the building's substantial completion. This is because the statute of repose, which is an eight year time limit on construction defect lawsuits, may bar some claims that an owner could have otherwise asserted against those responsible for the building's construction. However, when a condo conversion involves significant construction work that alters or is integrated with original work, the statute of repose probably will not provide a complete defense to an association's or owner's claims based on the new work. Also, the statute of repose may not apply at all to claims against a developer, including the building's original developer, who owned the property when the defects caused damage.

5. **Honesty is the Best Policy.** While the statute of repose may bar some claims, it likely will not affect claims that declarant-appointed board members breached their fiduciary duties or that the seller misrepresented or failed to disclose important facts about the building's or unit's construction during the sales process, including hidden defects and concealed costs. This is because these claims are not based directly on construction defects, but rather are based on breaches of loyalty to the homeowners' association, misrepresentations, and other types of wrongful conduct.

6. **What You Don't Know Can Hurt You.** Conversions raise complicated issues relating to who is responsible for investigating an already-constructed building and who is responsible for identifying problems and repairing them or fully disclosing their existence. An association's or owner's rights and remedies in these situations will ultimately depend on the extent and type of investigation and work performed as part of the conversion process, the roles and extent of knowledge of various entities involved in the conversion, when and how the defects were created and discovered, whether the existence of defects was or should have been disclosed and many other issues, including whether the converted condo is located in a municipality that regulates conversions and requires compliance with applicable building and fire codes.

If you would like more information about conversions or have questions about possible defects in your recently-converted condominium, call one of our attorneys at 303-792-5595 or reach out to Loura Sanchez at lsanchez@burgsimpson.com.

The Future of Consent-to Amend

Keith Hoagland
McKenzie Rhody, LLP

When creating a common interest community, the developer typically forms the owner's association and controls it for a period of time through a developer-appointed board of directors. The Colorado Common Interest Ownership Act ("CCIOA") requires that this period of control terminate after sufficient units have been sold, after sufficient time has passed since the last sale of a unit, or after sufficient time has passed since the last exercise of any right to add new units.

However, a developer may include provisions in a community's governing documents that allow it to continue to exert control over a community after its control of the owner's association has terminated. For example, the declaration may contain a requirement that certain amendments to the declaration require the developer's consent. As a result, the community may find it impossible to amend the declaration in some ways, regardless of how many unit owners approve. Such a requirement severely impairs the right of an association to self-govern and, in some circumstances, it may also limit the legal recourse it has against the developer. In fact, in Vallagio at Inverness Residential Condominium Ass'n v. Metropolitan Homes, the Colorado Supreme Court recently upheld such a requirement as valid.

The declaration at issue in the Vallagio case required the owner's association to arbitrate construction defect claims against the developer. Although declarations commonly contain such a requirement, this one further stated that the arbitration requirement could not be amended without the developer's consent. The Colorado Court of Appeals has previously held that an owner's association can remove an arbitration requirement in a declaration by amendment. However, requiring the developer's consent to do so effectively makes the requirement permanent, controlling the manner in which the association may pursue construction defect claims long after the developer has sold the last unit and relinquished any control over the association.

CCIOA prevails over any inconsistent provision in a community's governing documents, and the association in Vallagio made several strong arguments as to why the consent requirement in the declaration violated CCIOA. First, as noted above, CCIOA sets strict limits on the period of time during which the developer can maintain control over an owners association, and prohibiting amendment of the declaration without the developer's consent would amount to impermissibly exerting control over the association beyond the time limit set forth by CCIOA. However, the court of appeals found that this provision deals specifically with the developer's right to appoint and remove members of the association's board of directors. Since the unit owners and not the association itself make amendments to the declaration, the court reasoned that the declaration did not require the developer's consent for any actions of the association. Curiously, the Colorado Supreme Court did not address this argument separately on appeal, and it remains unclear whether it would have adopted the rationale of the court of appeals.

Second, outside of certain narrow exceptions, CCIOA explicitly provides that a declaration may be amended only by the affirmative vote or agreement of unit owners holding more than 50% (and up to 67%) of votes in the association. Requiring the developer's consent to amend the declaration, especially if the developer no longer owns title to any units, would effectively call for something above the required unit owner vote. However, the court found that this provision merely prohibits requiring a percentage of unit owners larger than 67% and does not prohibit imposing additional requirements.

Third, CCIOA prohibits a developer from evading CCIOA's limitations or prohibitions, an example of which would be controlling the votes of unit owners. By requiring its consent to amend the declaration, regardless of the number of unit owners in favor, the developer effectively controls the votes of those unit owners. However, the court rejected this argument, finding that it did not impermissibly create class voting or run afoul of CCIOA's policies or purposes, which endorse and encourage arbitration.

Finally, CCIOA prohibits imposing any limitations on the power of an owner's association to deal with the developer that are more restrictive than the limitations on the association's power to deal with other persons. Requiring the developer's consent to amend the declaration effectively restricts the association's ability to deal with the developer more so than its ability to deal with other persons. This would seem especially true where the provision being amended, as in Vallagio, is one that specifically benefits and protects the developer. However, the court found that because, as noted above, it is the unit owners and not the association itself that amends the declaration, the consent requirement did nothing to restrict any power of the association.

Significantly, the court stated in a footnote that its holding is confined to "a narrowly drafted consent-to-amend provision that pertains solely to the resolution of construction defect disputes," and that it "express[es] no opinion as to the propriety of any other consent-to-amend provisions." However, as noted by two dissenting justices, the rationale for the opinion was not limited in this way. Consequently, the dissent fears that it will allow developers to control the affairs of owner's associations "into perpetuity" simply by requiring its consent to amend any provision in a declaration. The fallout from this decision is likely to spawn future litigation testing the boundaries of consent-to-amend as a control mechanism that extends well beyond arbitration requirements in construction defect disputes.

Keith Hoagland is an attorney with McKenzie Rhody, LLP. McKenzie Rhody specializes in representing homeowners and homeowner associations in construction defect matters in Colorado, Texas, and California. www.mrcdlaw.com

m-204
Community Governance

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"You work for me!"

Well, no, I actually don't. Every community association professional has had a homeowner demand a particular action because, "You work for the homeowners, you work for me!" That isn't exactly true, and it's precisely false in the context of a community association attorney. Blurring a vendor's lines between a homeowner's request and a Board's request might be a minor concern when planting annuals outside a patio home, but it is a major ethical problem if the "vendor" is an attorney.

Colorado attorneys are governed by the Colorado Rules of Professional Conduct. Rule 1.13 details an attorney's duties and obligations when that attorney represents an organization—such as a homeowners association.

First and foremost, the attorney represents the corporate entity itself, "acting through its duly authorized constituents." This is typically the Board of Directors, but the attorney does not represent the Board of Directors. As an organization's attorney, I have additional ethical duties to homeowners and members of the public. Specifically, when dealing with directors, officers, members, or other constituents who may have interests adverse to my client's interests, I must explain that I represent the corporate entity and not that director, officer, member, or other constituent.

This circumstance could arise when a homeowner attempts to initiate a popular Bylaw amendment at an annual meeting. I am obligated to explain that while an amendment to prevent Carol from serving on the Board because she snubbed Rose at bingo last month might sound like a good idea, it's not an action that is legal to take at that meeting. While all the homeowners present might want to take that action (everyone really hates Carol), it is simply not legal. My duty is to help the corporate entity stay on the right side of the law—and the right side of the law does not include personally-motivated and improperly-noticed Bylaw amendments.

Similarly, other community association vendors need to keep their clients in mind. A paving contractor does not report to Carol or Rose; the contractor reports to the Board or the community association manager. The contractor needs to take direction from those who control the corporation (and its purse strings). If a contractor decides to follow Carol's dictates, that contractor may find himself in breach of the contract with the community association. Carol might find herself personally liable for her instructions. Avoid this situation and protect yourself, your clients, your vendors, and your homeowners from confusion and unnecessary expenses by ensuring that only the parties who can bind the corporate entity attempt to do so.

Lindsay Smith is an attorney with Winzenburg, Leff, Purvis & Payne, LLP. She represents communities as general counsel in a variety of legal circumstances, from governance and policy considerations to litigation and enforcement. When not attending community association meetings for clients, she relaxes by attending community association meetings.

DRONES DRONES DRONES Everywhere!

What Does Your Association Need to Know?

Ashley Nichols
Cornerstone
Law Firm

According to the Federal Aviation Administration (FAA), in 2018, there were over one million registered consumer drones in the United States. If you are like me, you may not have known that if you have an unmanned aircraft system (UAS or drone), you are now required to register your drone with the FAA. The FAA estimates that the actual number of drones in the United States is closer to 1.5 million. Additionally, at the industry's current pace for hobbyist drones, those numbers are expected to triple to over 3.5 million by 2021. Given those numbers, odds are good that you, or someone you know, owns and operates a drone.

The legal framework surrounding the drone industry is still developing. Many of the concerns are over privacy issues (flying over someone else's property, catching a neighbor sunbathing in the buff, peeping in windows, etc.). Associations are starting to question how to address drone operations in their communities. One question is who owns the air where the drone is being flown? On paper, the concept of land is relatively simple—you pay money, and in return, you're given unfettered access to a predetermined amount of land (but HA! Unfettered and HOA, as we know, don't go hand in hand). But do you own the sky above? There is a Latin phrase that translated says, "whoever owns the soil, holds title all the way up to the heavens and down to the depths of hell." However, today, you only really have the right to enough airspace to reasonably enjoy the land below that air. What does that mean? Well, that's up for debate.

There is "navigable airspace" which is regulated by the FAA. "Navigable airspace" is "airspace at and above the minimum flight altitudes …, including airspace needed for safe takeoff and landing." The minimum flight altitude while flying over congested areas is 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet; and in uncongested or sparsely populated areas, it is 500 feet above the surface.

As for regulation by the FAA, in addition to being registered, hobby drones are required to (a) fly below 400 feet and remain clear of surrounding obstacles; (b) remain well clear of and not interfere with manned aircraft operations; (c) not fly within 5 miles of an airport without the airport's prior approval; (d) not fly near stadiums or people; (e) not operate drones weighing more than 55 pounds; and (f) always keep the drone in a line of sight. Drone operators who violate these regulations could be fined for endangering other people or aircrafts.

So, is it trespassing if you fly over your neighbor's land? Unfortunately, as of now, the answer is not clear. A case that may have shed some light on the issue was dismissed by a federal judge for lack of jurisdiction. The following is some background: Boggs, the drone pilot, was flying his drone over property owned by Meridith. Meridith, alleging trespass and invasion of privacy, shot down the drone (he later began calling himself the "Drone Slayer"). Meridith was charged criminally, and those charges were dismissed by a Kentucky state court judge. The drone pilot, Boggs, later sued Meridith in federal court asking the court to make a legal determination as to whether his flight constituted trespassing. The suit was brought in federal court because Boggs' lawyers argued that the drone was flying in airspace which was regulated by the FAA, and as such, the incident was subject to federal jurisdiction. The FAA was not a party to the suit and the judge, dismissing the case, stated that the state courts would be better suited to adjudicate the claim.

The best case law on the issue of whether a drone flying over private property is trespassing is an old case dating back to 1946. That year, the Supreme Court ruled in a case known as United States v. Causby that a farmer in North Carolina could assert property rights up to 83 feet in the air. In that case, the farmer was awarded damages for chickens that were killed when they flew into a wall due to the noise of a low flying plane (83 feet).

State legislatures across the country are debating if and how drone technology should be regulated, taking into account the benefits of their use, privacy concerns, and their potential economic impact. Forty-one states, including Colorado, have passed legislation addressing drones. However, Colorado's legislation only addresses governmental use of drones.

"So, is it trespassing if you fly over your neighbor's land? Unfortunately, as of now, the answer is not clear."

What about the commercial side? The business applications of drone use are nearly limitless—from delivery of packages to your door to conducting roof inspections. Drones could be an excellent tool to help enforce violations within your community and provide efficiencies in doing so. Currently, commercial use of drones requires FAA approval. If your community is considering using drones for enforcement, make sure that your vendors are in compliance with federal laws and guidelines.

A March 2013 report from the Association for Unmanned Vehicle Systems International projects that by 2025 more than 100,000 jobs will be created with an economic impact of $82 billion. This is certainly a growing industry and associations should ensure that they are proactively taking steps to address concerns over the use and operation of drones, rather than reacting. At the same time, associations wanting to regulate drone use in their communities should do so with care. Until a court conclusively finds that some portion of the airspace above private property is owned by the property owner, associations regulating said airspace will be subject to potential litigation.

Remember that many times, drone use and operations really come down to neighbor to neighbor disputes. An association's best bet is to avoid provisions in a policy that are overly restrictive. Make sure to contact your association's attorney to discuss prior to implementation in your community.

Ashley Nichols is the principal and founder of Cornerstone Law Firm, P.C. She has been in the community association industry for eleven years, providing associations with debt recovery solutions for their communities. Cornerstone Law Firm represents Colorado communities in all areas of common interest community law. You may find out more at www.yourcornerstoneteam.com.

Getting Per

Cyber and Data Security in Colorado Common Interest Communities

Aaron Goodlock
Orten Cavanagh & Holmes, LLC

As banks, credit card companies, and financial service providers grapple with identify theft, so too must HOAs. Over the last several years, there has been a substantial increase in cyber-related crimes, resulting in increased identity theft and financial fraud. As a result, federal and state governments have been working to enact laws to reduce crime and protect constituents, primarily via statutes addressing consumer protection, data and cybersecurity requirements, and criminal sanctions.

In 2018, the Colorado legislature approved House Bill 18-1128, which was enacted and became effective September 1, 2018 to address privacy and cybersecurity protections. The new law applies to many entities in Colorado, including most HOAs and community association management companies.

HB 18-1128 has two primary components, including: (1) requirements for storing and protecting "personal identifying information" (as defined in the statute) and (2) changes to the Colorado's breach notification laws.

Managing and Protecting "Personal Identifying Information"

HB 18-1128 applies to all "Covered Entities." Covered entities include any individual or entity that maintains, owns, or licenses "personal identifying information" (PII). The statute defines PII to include social security numbers; personal identification numbers; passwords; passcodes; official state or government-issued driver's licenses or identification card numbers; passport numbers; biometric data (such as fingerprints); employer, student, or military identification numbers; or financial transaction devices (such as credit or debit card numbers or bank account information).

Under the newly enacted laws, HOAs and management companies that store or maintain PII are required to implement and maintain reasonable security procedures and practices that are "appropriate to the nature of the personal identifying information and the nature and size of the business and its operations." The statute also requires HOAs and management companies with access to PII to adopt written policies addressing the destruction of records containing PII when they are no longer needed.

A third requirement under the new statute is that HOAs that maintain PII must take measures to preserve the confidentiality of PII when transferring such data to third parties (such as the association's manager or management company or another service provider). The statute provides that covered entities "shall require" third party service providers to implement and maintain reasonable security procedures and practices which are reasonably designed and tailored to protect against unauthorized access, use, modification, disclosure, or destruction of PII. One method to address this requirement is for associations to carefully review their management agreements and ensure that adequate protections are in place, including appropriate indemnification provisions. Associations are also encouraged to consult their attorneys when reviewing association contracts whenever the disclosure or transfer of PII is involved.

Compliance with Colorado's Breach Notification Statute

The second primary component of HB 18-1128 deals with notification requirements in the event of a data or security breach that results in, or is likely to result in, the misuse of "personal information."

For purposes of Colorado's breach notification statute, "personal information" includes a Colorado resident's first name or first initial and last name in combination with any of the following data: driver's license number or identification card number; student, military or passport identification number; medical information; health insurance identification number; or biometric data. "Personal information" also includes a Colorado resident's username or email address in combination with a password or security questions and answers that would permit access to an online account or a Colorado resident's account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to that account.

The statute requires that if a breach occurs, the covered entity (e.g., the association or the management company) is required to notify the affected individuals within 30 days. The statute also specifies certain information that must be included in the notice and disclosed to the affected individuals.

If a breach involves a compromise of personal information affecting 500 or more individuals, the association or management company is required to notify the Colorado Attorney General's office. If the breach involves more than 1,000 individuals, notice is also required to be provided to the credit reporting agencies. Accordingly, large communities that include 500 or 1,000 homes or more, including the association's board of directors and management, should be cognizant of their duties and responsibilities in the event of a breach and would be wise to address such requirements in the association's written policies.

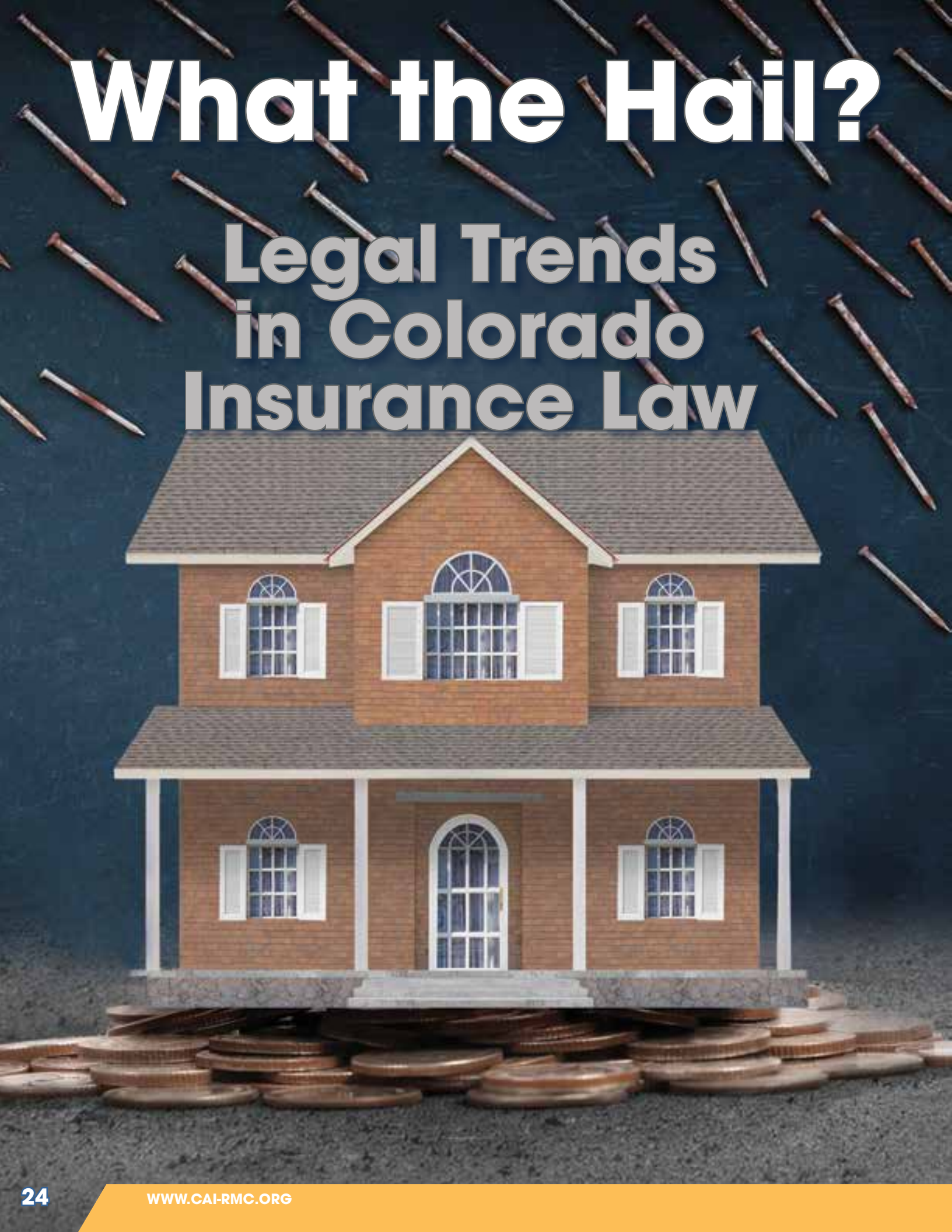
Conclusion

Good risk management practices for associations and management companies includes adopting and implementing appropriate written policies (pursuant to the statute), including policies for maintaining PII and other personal information and developing incident response plans in the event of a breach. By doing so, boards of directors and management companies can limit their risk of liability if and when a breach occurs.

Another method to limit risks involving data and security breaches is through obtaining and maintaining appropriate insurance including, without limitation, cyber liability insurance (cyber risk insurance), computer crime insurance, D&O insurance, and fidelity insurance. Associations should consult their insurance agents and advisors to determine the appropriate coverage based on the particular community's needs.

What the Hail?

Legal Trends in Colorado Insurance Law



Lisa Greenberg
Orten Cavanagh & Holmes, LLC

Catastrophic hail storms are an unfortunate and increasingly common reality throughout Colorado's Front Range, causing hundreds of millions of dollars of damage every year. In 2017, a hail storm severely damaged the Colorado Mills mall in Lakewood, breaking open skylights and severely damaging the mall's roof, allowing rainwater to flood the mall's stores. It took more than six months for repairs to be completed before the mall could re-open. However, these hailstorms are indiscriminate, damaging condo and townhome communities as well. The increase in destructive storms has caused a simultaneous increase in large insurance claims. This has prompted insurance companies to push back on policyholders attempting to recover property loss benefits. That pushback has led to litigation, where homeowner associations have been forced to sue their insurance carriers. This insurance litigation has resulted in some interesting trends that multi-family communities and managers should be aware of as they work together during the insurance claims process:

1. **Timely Reporting:** Most insurance policies require HOA policyholders to report damage to the insurance company "promptly." Unfortunately, these policies do not define what "prompt" means, leaving the interpretation of this vague term up to a court. Many of these cases end up in federal court. Our federal courts have identified two separate issues related to the question of prompt notice. Some courts have focused on the deadline for when the prompt notice timeline begins to run, finding that whether notice is "prompt" relates solely to the date the damage occurs, rather than from when the HOA knows about the damage. Other courts have focused more on the length of time between the occurrence and/or knowledge of the damage and when the notice is given to the insurance company. In those cases, courts have sometimes indicated that HOAs failed to provide prompt notice when they failed to report damage within a few months after the damage occurred. In all cases, however, the courts have found that if damage is not reported "promptly," the insurance company may be able to deny the claim in its entirety. This has given insurance companies a lethal advantage.

   These court rulings are of specific concern to multi-family communities because many hailstorms are not as obviously destructive as the one that hit the Colorado Mills. Instead, storms often damage roofing systems multiple stories off the ground and leave little evidence of damage to those observing from ground level. Because hailstorm damage is not always obvious, and the consequences of failing to report damage promptly can be significant, HOA owners, members of the Board of Directors, and management would be wise to implement measures that allow for the prompt discovery and reporting of hailstorm damage. In addition to being exceptionally vigilant and diligent in discovering and reporting damage, owners, Board members, and management should also be educated on when to investigate possible storm damage, even when such damage is not immediately visually apparent, so that insurance claims can be discovered and "promptly" made.

"The increase in destructive storms has caused a simultaneous increase in large insurance claims. This has prompted insurance companies to push back on policyholders attempting to recover property loss benefits. That pushback has led to litigation, where homeowner associations have been forced to sue their insurance carriers. This insurance litigation has resulted in some interesting trends..."

2. **Contingent Management Fees:** While HOAs must focus on prompt reporting of a loss to the insurance company, other trends in insurance law have put a spotlight on how HOAs handle insurance claims once they are reported. Many HOAs handle insurance claims through assistance from their management companies. Some management companies help manage the claim and are compensated with a percentage of the total amount of the claim ultimately paid by the insurance company because the work performed is outside of their regular duties as property managers. While this takes the grunt-work off the back of the Board of Directors and means that HOAs do not have to pay out-of-pocket for the (sometimes voluminous) work that goes into making an insurance claim, these contingency-based agreements have also created an opening for insurance companies to attack the legitimacy or amount of the insurance claims. From the perspective of the insurer, when a management company has a contingent interest in the outcome of an insurance claim, the insurance company may attack the validity of the claim by arguing that the management company has an interest to inflate the claim. While these agreements are not improper, rest assured, insurance companies are learning about our industry and are using certain trends against HOAs in litigation.

   Notably, this contingent-fee "issue" shows up in other ways in some insurance-related disputes. For example, Public Adjusters, like management companies, also often forego immediate payment in lieu of a percentage of the amount

of the claim ultimately paid by the insurance company. Similarly, some contractors may agree to repair the damage for whatever amount the insurance company ultimately decides to pay, regardless of the true value of the work. Some insurance companies argue that these contingent-type fee agreements also create the appearance of improper claim inflation. Regardless of its truth, this appearance can be damaging to the claims process and can create a significant roadblock to the policyholder collecting the full value of their claim.

3. **Counterclaims:** With insurance losses on the rise and insurance companies learning more about the business relationships between HOAs, management companies, and other entities assisting with the insurance claim process, some insurance companies are turning more and more to scorched-earth tactics to intimidate policyholders and avoid paying out on valid insurance claims. In perhaps the most significant modern trend in Colorado insurance law, insurance companies have been attempting (sometimes successfully) to turn an HOA's failure to report a claim within a "reasonable time" (regardless of the HOA's knowledge of the damage) and the HOA's payment of contingent fees to entities helping with such claims, into counterclaims based on allegations of fraud or misrepresentation. Most insurance policies have clauses that allow insurance companies to terminate their policy, and even recoup insurance benefits that were previously paid out should such conduct be proved to occur. The typical allegations are that the HOA policyholder and its agents are inflating the claim or withholding relevant information from the insurance company.

Not surprisingly, allegations of fraud against an HOA are highly damaging both to a community's ability to recover on a claim, and to the HOA industry in general. These counterclaims are changing the perception courts and laypeople have about insurer-insured disputes, suggesting the insurance company is the "victim" and the HOA is the perpetrator. Most importantly, insurance companies' newfound boldness in bringing these fraud counterclaims, and their current success in doing so, has, from all appearances, inspired insurers to continue their practice of disputing and/or refusing to pay on legitimate insurance claims.

In order to more easily navigate the insurance claim system in light of the modern trends in Colorado's insurance law, homeowners, Board members, and managers must strive to educate themselves on best practices in handling their insurance claims to prevent insurance companies from gaining additional leverage in court. With the concerns noted above in mind, multi-family communities are poised to turn the tide on insurance-related claims throughout the Front Range and Colorado in general.

CAI—Rocky Mountain Chapter is excited to announce that Ashley Nichols was recently elected to CAI's Business Partners Council!

Ashley is appreciative of the opportunity to represent both the Rocky Mountain and the Southern Colorado Chapters of CAI at the national level!

The Business Partners Council provides input on policy matters to the CAI Board of Trustees, and serves as a key resource to staff. Members of the group give their constituencies a voice in crafting CAI policy and work to ensure that CAI continues to provide services and benefits that members need and value.

Ashley is looking forward to her seat at the table! For more information about CAI at the national level, visit www.caionline.org.

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The Foundation for Community Association Research provides authoritative research and analysis on community association trends, issues and operations. Our mission is to inspire successful and sustainable communities.

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Michael Anderson—Stonebridge Builders, LLC
Paul Wesley Anderson—
The Landmark Towers Condominium Association
Alexis Beeman—5150 Community Management LLC
Adam D Berlin, Sr.—ACI Construction Services LLC
Mike Bilo—Crystal Lakes Road and Recreation Association
Dave Bradley—Lakeshore Village Homeowners Association
Sean Browning
Bob Chesnut—Crystal Lakes Road and Recreation Association
Kim Damion—Mesa View Estates
Michelle Dilley—True View Windows and Glass of Colorado
Alanna Fairburn—Stillwater Community Management
Donovan Garcia—Sentry Management, Inc
Neil Habbial—Lakeshore Village Homeowners Association
Jacob Hofmann—Crystal Lakes Water and Sewer Association
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Susan Sherman—Haven Community Management
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Heidi Wagner—Waterside Lofts
Tanner Waite
Ryan Wolffe—Design Review Administration
Dawn Wood—Gonzales Custom Painting

COMMON INTERESTS

Editorial Calendar

Issue	Topic	Article Due Date	Ad Due Date
April	Maintenance / Preventative / Upgrades	02/15/2019	03/01/2019
June	Insurance / Ethics	04/15/2019	05/01/2019
August	Finance	06/15/2019	07/01/2019
October	Tech / Modernization	08/15/2019	09/01/2019
December	Planning Ahead / Goals / Community Vision	10/15/2019	11/01/2019

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To provide a membership organization that offers learning and networking opportunities and advocates on behalf of its members.

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2019 CAI-RMC Committee Chairs

ACTIVITIES

Aaron Goodlock
agoodlock@ochhoalaw.com
(720) 221-9787

Tressa Bishop
tressa.bishop@centralbancorp.com
(720) 370-6300

CLAC

Brandon Helm
brandon@warrenmgmt.com
(719) 685-7831

EDITORIAL

Justin Bayer
jbayer@caretakerinc.com
(720) 595-1960

HOMEOWNER LEADERSHIP COUNCIL

Carmen Stefu
cstefu@4shoa.com
(303)952-4004

MARKETING & MEMBERSHIP

Karli Sharrow
ksharrow@bensonpc.com
(315) 335-3014

Devon Schad
dschad@farmersagent.com
(303) 661-0083

MEMBER FORUM COMMITTEE

Denise Haas
denise@5150cm.com
(720) 961-5150

Bryan Farley
bfarley@reservestudy.com
(303) 394-9181

Evelyn Saavedra
esaavedra@eastwestum.com
(720) 904-6904

MOUNTAIN CONFERENCE

April Ahrendsen
april.ahrendsen@mutualofomahabank.com
(303) 257-7273

MOUNTAIN EDUCATION

Murray Bain
murray@summithoaservices.com
(970) 485-0829

Jonah Hunt
jhunt@ochhoalaw.com
(720) 221-9783

NOMINATING COMMITTEE

Denise Haas
denise@5150cm.com
(720) 961-5150

NORTHERN COLORADO COMMITTEE

Melissa Garcia
mgarcia@altitude.law
(303) 991-2018

PROGRAMS & EDUCATION

Natalie Tuccio
Natalie.Tuccio@reconexp.com
(720) 233-7611

Mike Lowder
mlowder@bensonpc.com
(720) 749-3517

SPRING SHOWCASE & TRADESHOW

Mark Richardson
mrichardson@4shoa.com
(303) 952-4004

Kristen Jezek
kjezek@mrcdlaw.com
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CAI-RMC EVENT CALENDAR

MARCH	
15 **Fri**	**Spring Showcase & Trade Show**

APRIL	
11 **Thu**	**M204** Denver
24 **Wed**	**Mountain Education** Frisco

MAY	
15 **Wed**	**Mountain Education** Avon
22 **Wed**	**Mountain Education** Steamboat
31 **Fri**	**Annual Education Summit**

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Don't forget to register for events as prices are significantly higher the day of the event.