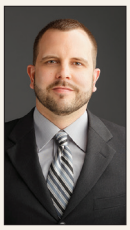
Kriger LAW FIRM News
Fourth Quarter · 2020

New Law Regarding Rental Restrictions (AB 3182)



By Tyler Kerns, Esq.

As discussed in a Kriger Law Firm email bulletin distributed on September 29, 2020, Governor Newsom signed Assembly Bill (AB) 3182 into law on September 28 to become effective January 1, 2021. AB 3182 is ostensibly intended to address a shortage of housing in California. The new law limits the ability of associations to impose restrictions on rentals. It amends Civil Code §4740 and adds a new Civil Code §4741, which will invalidate any provision in an association's governing documents that "prohibits, has the effect of prohibiting, or unreasonably restricts" the rental or leasing of any of the properties in the association. Unfortunately, the new law does not specifically define what types of governing document provisions would be considered to effectively prohibit or unreasonably restrict rentals.

Many associations have governing document provisions that set a minimum duration for rentals. For example, such provisions commonly provide that no property may be rented for a period of less than 30 days, or less than six months, or less than one year. The new law provides that it does not prohibit an association from adopting and enforcing a governing document provision that prohibits the transient or short-term rental of properties for a period of 30 days or less. Therefore, it appears that associations can have minimum rental period provisions of up to 30 days. However, any provision imposing a minimum rental period of greater than 30 days (such as six months or one year) will now be void and unenforceable.

Some associations also have provisions that cap rentals to a certain percentage of the properties at any one time. The new law prohibits an association from adopting or enforcing a governing document provision that limits rentals to less than 25 percent of the properties in the association. Accordingly, any provision that limits rentals to less than 25 percent of the properties (such as 15%, or 20 %, etc.) will be invalidated by the new law.

Another type of rental provision that will likely be invalidated by the new law is any provision that requires an owner to occupy the property for a specified period of time before being able to rent the property (such as a provision requiring a property to be occupied by an owner for at least a year after the close of escrow before the owner may rent the property).

In addition, AB 3182 specifies that accessory dwelling units (ADUs) and junior accessory dwelling units (JADUs) are not to be considered separate properties for purposes of the new law. Thus, even if an association caps rentals at 25 percent of the properties, for example, any owner could still rent out an ADU or JADU on their property even when the 25 percent rental cap has already been reached. Further, the new law provides that a property shall not be counted as being occupied by a renter if the owner also continues to occupy the property or an ADU or JADU on the property.

While any governing document provision that does not conform to the new law will be invalidated as of January 1, 2021, Civil Code §4741(f) includes a requirement that associations amend their existing governing documents to conform to the new law by no later than December 31, 2021. Associations that willfully violate the new law will be liable for damages and a civil penalty to any owner who might sue the association based on the association's failure to comply with the new law.

The attorneys at Kriger Law Firm can assist in reviewing an association's governing documents for any rental provisions that conflict with the new law and can also assist in amending governing documents to conform to the new law as required. ■

In This Issue:

Drain Away Your Drainage Disputes

By Niki Tran, Esq.

Disputes over drainage maintenance and repair are most common for our association clients around this time of year. One of the most common questions that we get from associations about drainage issues is who is responsible for repairing drainage systems and subsequent water damage. While most CC&Rs contemplate a division of responsibility regarding maintenance, repair, and replacement of various components and improvements within the community, and California Civil Code §4775 provides the general allocation of maintenance responsibilities between associations and individuals homeowners, the duty to maintain and repair a plumbing line or drainage is not always clear. Liability for maintaining a plumbing line or drainage and for subsequent water intrusion/damage depends on several factors. For example, is the drainage part or not part of the association's common area? Was there any negligence? What are the specific facts surrounding the situation? There are a lot of variables to consider. But typically, drainage issues are something that isn't an association's responsibility unless the drains are specifically tied to the association common area or assigned to the association in governing documents.

Unless the governing documents provide otherwise, the association is generally responsible for repairing, replacing, or maintaining the common area, and the owner of each separate interest is responsible for repairing, replacing, and maintaining his/her separate interest. (Civ. Code §4775(a).) Therefore, concerning drainage systems or plumbing lines, sometimes who the drainage systems or plumbing lines belong to or service may not be the issue, but rather who is responsible for its maintenance or repair under the governing documents. Always check your governing documents.

Not only are associations responsible for investigating water intrusion complaints but associations are generally responsible for performing preventative maintenance and/or periodic inspections of common area components, which could include plumbing lines, pipes, drainage systems, etc...

Water damage can be very costly; thus, whenever there is evidence of water intrusion, investigating the source and making appropriate repairs to stop the water intrusion should be the top priority, while determining liability and maintenance/repair responsibility should be

secondary. If the association identified the source and took reasonable action to make appropriate repairs and if it is later determined that the source of the water intrusion stems from an owner's separate interest and the governing documents provide that it is the owner's responsibility, then the association can seek reimbursement for costs.

Not only are associations responsible for investigating water intrusion complaints but associations are generally responsible for performing preventative maintenance and/or periodic inspections of common area components, which could include plumbing lines, pipes, drainage systems, etc., to the extent reasonably possible (obviously, associations cannot be expected to periodically inspect pipes running within the common walls of a building). Although the association's board is generally granted judicial deference when it comes to maintenance decisions, the association nevertheless may be held liable if it fails to investigate maintenance issues or fails to perform preventative maintenance and/or periodic inspections. For example, if the association is aware that one property's drainage is affected by common area tree roots, then the association should coordinate with a vendor to investigate whether common area tree roots could be obstructing established drainage patterns for other properties and the common areas. Associations often fail to regularly inspect stormwater components and drainage systems and, likewise, fall short on cleaning and maintaining them for optimal functionality absent a regular maintenance schedule. All it takes is one owner or a board that fails to maintains or modifies drainage to invite costly water damage; thus, preventive maintenance and/or periodic inspections are the best way to avoid costly drainage issues and water intrusion matters. Associations should consult with their legal counsel and qualified drainage experts to establish a preventative maintenance program if one is not already in place. ■

Don't Lose Enforcement Rights Through Delay or Inattention

By Steven L. Banks, Esq.

The law requires that civil actions be brought within specified, limited periods of time. Those periods of time are set forth in "statutes of limitation." A statute of limitation generally starts running on the date an injury occurs; that is when a cause of action accrues. However, there's an exception: under the "discovery rule," the statute begins to run when a plaintiff discovers, or through the exercise of reasonable diligence could have discovered, the facts constituting the cause of action. Statutes of limitation can also be "tolled" (paused) where a defendant fraudulently conceals a cause of action, but only for the period the claim is undiscovered by the plaintiff, or until the plaintiff should have discovered it by reasonable diligence.

Once wrongdoing is suspected, an HOA must investigate to find the facts and decide whether or not to bring an enforcement action. If misrepresentation or concealment has delayed the discovery of the violation, the HOA will need to allege this clearly and unequivocally if it hopes to extend the allowable time to bring an enforcement action; it cannot rest on inferences.

Fortunately, under Civil Code Section 5945, a Request for Resolution served before the end of the applicable time limitation for bringing an enforcement action extends the time limitation during the statutory period for response to the Request for Resolution. If the Request for Resolution is accepted, the time is extended for the statutory period for completion of Alternative Dispute Resolution (ADR), including any extension of time agreed to by the parties.

In an HOA setting, a typical enforcement action might relate to an unsubmitted and unapproved architectural modification. Actions for breach of an HOA's governing documents must be brought within five years. Since such actions seek equitable relief in the form of an injunction, they are also subject to equitable defenses, including "laches," where an Association waits too long to sue.

Accordingly, it is important that HOAs act reasonably to ensure that violations of the governing documents are discovered and acted on timely so that enforcement rights are not lost by the passage of time. An HOA may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the information necessary to discover violations. If an HOA has notice or information of circumstances sufficient to put a reasonable person on inquiry, the clock starts ticking. This is why regular walk-throughs and follow-through on reports of violations are crucial to preserving an HOA's right to bring an action to enforce its governing documents. ■

HOAs Deal With Defamation, Too

By Garrett Wait, Esq.

Defamation is a trendy legal threat. Any time people receive public criticism, claims of defamation are sure to follow. Homeowners associations and their boards of directors are not immune to such claims, of course. However, defamation is not an easy claim to prove and the defenses available to associations are numerous.

Defamation, either libel or slander, is a serious allegation and not to be taken lightly. Defamatory conduct is the "intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." *Grenier v. Taylor* (2015) 234 Cal.App.4th 471. For a statement to be defamatory, it must be false. "Truth… is an absolute defense to defamation." *Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572.

For example, defamation claims can arise during the course of a board meeting when discussions of association business get heated. But even when the discourse is reduced to name-calling and dubious claims, defamation is still difficult to prove. For one, there is some case law to suggest that a director for an HOA is a limited public figure, meaning that the defamatory statement must also be made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240. Moreover, if the allegedly defamatory speech is made in connection with a matter of public interest – including, for example, fitness for election to an HOA board – *Civil Code* Section 425.16 may protect that speech per *Cabrera v. Alam* (2011) 197 Cal. App.4th 1077.

Finally, whether the allegedly defamatory statements contain "provable falsehoods" or are offered as statements of opinion is ordinarily a question of law for the court. *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669. With regard to potentially defamatory statements offered as opinions, per *Smith v. Maldonado* (1999) 72, Cal.App.4th 637, "The question whether a statement is reasonably susceptible to a

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HOAs DEAL WITH DEFAMATION, TOO

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defamatory interpretation is a question of law for the trial court." The important language there is the creation of a reasonableness standard. Courts are allowed to think about whether an average reasonable person would consider a statement defamatory.

Importantly, retractions are not required when association media is utilized to spread allegedly defamatory statements. Under such circumstances, *Civil Code* Section 48 will have no effect. An association's private message board does not qualify as a news website because it is not a medium regularly used for breaking news dissemination purposes in accordance with the Court's ruling in *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991. Demanding a retraction under that section is superfluous and unnecessary.

California *Civil Code* Section 47 and California *Code of Civil Procedure* 425.16 offer significant defenses to claims of defamation against an association. Both the litigation privilege and the Anti-SLAPP laws allow for expansive discussion of issues within an association, and allow for significant leeway when dealing with accusations of defamation. Success on an Anti-SLAPP motion has the additional effect of creating liability for an association's defense costs for the losing complainant.

As you may gather, defamation is difficult to prove and associations are afforded significant defenses. Nevertheless, when disagreements lead to allegations of defamatory conduct, there has likely been a serious breakdown of communication between the parties. Directors should treat one another and the other members of the association with respect and civility, and vice versa. If your association is dealing with allegations of defamation, please contact us. ■