



“TENDERING” LAWSUITS BROUGHT AGAINST THE HOA

Helpful Guidance for HOA Boards and their Management

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There are instances where a disgruntled homeowner may file a lawsuit against his or her homeowners association (“HOA”). The lawsuit may be based on a variety of claims (i.e., claims involving property damage or alleged malfeasance on the part of the HOA’s Board of Directors). This is one of the reasons why HOAs are legally required to purchase and maintain certain

insurance policies designed to protect the HOA and its membership from a variety of risks.

However, problems may arise in response to the actions taken by the HOA and its management once the lawsuit has been served. Those problems generally result from the way in which the lawsuit may have been “tendered” (sent to) to one or more of the HOA’s insurance carriers, including whether it was even appropriate to tender the lawsuit in the first place. This article addresses some of those problems and provides guidance to HOA Boards and their management with regard to this issue.

Lawsuit & Insurance Overview

As stated above, HOAs are legally required to purchase and maintain certain insurance policies designed to protect the HOA and its members,

including its Board Members, from a variety of risks. Those policies almost always include (1) a general liability policy for claims relating to personal injury or property damage, and (2) a “D&O” (Directors and Officers) policy that extends



to actions taken by the Board and potentially HOA Committee Members. In general, these policies obligate a HOA’s insurance carrier(s) to “indemnify” the HOA (to reimburse the HOA for any judgment award entered against it), and to provide the HOA with a legal defense in the lawsuit. However, this does not mean that the insurance policies will provide indemnification and a defense in every type of lawsuit that may be brought against the HOA (i.e., HOA insurance policies rarely, if ever, provide indemnification and a defense to lawsuits brought by a vendor of the HOA based on an alleged breach of contract).

Initial Evaluation of the Lawsuit by the HOA's Legal Counsel

HOAs may run into problems when the first step the HOA or its management take in response to being served with a lawsuit is to automatically tender the lawsuit to one or more of the HOA's insurance carriers. We have seen

instances where lawsuits should not have been tendered for numerous reasons, including:

- (1) The lawsuit itself being meritless;
- (2) The lawsuit involving a claim which is not covered by the HOA's insurance policies;
- (3) The lawsuit being merely a small claims action;
- (4) The HOA being erroneously named as a party in the lawsuit; or
- (5) The homeowner failing to first utilize the statutorily required dispute resolution procedures (i.e., "Alternative Dispute Resolution") prior to filing the lawsuit.

Even where a lawsuit should be tendered, we have seen situations where the lawsuit was tendered to the wrong insurance carrier, or there was some other error or delay in tendering the lawsuit. The HOA has thirty (30) days from the date of service of the lawsuit to respond to the complaint. Therefore, any delays in tendering the lawsuit to the appropriate insurance carrier may put the HOA at risk of having a default judgment entered against it.

For these reasons, the very first step that a HOA and its management should take in response to being served with a lawsuit is to immediately notify the HOA's legal counsel so that an initial evaluation of the lawsuit can be performed. That evaluation will avoid the problems discussed above and will provide the Board with guidance in determining whether tendering the lawsuit is necessary or appropriate. Additionally, the initial evaluation may reveal time-sensitive actions that should be taken prior to tendering the lawsuit (i.e., a motion to disqualify the judge that has been assigned to the case on the basis of a perceived prejudice).



insurance carriers. We have witnessed incidents in the past where a HOA's management was strongly criticized for automatically tendering a lawsuit without having the Board's explicit authorization to do so. As with most matters pertaining to the business and affairs of the HOA, the results of the Board's vote should be documented in

the Board's meeting minutes and made part of the HOA's records.

Tendering the Lawsuit

Where a lawsuit is to be tendered, the HOA will send the necessary correspondence (i.e., the lawsuit summons and complaint) to the agent/broker of the HOA's insurance carrier. That correspondence will also include a formal request for the insurance carrier to indemnify and defend

the HOA in the lawsuit. HOAs should consider having this correspondence prepared and sent by the HOA's legal counsel for several reasons, including:

- (1) To ensure that the insurance carrier(s) are notified of the pertinent response deadlines;
- (2) To set forth the legal basis for the HOA's indemnification and defense request; and
- (3) To provide the insurance carrier(s) with information obtained in the initial review of the lawsuit that may be useful in defending the HOA.

HOAs may in the alternative have the correspondence sent by the HOA's management. However, that correspondence should at least be briefly reviewed by the HOA's legal counsel prior to being sent.

Legal Counsel Involvement Once the Lawsuit has been Tendered

Once the lawsuit is tendered, the HOA's insurance carriers will typically assign "panel counsel" to the case. Panel counsel is an attorney that provides insurance defense services for that insurance carrier, and may even be an in-house attorney for the insurance carrier. Some circumstances may allow for the HOA to assign its own attorney ("cumis counsel") to defend the HOA in the lawsuit, though these circumstances are becoming increasingly rare.

After panel counsel is assigned, there is generally no need to have the HOA's legal counsel directly involved in the case. However, some involvement may be required to

Board Determination Whether to Tender the Lawsuit

Once the Board has consulted with the HOA's legal counsel, the Board should vote on whether or not to tender the lawsuit to one or more of the HOA's

review and explain correspondence by the insurance carrier (i.e., the insurance carrier's "Reservation of Rights" letter regarding its indemnification obligations as they relate to the homeowner's claims) and to report on the status of the case to the Board. Additionally, the HOA's legal counsel should review the terms of any proposed settlement agreement



to ensure that it is appropriately drafted to avoid issues that may arise after the lawsuit is settled. Therefore, for lawsuits involving complex issues and/or significant monetary claims, the Board should consider having the HOA's legal counsel operate in a supervisory role.

Summary

A lawsuit being served against the HOA is a serious matter and should be treated as such. Fortunately, HOAs have insurance policies designed to protect the HOA in a wide variety of claims that may be brought against it. However, this does not mean that HOAs and their management should automatically tender a lawsuit to the HOA's insurance carrier(s) without first consulting with the HOA's legal counsel. Having the HOA's legal counsel perform an initial and immediate review of the lawsuit is vital to avoiding the problems discussed above.

The decision as to whether to tender any lawsuit should be voted on by the Board and made part of the HOA's records. Once a lawsuit is tendered and the insurance carrier has assigned panel counsel to defend the HOA, there is generally no need to have the HOA's legal counsel directly involved in the case. However, for lawsuits involving complex issues and/or significant monetary claims, the Board should consider having the HOA's legal counsel operate in a supervisory role.

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