

**KEY COURT DECISIONS AFFECTING COMMUNITY ASSOCIATIONS –
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CASE SUMMARIES

I. Davis-Stirling Common Interest Development Act

Committee to Save Beverly Highlands Homeowners Ass'n. v. The Beverly Highlands Homeowners Ass'n. (2001) 92 Cal.App.4th 1247

Facts: In 1952, CC&Rs were recorded against lots in a development in Beverly Highlands. An association of the owners of the lots was created. Four of the lots in the development were not buildable, and the CC&Rs restricted their use to open space, and obligated the association to maintain them. The association was suspended in 1972, but revived in 1989. In 1996, there was debate over whether the development was subject to the Davis-Stirling Common Interest Development Act ("Davis-Stirling" or "Davis-Stirling Act"), which arose from the fact that the association owned none of the lots. The association decided not to purchase the lots. Subsequently, some of the members

determined to dissolve the association. In the face of their actions, a committee of members who opposed the dissolution (“Committee”) filed legal proceedings. Both sides moved for summary judgment, and the court granted the Committee's request to stay the dissolution of the association. The court based its ruling on a finding that the community was subject to Davis-Stirling, declared plaintiff the prevailing party and awarded attorney fees. On appeal, defendant association contended the project was *not* subject to Davis-Stirling.

Held: For association (project not subject to Davis-Stirling.) The court first noted that if the association was subject to Davis-Stirling, Corporations Code §8724 would require 100% of the members to consent to dissolution. (A smaller percentage would be required for dissolution if the association was not a Davis-Stirling homeowners association.) However, for a community to be subject to Davis-Stirling, it must have common area. For a planned development, that common area may be either separately owned lots, or easements across other lots for the benefit of members. The CC&Rs *did* restrict the use of the unbuildable lots, but that was not the equivalent of the easements necessary to bring the project under Davis-Stirling. The court also noted that even if the association were dissolved, individual owners still had the right, pursuant to the CC&Rs, to enforce the CC&Rs.

Golden Rain Foundation v. Franz (2008) 163 Cal.App.4th 1141

Facts: Golden Rain Foundation (“Foundation”) was created in 1961, to provide services to 16 projects including condominiums and stock cooperatives, collectively referred to as the "mutuals." Golden Rain was organized as a trust, and as trustee, it held title to streets used by all mutuals, and was obligated to maintain the "common facilities" owned by the mutuals. Franz *et al.* were owners within the various mutuals, and sought production of Foundation's documents pursuant to the Davis-Stirling Act. When Foundation declined, Franz filed a small claims action, which resulted in a judgment against Foundation. Foundation then filed the current action, asking the court to rule that it was not subject to the Davis-Stirling Act.

Held: For homeowners. Although the Foundation did not hold fee title to all common areas, it was organized to manage the various mutuals, which were themselves subject to the Davis-Stirling Act.

Mount Olympus Property Owners Ass'n. v. Shpirt (1997) 59 Cal.App.4th 885

Facts: A property owners association filed legal action to enforce the CC&Rs against defendant homeowner. After the parties settled mid-trial, the court awarded attorney fees to the defendant homeowner as prevailing party, pursuant to the Davis-Stirling Act. On appeal, the association contested the award of fees arguing that the project was not subject to the Davis-Stirling Act, because it did not own any common area. The sole property owned by the association consisted of two small plots of land on one of which was located the sign for the project. Further, membership in the association was not mandatory, and the association lacked the power under the CC&Rs to impose assessments on owners.

Held: For defendant association: When an association has neither common area nor mandatory membership in an association which can assess members, it is not a "Davis-Stirling" common interest development; therefore, homeowner cannot recover his fees under Civil Code §1354.

II. Governing Documents

A. CC&Rs--Amendment--Lender Consent

Fourth La Costa Condo Owners v. Seith (2008) 159 Cal.App.4th 563

Facts: Association circulated proposed CC&R amendment which required the consent of lenders. The association mailed a notice and consent form to the lenders by certified mail. The notice recited that if the ballot were not received within 30 days, the signature on the certified mail receipt would be counted as consent. Homeowner challenged the propriety of this procedure.

Held: For association. Requiring only consent from the lenders, as opposed to an affirmative vote, indicates less was required to signal lender consent, and therefore the method chosen was adequate for the purpose of proving lender consent

B. CC&Rs--Enforceability

Nahrstedt v. Lakeside Village Condominium Ass'n. (1994) 8 Cal.4th 361

Facts: The association tried to force a homeowner with 3 cats to remove them, on the basis of a "no pet" prohibition in the CC&Rs. The homeowner argued that the restriction was unreasonable as applied to her, because her cats never went outside, and did not bother the surrounding owners. She argued that the CC&R provision violated her constitutional right to privacy.

Held: For association. The California Supreme Court ruled (in this major case on association jurisprudence) that developer-imposed CC&R provisions are presumed reasonable and enforceable. For a homeowner to prove a CC&R provision unreasonable (and therefore unenforceable), the homeowner has to prove one or more of the following: (1) that the restriction violates public policy, (2) that the restriction bears no rational relationship to the protection, preservation, operation or purpose of the association, or (3) that the burden of the restriction, as to the entire community, outweighs the benefit, as to the entire community.

NOTE: Since *Nahrstedt* was decided, California adopted a provision of the Civil Code which requires an association to allow at least one pet, as described in the statute. See Civ. Code §1360.5.

Villa de las Palmas Homeowners Ass'n. v. Terifaj (2004) 33 Cal.4th 73

Facts: Homeowner sought to keep numerous pets in violation of a CC&R provision adopted by the members. She argued that *Nahrstedt* only covered developer-imposed restrictions, and that restrictions adopted by the members should not be presumed to be reasonable (meaning the association would have to prove, in each case, that the CC&R provision was reasonable as to a particular homeowner in a particular case.)

Held: For association. The California Supreme Court held that homeowner-adopted CC&R provisions are to be accorded the same presumption of reasonableness as those imposed by a developer. To hold otherwise would result in a patchwork of restrictions, which does not accord with the legislature's endorsement of common interest developments. Further, when a homeowner purchases a home subject to CC&Rs which may be amended by the other homeowners, that buyer takes title subject to the possibility that the homeowners may amend the documents in ways he or she finds undesirable.

C. CC&Rs--Interpretation

Dover Village Ass'n. v. Jennison (2010) 191 Cal.App.4th 123

Facts: A deteriorated sewage pipe underneath an owner's condominium unit ruptured, and the sewage entered owner's unit. The association entered the unit and made repairs, including jack-hammering the unit's slab and replacing approximately 50' of sewer line that connected owner's line to the main line. A dispute arose over who was responsible for the cost of the repair. The governing documents provided that pipes and other utility installations, wherever located, except the portions within the unit, were not part of the unit. The issue was whether the pipes were common area, or exclusive use common area (if exclusive use common area, the repair would be the owner's responsibility, if merely common area, repair would be the association's responsibility.)

Held: For owner. Although Davis-Stirling identifies as exclusive use common area "a portion of the common areas designated by the declaration for the exclusive use of one or more, but fewer than all the owners..." in this case, the CC&Rs specifically identified exclusive use common area as consisting of the patio area and garage area. The court ruled that since the CC&Rs had called out specifically what exclusive use common area would be, that meant the drafter intended to exclude other potential exclusive use common areas.

D. CC&Rs--Relationship to Statutes and Ordinances, Building Code

Mullaly v. Ojai Hotel Co. (1968) 266 Cal.App. 2d 9

Facts: Defendant Ojai Hotel Co. ("Hotel") owned a property adjacent to a development which was subject to CC&Rs providing for a single-family residential use. The Hotel bought lots within the association, intending to build tennis courts on those lots, for use by the Hotel's guests. The Hotel obtained the requisite city permits for such construction. Homeowners then sought to enforce the CC&Rs as to the lots in question, maintaining

that construction of the tennis courts would violate the CC&Rs. The Hotel countered that it had obtained city permits, and that should override the CC&R prohibitions.

Held: For association owners. The CC&Rs are different than zoning laws. If a lot is subject to the CC&Rs, use of the lot must comply with the CC&Rs, regardless of whether zoning laws would permit a different use.

E. CC&Rs--Renters and Rentals

Colony Hill v. Ghamaty (2006) 143 Cal.App.4th 1156

Facts: Association sought to enforce its CC&R provision restricting use of dwellings to "single family residential" against an owner who had serially rented rooms out in his home. The owner argued that he considered the renters to be his "family" and noted that one of the tenants actually was related to him.

Held: For association. The court noted that while the documents contained no definition of what might constitute "single family" use, it was clear that the owner had no prior relationship with the majority of the residents, that he found them by placing an ad in the paper, that all had separate month-to-month rental agreements, and that there was no evidence of traditional "familial" types of use, including sharing meals.

The owner also contended that the single-family restriction violated his constitutional right of privacy, and it was unreasonable as a result (see *Nahrstedt*). While many cases stand for the proposition that occupancy may no longer be restricted to require a blood/marriage relationship between the occupants, nevertheless, there continues to be a distinction between a "familial" use and a commercial use. Here, said the court, it was clear that the use was commercial, not familial.

Mission Shores Association v. Pheil (2008) 166 Cal.App.4th 789

Facts: Association sought to enact a CC&R amendment which limited rentals to a minimum of 30 days. When the vote failed to pass by a super-majority, as required by the CC&Rs, the association filed a petition under Civil Code §1356 ("1356 petition"), asking the court to approve the amendment. Homeowner opposed because he had bought his unit with the express intent to rent it on a short-term basis.

Held: For association. In a 1356 petition, the association must demonstrate that the proposed amendment is reasonable. The association urged that the amendment sought to avoid having the residential community become more like a hotel. The court agreed, and noted that such restrictions were quite common. Further, the amendment granted the association the right to evict tenants of the owners for violations of the documents. The court found this, too, to be reasonable: "...[I]f an association is held to a landlord's obligations, it should equally benefit from any rights attributed to the landlord. We agree. Second, the association argues that any tenant should be bound by the CC&Rs to the same extent that the homeowner is bound. In the event the homeowner fails or refuses to take effective measures to assure his or her tenant is complying with the CC&Rs, the

association needs some means to assure compliance. We agree. Third, according to the association, the enforcement remedies apply to any and all tenants in breach of the CC&Rs, and providing the association with the right to enforce any breach of the CC&Rs does not violate public policy ... Again, we agree."

F. CC&Rs--View Protection

Ezer v. Fuchsloch (1979) 99 Cal.App.3d 849

Facts: Plaintiffs and Defendants resided in a Pacific Palisades hillside development. The properties were governed by restrictive covenants that prohibited trees, shrubs or other landscaping from obstructing the views from other lots. Plaintiffs sued the Defendants contending the Defendants' trees were blocking Plaintiffs' view of the Pacific Ocean. Following a trial, the Defendants were ordered to cut down to the level of their roof all trees and shrubs located on their property and to thereafter keep their trees and shrubs cut so that they did not grow above the rooftop of their home. The Defendants appealed contending the court erred in interpreting the restrictive covenants.

Held: For the Plaintiffs. The rule that restrictive covenants are to be construed strictly against persons seeking to enforce them, and in favor of the unencumbered use of the property, is subject to the limitation that the intent of the parties and the object of the restriction must be given a just and fair interpretation. The primary object in construing restrictive covenants is to effectuate the legitimate desires of the drafting parties. When read as a whole, the court determined that the declaration of restrictions reflected a plain intent and purpose that all trees should be maintained to one story in height to preserve the views of all lot owners.

King v. Kugler (1961) 197 Cal.App.2d 651 (superseded by statute on other grounds)

Facts: Plaintiffs and Defendants resided in adjacent houses in a 174-tract development. The development was governed by a declaration of restrictions that provided "no structures shall be erected, altered, placed or permitted ... other than one detached single family dwelling not to exceed one story in height...." Defendants obtained a building permit from the City of Torrance to build a garage with a room overhead and began construction. Plaintiffs obtained an injunction that prevented the construction and Defendants appealed contending the "not to exceed one story in height" was too uncertain to be enforceable.

Held: For the Plaintiffs. Although the court noted that the declaration of restrictions did not expressly declare the intent of the drafters was to protect the lot owner's view from one elevation to another, the court held that the intent of the declarant was obvious from the language used in the declaration, the topography of the development, the finished ground elevations of the homes, the general physical appearance of the land and the existing structures. The court rebuffed the Defendants' argument that the declarant should have defined "one story in height" by inserting a limit in feet and inches or using other language that specifically stated what the maximum height limitation was, and

instead concluded that the words “one story in height” when construed in the light of the entire document, neither encompassed nor contemplated Defendants’ proposed structure.

Seligman v. Tucker (1970) 6 Cal.App.3d 691

Facts: Plaintiffs and Defendants owned adjacent homes in a hillside development. The properties were governed by a declaration of restrictions that provided that “no ... structure shall be ... erected ... upon any lot in such location or in such height as to unreasonably obstruct the view from any other lot ...” In February 1968, Defendants contracted for an addition to their home which consisted of a flat-roofed rumpus room above the lower floor of the main house. While the addition was under construction, Plaintiffs filed suit seeking a mandatory injunction that required the removal of the structure.

Held: For the Plaintiffs. In affirming the trial court’s order compelling the removal of the addition, the court stated the term “unreasonably obstruct” was not too vague or uncertain to be enforceable, and determined that a restriction “not to exceed one story in height” impliedly prohibited construction of an unreasonably high one-story home. The court also held that the view protection clauses are to be interpreted in a manner that protects the views the residences had upon completion of **original** construction.

White v. Dorfman (1981) 116 Cal.App.3d 892

Facts: Plaintiffs and Defendants owned homes adjacent to each other in a Beverly Hills terraced development. At the time Defendants purchased their property, it was a vacant lot. Defendants commenced construction of a single family residence in April 1977 and Plaintiffs filed suit to enjoin the construction shortly thereafter claiming the construction would obstruct their view. The declaration of restrictions for the subdivision included provisions that prohibited the construction of any structure that exceeded 22 feet in height and further proscribed the planting or erection of any hedge, fence or structure that unreasonably obstructed the view from any other lot. Defendants’ home was completed in February 1979 and was built to a height of 17 feet, well within the 22-foot height restriction. Nevertheless, Plaintiffs sought injunctive relief based on the fact that Defendants’ structure blocked Plaintiffs’ panoramic city view.

Held: For the Defendants. In reaching its decision, the appellate court strained to distinguish the ruling reached in *Seligman*, and held that while a homeowner can be enjoined from expanding his existing residence that will unreasonably obstruct an adjoining view, a landowner cannot be denied the right to develop vacant residential lot that would prevent the owner from building any structure whatsoever on the property.

Zabrucky v. McAdams (2005) 129 Cal.App.4th 618

Facts: Plaintiff and Defendants were adjoining neighbors in the Pacific Palisades development known as Marquez Knolls. After learning the Defendants were contemplating a second story addition to their home that would obstruct Plaintiffs’ view of the Pacific Ocean, Plaintiffs filed suit to enjoin Defendants’ construction. Plaintiffs

claimed in their suit that the unobstructed ocean view of the Pacific from their lot was a material factor in the purchase of their home, and coupled with their belief that the provisions within the declaration of restrictions would always protect their unobstructed views, they purchased the property. The declaration limited residences to one-story, unless a two-story structure would not obstruct the views of adjoining landowners. At trial, the Defendants argued that even though their proposed construction would result in a two level structure, it had a one-story character. The trial court denied injunctive relief, and appeal followed.

Held: For the Plaintiffs. The appellate court reversed and remanded the trial court's denial of injunctive relief, finding the Plaintiffs purchased their home primarily for the unobstructed views of the Pacific Ocean. In so ruling, the court adopted a "just and fair" interpretation of the declaration, and in effect, read into the declaration a provision that no structure, tree, shrub or landscaping may be installed or erected that may at the present or in the future unreasonably obstruct the view from any other lot.

NOTE: This case went to the appellate court on two more occasions but those cases resulted in unpublished opinions. Although Plaintiffs won the first case on appeal, they ultimately lost the war. On remand, the trial court determined the Defendants did not violate the declaration by finding that the "obstruction" was "minimal" and only affected Plaintiffs' view of the Palisades Bluffs rather than the Pacific Ocean. The trial court also stated that what "one story" means depends on context and the more reasonable interpretation is that it does not simply mean more than one level of habitable space (or more than one story measured from the bottom of the home itself) but rather pertains to the height of the dwelling above grade. In the third appellate case, the court affirmed the trial court's decision that Defendants' addition did not violate the declaration as it was not really more than one story and, in any event, did not unreasonably detract from the Plaintiffs' ocean views. *Zabrucky v. McAdams*, Cal. App. Unpub. LEXIS 5312.

G. Rules

Dolan-King v. Rancho Santa Fe Ass'n. (2000) 81 Cal.App.4th 965

Facts: After a homeowner's architectural application was denied by the association's architectural committee, homeowner sued challenging both the CC&R provision, the guidelines (rules) under which reviews of architectural applications were performed, and the actions of the architectural committee in reviewing the application.

Held: For association. The CC&R provisions are presumed reasonable under *Nahrstedt*. And while guidelines (rules) are not entitled to the same presumption of reasonableness, they are enforceable if reasonable. The court held the guidelines were reasonable, because they represented the association's good faith attempt to give owners guidance, by means of detailed examples and explanations, as to the criteria the architectural committee employs in ruling on applications.

The court also extended the *Lamden* rule of judicial deference to the architectural committee's deliberations, holding that where the committee determines (1) in good faith, (2) not in an arbitrary or capricious fashion, (3) in conformity with the governing documents, and (4) a particular proposed improvement is consistent with the prevailing aesthetic norms, that the committee's decisions are also entitled to judicial deference.

Ekstrom v. Marquesa at Monarch Bay Homeowners Association (2008) 168 Cal.App.4th 1111

Facts: An association's CC&Rs provided that trees which impaired views were to be trimmed to preserve views. The association's board sought to exempt palm trees from the trimming requirement by enacting a rule which provided for an exception to the CC&R provision. Homeowners sued to have the rule declared unenforceable.

Held: For homeowners. The board argued that trimming a palm tree would mean removal of the palm tree. The court found that regardless of the damage to the palm trees, the CC&R language was clear, and a rule which contravened the explicit language of the CC&Rs could not be a reasonable rule.

Liebler v. Point Loma Tennis Club (1995) 40 Cal.App.4th 1600

Facts: The association adopted rules which precluded an owner who had rented his unit from using the association's recreational facilities. When the association sought to enforce the rule against the homeowner by fining him for violation, the homeowner sued, arguing the rule was unreasonable since the CC&Rs provided (as is common) for all owners to have a right to use of the common areas.

Held: For association. The Court noted that the CC&Rs also provided that the right to use the recreational facilities could not be severed from the right to use the unit. The intent of the CC&Rs was, therefore, to provide for one set of users of the recreational facilities per unit. The rule carried out the intent of the CC&Rs and was therefore reasonable. Further, there was no evidence that the homeowner had been singled out for enforcement, rather, the rule was applied even-handedly throughout the association.

III. Common Area

A. Common Area--Board's Authority to Allow Exclusive Use of Portions of the Common Area

Harvey v. The Landing Homeowners Ass'n. (2008) 162 Cal.App.4th 809

Facts: The association consisted of a four story building with 92 units. The units on the top story had adjacent common area, essentially attics, which could be accessed only by the adjacent units. Over the years, the top-story homeowners had been the habit of using those spaces as attics. When another owner complained in 2002, the board investigated the uses, and discovered various types of uses, some or all of which violated the CC&Rs. The board sent violation notices, and the affected owners responded, including legal

opinions to the effect that their long-term use had given rise to irrevocable use rights. After evaluating the pros and cons of the situation, the board elected to address the issue by the use of "permission forms," granting the owners the right to continued use, but conditioning the use on certain requirements and allowing revocation of the use if the conditions were violated. And, after Civil Code §1363.07 was enacted allowing the board to grant exclusive use of nominal portions of the common areas to individual owners, the board passed a resolution making that grant to the top-story owners.

Plaintiff homeowner was not satisfied, and sued, arguing that the board had no authority to ignore a violation of the CC&Rs regulating common areas.

Held: For association. The court concluded that *Lamden's* rule of judicial deference should apply to this decision. Homeowner argued that *Lamden* does not protect a board that acts in contravention of its own governing documents (true) but the court concluded that the association's governing documents afforded the board sufficient discretion to make the decision that it did.

B. Common Area--Board's Authority to Make Decisions Regarding Maintenance of Common Area

Affan v. Portofino Cove Homeowners Ass'n. (2010) 189 Cal.App.4th 930

Facts: Despite recurring sewer backup problems, the board refused for many years to undertake a routine maintenance program or perform repairs to its common area sewer system. Homeowner, after reporting multiple serious sewer backups, sued the association for breach of its duty to maintain the common areas.

Held. For homeowners. The board had argued that *Lamden's* rule of judicial deference protected it from liability for the sewer intrusions. The board had performed no investigations, and its decision to refrain from maintenance was not the result of a decision-making process. The court ruled, instead, that normally, refusal to undertake any maintenance (as opposed to choosing the wrong way to maintain) would not be covered by *Lamden*. The court did note that in certain rare cases, as when the repair would be "prohibitively expensive," the board might be justified in electing to do nothing.

Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n. (1999) 21 Cal.4th 249

Facts: A homeowner in a condominium project rented several of her units. She objected to the way the board of directors decided to treat a termite issue. The board had declined to tent the building because it was involved in reconstructing the entire project. Instead the board offered to spot-treat the building, but the homeowner found this unacceptable.

Held: For board. When the duly-constituted board of an association, after reasonable investigation, in good faith and with due regard for the best interests of the owners, exercises its discretion on how to maintain the common areas, in accordance with the

governing documents and relevant statutes, a reviewing court will defer to the board's decision.

Ritter & Ritter, Inc. v. The Churchill Condominium Ass'n. (2008) 166 Cal.App.4th 103

Facts: A homeowner sued the association based on the board's failure to repair slab penetrations which had existed in the building from construction, about 40 years earlier. The slab penetrations were supposed to be fire-proofed at the time of construction, and were not; nevertheless, an occupancy permit was issued by the City. The board defended that its decision not to repair was protected by the *Lamden* rule of judicial deference.

Held: For homeowners. The *Lamden* rule of judicial deference to a board's maintenance decisions covers only "ordinary" maintenance, not "extraordinary" situations such as major damage from earthquakes. Further, the *Lamden* defense only covers individual directors, it does not cover the association itself (meaning that *Lamden* may insulate the directors from personal liability, but at the same time, the association may still be liable for an improper decision.)

C. Common Area--Duty to Maintain--Exculpatory Clause

Franklin v. Marie Antoinette Condominium Owners Ass'n. (1993) 19 Cal.App.4th 824

Facts: Common area pipes in a highrise condominium project leaked, allowing water intrusion and damage to an owner's unit. Owner sued association for breach of the duty to maintain and for negligence. The association countered by arguing that the association had not been negligent because it was involved in repairs when the damage occurred, and further, that it was protected from liability for breach of the CC&R-imposed duty to maintain the pipes by virtue of an "exculpatory clause" contained in the CC&Rs, which protected the association from liability for failures of the common elements unless the association had acted in a grossly negligent manner. The jury found that the association had not acted negligently, but that it had breached the duty to maintain. Association appealed.

Held: For association. While exculpatory clauses are not favored, they will be enforced by a court when they do not relieve the association of the duty to maintain common elements (which would contravene public policy) but instead shield it from liability for damages arising from damage, at least when the damage is not due to any negligence on the part of the association. Because the jury had found the association NOT negligent, the court did not need to address the question of whether a clause which relieved the association of liability in case of negligence would be enforceable as well.

D. Common Area--Duty to Maintain--Safety Issues

Alcares v. Vece (1997) 14 Cal.4th 1149

Facts: An occupant of an apartment complex was injured when he stepped into a water meter box, which was not located on the apartment property, but on property adjacent to

the apartment complex which had been sporadically maintained by the owner of the apartment complex. The occupant alleged that the apartment owner should be liable because the owner exercised control over the property, including maintaining the land in question, and, after the accident, erecting a fence around the box. Nevertheless, the complaint was dismissed and occupant appealed.

Held: For occupant. Even though the apartment owner did not own the water meter box, if the occupant could prove at trial that the owner exercised control over the land upon which the box was located, the owner could be liable for the injuries.

Alpert v. Villa Romano Homeowners Ass'n. (2000) 81 Cal.App.4th 1320

Facts: Plaintiff tripped and fell on a sidewalk adjacent to association's property. Association had planted all the trees which caused the sidewalk to rise, and had known of the dangerous condition for several years.

Held: For Plaintiff. State law imposes a duty on an abutting landowner to maintain the sidewalks adjacent to the owner's property, although the duty is owed to the city/county, rather than to members of the public who might be injured as a result of the failure to maintain. When, however, the abutting landowner's own negligence causes the defect in the sidewalk, the abutting landowner may be held liable for injuries caused thereby. The court also approved admission of the association's minutes to show the association's notice of the problem.

Frances T. v. Village Green Owners Association (1986) 42 Cal.3d 490

Facts: A homeowner, worried about break-ins in the community, asked the board to erect additional lighting. When the board declined to do so, she bought lights and plugged them into a common area electrical source. The board directed her to quit using common area electricity for the lights, and she complied. Shortly thereafter, she was raped and robbed in her unit. She sued both the association and the individual directors on various causes of action. The trial court dismissed her case, and she appealed.

Held: For homeowner. An association has the same duties to residents of the association as a landlord has to tenants. Under California law, this may, depending on the circumstances, give rise to a duty to investigate criminal wrongdoing in and around the association, and to take appropriate safety measures. Here, the board was alleged to have been on notice of criminal activity, and yet to have failed to adequately investigate reports of criminal activity, and take adequate precautions (such as installing sufficient common area lighting.) The court also considered whether individual directors could be liable for her injuries, since they made the decisions which allegedly gave rise to the dangerous condition. The court concluded that directors who are on notice of a dangerous condition, and do not vote to take appropriate action to alleviate the danger, may be individually liable to a person injured as a result of the dangerous condition. (Homeowner also sued for breach of contract and breach of fiduciary duty, but the court held that as to fiduciary duty, the directors had acted appropriately in ordering her to disconnect her lighting from the common area electrical source. As to contract, the

governing documents did not specifically impose the duty to provide lighting, and there was no breach of contract.)

NOTE: Since the decision in *Frances T.*, the legislature enacted Civil Code §1365.7, which provides immunity to officers and directors under these circumstances, provided the association carries the prescribed amounts of insurance, and also that the officer/director's decision was made in good faith, and was not willful, wanton, or grossly negligent.

Pamela W. v. Millsom (1994) 25 Cal.App.4th 950

Facts: A resident of a 4-unit condominium project was raped in her unit. She sued the owners of the unit and the association, alleging that their negligence was a cause of the damage. She urged that the association could have employed additional security measures to prevent the attack, however, she conceded that there was no evidence of prior, similar criminal activity.

Held: For association. Violent criminal acts are generally not foreseeable, and that was the case here. Without foreseeability, there is generally no duty to provide security measures, particularly measures which may not prevent the crime in question, and which would impose a heavy financial burden on a small association.

IV. Enforcement of Governing Documents

Beehan v. Lido Isle Community Ass'n. (1977) 70 Cal.App.3d 858

Facts: Homeowners alleged their neighbors' construction violated a setback provision in the governing documents. The board researched the alleged setback, and concluded its enforceability was questionable. The board declined to file suit for enforcement, and the neighbors sued the neighbors to enjoin construction, and the association for refusing to file an enforcement action.

Held: For association. The board's decision whether or not to file an action to enforce the CC&Rs is governed by the business judgment rule. The evidence showed the board conducted an extensive review of corporate records to determine whether or not the setback provision had been validly adopted, concluded after debate it was questionable, and accordingly declined to file. This decision was not a violation of the board's discretion.

Duffey v. Superior Court (1992) 3 Cal.App.4th 425

Facts: A homeowner complained to the association that his neighbor's construction violated the view protections in CC&Rs. Because the association could not decide whether the construction did, or did not, violate the CC&Rs, it filed an action for declaratory relief naming both the complaining homeowner and the homeowner seeking permission to construct an improvement. The complaining neighbor sought to be dismissed from the case.

Held: For homeowner. The association has a duty to enforce its CC&Rs, whether or not another homeowner complains about a violation. It follows that the complaining neighbors are not necessary parties to the dispute. The association argued that the neighbors should be parties to the suit, so that their objections about the construction would be before the court when it decided whether or not the association should approve the construction. After pointing out that the association had a duty to fully litigate this question of entitlement to build, the court noted that the neighbors could, should they wish, intervene in the lawsuit, but that they were not required to be parties to the suit. If they did not intervene, they would be bound by the outcome of the case.

Fountain Valley Chateau Blanc Homeowners Ass'n. v. Department of Veterans' Affairs (1998) 67 Cal.App.4th 743

Facts: Association, threatening litigation, gained access to a homeowner's unit and demanded, in particular terms, that the occupant (Cunningham) rid the unit of specified items which the association deemed to constitute a threat to health and safety. association later sued the titular owner (Department) and the occupant cross-complained for invasion of privacy, trespass and negligence.

Held: For homeowner. The case concerned what is commonly known as "hoarding." The association had received complaints from adjacent neighbors, as well as a statement from a roofing vendor indicating he could not proceed with his work due to the accumulation of goods in and around the property. The association contacted the fire department, but it refused to issue a citation to the occupant. Undeterred, the association filed suit against the occupant. That suit was settled when the occupant agreed to get rid of some of the accumulation, but he pursued his cross-complaint for damages against the association. Ultimately the issue was tried to a jury, which decided some of the relevant facts. On appeal, the court affirmed judgment for the homeowner, indicating in passing that there was no way the association's decision to pursue litigation after the city had found there was no fire danger could be characterized as "reasonable." The court was particularly incensed that the association had dictated to the homeowner what could be kept, and what had to be discarded: "...[T]he CC&R's cannot reasonably be read to allow an association to dictate the amount of clutter in which a person chooses to live; one man's old piece of junk is another man's objet d'art. The association's rather high-handed attempt to micromanage Cunningham's personal housekeeping--telling him how he could and could not use the interior rooms of his own house--clearly crossed the line and was beyond the purview of any legitimate interest it had in preventing undesirable external effects or maintaining property values."

Haley v. Casa del Rey Homeowners Ass'n. (2007) 153 Cal.App.4th 863

Facts: Homeowners in a small condominium complex had been in the habit for many years of using common areas adjacent to their units for their own gardens and passages. When a homeowner objected to this use of the common area and demanded the board sue offending homeowners, the board circulated a CC&R amendment to legitimate the use.

The CC&R amendment passed. Homeowner sued the board for alleged breach of fiduciary obligation.

Held: For association. The association has the discretion to select among various means for remedying violations of the CC&Rs, without resorting to time-consuming and expensive litigation. The amendment was characterized as a "reasonable and commonsense solution" to the homeowner's complaints.

Ironwood Owners Ass'n. IX v. Solomon (1986) 178 Cal.App.3d 766

Facts: The CC&Rs required an owner to submit an architectural application and receive approval before installing new trees. Without receiving such permission, homeowner planted eight tall palm trees. Association thereafter sued requesting an order directing homeowner to remove the trees.

Held: For homeowner. In order to obtain an order forcing a homeowner to undo a violation (such as remove trees), the association must demonstrate that it has followed its own procedures before filing the action, and that the decision it made was in good faith, and neither arbitrary nor capricious. In this case, the record did not show that the architectural committee or the board had met to consider whether the trees violated the guidelines of the association. Without those facts, and because obtaining a "mandatory" injunction (that is, an order to have the homeowner take affirmative action) required such proof, the association's application had to be denied.

V. Association Operations

A. Access to Association Records

Chantiles v. Lake Forest II Master Homeowners Ass'n. (1995) 37 Cal.App.4th 914

Facts: A director elected to the board sought to view the ballots from the election in which he had been elected, apparently because he concluded he had not received as many votes as he had been promised. The association refused to permit him to inspect the ballots, arguing that homeowners had a constitutionally-protected expectation of privacy in their election ballots. It did offer to allow his attorney to review and tally the ballots, provided he agreed not to indicate how particular persons voted, and ultimately that was what the court ordered. The director appealed.

Held: For association. Although directors have a right under Corporations Code §8334 to view all documents and assets of the corporation, there is a public policy as to ballots and voting (constitutional right of privacy), which outweighs the policy underlying the right to inspect. Thus the director did not have the right to inspect the ballots.

NOTE: Since *Chantiles*, the manner in which association elections are conducted has been substantially modified by the enactment of Civil Code §1363.03, which provides for a double-envelope, secret ballot procedure which would largely prevent disclosure of how a particular owner voted.

Smith v. Laguna Sur Villas Community Ass'n. (2000) 79 Cal.App.4th 639

Facts: Association had filed a construction defects suit. Homeowners, unhappy with the fees being charged for the suit after a special assessment was imposed to pay for it, demanded copies of billings to the association by its construction defects attorney. Association refused to provide copies of the billings, asserting they were subject to the attorney-client privilege, and that the board, not the homeowner, was the holder of the privilege.

Held: For association. A corporation is entitled to claim attorney-client privilege for communications between the corporation and its attorneys. The shareholders of the corporation are not the holders the privilege; rather, the board of directors of the corporation is the holder of the privilege. And while it can be said that the homeowners are, indeed, the persons for whose benefit the litigation is instituted, that does not mean they hold the privilege. Finally, there are sound policy reasons why the privilege is held by the board (which has a fiduciary duty to all homeowners), rather than individual owners, who have no such broad duty and could well be expected to disclose confidential information improperly.

B. Disclosures, Duty to Make

Kovich v. Paseo del Mar Homeowners Ass'n. (1996) 41 Cal.App.4th 863

Facts: After completing purchase of his home, homeowner discovered cracked walls in the common areas. He filed an action against the seller for failure to disclose the defects in the common area, and against the association alleging that the association had a duty to inform him, when he was a purchaser, of a prior construction defects suit against the developer, which had been settled.

Held: For association. An association has no duty to disclose information to a prospective purchaser. The association's duty of disclosure is defined by Civil Code §§1365 and 1365.5 (disclosures of financial information to owners) and Civil Code §1368, which contains a list of documents an association must provide to an existing homeowner, in connection with a proposed sale. The court specifically noted that there is no statutory duty on the part of an association to disclose to its members the existence of construction defects or litigation involving construction defects.

NOTE: Civil Code §1375.1 does require the association to provide notice to homeowners of the settlement of a construction defect case. And, some CC&Rs have voting requirements before undertaking construction defect suits, which requirements may, or may not, be enforceable.

Ostayan v. Nordhoff Townhomes Homeowners Ass'n. (2003) 110 Cal.App.4th 120

Facts: A former homeowner sued the association demanding his share of the proceeds of an insurance bad faith case instituted by association in connection with construction

defects. The proceeds were received by the association after homeowner had sold his unit. Homeowner argued that the association had breached a duty to inform him of the suit prior to its settlement.

Held: For association. Neither the CC&Rs nor statutes obligated the association to give notice to its members of the filing of the lawsuit. Nevertheless, the association here had notified its members of the filing of the lawsuit, although they had not further advised their members of the status of the suit. The court noted, "The association cannot be expected to make disclosures so as to impart information in relation to every possible sale of a unit within the development. Were there such a requirement, the association's time could be consumed with the preparation of disclosure statements. Any such rule would also render redundant the procedure of annual reports, meetings, and the disclosures of budgets established by statute...If Ostayan had wanted information concerning the dispute with the association's insurer, he could have exercised his right to inspect the association's records—or even queried a director. Then he would have been armed with all the information he now claims he needed before selling his unit. Having failed to gather this information through the methods provided by law and the CC&Rs, Ostayan cannot now shift the blame for failing to do so to the association for its purported failure to fulfill a duty."

VI. Directors' Fiduciary Duty

Cohen v. Kite Hill Community Ass'n. (1983) 142 Cal.App.3d 642

Facts: After association approved a fence at the rear of a neighbor's yard which did not comply with the CC&Rs (and deprived the complaining homeowner of a view) the affected homeowner sued the neighbor and the association. Because the fence was substantially completed by the time of trial, the case proceeded against association on the issue of damages. Association argued that it should be dismissed and the action be tried solely between the two owners. When the trial court agreed to dismiss the association, homeowner appealed.

Held: For complaining homeowner. The court indicated that the grant of permission to build a fence which did not comply with the CC&Rs was the equivalent of a zoning variance. For such a variance to be valid, the city (or association) must demonstrate that the grant of variance was not arbitrary or capricious, and it follows that the association is a proper (if not indispensable) party. Further, the association must demonstrate that its decision to allow the fence was "in keeping with the general plan for the improvement and development of the project." In short, per the court, the parties would not have been before the court at all but for the allegedly arbitrary decision of the board in approving the fence.

Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal.App.3d 783

Facts: Homeowners association sued its development company, which had created and populated initial boards of directors, for breach of fiduciary duty, after the developer-dominated board failed to fund reserves.

Held: For association. The directors had a fiduciary obligation to adequately assess each unit for the creation of reserve funds, and the individuals are liable for breach of that duty. The court noted that these directors were also employees of the developer, and had a conflict of interest, indicating that such directors may not make decisions for the association which benefit the developer's interests to the detriment of the association and its members.

VII. Assessments and Use of Association Monies

Anthony v. Brea Glenbrook Club (1976) 58 Cal.App.3d 506

Facts: A homeowner brought suit to have the mandatory membership in the association, and dues assessed for the support of the recreation club/common areas, declared invalid, arguing the covenant did not "run with the land" because it did not "touch and concern" the homeowner's property (these are the traditional bases for holding that a covenant binds all owners of the land affected by CC&Rs.)

Held: For association. The court noted, "Manifestly, the maintenance of a well-kept clubhouse, recreational area and swimming pool in this tract enhanced the value of each home therein. In the Southern California area it would be reasonable for a court to take judicial notice of the obvious fact that there are a great many swimming pools attached to private residences. The availability of such a facility at the Brea Glenbrook Club would make it unnecessary for any homeowner to invest a considerable amount of money in a swimming pool for the use of his family. Also, it would be a fair deduction from the agreed statement of facts that the availability of the clubhouse and grounds provided opportunities for playground activities and other forms of family and community recreation within the Glenbrook Hills project. Thus, it would seem that the so-called "burden" of maintaining membership in this association would in reality be an asset to each and every property owner in the use of his land." In short, whether a homeowner chooses to use the facilities or not, does not matter; the CC&R provision requiring assessment for the support of such facilities is valid and enforceable.

James F. O'Toole Co. Inc. v. Los Angeles Kingsbury Court Owners Ass'n. (2005) 126 Cal.App.4th 549

Facts: Association retained an insurance adjuster to assist it in connection with recovering insurance proceeds after earthquake damage. When the association later refused to pay the agreed-upon fee, adjuster sued and received a judgment against the association in the approximate amount of \$200,000. Adjuster began collection efforts on the judgment, and sought an order assigning to it all regular assessments collected by the association. The court refused to grant that order, but ordered the association to levy a special assessment to pay the judgment. When the members refused to approve the assessment, the court appointed a receiver to levy the assessment against the members and to collect it and pay the judgment. Association appealed.

Held: For adjuster. The court reasoned that the association had an obligation to assess in sufficient amounts to pay for the maintenance of the common areas, and working to obtain insurance proceeds for that purpose was within the board's power. Further, since the special assessment in question was ordered by the court, the consent of the members was not necessary. While some portion of the regular assessment income stream is exempt from attachment in order to allow the association to pay necessary costs of operation, this protection does not apply to special assessments ordered by the court, so that the adjuster could levy both against non-exempt portions of regular assessments, and the court-ordered special assessment.

Park Place Estates Homeowners Ass'n. v. Naber (1994) 29 Cal.App.4th 427

Facts: Homeowner, dissatisfied with how the association maintained the common areas adjacent to his home, withheld his assessments. The association sued to foreclose its lien, and in the suit, homeowner sought to introduce evidence that he was entitled to a set-off for the alleged damage to his unit due to association failures to maintain. The trial court refused to allow him to introduce the evidence. Homeowner lost, and appealed.

Held: For association. Homeowner had no right to a set-off against assessments based on alleged failures to maintain the common areas, and he had no right to introduce evidence on the subject as a defense to a court action to foreclose an assessment lien. The court noted that because associations would cease to exist without regular payment of assessment fees, the legislature created procedures for associations to quickly and efficiently collect such fees; allowing a homeowner to use an association's alleged misconduct as a "set off" would seriously undermine the legislature's goal.

Spitser v. Kentwood Home Guardians (1972) 24 Cal.App.3d 215

Facts: After association filed a lawsuit to abate noise from a nearby airport, and assessed owners for the cost of such suit, homeowner filed a complaint against association alleging it lacked the authority to assess for this purpose.

Held: For homeowner. The statement of corporate purpose in the CC&Rs indicated that the purpose of assessments was for the maintenance of the common areas, and to enforce the CC&Rs. While the CC&Rs did prohibit nuisances, they only operated as to property subject to the CC&Rs (which did not include the airport). Accordingly, the CC&Rs did not support imposition of assessments to finance the lawsuit in question.

VIII. Constitutional Issues; Defamation

A. Constitutional Issues--Free Speech

Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n. (2001) 26 Cal.4th 1013

Facts: The owner of an apartment complex brought an action to enjoin a tenants' association from distributing unsolicited newsletters to other tenants of the building.

The tenants' association cross-complained, arguing that it had a constitutional right to leaflet the building.

Held: For owner of the building. The California Constitution provides protection of free speech when the challenge is by state action. The actions of a private landowner constitute "state action" only when the property is freely and openly accessible to the public (as, for example, in a shopping center.) Here, the complex was privately owned and access was carefully limited. Thus no state action was involved, and the owner could restrain the distribution of the leaflets.

Laguna Publishing v. Golden Rain Foundation (1982) 131 Cal.App.3d 816, disapproved on other grounds in *Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300

Facts: Association allowed one neighborhood newspaper to be distributed to residents of its gated community, but refused to allow a competing newspaper access for distribution. The competing newspaper argued that such behavior violated its constitutional rights.

Held: For competing newspaper. Without analyzing the state action aspect of the case, the court held that allowing one newspaper to be circulated while preventing the other constituted wrongful discrimination.

NOTE: It is uncertain what continuing validity *Laguna Publishing* has, given the Supreme Court's decision in *Golden Gateway*, above.

B. Defamation

Damon v. Ocean Hills Journalism Club (2000) 85 Cal.App.4th 468

Facts: An association manager sued an association club, which produced a newsletter critical of the manager's performance, for defamation. The club responded by filing an "anti-SLAPP" motion. ("SLAPP" stands for "strategic lawsuit against public participation." An anti-SLAPP motion asks the court to strike a complaint when that complaint is filed for the purpose of chilling the defendants' constitutional rights.)

Held: For club. After noting that the association was comprised of more than 1600 homes, the court observed that to prevail on an anti-SLAPP motion, the manager had to demonstrate that the complaint was based on "an[] act in furtherance of the person's right of petition [to the courts or legislature] or free speech... on a matter of public interest." Further, the "free speech" must consist of writings or statements made "in a place open to the public or in a public forum...."

The court held that board meetings (at least for this large association) constitute a "public forum" for the purposes of the anti-SLAPP statute, as was the newsletter. The manager argued that the newsletter only represented the views of a minority of the members, but the court ruled that even such minority view publications were entitled to anti-SLAPP protection.

Further, the statements were a matter of "public interest" because the subject (whether to continue the manager's tenure) was a matter which "concerned the very manner in which this group of more than 3000 individuals would be governed...."

NOTE: Anti-SLAPP motions are one of the most often-employed defenses in lawsuits arising from association disputes. While there are other grounds for bringing such a motion (see *Ruiz v. Harbor View Community Ass'n.*), the portion of the statute discussed in *Damon* is the more frequently encountered.

***Healy v. Tuscany Hills Landscape and Recreation Corp.* (2006) 137 Cal.App.4th 1**

Facts: After association sued a homeowner in connection with her refusal to allow association access to her lot in order to maintain adjacent common areas, association's attorney sent letter to all homeowners indicating that the expense of litigation was attributable to the homeowner's refusal to allow access. In response to this letter, the homeowner sued the association for defamation. Association responded with an anti-SLAPP motion.

Held: For association. The anti-SLAPP statute protects against liability based on statements in a legislative or judicial proceeding, whether or not those statements concern a matter of public interest. The statute operates by allowing a defendant to make a motion to strike the complaint. The defendant does so by showing the court that the statements are those protected by the anti-SLAPP statute; in response, the plaintiff must then show a substantial likelihood of prevailing at trial.

In this case, the attorney's statements concerned an ongoing lawsuit brought by the association against the homeowner. Since these are amongst the types of statements protected by the anti-SLAPP statute, it fell to homeowner to demonstrate that she would likely succeed if her suit were permitted to proceed. However, in the instant case, since the statements which formed the basis of the alleged defamation were "privileged" (made by an attorney in the context of litigation), the homeowner was not likely to prevail at trial, and granting the motion to strike was proper.

***Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1**

Facts: The association sued two homeowners who allegedly defamed one of the directors running for election. The statements included excerpts from board minutes which allegedly indicated one of the directors had, in the past, "attempted to assault" a homeowner, and that the director "repeatedly raised his voice and insulted" another homeowner. The minutes did not contain the referenced statements. The homeowners "demurred" (sought to have the complaint dismissed) on the basis that the association had no right to bring a defamation action on behalf of individual directors.

Held: For homeowners. If language written about a corporate director cannot be interpreted as saying anything about the way the director performs his or her duties, the corporation has no right to bring an action for defamation. The statements in question,

while critical of the directors who were running for re-election, did not pertain to the way in which the association was governed. Accordingly, the association had no cause of action for defamation.

Ruiz v. Harbor View Community Ass'n. (2005) 134 Cal.App.4th 1456

Facts: After an association's attorney sent letters to a homeowner concerning his behavior at board meetings after the association denied the homeowner's architectural application, the homeowner sued association for defamation. The letters concerned the homeowner's behavior at board meetings. In response to the complaint, association filed an anti-SLAPP motion, urging that the action for libel could not succeed because the letters were "privileged" by law.

Held: For association. In an anti-SLAPP motion, the moving party must show first that the communications are in furtherance of protected speech. In response, the plaintiff must show that he is likely to succeed on the merits of the case (in other words, that his action for libel is likely to succeed if it goes to trial.) In this case, the court found that the statements were one of the types of statements the anti-SLAPP statute was designed to protect, that is, statements made in connection with an issue of public interest. Even though the letters were private (sent by the association's attorney to the homeowner), they concerned an issue of ongoing controversy, *viz*, the association's treatment of the homeowner's architectural application. The court then ruled that the homeowner had failed in response to show that he was likely to succeed on the merits of his case. One of the letters was only sent to the homeowner himself (and therefore lacked one of the requirements for defamation, that is, that the statement be "published" to a third party.) The other statement was held to be "mere hyperbole" and therefore, not defamation.

IX. Fair Housing and Discrimination

A. Fair Housing--Disability Accommodation--Animals

Auburn Woods I Homeowners Ass'n. v. FEHC (2004) 121 Cal.App.4th 1578

Facts: Condominium unit owners sought permission to keep a small dog (in violation of rules against it), in order to alleviate depression. The owners filed a claim with the Fair Employment and Housing Commission (FEHC), which was heard by an administrative law judge. The judge found that suspending the rules to allow the owners to keep their dog was a reasonable accommodation. Association sought review of the administrative decision in court.

Held: For unit owners. The court found that the unit owners had produced substantial evidence of disability (husband had seizures, wife had recurring depression) and that the dog alleviated the symptoms of those disabilities. There is no requirement that the animal be a certified "service animal." The court also emphasized that, once a resident introduces the subject of disability, the association (rather than the owners) has the duty of satisfying itself as to the nature of the disability and the propriety of the accommodation.

B. Fair Housing--Disability Accommodation--Parking

Shapiro v. Cadman Towers, Inc. (2d Cir 1995) 51 F3d 328

Facts: Disabled co-op resident requested she be granted a parking space closer to her unit. The board of the co-op responded by placing her on a waiting list for reassignment of spaces. Owner contended this violated the Federal Fair Housing Amendments Act. Co-op argued that she had access to spaces set aside for the disabled, or that she could use on-street parking.

Held: For owner. Association argued that the assignment of the space would effectively be preferential, not equal, treatment for the disabled person. While the court agreed that the Act does not call for preferential treatment of the disabled, it does require an association or co-op to take at least modest, affirmative steps toward accommodation. The co-op also argued that giving the resident the assigned parking she requested would displace other owners who had waited for the space to become available. The court also rejected this argument, because the evidence did not bear out the co-op's contention.

C. Fair Housing--Familial Status Discrimination--Rules

United States v. Plaza Mobile Estates (2003) 273 F.Supp2d 1084

Facts: The U.S. sued the owners of numerous mobile home parks in the Los Angeles area, alleging that the parks' rules, which regulated or prohibited use of recreational facilities by children in the communities, constituted familial status discrimination in violation of federal and state laws. The rules fell into several categories, including complete prohibition of use, or restriction of use to specified hours, based on age, and a requirement that an adult accompany a child who used facilities. The owners of the parks argued that such rules addressed legitimate health and safety concerns (such as pool safety).

Held: For the U.S. The court found that any legitimate health and safety concerns could be less restrictively addressed by rules which required the children to act in a safe manner or to be tested for swimming proficiency by the owner of the premises.

X Construction Defect Litigation

A. Association's Right to Jury Trial

Treo@Kettner Homeowners Association v. Superior Court (2008) 166 Cal.App.4th 1055

Facts: The association brought a claim for construction defects alleging common area claims for construction defect. The CC&Rs had a provision purporting to require the association to submit its claims to judicial reference, which is a form of a jury trial waiver in which a private referee makes all decisions in the case instead of a judge and jury. The

developer filed a motion to compel the association's claims to judicial reference, citing the CC&R provision as the "contract" for judicial reference between the association and developer.

Held: The right to a jury trial is a fundamental right protected by the California constitution. It can only be waived in a manner expressly provided for by statute. The statute allowing for judicial reference of claims requires a contract between the parties with a judicial reference provision. Because of the manner in which the CC&Rs are created (years before the association is created), the CC&Rs are not the type of document in which there is the free and voluntary consent on the part of the association as required to support a waiver of the association's Constitutional right to a jury trial.

Villa Milano v. Il Davorge (2000) 84 Cal.App.4th 819

Facts: The association brought a claim for construction defects alleging common area claims as a representative of its members. The CC&Rs had a provision requiring the association to submit construction defect claims to arbitration. The developer filed a motion to compel the association's claims to arbitration, citing the CC&R provision as an "arbitration agreement."

Held: While the CC&Rs may be construed as an "arbitration agreement," it was unenforceable because it was recorded against the property as part of the CC&Rs in a manner which precluded a finding the association had voluntarily agreed to arbitration. In addition, there are statutes in California suggesting that the legislature does not favor binding arbitration of claims in purchase contracts for new homes, so by analogy to purchase contracts, the mandatory arbitration clauses in CC&Rs are also against public policy.

B. Recoverable Damages and Association Standing

1. Damages For Defects Causing Tangible Physical Property Damages "The Economic Loss Rule"

Aas v. Superior Court (2000) 24 Cal.4th 627

Facts: This matter involved two construction defect actions brought by a condominium homeowners association and owners of single-family homes in a subdivision (collectively, "Plaintiffs") against a developer, a contractor, and subcontractors (collectively, "Defendants"). Plaintiffs alleged their dwellings suffered from a variety of construction defects. Plaintiffs asserted causes of action for negligence, strict liability, and breach of express and implied warranty. In pretrial proceedings, Defendants moved to exclude evidence of those alleged construction defects that had not caused property damage. The trial court granted Defendants' motions as to the tort claims. Plaintiffs sought review of the rulings by petition for writ of mandate. The Court of Appeal denied the

petition. The California Supreme Court granted review of that decision and affirmed.

Held: The California Supreme Court concluded that Plaintiffs could not recover damages in negligence or strict liability from the developer, contractor or subcontractors who built their homes for existing construction defects that had not yet caused either property damage or personal injury. The court explained that while tort law provides a remedy for construction defects that cause property damage or personal injury, the “economic loss rule” precludes recovery for defects that have not yet resulted in property damage or personal injury.

NOTE: In response to the holding in *Aas*, the California Legislature enacted Civil Code §895 *et seq.* also known as the Right to Repair Act (the “Act”). The Act establishes a set of building standards pertaining to new residential construction, and provides homeowners with a cause of action against, among others, builders and individual product manufacturers for violation of the standards. The Act makes clear that upon a showing of violation of an applicable standard, a homeowner may recover economic losses from a builder without having to show that the violation caused property damage or personal injury. In such an instance, the Act abrogates the economic loss rule, thus legislatively superseding *Aas*.

2. Association’s Standing to Pursue Implied Warranty Claims

Windham at Carmel Mountain Ranch v. Superior Court (2003) 109 Cal. App. 4th 1162

Facts: Plaintiff condominium association brought a breach of implied warranty action against defendant condominium developer. Claims for breach of implied warranty are considered contractual in nature and such claims generally require a showing of “privity” between two parties. The Superior Court of San Diego County dismissed the association’s claim, concluding that the association lacked the requisite privity of contract with the developer. The association appealed.

Held: Reversed (for association). The association has sufficient “privity” with the developer, by statute. Code of Civil Procedure §383 provides that associations have standing to sue in their own names as real parties in interest for damage to common areas and it deems associations to be owners of causes of action for damage to common areas with the right to relief for that damage. As such, the association had the requisite privity of contract not because privity was transferred from the owner of the condominium, but because the legislature by statute deemed the association to have the requisite privity of contract. Accordingly, the trial court erred by sustaining the developer's demurrer.

3. No Emotional Distress Damages

Erlich v. Menezes (1999) 21 Cal.4th 543

Facts: Plaintiffs Barry and Sandra Erlich contracted with defendant John Menezes, a licensed general contractor, to build a "dream house" on their ocean-view lot. The Erlichs moved into their house in December 1990. In February 1991, the rains came. The house leaked from every conceivable location. Mr. Menezes's efforts to remedy the situation were to no avail. The Erlichs testified that they suffered emotional distress as a result of the defective condition of the house and Menezes's invasive and unsuccessful repair attempts. Mr. Erlich even developed a permanent heart condition. The Erlichs sought recovery against Mr. Menezes on several theories, including breach of contract, fraud, negligent misrepresentation, and negligent construction. At trial, the Erlichs were awarded emotional distress damages along with compensatory damages. The Court of Appeal affirmed. The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings.

Held: Mr. Menezes's negligence directly caused only economic injury and property damage and breached no duty independent of the contract. As such, the Erlichs could not recover damages for emotional distress based upon breach of the contract to build the house.

4. Right to Recover Expert Fees and Costs Incurred to Investigate Defects

Stearman v. Centex Homes (2000) 78 Cal.App.4th 611

Facts: Defendant Centex Homes was a mass producer of homes in Southern California. In February 1990, plaintiffs bought a Centex tract house in San Clemente. Problems with the property began to appear shortly after plaintiffs moved in and continued over the next few years. In 1993, plaintiffs sued Centex Homes, stating only one cause of action, for strict liability in tort. Plaintiffs alleged defendant constructed the home on inadequately compacted soil, causing slab movement and deformation which, in turn, damaged the structure and yard improvements, diminished the property's value, and required plaintiffs to incur expenses for remedial measures, including employing various professionals to assess the situation and make recommendations. Following a judgment in favor of homeowners, the trial court denied defendant's motions for a new trial and judgment notwithstanding the verdict. The Court of Appeal modified the judgment to award plaintiffs expert fees as damages and affirmed as modified.

Held: Plaintiffs can recover under strict liability when a defect in one component part of a house causes injury to other component parts of the

house, even though the damage is not to persons or property apart from the structure. Further, plaintiffs are entitled to recover as damages, fees paid to experts who investigated the foundation problems in order to formulate an appropriate repair plan. The expenses were damages due for a portion of the cost of repair, which is an appropriate measure of damages in cases based on damage to real property.