HILL WALLACK
ATTORNEYS AT LAW

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NEWSLETTER

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IN THIS ISSUE

Message From the Managing Partner

In this fall edition of our firm's *Quarterly,* we want to make our readers aware of the many skills and services our attorneys provide in the area of Community Association Law. Our community association clients include residential, condominium and homeowners associations of all sizes. We assist our association clients in amending and interpreting governing documents, in defending director and officer claims, in handling covenant and rules enforcement litigation, insurance claims and construction defect cases just to name a few. In addition, we have a specialized collection practice to assist our community association clients in pursuit of delinquent assessment payments. Our extensive experience in this area, as well as the assistance of the other practice groups within the firm enable us to provide a full range of legal services to our community association clients.

Continuing to lead in this field of law, Partners, Ronald L. Perl and Michael S. Karpoff have been admitted to the prestigious College of Community Association Lawyers. Both lawyers have lectured nationally on a variety of topics for the Community Associations Institute (CAI).

In our lead article *"Governing Documents Yield To Court's Interpretation of Law; Owners' Expectations Secondary",* my Partner, Ron Perl discusses the enforcement of common interest community governing documents. *"Court Speaks on Speech, But Final Word Still Unspoken…",* written by Partner, Michael Karpoff, concentrates on the constitutional protections of association members. Another Partner, Terry Kessler discusses pet ownership rights in her article *"Investigation of Disability Claim Prevents Pet Free Community From Going To The Dogs."* Andrew McDonald addresses liability issues stemming from errant golf shots in his article *"The Price of a Happy Hooker",* while Jessica Battaglia gives insight into mold related claims in her article *"Toxic Mold Uncovered…".* Todd Greene outlines Multiple Chemical Sensitivity Syndrome in his article *"Your Lawn Is Making Me Sick!…",* while Adam Picinich examines the fundamental role of directors and officers of community associations.

We are sure that you will enjoy both the substance and the variety of the articles in this issue. Again, please let us know the subjects you would like to see covered in the *Quarterly.* We hope that you will find this newsletter useful, and we would be pleased to have your comments or suggestions.

– Robert W. Bacso

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Governing Documents Yield to Court's Interpretation of Law; Owners' Expectations Secondary

by Ronald L. Perl

Common interest community governing documents will not be enforced in New Jersey if they are found to be in violation of a public policy or in conflict with a statute. The New Jersey Supreme Court recently reached that conclusion in a case entitled *Brandon Farms Property Owners Association, Inc. v. Brandon Farms Condominium Association, Inc.* In that case, the Court reviewed the relationship between a condominium association and the umbrella association of which it is a part. The issue was whether a condominium association could be held liable for common expenses owed by its unit owners to the umbrella association as required by the umbrella declaration. The Court unanimously held that the arrangement was unenforceable because it was contrary to the provisions of the New Jersey Condominium Act.

"The Supreme Court has clearly indicated that it will review governing and financial arrangements in common interest communities on the basis of fairness and equity."

Brandon Farms is a housing development consisting of detached single family homes, townhomes and condominium units. Typical of communities containing different styles of housing and forms of ownership, a master declaration of covenants and restrictions was recorded to govern the overall property. Within this "umbrella" entity or "master association," the developer established a condominium association which was responsible for the management and operation of the condominium section and its common elements. The owners of *all* units, whether townhomes, detached homes or condominiums were each responsible for the payment of a monthly maintenance fee to the master association for the purpose of maintaining and operating the master "common elements and facilities." In addition to the common expense assessment imposed by the master association, there was a recreational limited common expense assessment which was mandatory for the townhome and condominium owners but optional for the owners of single family homes and a small condominium sub-association known as the Twin Pines Condominium Association.

Condominium Association To Pay Master Association Fees

At issue in the case was Section 7.21 of the master association declaration, which authorized the property owners' association to impose a single assessment against the condominium association instead of individual assessments against the condominium unit owners. Thus, if an individual condominium unit owner failed to pay his or her assessment attributable to the property owners association, the condominium association would still have to pay the full amount due the property owners association and then would be solely responsible for collecting the fees from the owner.

Although set forth in the declaration, this arrangement was not implemented by the developer. Rather, the developer billed the individual condominium unit owners just as the owners of other

units within the umbrella association. However, when the developer relinquished control to the unit owners, the property owners association sought to collect the fees from the condominium association in accordance with Section 7.21. The condominium association resisted, and the lawsuit ensued.

The trial court found that the arrangement contained in Section 7.21 placed a disproportionate burden on the owners of condominium units, which included owners of affordable housing units. The Appellate Division reversed the trial court, finding that Section 7.21 had a legitimate purpose and that the property owners association fee could be construed as any other "common expense" of the condominium association and therefore could be made part of the condominium association's annual budget, like landscaping or any other common expense.

Fee Arrangement Held Contrary to Law

The Supreme Court, though, found that Section 7.21 violated the Condominium Act. The Court concluded that Section 7.21 constituted an "agreement" between the condominium association and the property owners association. It determined that Section 7.21 therefore usurped the power of the condominium governing board to determine whether the condominium association should enter into such an agreement. The Court relied heavily on its 2001 decision in *Fox v. Kings Grant Maintenance Association,* which dealt with another umbrella arrangement of a master property owners association and several sub-condominium associations within it. In that case, the Court invalidated a governance arrangement contained in the declaration whereby many of the decision-making and maintenance responsibilities of the various sub-associations were delegated to the master association. The Court found that such a delegation violated the Condominium Act by stripping the condominium associations of their statutory authority and mandate. The *Brandon Farms* Court found a similar unauthorized delegation of the authority of the Brandon Farms Condominium Association.

The Court also found that the owners of units within the condominium bore a disproportionate responsibility for a condominium unit owner's default in payment. When the owner of a townhome or detached home defaulted in the payment of the master association fee, all of the other members of the master association, including the condominium owners, bore the cost of this default. In the case of a defaulting condominium owner, however, only the condominium owners were responsible for the default. The Court was particularly concerned with the impact this disproportionate responsibility had on the affordable housing units, which were all located within the condominium. The Court decided that the arrangement contemplated by Section 7.21 had a disproportionate detrimental impact on the condominium owners and thus was void as a matter of public policy.

Court's Analysis Raises Questions

There are several concerns over the Court's opinion in this case. First, the Court did not address the reasonable expectations of the parties. The governing documents contained a description of the financial relationships of the unit owners, the condominium association, and the property owners association. When a purchaser agreed to become a

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Court Speaks on Speech, But Final Word Still Unspoken: *Twin Rivers* Case Establishes Some Parameters

by Michael S. Karpoff

"…the relationship between the homeowners and the Association is contractual…"

New Jersey's courts have essentially established that members of the public have no right to express themselves in private communities which have not invited public access. However, the courts had been silent on what speech rights community members have—until now. In *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association,* the court considered the rights of Association members to obtain information about and to express themselves on Association matters. The case is presently on appeal, so there has not yet been a final determination, but the trial court's rulings can provide guidance to association governing boards.

Twin Rivers is a planned development which includes 2,700 residences with 10,000 occupants. The Twin Rivers Community Trust owns the common property, and the Twin Rivers Homeowners Association, through its Board of Directors, governs the use of the common property. The plaintiffs challenged a number of the Association's regulations and practices. Conceding that the U.S. Constitution's First Amendment does not control on private property, the plaintiffs relied primarily upon New Jersey's state constitutional free speech clause, which grants broader rights than the First Amendment.


La Cita
HOMEOWNERS ASSOCIATION
Association to Vote on Board of Directors
Clubhouse Under Renovation

Court Rejected Constitutional Claims

Plaintiffs argued that Twin Rivers is similar to a town and therefore should be subject to the constitutional protections. The court concluded, however, that Twin Rivers is neither a state actor nor an arm of municipal government; so, in general, it is not subject to state constitutional limitations. On the other hand, the court held that although Twin Rivers was created before the adoption of the Planned Real Estate Development Full Disclosure Act (PREDFDA), it is subject to the statute's 1993 amendments.

The court then considered each of the plaintiffs' specific claims. First, the plaintiffs challenged the Association's policy on posting signs, which limits residents to one sign in a window and one sign in the garden bed no more than three feet from the residence. The plaintiffs claimed that this policy violates their free speech by restricting the number and location of signs, particularly political signs.

The court found that the relationship between the homeowners and the Association is contractual, as set forth in the covenants in the governing documents and deeds. Such covenants will be upheld if they are reasonable. The court determined that the sign policy was reasonable and therefore enforceable. Furthermore, because the property is private, no public interest is affected by the sign policy, so constitutional provisions do not apply. The court also rejected the argument that the restrictions are a "contract of adhesion" which plaintiffs had no ability to negotiate. The court noted that contracts of adhesion are overturned only if the terms are unconscionable, but the Twin Rivers sign policy is not unconscionable.

Fees for Use of Community Room Upheld

The plaintiffs also contested the Association's regulations requiring owners to pay rent, to post a security deposit, and to provide an insurance certificate to use the community room for a meeting and permitting the Board to deny such rentals. The court upheld the rental fee, deposit, and

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Investigation of Disability Claim Prevents Pet Free Community From Going To The Dogs

by Terry A. Kessler

Not everyone likes animals. Therefore, some common interest communities have covenants or rules which prohibit or restrict the ownership of pets. Yet, federal law may supersede such rules under certain circumstances. By understanding the law and knowing what procedures to apply, community associations can avoid problems.

More and more, requests are made to association boards by homeowners or residents for permission to keep pets within their units despite clearly defined "no pet" policies in the governing documents. These requests are frequently based on the premise that the resident requires the pet for his or her mental and/or physical well-being. The pet owner contends that he suffers from a disability, and that retention of the pet is crucial to his health in that it alleviates symptoms or conditions. While no one would dispute the necessity of a seeing-eye dog, difficulties arise when a resident seeks to retain a pet to ameliorate a psychological disability.

Fair Housing Act Requires Reasonable Accommodation

The Federal Fair Housing Act (the "Act"), as amended, while prohibiting discrimination and special treatment, requires housing providers to give special treatment to the disabled, if necessary, thus allowing them equal opportunity to enjoy their dwellings. The Act requires that a "reasonable accommodation" be made by the association, where necessary, for a disabled person to enjoy or use his or her dwelling. Failure to provide a reasonable accommodation may result in a complaint to the Department of Housing and Urban Development (HUD). If found in violation of the Act, an association may be subject to substantial penalties, damages and attorneys fees. Therefore, associations should be familiar with the requirements of the Act and what constitutes a reasonable accommodation.

Is the Resident Disabled?

When a request for an exemption from a restriction or for special treatment is made by a resident, the association must first determine if the individual is, in fact, disabled. A disability can be a mental impairment which limits one or more of life's activities or a physical disability. That the person requesting the accommodation may not appear to be disabled is not a sufficient reason to deny the request. Rather, the association must conduct a reasonable investigation to determine if the person qualifies under federal law.

"The Federal Fair Housing Act (the 'Act') … requires housing providers to give special treatment to the disabled, if necessary, thus allowing them equal opportunity to enjoy their dwellings."

Second, the association must evaluate whether the requested accommodation is reasonable. The association should consider whether the exemption imposes an undue burden on it or other residents. The obligation to provide a reasonable accommodation does not end even if there is some cost to the association. In some instances, the association may require the individual requesting the accommodation to bear the costs associated with the request. Finally, the board must determine whether the requested accommodation is necessary in order for the individual to use and enjoy his or her dwelling.

Obtaining Reasonable Information

In the case of an application to allow a pet in a pet-restricted

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The Price of a Happy Hooker

by Andrew T. McDonald

"…liability stemming from errant golf shots, including damage or nuisance therefrom, is an issue of relatively new impression."

What's a "Happy Hooker" you might ask? Well among other references, it is a "Sunday" golfer that has a tendency to hit his golf ball into areas of the golf course that are even foreign to the greens keeper. This "so-called tendency" places adjacent property homeowners and bystanders in harms way (i.e. being struck by a projectile). While the judiciary in New Jersey has addressed such issues as the duty of golf courses to protect patrons from the danger of lightning and abutting landowners from unnecessary trespass, liability stemming from errant golf shots, including damage or nuisance therefrom, is an issue of relatively new impression.

The judiciary in other states has addressed the liability issues caused by the "Happy Hooker." The New York Court of Appeals found neither a country club nor golfer liable to an adjacent property owner who was struck and injured by an errant golf shot. Specifically the Court in *Nausbaun v. Lacopo* opined that persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life. So, too, one who deliberately decides to reside in the suburbs on very desirable lots adjoining golf clubs and thus receives the social benefits and other not inconsiderable advantages of country club surroundings must accept the occasional, concomitant annoyances.

In Ohio, a lawsuit was brought where golf balls had broken a neighbor's windows, struck one daughter and just missed another. In response, the Court in *Patton v. Westwood Country Club* found that one who chooses to reside on property abutting a golf course is not entitled to the same protection as the traveler on the public highway. An owner who chooses to reside in an area that abuts an existing golf course, where the design and construction of the course and location of the tees, fairways and greens does not create an unreasonable risk of harm, was not entitled to an injunction restraining the golf course from operating in such a manner as to permit members' golf balls to land on the homeowner's property.

These two opinions are rooted in three very basic tort/negligence

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Toxic Mold Uncovered: Is There Insurance Coverage for Mold Related Claims?

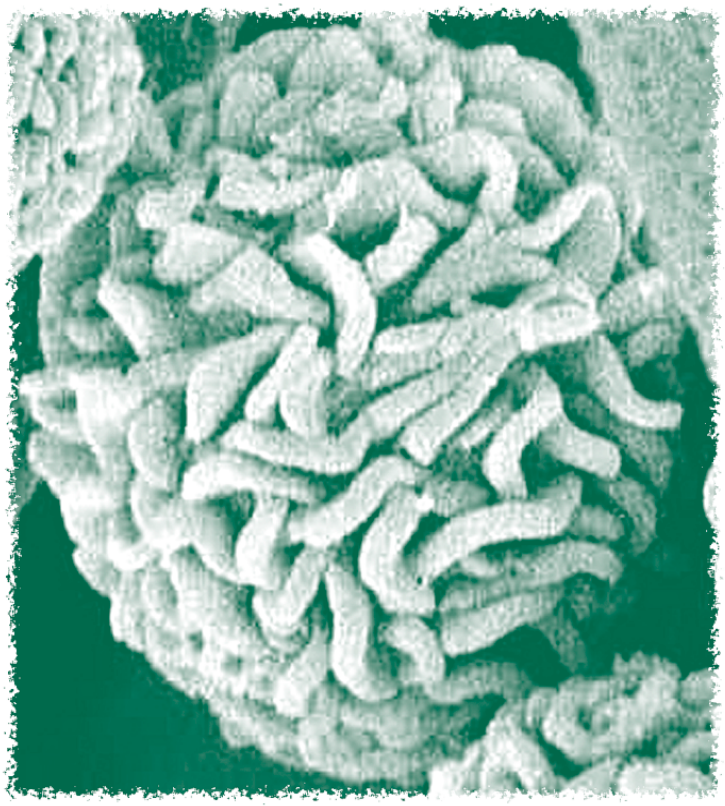
by Jessica F. Battaglia

The Mold Rush

Simply uttering the word "mold" is enough to make most of us cringe these days. This sentiment is revealed through the dramatic increase of toxic mold lawsuits alleging property damage or personal injury arising out of mold formulations found in residential and commercial real estate. Recent media exposure of high damage awards has increased public awareness in this area. For example, a Texas jury awarded a family $32 million for water damage and mold related claims. Similarly, a New York apartment complex tenant has filed a $65 million lawsuit alleging that mold caused her daughter's death. At least four other New York families are suing over the allegedly mold related deaths of their loved ones.

Further fueling the public controversy surrounding toxic fungal exposure are the well-publicized claims of Erin Brockovich and Ed McMahon regarding mold contamination of their homes. These and other media portrayals have given notice—that, where mold is found, litigation will soon follow—to a broad section of our society which is involved with real property: commercial and residential land owners, developers and contractors, condominium and homeowners associations, and their respective insurers. This article highlights the importance to those potentially affected by mold claims of obtaining competent counsel before attempting to navigate the myriad complexities of this difficult area.

The Insidious Intruder



According to the United States Environmental Protection Agency (USEPA), mold spores continuously "waft through the indoor and outdoor air." Spores may come to rest on indoor areas that are wet or damp and begin to grow. If left untreated, the spores will digest the very surface materials on which they grow—usually wood, paper, carpet, food or other organic material. In extreme cases, toxic mold can develop and become so pervasive that remediation becomes impossible.

Overshadowing the outwardly offensive physical and structural effects of mold is the fear of health risks. One of the greatest problems arising in connection with claims alleging personal injury due to mold exposure is the complete lack of uniform environmental and medical standards on the subject. While research is ongoing, mold experts appear to have reached agreement that mold *may* be a health concern. New Jersey's Department of Health and Senior Services (NJDHSS) has found that mold emit spores containing allergens that cause reactions in sensitive individuals. Recent research indicates that otherwise healthy people are more likely to develop symptoms of asthma and other disorders if exposed to certain types of mold. A study by the National Institute of Medicine found that those exposed to mold are statistically more likely to suffer from other symptoms, such as skin disorders, gastrointestinal problems and fatigue, although the study did not establish a specific causal relationship.

Molds also emit microbiological volatile organic compounds (MVOC's), which are generally associated with

"In an effort to control or limit their exposure, insurers have added or strengthened exclusions for mold related losses."

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SPOTLIGHT

APPOINTMENTS & RECOGNITION

Thomas F. Carroll, III, partner of **Hill Wallack** was recently appointed as Chairman of the Land Use Section of the New Jersey State Bar Association. He has previously served as Vice Chair and member of the Board of Directors of the 560 attorney Section for the past five years. Mr. Carroll is a partner of the **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups.** He concentrates his practice in the development application process and the litigation required in the course of land development. Mr. Carroll has significant experience in the land development application and permitting process, and has a practice concentration on the litigation of land use matters at the trial level and in the appellate courts. He has authored numerous articles and presented seminars concerning land use issues.

Kenneth E. Meiser, a partner of the firm has recently been re-appointed to the Board of Directors for the Central Jersey Builders Association and awarded the Central Jersey Builders Appreciation Award for Outstanding Performance on the Land Use Committee. Known for his role in several precedent-setting legal decisions, Mr. Meiser is a partner in the **Land Use Division.** He has a practice concentration in the areas of land use applications and litigation. A graduate of Xavier University, Meiser earned his law degree cum laude from Harvard Law School. He has taught courses in land use regulation as an Adjunct Professor at Rutgers Law School. A frequent public speaker, Meiser has made presentations to the Institute for Continuing Legal Education, the National Business Institute and numerous other organizations in New Jersey. He serves on the New Jersey Builders Association's Legal Action Committee and is a member and former chair of the Board of Directors of the Land Use Section of the New Jersey State Bar Association.

Dakar R. Ross, an associate at **Hill Wallack** where he is a member of the **Litigation Division, School Law** and **Municipal Law Practice Groups,** was recently appointed as a member of the Governor's Advisory Commission on Faith-Based Initiatives. The role of the Advisory Commission on Faith-Based Initiatives is to advise the Governor regarding matters affecting faith-based organizations including, but not limited to, making recommendations to the Governor concerning State programs and initiatives designed to assist faith-based organizations in their community improvement and redevelopment efforts. Mr. Ross received his law degree from Rutgers University School of Law and is admitted to practice in the State of New Jersey and the United States District Court.

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SEMINARS

Jeffrey L. Shanaberger, a partner at the firm and member of the firm's **Litigation Division** and **Trial & Insurance Practice Group,** was recently a featured speaker at the New Jersey State Interscholastic Athletic Association (NJSIAA) Workshop entitled *"Dealing with Difficult Issues and People: A Guide to Supervising Your Interscholastic Athletic Program."* Mr. Shanaberger's presentation focused on the current legal issues facing interscholastic athletics in his portion of the Workshop *"Sports, Courts and Torts"*. A fully-experienced trial attorney, Mr. Shanaberger has a practice concentration in trial and appellate practice, emphasizing on insurance coverage and defense in matters of governmental, public entity, civil rights, and real estate contract litigation. Mr. Shanaberger graduated with honors from Rutgers University and received his law degree, cum laude, from New York Law School. He is a member of the Middlesex and Mercer County, New Jersey and New York State Bar Associations, Defense Research Institute and the New Jersey Defense Association.

Michael S. Karpoff, a partner at **Hill Wallack** and member of the **Community Association Law Practice Group,** was recently a featured speaker at a seminar entitled *"Community Association Law: Update 2004"* presented by the New Jersey Institute for Continuing Legal Education (NJICLE) at the New Jersey Law Center in New Brunswick. The seminar focused

on the concerns of lawyers representing buyers of homes in common interest communities, issues which face association governing boards and their attorneys, and recent developments in community association law. Certified by the Supreme Court of New Jersey as a civil trial attorney, Karpoff is also a member of the National College of Community Association Lawyers of the Community Associations Institute (CAI). A graduate of Rutgers University, he holds a Master of Science Degree in public relations from Boston University, and received his Juris Doctor degree from Rutgers Law School – Newark. He is admitted to practice law in New Jersey, New York and Pennsylvania, as well as before the United States Supreme Court, the U.S. Court of Appeals for the Third Circuit, and the U.S. District Court for the District of New Jersey. Mr. Karpoff has written numerous articles concerning community association law and has lectured on such topics for Seton Hall Law School, the New Jersey Institute of Continuing Legal Education, the New Jersey Chapter of CAI and CAI's National Community Association Law Seminar. In addition to holding membership in several bar associations, he is a member of the New Jersey State Bar Association's Common Interest Ownership Committee and previously served as the Committee's chairman. He is also a member of the Editorial Board of the *Journal of Community Association Law.*

Terry A. Kessler, a partner of the firm where she is a member of the firm's **Community Association Law Practice Group,** was recently a featured speaker at the New Jersey Regional Council's 7th Annual Coffee and You! Program *"Media Mayhem on Main Street"*. Ms. Kessler gave a presentation on the sensational stories that make headlines concerning community associations and how to handle similar situations that generate negative publicity for community associations. The program was attended by managers and other vendors involved with the Community Association Institute in South Jersey. A graduate of Albright College, Ms. Kessler received a degree in law from Seton Hall University School of Law. Ms. Kessler is actively involved in the New Jersey Chapter of Community Associations Institute (CAI) as a frequent lecturer on community association law. She also previously served as chairman of the Chapter's membership committee, has served on the Special Events Committee and the Trade Show Committee. She is currently a member of the Education Committee.

Nielsen V. Lewis, partner of the firm was recently a featured panelist at two timely environmental law seminars. He provided an overview of New Jersey's new Natural Resource Damage Claims Enforcement Program at the seminar, *"Natural Resource Damages and Insurance Coverage For Those Liabilities,"* sponsored by the Insurance Law, Corporate and Business Law and Environmental Law Sections of the New Jersey State Bar Association and the Insurance Council of New Jersey. In June, at the *"Natural Resource Damage Claims"* seminar hosted by the New Jersey Institute of Continuing Legal Education (ICLE) in cooperation with the Insurance Law Section, Mr. Lewis opened the program speaking on the topic, "Natural Resource Damage Claims and the Public Trust Doctrine: An Ancient and Evolving Doctrine." Partner-In-Charge of the **Environmental Law Practice Group,** Mr. Lewis counsels clients on a wide variety of environmental and related insurance matters and represents them in complex environmental matters and litigation. He is a frequent lecturer at continuing legal education, business and municipal seminars, and the author of numerous articles on timely environmental and insurance topics. Immediate Past Chair of the Insurance Law Section of the State Bar Association, Mr. Lewis is also a member of its Environmental and Dispute Resolution Sections. He is admitted to the Superior Court Roster of Court-Appointed Mediators. Mr. Lewis earned his law degree from the University of Michigan Law School and is admitted to practice in New Jersey, the United States District Court for the District of New Jersey, and the United States Court of Appeals for the Third Circuit.

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Your Lawn Is Making Me Sick! Pesticide Application and Multiple Chemical Sensitivity

by Todd D. Greene

Many community associations spend a sizable portion of their operating budgets on landscaping to ensure that the association's property is lush, green and pest free. Unfortunately, the very chemicals and pesticides landscapers use can pose a serious health risk to certain members of the community. Individuals suffering from Multiple Chemical Sensitivity Syndrome or "MCSS" can become severely ill from being exposed to chemicals that are benign to the majority of the population. Recently, individuals with MCSS have sought legal protection and relief in lawsuits involving fair housing and discrimination. This article seeks to give a brief overview of MCSS and how an association can avoid indirectly injuring its members and potential liability.

What is Multiple Chemical Sensitivity Syndrome?

MCSS has many definitions, but the most comprehensive may be the one offered by the Ad Hoc Committee on Environmental Hypersensitive Disorder of the Ontario Ministry of Health. The Committee defined MCSS as "a chronic multi-system disorder, usually involving symptoms of the central nervous system. Affected persons are frequently intolerant to some foods, and they react adversely to some chemicals and to environmental agents, singly or in combination, at levels generally tolerated by the majority." The symptoms of MCSS include depression, irritability, mood swings, an inability to concentrate or think clearly, poor memory, fatigue, drowsiness, diarrhea, constipation, sneezing, runny or stuffy nose, wheezing, itching eyes and nose, skin rashes, headache, muscle and joint pain, frequent urination, pounding heart, muscle incoordination, swelling of various parts of the body and even schizophrenia.

Multiple Chemical Sensitivity and The Fair Housing Amendments Act

The Fair Housing Amendments Act ("FHA") makes it unlawful to discriminate against any person regarding the terms, conditions or privileges of sale or rental of a dwelling, or in providing services or facilities in connection with a dwelling because of a handicap. It is a violation of the FHA to refuse to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling.

In 1992, Housing and Urban Development officially recognized that individuals with MCSS are handicapped within the meaning of the Act. As a result, any community association that refuses to make reasonable accommodations to an individual with MCSS may be liable under the FHA.

For example, in *Lebens v. County Creek Ass'n,* a case emanating from the Eastern District of Virginia, a plaintiff lessee with MCSS alleged that the pesticide spraying throughout her townhouse community exacerbated her MCSS symptoms and prevented

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"The Fair Housing Amendments Act ("FHA") makes it unlawful to discriminate against any person regarding the terms, conditions or privileges of sale or rental of a dwelling, or in providing services or facilities in connection with a dwelling because of a handicap."

DOs & DON'Ts of D&Os

by Adam S. Picinich

"In order to overcome the Business Judgment Rule's rebuttable presumption, an injured party must show fraud, illegality, conflict of interest, or lack of rational business purpose."

The fundamental role of directors and officers of condominium associations and homeowner's associations is to manage the business of their respective associations. Namely, they establish the corporate policies, declare monetary distributions, and recommend fundamental corporate changes. In executing these roles, the directors and officers of condominium associations and homeowner's associations must discharge certain fiduciary duties. Typically, fiduciary duties stem from the obligations owed as a result of the relationship between a trustee and the entity for which the trustee acts. As trustees, the directors and officers owe both the duty of care and the duty of loyalty to the association that they govern.

The Duty of Care

As a fiduciary of the corporation, a director or officer's nonfeasance or malfeasance may give rise to liability. In a situation of nonfeasance, liability stems from a director or officer's inaction that proximately caused a loss to the corporation. In the case of malfeasance, liability may arise when a director or officer acts in a fashion that causes harm to the corporation. However, in the case of malfeasance, a director or officer will not be held personally liable if he or she has satisfied the Business Judgment Rule. This rule creates a rebuttable presumption that the directors and officers were honest, reasonable, informed, and rational in reaching their decision to act. In order to overcome the Business Judgment Rule's rebuttable presumption, an injured party must show fraud, illegality, conflict of interest, or lack of rational business purpose.

In *Francis v. United Jersey Bank,* the Court addressed the issue of whether a corporate director may be held personally liable for failing to prevent other directors (who were also officers and shareholders) from misappropriating corporate trust funds. There, the plaintiff trustees filed an action to recover the funds a corporation paid to its primary shareholder's estate and family members that were the directors and officers of the corporation. The New Jersey Supreme Court applied a negligence standard to the defendant director, finding that the defendant director breached her duty of care due to her nonfeasance.

The Supreme Court held that, as a general rule, corporate directors must "acquire at least a rudimentary understanding of the corporation" by apprising themselves of the "fundamentals of the business in which the corporation is engaged." Accordingly, a director or officer's duty of care must be discharged in good faith and with a degree of diligence, care and skill that an ordinarily prudent person in the like position would exercise in similar circumstances. Furthermore, to facilitate proper participation in the overall management of the corporation, directors and officers are charged with a continuing duty to keep themselves reasonably informed of the business affairs of the corporation; they may not "bury their head in the sand" with respect to corporate misconduct and then maintain that they did not have a "duty to look." As noted by the Supreme Court in *Francis,* the "sentinel asleep at his post contributes nothing to the enterprise he is charged to protect." Thus, to avoid personal liability as fiduciaries of the condominium/homeowner's association, directors and officers must educate themselves as to the basic workings of the corporation in which they govern as the duty of care requires a director and/or officer to be reasonably informed of the workings of the corporation. Furthermore, to protect against personal liability, directors and officers must make honest, reasonable, and informed decisions to act on the corporation's behalf to ensure that such decisions are protected by the Business Judgment Rule.

Duty of Loyalty

The second duty required of a

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Court Speaks on Speech... cont. (continued from page 4)

insurance requirement, finding that the charges are reasonably related to the Association's costs and the insurance requirement can be met at no cost and with little difficulty. However, the court overruled the Board's ability to deny rentals because there were no standards to guide its decisions.

The Association publishes a monthly newsletter, *Twin Rivers Today,* which is distributed to the residents. The newsletter contains articles about Twin Rivers, a president's message, and letters to the editor. The plaintiffs complained that they were denied equal access to *Twin Rivers Today* because the president of the Association, who also was the editor, allegedly used the newsletter to advance his own views and to criticize them and placed their responses in positions of lesser prominence. The court rejected that argument, stating that as long as the newsletter prints opposing viewpoints, its editors retain discretion on the actual content and placement of articles.

Disclosure of Documents and Information Subject to Reasonable Rules

Another subject of plaintiffs' complaint concerned the Association's policies regarding disclosure of information. As a result of an earlier lawsuit, the Association had adopted standards for disclosing documents requested by unit owners. The plaintiffs argued that the policy denies access to documents to which they are entitled. The court found the policy to be valid because it is within the authority of the Board and contains sufficient standards.

The Board also had adopted a resolution concerning confidentiality of certain Board matters and subsequently censured one of the plaintiffs, a Board member, for violating that resolution. Plaintiffs argued that the Board exceeded its authority in determining what subjects were confidential. The court referred to an opinion by an official of the Department of Community Affairs which disagreed with the Board's position but ultimately ruled that the resolution was unenforceable because it contained no standards as to confidentiality.

Association members may obtain a copy of the membership list, but only if they sign an agreement to keep the list confidential. The agreement required a member to pay liquidated damages of at least $1,000.00 if he or she breached the agreement. The plaintiffs sought to invalidate these requirements. The court approved the confidentiality requirement as reasonable but voided the liquidated damages clause because there was no showing that the amount was reasonably related to actual damages.

ADR Procedures Approved

Twin Rivers established a procedure for alternative dispute resolution (ADR). The rule requires the party requesting ADR to submit a $150.00 deposit but splits the costs equally between the parties. The rule exempts three types of disputes from ADR: disputes over common expense assessments, election issues, and issues of compliance with the governing documents or applicable law. Plaintiffs sought to void the ADR rule on the grounds that the cost is too high, and that it improperly excludes matters, contrary to PREDFDA. The court found the ADR provision to be valid.

Finally, the plaintiffs argued that Twin Rivers' voting formulation, based upon the respective value of the units, is constitutionally unsound. They also claimed that a rule prohibiting owners who are delinquent in paying assessments or fines from voting is improper. Plaintiffs asked the court to impose a requirement of one vote per unit, including tenants. The court rejected this claim, finding that the owners had consented to the voting scheme by taking title subject to the governing documents, and that tenants have no right to vote since they are not members of the Association.

Owners' Speech Balanced Against Association's Responsibilities

In summary, the court held that since Twin Rivers has not opened itself to public access and is not an arm of municipal government, the Association's actions are not subject to state constitutional guarantees. Rather, the Association's regulations must be judged on whether they are authorized by the governing documents and state law, whether they reasonably achieve permitted objectives, and whether there are sufficient guidelines to prevent arbitrary action. Governing boards must act in good faith, without fraud or self-dealing and must allow unit owners reasonable opportunities to express themselves regarding association matters. As long as they act in such a manner, the courts will allow them discretion.

Thus, the *Committee for a Better Twin Rivers* case presently stands for the proposition that although constitutional provisions do not apply to private communities which do not invite public speech, unit owners do have certain rights of expression. Those rights are subject to reasonable limitations so that they do not interfere unduly with the rights of other members, the functioning of the association, or the ability of the association to fulfill its purposes. However, the plaintiffs have appealed the court's decision, so the final word on members' speech rights has not yet been spoken.

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Toxic Mold Uncovered... cont. *(continued from page 7)*

mold's unpleasant smell. The most widely publicized types of mold are those that emit potentially toxic substances called "mycotoxins." The *Stachybotrys chartarum (Stachybotrys atra)*, or "black mold", is one of the more common strains of mold known to emit mytoxins.

According to both USEPA and NJDHSS, myotoxin emissions have been found to cause irritation in the eyes, skin, nose, throat, nervous system [vertigo, memory, irritability, concentration, and verbal dysfunction] and lungs, and may even cause cancer, in both mold-allergic and non-allergic people. The NJDHSS cautions that these effects vary among individuals, and that there is no conclusive medical evidence that mold exposure always presents a health problem.

Determining the Extent of Exposure

The ubiquitous nature of mold, and the many unknowns associated with it, have caused insurance carriers—particularly those writing homeowners and casualty policies—to wrestle with coverage issues. For example, does unsightly mold on a surface constitute property damage or must there be damage to the underlying material before coverage is triggered? Similarly, it is very difficult to determine when a mold related loss occurs; particularly in instances of alleged injury or illness resulting from mold exposure. Mold tends to settle within dark and damp areas; usually discovered only after structural facades have been opened or removed. Moreover, there is no test that can determine definitively when a mold formation first occurred. Consequently, there is no bright-line method for insurers or claimants to determine whether a given loss occurred during a particular policy period. Such uncertainties increase the likelihood of lengthy and costly litigation to determine whether there is insurance coverage for mold related losses.

Uncovering Mold

In an effort to control or limit their exposure, insurers have added or strengthened exclusions for mold related losses. In September of 2003, the New Jersey Department of Banking and Insurance (DOBI) issued a bulletin to all New Jersey property and casualty insurers providing guidelines on Mold/Fungus Exclusions. The Commissioner advised that personal and commercial lines property insurers should offer a minimum of $10,000 in aggregate coverage with optional increased limits of $25,000 and $50,000 for costs to remove mold from property, tear out and replace any part of the building or other covered property needed to gain access to mold and for testing air or property to confirm the absence, presence or level of mold.

Conclusion

Those potentially affected by mold related claims have little direct guidance under federal, state or local law upon which to assess their insurance needs or their non-covered risks. Absent legislation or regulation which clarifies the exposure of property owners and contractors to such claims and the contours of permissible first and third party insurance policies to respond to such claims, these uncertainties will necessarily be addressed through litigation in state and federal courts. Early legal consultation with counsel knowledgeable in this area is essential to assure that you understand your exposure to mold related liabilities and to assist in evaluating your insurance protection. Similarly, upon notice of a developing mold condition, prompt legal counsel is critical to properly address the many legal and insurance issues which mold claims create. As always, the attorneys at **Hill Wallack** stand ready to provide prompt, effective and cost-efficient legal counsel on these complex issues.

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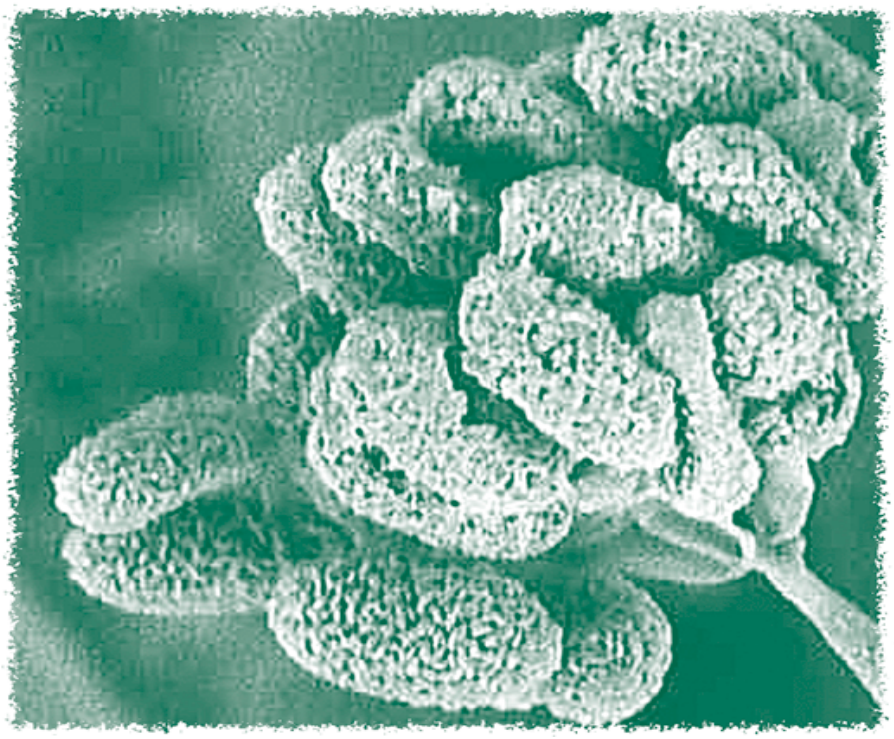

Your Lawn Is Making Me Sick!... cont. *(continued from page 10)*

her from using and enjoying her dwelling and surrounding areas. To accommodate the plaintiff, the community agreed to adopt an integrated pest management program which eliminated blanket spraying and established a pesticide-free zone surrounding plaintiff's home. The settlement agreement also designated specific mechanical controls and horticultural practices; included a list of approved pesticides for limited, identified uses; and provided a seven-day notice requirement for any proposed construction or pesticide use.

New Jersey Pesticide Regulations— Notification Required

New Jersey is one of the most progressive States when is comes to pesticide regulations. Commercial applicators are highly regulated to ensure that pesticides are used in a safe manner. In many instances, the administrative code may require notification of the target community prior to the use of a pesticide. Furthermore, *N.J.A.C. 7:30-9.15,* which governs general notification requirements, mandates that no person should apply a pesticide "where a person not previously notified requests to be notified of such an application, or where conditions indicate that notification in addition to that specified in this subchapter is necessary to prevent a significant risk of harm, injury or damage." If notification is required, it shall be made and reasonable precautions taken, including the allowance of sufficient time for those notified to take appropriate precautions, before application may commence. Notice must include the date and time of the pesticide application, the brand name and EPA registration number of the pesticide which will be applied, the common chemical name of the active ingredients, the location or address of the application and the name and telephone number of a contact person to receive further information.

Conclusion

In light of the aforementioned regulations, there are a few simple steps a community association should follow in order to avoid injuring members of the community and risking costly legal action. First, a community association should hire a reputable, licensed landscaper. Second and most important, the association should know its members. A brief survey should be sent to the members of the community to determine if anyone suffers from MCSS. If so, appropriate measures must be taken to avoid harmful exposure to a pesticide or other chemical. Lastly, the association must provide appropriate notice to the members of the community prior to any pesticide application. By following these few simple rules, an association can protect itself and its members.

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...Going To The Dogs cont.

(continued from page 5)

community, the individual requesting the accommodation may be required to submit a doctor's or psychologist's certification or affidavit which validates the claim and substantiates the need in accordance with the law. This certification should be forwarded to the individual with a request that it be completed by a licensed professional who is treating the person and is willing to certify as to the need for the pet. While it may be easier for a patient to provide a note from a doctor or other health care provider, it is suggested that a note is not sufficient. The association should require a statement which forces the writer to acknowledge the truth of the information being provided.

The form should require the health care provider's name, address, telephone number, specialty, and license number. This information is necessary to verify that the health care provider is qualified to make the statements on behalf of the individual. In addition, the health care provider should verify that the individual requesting the accommodation is handicapped as defined under the Act and should provide a description of the handicap. Furthermore, the health care provider should certify that the patient has requested a waiver of the association's policy and describe what the waiver entails. The health care provider also should certify that the waiver of the association's policy will alleviate or mitigate the described handicap, and that the reasonable accommodation proposed is satisfactory. Finally, the health care provider should be made aware that the information provided will be kept confidential but may be periodically reviewed to verify and revalidate the information supplied.

If a request is made to your association for a waiver of the governing documents to accommodate a disability, legal counsel can provide an appropriate certification to be completed by the health care provider and submitted to the association. Use of such a procedure will help prevent the association from wrongfully denying a reasonable accommodation. Moreover, the certification process assures the membership that exceptions to the governing documents are granted only if required by and consistent with federal law.

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Governing Documents... cont. *(continued from page 3)*

part of the Brandon Farms community, he or she presumably was aware of the respective financial obligations. Individuals made their purchase decisions relying at least in part on the arrangement set forth in the documents. Absent an unconscionable provision, the expectations of the parties should be fulfilled. (Interestingly, the assessment arrangement contained in the Brandon Farms Declaration was reviewed and approved by the New Jersey Department of Community Affairs, the regulatory agency governing community associations. Section 7.21 was not sufficiently disturbing that it concerned the regulators.)

Next, the Supreme Court adopted the factual findings of the trial court, which were based on limited evidence and only superficial analysis. The assumption seems to have been made that all delinquencies are uncollectible. The Court did not consider the assessment collection process and the impact of those costs on the unit owners. The Community Associations Institute (CAI), as *amicus curiae,* had argued that the arrangement contemplated by Section 7.21 would result in a single collection effort against a defaulting unit owner who would most likely be in default of both the condominium assessment and property owners assessment as well and therefore would result in greater economy and efficiency. The Court's ruling, on the other hand, means that both the condominium association and the property owners association must independently seek collection of fees from a single defaulting owner.

Third, the Court relied, in part, on *N.J.S.A. 46:8B-12.2,* a statute which essentially prohibits a developer from entering into long term management, employment, service or maintenance contracts, or contracts for equipment or materials. In Brandon Farms, though, the declaration established the manner and method of collecting these fees, and the condominium's master deed adopted the provisions of the declaration. This is not a question of the developer-controlled board entering into a contract relating to the collection of fees; the developer established the collection method through the constituent documents, to which the individual unit owners are contractually bound. One wonders whether the Court might have reached a different conclusion had the condominium's master deed expressly repeated Section 7.21 verbatim instead of adopting it by reference.

The Supreme Court has clearly indicated that it will review governing and financial arrangements in common interest communities on the basis of fairness and equity. While no one can argue that governing documents should be anything but fair and equitable, some deference should be given to the reasonable expectations of the parties and the relationships that have been created by approved, published and recorded documents. There was no demonstrable evidence that the arrangement in Brandon Farms was so onerous or burdensome that it should be invalidated.

The Supreme Court thus has indicated a willingness, in both the *Brandon Farms* and *Kings Grant* cases, to rewrite association documents when it perceives an inequity. We may see more cases in the future challenging governing documents in which allegations of inequitable treatment are raised.

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DOs & DON'Ts of D&Os cont.

(continued from page 11)

director or officer is the duty of loyalty, which requires the placement of the corporation's interests above their personal financial interests. More specifically, directors and officers are obligated to act in good faith and with the conscientiousness, fairness, and honesty that the law requires of fiduciaries. They are not permitted to use their position of trust and confidence to further their private interests. The public policy underlying the duty of loyalty demands the utmost observance of the duty to protect the interests of the corporation and to refrain from engaging in any transactions that would cause injury to the corporation or that would deprive it of profit or advantage which his skill and ability might properly bring to the corporation. A breach of the duty of loyalty may arise when a director or officer engages in self-dealing transactions or misappropriates a corporate opportunity. Given the conflict of interest involved in a breach of the duty of loyalty, a director or officer cannot invoke the Business Judgment Rule in defense of a claim for personal liability. Thus, an aggrieved party does not have to overcome the presumption that the director or officer's actions were honest, reasonable, informed, and rational.

The administration and interpretation of the fiduciary duties imposed upon the directors and officers of Condominium or Homeowner's Associations may be difficult to comprehend without the guidance of knowledgeable legal counsel. **Hill Wallack's** Community Association Law Practice Group is legally experienced and knowledgeable in representing Boards of Directors and Trustees and is readily available to provide guidance in the interpretation and execution their official duties.

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The Price of a Happy Hooker cont.

(continued from page 6)

principles. The principles include notice, foreseeability and assumption of risk. Assumption of risk can be compared to "coming to the nuisance" in a "property sense." The doctrine of assumption of risk is an affirmative defense that may be invoked to escape or diminish liability for having created unreasonable risk of injury if one can prove that the injured party knew of the danger, appreciated its unreasonable character and then voluntarily exposed himself to it.

In the recent Middlesex County Special Civil action entitled *Anklowitz v. Greenbriar Golf Association*, the Court refused to impose liability on a golf association for errant golf shots. Plaintiff's Complaint alleged that the golf course association refused to remedy a dangerous condition which interfered with the quiet, peaceable use and enjoyment of property. Further Mr. Anklowitz complained that errant golf balls frequently hit his deck, backyard, house and nearly missed individuals. He asked the association to install trees or reimburse him for the cost of installing trees to provide safety and protection.

The case proceeded to trial before the Honorable Frank M. Ciuffani, J.S.C. After both parties rested, the Court considered the Plaintiff's Complaint, the evidence before it and the motion for summary disposition filed by **Hill Wallack** on behalf of the Association. On what was described as an issue of first impression for the Court in the State of New Jersey—liability of a golf association for errant golf shots—Judge Ciuffani dismissed the Plaintiff's Complaint in its entirety and rendered a judicial opinion in favor of the Association.

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