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*Social Media in Communities: Is Facebook Your Friend or Foe? Is Using Twitter Good or Bad for the Community? How Associations Can Benefit from and Properly Handle Social Media Issues.*

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Community Association Law Seminar

2017 Best Manuscript

ISBN: 978-1-59618-085-7

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Community Association Law Seminar 2017

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Printed in the United States of America

## **Social Media in Communities: Is Facebook Your Friend or Foe? Is Using Twitter Good or Bad for the Community? How Associations Can Benefit from and Properly Handle Social Media Issues.**

This session is an interactive discussion from the perspective of two association attorneys and a senior claims adjuster for a leading association insurance provider. You'll learn about how properly control your clients' online association profiles and communications and discuss situations in which social media exposes an association to potential liability, the possible insurance coverage issues that arise, and where the courts stand on these topics.

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## **I. Use of social media by Associations. (Edward Hoffman, Jr., Esq.)\***

### **A. Planning and executing an association's online profile – websites, social media and online communications.**

Time and time again, I have seen too many communities go “online” without really having a plan. The end result is usually a disorganized free-flow of ideas and information that serves no real purpose aside from being able to say that the community is online. Instead of simply throwing content on a website, the community's leaders should determine exactly why they want the community to be online. Determining why the community is going to be online will then automatically serve to determine what gets put online. For example, if the community's main purpose in going online is to disseminate information relevant to the community to its member-owners, then the content that is posted should be specifically tailored to that audience. Posting content about topics unrelated to information about the community will only distract from the purpose of the association's website and may lead to unexpected problems down the road. Therefore associations should carefully plan and execute their various online profile(s). This section will provide guidance to association counsel on how to best protect their clients' interests in this online world, from 2017 and beyond.

### **B. Limiting content.**

From a liability perspective, the Achilles heel for most association websites is the failure to limit content. Content should be limited, by the association, to matters that benefit the community. A community should never allow unrestricted content to be posted to its website, whether it comes from members or non-members. In other words, the official association website is not the place to allow people to post their gripes about

the association, its leadership, other owner-members, the municipality, the landscaper, the Manager or a host of other unsuspecting victims. The association website should therefore not contain an “open-posting” forum, bulletin board or other area where people can freely post anything they want to the website. Remember, this content gets posted to the association website, which means that the association can be held responsible for its content. If owner-members want the community to have an online “bulletin-board” to post garage sales, items for sale, recipes, a community calendar and other events, the community should encourage members to submit this information to the designated contact person for the community website, either by email, mail or in person. This person can then compile the information, edit if necessary, and post it to the website.

### **1. Public v. Private Content.**

With respect to any content that is posted by the association to its website, the difference between public and private content must be examined very carefully by the association. In a nutshell, public content is content that the whole world can see, for example, the association name, the location of the community, amenities and photographs of common areas. Public content is generally included in an association website to show people why that community is, in fact, a great place to live. Some associations post association documents, like committee forms, budgets, meeting minutes and other items as public content. Generally, associations should post these items to a designated “owners-only” area that requires a username/login and a password for access. While people who do not live in the community might, for some odd reason, want to read the association’s budget or check out last month’s meeting minutes or a blank architectural review committee application, they are not entitled to have access to these documents.

These types of documents are relevant to those who live in the community and access to them should therefore be limited to residents.

An association's governing documents might provide the association with the ability to post information on a community bulletin board, electronic or otherwise, including the names of owners that are more than ninety (90) days delinquent on their assessments, for example. This information should not be posted to the "public" portion of the website because of privacy concerns and fair credit issues. For instance, if Mrs. Jones in unit 2B is 120 days in arrears on her assessments, a quick Internet search of "Mrs. Jones, unit 2B, town of XYZ" might provide this information to a potential employer, creditor or other person that might wrongly or illegally hold it against Mrs. Jones. Sometimes sharing information becomes a problem not only for those whom are the subject of the information, but also for those who are innocently providing the information for some good-faith purpose. Remember, the general rule is that once information is out in cyberspace, it can't be taken back or permanently deleted. Therefore, it is better to ensure that the content that is posted on the association website is really content that is safe for public consumption.

Dealing with private content is a bit trickier since there are two levels: (1) private content which all members of the community have access to; and (2) private content specific to each individual owner. All members might have access to association forms and documents. If an association wants to post its various community documents online for the benefit of its owner-members, the association can easily set up a designated area that requires a login and password to gain access to this downloadable information. The

designated website administrator should be the only person able to upload documents to the website, so that the association can control which documents are posted.

Associations should also include the community's online bulletin board, calendar and contact information for the Manager in the private members-only area rather than on the public portion of the website. While this is "private" content which only members of the community can view, associations should limit the content that goes in this area just as they limit the content that goes in the public area of the website. For example, while the association might be allowed to post the names of owners that are more than ninety (90) days delinquent on their assessments, it doesn't mean that the association should do it — even on the "private" portion of the website. Common sense should come into play (gasp!) and an evaluation of why the association is posting this information should be undertaken. Moreover, if it decided that this arrearage information will be posted to the private portion of the website, the association must uniformly apply this standard to all members of the community on a consistent basis, and not just a handful of people in a piecemeal fashion. Otherwise, the association might find themselves defending an "unequal enforcement" or defamation to reputation lawsuit brought by the owner that feels like they were singled out by the association.

The second level of private content, content that is specific to each individual owner, is an area that is ripe for potential legal problems if the information were to get into the wrong hands. This content includes, but is not limited to, banking and account information for electronic assessment payments by owners, the owner's account history and other Personally Identifiable Information (PII)<sup>1</sup> like Social Security numbers, vehicle

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<sup>1</sup> It is noted that many states have statutes that deal with the breach of PII. For example, in Mr. Hoffman's home state of Pennsylvania, the Breach of Personal Information Notification Act (BPINA),

license plate numbers, birthdays, private telephone numbers and an owner's age. Therefore, if an association chooses to post this content on the Internet, it must do so with the understanding that this information is confidential in nature and every possible precaution must be undertaken to protect this information. Aside from the normal login & password requirements, the portion of the site should also utilize a secure connection (usually Transport Layer Security, or TLS, in the form of an "https" page over the Internet) to protect the information.

It is recommended that associations use a qualified, professional management company to provide such a service or a third-party vendor that specializes in this area of information technology. Retaining a third party to handle managing and protecting the private content is a good idea (along with getting the third party to agree to indemnify, hold harmless and defend the association), but this may not completely absolve an association from liability should there be a breach of information (it is noted that should a breach occur, the affected owner(s) must be immediately notified of said breach under most breach statutes). However, every association should strive to be proactive when it comes to protecting private content. A failure to be proactive can lead to potentially devastating consequences for an affected owner and a strong likelihood that the association will face some sort of legal liability for the breach.

### **C. Monitoring content.**

If an association decides that it wants to allow some level of interactivity or unrestricted posting on its website (which the author strongly advises against), then it is

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73 P.S. § 2301 *et seq.*, applies. The BPINA defines PII, breach, and designates the procedure for notification to those whose PII data may have been breached. A violation of the BPINA also constitutes a violation of Pennsylvania's consumer protection law and permits the Pennsylvania Attorney General to bring an action under the consumer protection law for a violation of the BPINA.



imperative that the association monitor what is being posted on the site. Monitoring the content that is posted to the site should be done on a consistent, timely basis by a designated moderator, such as the Property Manager or a member of the Property Manager's staff. Alternatively, one of the Board Members can be assigned the task to regularly monitor the website (or a committee can be formed, under the authority of the Board). The moderator should enforce the "ground rules" that must be listed on the site as it pertains to posting.

Ideally, the association should have an Acceptable Use Policy (AUP)<sup>2</sup> for posting that the site visitor must agree to *prior* to being able to post any content to the website. An example of what the AUP should provide for includes, but is not limited to, the following:

- The posting of harassing, discriminatory or otherwise threatening comments and/or material is prohibited;
- The posting of pornographic, obscene, hateful, incendiary, violent, unlawful or otherwise illegal comments and/or material is prohibited;
- The uploading of copyrighted material or images is prohibited;
- The posting of defamatory comments of any kind is prohibited;
- The posting of personal views as representing those of the association is prohibited;
- The posting of "junk" messages, advertisements or other solicitations, not related to the association in any way, is prohibited;
- The association reserves the right to remove offending post(s) without any prior notice and/or reserves the right to terminate access to any person who does not abide by the posting policy.

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<sup>2</sup> These materials focus on policies pertaining to the association's online presence and not "internal" policies that deal with association employees or agents. All associations should also adopt a AUP/E-mail and Internet Use Policy and a policy pertaining to handling PII, including a plan for notification of a breach, for their employees and agents.

Any violation of the AUP can be grounds for removal of the post and a ban on all future posts on the association's website. This type of content monitoring and moderation can also be performed on social media websites like Facebook, so long as the association sets up and runs the social media page on behalf of and in the name of the association.

It is good practice to never allow an owner or some other person to set up a social media page on behalf of or in the name of the association because (a) others may think it is the official association page and (b) the association won't be able to manage/restrict the content on the page. If an owner is hosting such a social media page, the association can politely ask the owner to remove the page and can concurrently direct all owners to "join" the "official" social media page for the community by informing the owners by way of newsletter, e-mail or otherwise. If an owner or other person who is hosting the "non-official" social media page refuses to take it down, the process of trying to have an "unauthorized" association social media page removed from the hosting social media site frequently involves litigation and can be lengthy, expensive and stressful for an association to endure. In addition to the logistical and economic aspects involved in such an undertaking, first amendment freedom of speech issues would most certainly be implicated, and the end result is not guaranteed. However, this being said, the association most certainly has a duty to at least make a reasonable effort to deal with any unauthorized sites which purport to be the association site, regardless of outcome.

The best course of action therefore appears to be for the association to create an AUP for members who want to post to an "open" association website as well as a similarly-structured social media policy (SMP) identifying the association's social media page(s) as the official page(s) for resident use. Having owners sign a copy of each policy

would put them on notice as to the existence of each policy and may dissuade negative behavior associated with a breach of either policy. While the legal enforceability of each type of policy in a community association setting currently lies in uncharted waters, given the prevalence of technology in a community association setting these issues will most certainly be litigated at some point in the near future.

Finally, while implementing acceptable use and social media policies and monitoring posted site content is surely proactive behavior, these actions can't completely relieve an association of potential liability for improper, damaging, false, inflammatory or defamatory content that is posted to the association's website or social media page. The key is to never acquiesce, either by way of action or by a failure to act, to potentially harmful postings on the association site.

**D. Proactively handling social media issues and problems, including non-sanctioned and “unofficial” sites and pages.**

Cyberspace, like outer space, is a seemingly endless place. Just as exploration of outer space is possible, so is exploration of the Internet. However, rather than using spacecraft, all we must do to explore the Internet is log a few keystrokes. In other words, we can utilize the myriad of search tools available on the Internet to pinpoint the exact information we need. Using sites like Google, for example, we can search most of the information that is publicly available on the Internet for free and with very little effort.

Accordingly, my advice is to perform a search, every so often, on the association's name. This is due to the prevalence of copycat websites which purport to be the official association site, as well as an increasing number of “anti-association” sites created by disgruntled owners, former owners, non-community member neighbors or others that have an axe to grind with the association. An association should act quickly to

remove a website which purports to be the official site. This is no easy task, and it usually involves litigation against the copycat site operator.

Similarly, should an “anti-association” website be located which contains negative, inflammatory, defamatory, false, confidential or damaging information on the website, the association must take affirmative steps to try and have this website taken down or at least have the harmful information removed from the site.

On social media sites, associations may discover unofficial pages run by owners, former owners and others, related to the association. If run by current owners, the association should politely ask the owner to remove the non-official page and ask all owners to join, “like,” or follow the official page for the community.

The situation is a bit more problematic when groups of owners maintain their own page. These members of the community may use the social media page, which is sometimes public in nature due to a lack of privacy restrictions set up by the page administrator, to vent about issues of concern to the community. Association leaders or Managers should try to monitor these pages, if at all possible, and do the best they can to have the social media users limit their comments about the community or other owners. Of course it’s not always possible find every page that is somehow related to the community, but if one is found efforts should be made to try and protect the interests of the community.

Associations should also contact their insurance professionals and inquire about obtaining standalone cyber-liability insurance and/or adding a cyber-liability rider to their current insurance coverage in an attempt to insure against and offset any potential liability to the extent possible. Such insurance should cover employee technology use,

data breach and notification issues as well as “other” potential liability that may arise from and/or out of the association’s online presence (i.e., defamation, fair credit issues, etc.).

Finally, community leaders, Board Members and Managers should avoid connecting with association members on social media sites. By limiting their virtual relationships, they can avoid issues surrounding favoritism and ever-present fiduciary duty issues. If not “friending” others in the community is simply not possible, then the community leaders and Manager must refrain from posting comments about the community or community issues on any website that is not designated as an official community site. Similarly, even if the community leaders and Manager are not posting comments about the community or community issues on their own or their friends’ social media walls, they have an obligation to look out for the best interests of the association when reading comments that are made by others about the association.

**E. Do we need to go to court? Picking your battles.**

Associations must be proactive in cyberspace, in order to preserve the “virtual brand” of the association and protect the best interests of the association. When there is doubt as to what to do, association leaders and Managers should seek the advice of qualified legal counsel so the association. Counsel will need to carefully evaluate if the specific factual circumstances dictate that the association “become the plaintiff” and affirmatively seek relief in the form of injunctive/equitable relief in order to best protect the association from harm. The costs (from a financial and/or other perspective(s)), benefits and effects on the community as a whole must be considered in making this determination. Finally, association counsel should be cautioned that first amendment

protections might be at issue; therefore counsel and their association clients must also carefully weigh any actions that will be taken from this perspective.

*\* The author of this section, (Edward Hoffman, Jr., Esq.) notes that content in this section is based upon prior the written work of the author, notably, "Community Associations in the Information Age: How to Stay in Control and Out of Court", published in the November/December 2011 issue of Community Assets, a publication of the Pennsylvania & Delaware Valley Chapter, Community Associations Institute; "Social Safety: How an Association Can Stay in Control of its Online World", published in the May/June 2012 issue of Common Ground, a publication of the Community Associations Institute; and, a live/on-demand Community Associations Institute webinar, "Safely Social: Legal Issues of Social Media for Associations", originally presented in December of 2011.*

## **II. What Insurance is Available for Social Media Liability? (Daniela Burg, J.D.)**

An association's actions or inactions relative to social media may give rise to claims or suits triggering the Association's liability coverages – general liability, directors & officers liability and/or cyber liability.

### **A. Social Media and the Insuring Agreement of the General Liability Policy.**

All insurance coverage is dictated by the policy's language. Therefore, in order to evaluate whether a coverage part is triggered, it will be important to know the definition of key terms within the policy. The general liability coverage part generally states:

We will pay those sums the insured becomes legally obligated to pay as damages because of “bodily injury”. . . “personal injury” to which this insurance applies. . . . the insurance applies only to “bodily injury” . . . caused by an “occurrence”. . . . “personal injury” caused by an “offense”. . . .

#### **1. Mental or Emotional Injury as “Bodily Injury”.**

“Bodily injury” is generally defined to include “bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time.” However, injuries arising from social media typically involve not bodily injury, but rather, mental or emotional injury. Where the policy definition of “bodily injury” does not specifically include mental or emotional injury, it is questionable whether coverage is extended for emotional and mental injuries which may result from a social media posting.

In the absence of such a definition, emotional distress may not trigger the insuring agreement of a general liability policy. *See Allstate Ins. Co. v. Diamant*, 401 Mass. 654, 655 (1988)(finding that bodily injury is a narrow term encompassing only physical injuries). In fact, the “majority rule” is that pure emotional injury does not constitute “bodily injury.”<sup>1</sup> However, there are courts that will nonetheless interpret “bodily injury” as including such mental and emotional injury, notwithstanding the fact that the policy definition of “bodily injury” does not explicitly include mental or emotional injury. Certain courts have determined that an emotional injury, even in the complete absence of any physical manifestation, constitutes “bodily injury” for purposes of triggering the general liability coverage part.<sup>2</sup>

## **2. “Bodily Injury” Caused By An “Occurrence”**

One of the most common issues presented in general liability claims is whether an “occurrence” is alleged. The insuring agreement to a general liability policy typically affords coverage for injuries or damage only when caused by an “occurrence”, a term defined as an “accident.”

When considering a claim against an association for damages related to a social media post, it is not uncommon to hear “there can’t be general liability coverage because the act was not an ‘occurrence’”, or because “the act was intentional”. For example, so the argument goes, you cannot “accidentally” draft and post a message to social media.

## **3. “Personal and Advertising Injury” Caused by An “Offense”**

Often the definition of “personal and advertising injury” includes “oral or written publication, in any manner, of material that slanders or libels a person or organization or

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<sup>1</sup> See General Liability Insurance Coverage: Key Issues in Every State, p. 200, Randy Maniloff and Jeffrey Stempel, Oxford University Press, 2011. For example, in the recent case of *Heacker v. Safeco Ins. Co. of America*, 676 F.3d 724 (8<sup>th</sup> Cir. 2012)(Missouri), the Court found that “Physical manifestations of emotional distress or other related emotional harm may offer insight into the severity or extent of the emotional trauma suffered, but, absent some physical, bodily harm, such physical manifestations arise out of and are directly caused by purely emotional injury, which is clearly excluded from coverage.”

<sup>2</sup> In *Washington v. Krahn*, 440 F.Supp.2d 911, 913 -914 (E.D. Wis. 2006), the Court explained that Wisconsin is “one of a number of states in which an allegation of emotional distress is sufficient to trigger bodily injury coverage ‘when there is no physical impact, fear of physical harm, or physical manifestation of emotional distress.’ ” Citing *Eric Mills Holmes*, 20 *Holmes' Appleman on Insurance* 2d § 129.2, at 19 (2002).



disparages a person's or organization's goods, products or services" or "oral or written publication of material that violates a person's right of privacy." A social media post that defames a claimant's character would foreseeably qualify as a libelous statement thereby likely constituting a "personal injury" as defined by the applicable policy. Similarly, a social media post that disparages a particular contractor used within the community may constitute an "advertising injury."

#### **4. Potential policy exclusions.**

Even if the claim is being presented against an insured under the policy qualifies as a "bodily injury" caused by an "occurrence" or a "personal or advertising injury" caused by an "offense," there are coverage exclusions that may be applicable. Let's take a look at some potential exclusions:

- Expected or intended – Policies often include an exclusion for "bodily injury" expected or intended from the standpoint of the insured. Recall that the definition of "bodily injury" may include mental anguish or humiliation. Let's assume that the social media post makes public that Mrs. Jones from unit 2B is 120 days in arrears on her monthly assessments. If this post intentionally brings about mental anguish or humiliation to Mrs. Jones, this policy exclusion may apply and there may be no duty to defend or indemnify the association for a claim arising out of this.
- Acts causing personal injury – Policies often include an exclusion for personal injury arising out of oral or written publication of material if that publication is done by or at the direction of the insured with knowledge of its falsity. If the association posted that Mrs. Jones was 120 days in arrears, but knew that this information was false and the posting caused Mrs. Jones to be humiliated, this coverage exclusion may apply.
- Discrimination – The association's policy may exclude coverage for any claim or suit arising out of discrimination. If Mrs. Jones feels that she is being discriminated against in the publication of her private information, this coverage exclusion may apply.

#### **B. Coverage for Claims Under the Directors & Officers Liability**

## **Coverage Part.**

The directors & officers coverage part of the association's policy is also often implicated. The Insuring Agreement to a Directors & Officers Liability policy is drafted to include a vast number of possible claims. For example a common insuring agreement for the directors & officers liability coverage provides:

We will pay those sums that the insured becomes legally obligated to pay as damages because of any "wrongful act" to which this insurance applies.

"Wrongful act" is broadly defined as:

Any actual or alleged error, mistake, misstatement or misleading statement, act, omission or negligent or breach of duty by any insured.

For instance, if the policy provides that the insurer will pay for a "loss" that is the result of a "wrongful act" and the allegation is that the association's actions were discriminatory in nature resulting in damages, the directors & officers coverage part may be implicated.

### **1. Potential exclusions under the directors & officers coverage part**

Although a claim for a "wrongful act" resulting in damages may pass the test to initially trigger the insuring agreement of a directors & officers liability policy, coverage may nonetheless be precluded by the application of the following exclusions:

- Breach of contract – The association's policy may exclude coverage for any claim arising out of a breach of contract. Assuming that the association has an AUP or SMP which is breached, it is possible that the claimant would allege breach of contract and that this coverage exclusion could apply.
- Injury and damage – The directors & officers liability coverage part of the association's policy may exclude coverage for a claim that is related in any way to "bodily injury" or "personal injury." If Mrs. Jones alleges that she suffered any "bodily injury" or "personal injury" as defined by the applicable policy, it is

possible that there would be no coverage for the association under the directors & officers liability coverage part.

**C. Other Insurance Considerations.**

**1. Who is an insured?**

Let's assume that the association failed to use common sense and that they now find themselves defending an "unequal enforcement" or defamation to reputation lawsuit brought by the unit owner. Obviously, the association is the named insured on their liability policy, but what if the claim is against one of the board members? The "Who is an Insured" portion of the applicable policy will need to be reviewed. It is common for the policy to provide that directors are insureds, but only with respect to their duties as an officer or director. Was the social media post done in the director's capacity as a board member? If so, a defense may be provided pursuant to a reservation of rights. However, if the post was made by a board member, but it was done *outside* of his duties as a board member, he may not be considered an insured under the policy. In that situation, it is recommended that the unit owner/board member place any other insurance available on notice of the claim as they may not be covered by the association's policy.

Similarly, if a board member posts on a non-sanctioned or "unofficial" association page, the facts surrounding the post will need to be carefully reviewed to determine whether that board member would qualify as an insured. Was the posting on the "unofficial" page done in his capacity as a board member? Did he simply use his position as a board member to share pertinent information on that non-sanctioned web page? If so, he may be considered an insured under the association's policy. However, if the board member posted on the association's "unofficial" page in his capacity as a unit owner, it is questionable whether coverage will be made available to him. Conversely, if that board member hosts his own "unofficial," non-sanctioned association page, but that website only provides relevant information regarding the association, an argument could be made that for actions concerning this non-sanctioned website, the board member could be considered an insured.

The "who is an insured" section of the policy may even qualify as an insured any member of the association acting at the direction of the board. To that end, if

a unit owner posts information at the board's direction on a sanctioned or non-sanctioned website, that unit owner may be considered an insured under the relevant policy.

**2. When an exclusion does not include the duty to indemnify.**

An applicable exclusion in the policy may provide that while there is no indemnification coverage, the insurer does still have a duty to defend the insured. In that situation, the insured will often look to the association itself to contribute toward paying the damages. For instance, if the relevant policy provides that in a breach of contract claim, there is no duty to indemnify but there is a duty to defend, the insurer may assign counsel to defend the insured, but if there is an opportunity to settle the case, the insurer will likely request that the association cover any damages. It is important that the association understand its coverages because in such a case, the association may choose to simply resolve the matter on their own without involvement of the insurer and without that claim and the defense costs associated with it ever appearing on their loss run.

**3. Transferring the risk.**

An insurer is typically interested in transferring the risk and it is no different when the claim involves social media. For instance, if the claim involves private information that is made public such as posting a list of delinquent unit owners or a making a disabled unit owner's request for an accommodation public, it is important to determine whether there is a third party involved in the posting that should be brought into the claim. When dealing with vendors or contractors, there are ways the Association can protect itself and its insurance policy. For instance, the association can require the vendor to add the association to its own insurance as an additional insured. The contract with the vendor may state:

Professionals shall provide Association a Certificate of Insurance with amounts and types of coverage and shall name Association as an additional insured. . . The Certificate of Insurance shall provide that the insurance referenced therein shall not be cancelled or modified except upon ten (10) days prior written notice to the additional insured.

The evidence of this insurance, provided to the association/property manager, is often by way of Certificate of Insurance. However, the association should strive to secure a copy of the policy and/or any additional insured endorsement. The Certificate of Insurance is generally not evidence of insurance actually in place. The Certificate of Insurance contains language similar to:

If the certificate holder is an ADDITIONAL INSURED, **the policy(ies) must be endorsed.** A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

#### **DISCLAIMER**

**The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder,** nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

Therefore, even if the vendor provide a certificate of insurance, it does not confirm that such insurance coverage is in force. If the association is named in litigation and/or the subject of a claim, in which the vendors were, or should have been, involved, be sure to tender the matter to the vendor, as well as the producer and company identified on the Certificate of Insurance. The failure to provide timely notice to an insurance carrier can resulted in a forfeiture of coverage.

As an additional insured, the association is subject to the same rights as an insured to policy, including any defense and/or indemnity. Therefore, the insurance carrier that issued the policy to your vendor may be required to defend and/or indemnify the association in connection with such claims.

In addition to, and/or separate from, the additional insured status provided by your vendor, the association may also insist that indemnification provisions are included in the contract. Such provisions would provide for defense and/or indemnify by the vendor (even in the absence of applicable insurance) of the association. The indemnification provided may be whole, partial and may or may not include an affirmative duty to provide a defense.

Unfortunately, even if the association uses a qualified, professional management company, their policy may still be on the hook as the property manager is likely included in the “who is an insured” provision of the association’s policy.

### **III. How Associations can benefit and properly handle social media issues. (Gerald C. Wigger, Esq.)**

#### **A. Overview of case law involving social media/internet and HOAs.**

In *Westbrooke Condo. Ass'n v. Pittel*, No. A14-0198, 2015 WL 133874 (Minn. Ct. App. Jan. 12, 2015), Defendant Pittel was a condo owner at Westbrooke who began harassing members of the association in 2010. He sent threatening letters and became disruptive during condominium board meetings. He also started three websites in which he stated that the Board was involved in criminal activity and posted personal information of a board member. The trial court granted a Harassment Restraining Order (HRO) under Minnesota law, requiring Pittel to shut down the websites and cease posting disparaging comments and personal information on any social media websites. Pittel appealed<sup>1</sup> arguing that the District Court's order was a prior restraint of speech which violated his Constitutional rights. The Court of Appeals upheld the HRO, holding the HRO statute and Court Order were narrowly tailored to serve a compelling state interest. The order was not unconstitutionally vague because it specifically prohibited the appellant from posting harassing content, which was statutorily defined as: "repeated

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<sup>1</sup> Pittel did not file an anti-SLAPP motion although Minnesota has enacted anti-SLAPP legislation.

incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse affect . . . on the safety, security, and privacy of another.”

In *Jamestown Condo. v. Sofayov*, No. 1459 C.D. 2014, 2015 WL 5458373 (Pa. Commw. Ct. July 30, 2015), Defendant Sofayov purchased a condominium in Jamestown at a Sheriff’s Sale and transferred title to S.P.S. Real Estate L.P. (SPS). Robert Keddie was Jamestown’s attorney at the beginning of litigation; Patricia Gallagher is the President of Jamestown’s Condominium Board; Robert Stevenson is the Property Manager. Jamestown brought action, seeking outstanding association fees, interest, and attorneys’ fees. A magisterial district justice found in Jamestown’s favor, and Jamestown sought to collect from SPS. During the course of this ongoing litigation, Jamestown, Keddie, Stevenson, and Gallagher learned of a website created by Appellants, which contained statements regarding Jamestown's management, the ongoing litigation between Appellants and Appellees, an accounting of the legal fees related to that litigation, and allegations concerning Jamestown's overall accounting. This information was also posted on social media. Appellees filed a motion alleging the items posted on the website and social media violated their right to a fair trial. The Trial Court ordered Appellants to remove all information on the website and social media accounts. Appellants appealed. The issue on appeal was whether there was a conflict between freedom of speech and the right to a fair trial. The Court remanded this case back down to the Trial Court to apply the following balancing test: Court’s must make an inquiry as “whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger.” *Aftermath*: The Court of Appeals decided this case on July 30, 2015. The website is no longer active. The website previously estimated \$175,000.00 in



litigation costs assessed to the association. According to the website, the original claim was for \$1,040.20.

In *Wittenberg v. Beachwalk Homeowners Ass'n*, 158 Cal. Rptr. 3d 508 (Ct. App. 2013), HOA Board members, needing a majority vote, sent newsletters, posted bulletins, and maintained an association website encouraging members to vote yes to amending the CC&R's. Non-board members were not invited, permitted, or allowed access to post opposing viewpoints on the amendment. After achieving a majority vote, the association petitioned the trial court to amend the CC&R's. The homeowners filed the underlying complaint to invalidate the majority vote, alleging the association denied equal access, permitting board members to advocate their viewpoint using association media and then refused to permit opposing members to utilize the same media to express their point of view. The homeowners were relying on statutory language California had in place at the time:

(a) An association shall adopt rules ... that do all of the following:

(1) Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or Internet Web sites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election....

(2) Ensure access to the common area meeting space, if any exists, during a campaign, at no cost, to all candidates, including those who are not incumbents, and to all

members advocating a point of view, including those not endorsed by the board, for purposes reasonably related to the election.

Cal. Civ. Code § 1363.03.

The Trial Court concluded the board was immune from requiring equal access. The Court of Appeals disagreed, stating “while in the midst of an election, the board must either give equal access to opposing viewpoints or forego the use of association media to advocate its viewpoint.” The results of the election were voided. However, since this case was decided, Cal. Civ. Code § 1363.03 was re-assigned to Cal.Civ.Code § 5105. The language stayed the same.

In *Stiles v. Kearney*, 277 P.3d 9 (Wash. Ct. App. 2012), Plaintiff Stiles, a secretary of a homeowners’ association, brought a defamation action against Kearney, an attorney and former member of the association's executive board. Kearney sent an email to the property management company stating the minutes for a recent meeting were “written by someone with an axe to grind” and instructed Stiles to “do your job even-handedly or step down.” Stiles alleged that Kearney sent his response from his work e-mail address to the Association listserve; the Association's property management company, which includes other business contacts; and other individuals. Stiles's complaint sought damages and a retraction of the statements. The Trial Court granted summary judgment for Kearney and awarded Kearney attorneys’ fees after determining Stiles failed to prove her defamation claim, finding that for *at least* the elements of falsity, unprivileged communication, and damages, Stiles's allegations were not factually supported, and then concluding that Stiles's defamation claim was baseless because it was

not well-grounded in either factual or legal support. Later, Kearney filed a motion for sanctions against Stiles' attorney, which were granted by the Trial Court. Stiles appealed. The issue on appeal was whether the Trial Court abused its discretion in granting the Rule 11 sanctions. The Court of Appeals held that substantial evidence supported the Trial Court's findings and upheld the sanctions.

In *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205 (Ct. App. 2000), (see additional analysis below) the former manager of homeowners association brought a defamation action against association members who had authored articles critical of his performance, the publisher of community newsletter in which those articles appeared, and members of the association's board of directors who had been critical at board meetings of manager's performance. The lower court granted the Defendants' motion to strike complaint as a strategic lawsuit against public participation (SLAPP). The Plaintiff appealed. The Court of Appeals held that: (1) board meetings and newsletter were "public forums" within meaning of anti-SLAPP statute, and (2) the statements giving rise to present action involved "public issues" within meaning of anti-SLAPP statute. The Court stated, "It is in this marketplace of ideas that the *Village Voice* served a very public communicative purpose promoting open discussion and constituted public forums. Given the mandate that we broadly construe the anti-SLAPP statute, a single publication does not lose its "public forum" character merely because it does not provide a balanced point of view." Thus, the Plaintiff's defamation lawsuit was dismissed.

In *Baskerville v. Soc'y Hill at Droyers Point Condo. Ass'n*, No. A-2732-08T3, 2009 WL 3849693 (N.J. Super. Ct. App. Div. Nov. 16, 2009), the Plaintiff, Baskerville, a former board member and unit owner, posted his letter of resignation on a private

website. The private website was utilized to, “make communication between residents easier, to share services advice, complain about things, like a forum.” A private website administrator deleted the letter and suspended Baskerville’s ability to post messages on the website’s message boards and forums. Board members enjoyed moderator rights that allowed them to adjust information posted on the website. Plaintiff filed suit, asserting the act violated his right of free speech. The lower court granted summary judgment to the Defendants. Plaintiff appealed. The issue on appeal was whether Baskerville’s freedom of speech rights were violated. The Court of Appeals balanced Baskerville’s expressional rights against the private property interest of the Association and the individual members of the board and the webmasters, finding none of the defendants’ conduct violated free speech. The Court stated, “[a]lthough at first blush, removing Baskerville’s resignation and denying him further access to the website may appear draconian, none of the defendants are governmental, quasi-governmental, or public actors.”

*Wittenberg* allowed members to post opposing viewpoints. *Damon* allowed members to post opposing viewpoints. In *Baskerville*, the Plaintiff was NOT allowed to post opposing viewpoints. Why? The website is private intangible property owned by an individual, not the association. Its audience is self-limiting and narrow. Individual co-administrators maintained the unilateral authority to change board member moderator rights at will.

## **B. Analysis of anti-SLAPP laws nationwide.**

### **1. Overview of anti-SLAPP.**

The anti-SLAPP (Strategic Lawsuit Against Public Participation) statute was enacted to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. In California, which enacted the nation's oldest anti-SLAPP statute in 1992, the analysis of an anti-SLAPP motion requires a two-step process:

- a. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.
- b. Next, if the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

A cause of action is subject to an anti-SLAPP motion to strike only if it arises from an act “in furtherance of the person's right of petition or free speech under the United States or state Constitution in connection with a **public** issue.” An act in furtherance of the right to petition includes “any written or oral statement or writing made in connection with an issue under consideration or review by a ... judicial body, or any other official proceeding authorized by law....” The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability-and whether that activity constitutes protected speech or petitioning. The anti-SLAPP statute does not apply where protected activity is only collateral or incidental to the purpose of the transaction or occurrence underlying the complaint.<sup>2</sup>

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<sup>2</sup> See California Back Specialists Med. Grp. v. Rand, 73 Cal. Rptr. 3d 268, 271 (Ct. App. 2008).

These suits are most commonly in the form of defamation or business interference tort suits.

## **2. States which have enacted anti-SLAPP statutes.**

Thirty states have enacted anti-SLAPP laws either by statute or case law. Several jurisdictions have also enacted SLAPPBack causes of action, which provide for compensatory and punitive damages in addition to attorneys' fees and costs if it can be shown that the SLAPP was merely filed for harassment or other illegitimate purposes.

The following is a list of states which have enacted the anti-SLAPP procedures:

**Arizona:** [ARIZ. REV. STAT. §§ 12-751 – 12-752 \(2006\)](#): Statements that are all of the following: made as part of an initiative, referendum or recall effort, before or submitted to a government body, concerning an issue under review by that body, to influence government action or result are protected.

Arkansas also provides for a SLAPPBack under [ARK. CODE ANN. §§16-63-506](#).

**Arkansas:** [ARK. CODE ANN. §§16-63-501 – 16-63-508 \(2005\)](#): Acts in furtherance of the right of free speech, or petition in connection with an issue of public concern, including statements or petitions before an official proceeding, or in connection with issue under consideration by government body, are protected.

**California:** [CIV. PROC. CODE § 425.16 \(as amended 2009\)](#): Statements before a government body or official proceeding; or in connection with issue under consideration by government body; or in a place open to the public or public forum in connection with issue of public interest; or any other conduct in furtherance of petition/free speech in connection with issue of public interest, are protected. [CIV. PROC. CODE § 425.17](#):

Exempts from the anti-SLAPP law public interest litigation and claims arising from commercial speech.

[CIV. PROC. CODE §425.18](#): SLAPPbacks: Prohibits the use of certain provisions of the anti-SLAPP law against a SLAPPback brought in the form of a malicious prosecution claim.

**Colorado:** [Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 \(1984\)](#): An action against a defendant arising out of a defendant's legitimate petition for redress of grievances under the First Amendment of the U.S. Constitution is subject to summary judgment for the defendant. The moving party must present sufficient facts to permit the court to reasonably conclude that the plaintiff's action is devoid of reasonable factual support or, if so supported, is lacking a cognizable basis in law. If this showing is made, the plaintiff must present sufficient facts to permit the court to reasonably conclude that defendant's petition for redress of grievances was primarily for the purpose of harassment or some other improper purpose.

**Delaware:** [DEL. CODE ANN. tit. 10, §§ 8136 – 8138 \(1992\)](#): Statements made by an applicant, permittee, or related person regarding a government licensing, permitting, or other decision, are protected.

Delaware also provides for a SLAPPBack cause of action. Under DEL. CODE ANN. tit. 10, § 8138, a SLAPP defendant may recover compensatory and punitive damages, in addition to fees and costs, upon an additional demonstration that the SLAPP was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting, the free exercise of speech, petition or association rights.

**District of Columbia:** [DC ST § 16-5502](#): A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

**Florida:** [FLA. STAT. §§ 768.295](#): Protects peaceful assembly, instructing representatives or petitioning for redress of grievances from lawsuits brought by the government. [FLA. STAT. §§ 720.304](#) explicitly protects speech on matters related to a homeowners' association.

**Georgia:** [GA. CODE ANN. § 9-11-11.1 \(1996\)](#): Statements made before a government body, or in connection with an issue under review by a government body, are protected in that a plaintiff filing a claim arising from such statements must file a verification that the claim is in good faith.

**Hawaii:** [HAW. REV. STAT. § 634F-1 – 634F-4 \(2002\)](#): Oral or written statements submitted to or made before a government body are protected.

HAW. REV. STAT. § 634F-2(9) provides for a SLAPPBack. It allows a SLAPP defendant to seek relief in the form of a claim for actual or compensatory damages, as well as punitive damages, attorneys' fees and costs, from the person responsible.

**Illinois:** [735 ILL. COMP. STAT. 110/1 – 110/99 \(2007\)](#): Acts in furtherance of constitutional rights to petition, speech, association, and participation in government, except when not aimed at procuring favorable government outcome, are immunized from civil liability.

**Indiana:** [IND. CODE § 34-7-7-1 et seq. \(1998\)](#): Any conduct in furtherance of free speech or petition in connection with a public issue or issue of public interest, is protected.



**Kansas:** In March, 2016, The Kansas House of Representatives [passed](#) the Enacting the Public Speech Protection Act ([HB 2054](#)) by a nearly unanimous 123-1 margin.

**Louisiana:** [LA. CODE CIV. PROC. ANN. art. 971 \(1999\)](#): Acts in furtherance of petition and free speech in connection with a public issue are protected.

**Maine:** [ME. REV. STAT. ANN. tit. 14 § 556 \(1995\)](#): Statements made before a government body or proceeding; or in connection with an issue under review by a government body; or reasonably likely to encourage review by government; or reasonably likely to enlist public participation to effect consideration; or any other statement within constitutional right of petition, are protected.

**Maryland:** [MD. CODE ANN. CTS. & JUD. PROC. § 5-807 \(2004\)](#): Communications with a government body or public regarding any matter within the authority of a government body, if made without constitutional malice, are protected.

**Massachusetts:** [MASS. GEN. LAWS ANN. ch. 231 § 59H \(1994\)](#): Statements made before a government body or proceeding; or in connection with issue under consideration by a government body; or reasonably likely to encourage consideration or review by a government body; or reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within the constitutional right to petition government, are protected.

**Minnesota:** M.S.A. § 554.02: Protection of citizens to participate in government.

MINN. STAT. §554.04(2)(b) provides for a SLAPPBack cause of action. It provides that a court shall award actual damages, and may award punitive damages, if a SLAPP defendant shows that the SLAPP was brought to harass, inhibit the defendant's

public participation or exercise of constitutional rights, or otherwise wrongfully injure the defendant.

**Missouri:** [MO. REV. STAT. § 537.528\(2004\)](#): Speech or conduct undertaken at, or made in connection with, a public hearing or public meeting, or in a quasi-judicial proceeding before tribunal or decision making body, is protected.

**Nebraska:** [NEB. REV. STAT. §§25-21,241 – 25-21,246 \(1994\)](#): Speech by applicant or permittee that comments, rules on, challenges, or opposes application or permission decision by government is protected. Under NEB. REV. STAT. §§ 25-21-243 & 244, a SLAPP defendant may recover damages, including costs and attorneys' fees, from any person who commenced or continued the SLAPP. Costs and attorneys' fees may be recovered upon a demonstration that the SLAPP was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. Other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights.

**Nevada:** NEV. REV. STAT. §§ 41.635 – 41.670 (1993): Communications aimed at procuring government outcome; or informing or complaining to government regarding matter reasonably of concern to the government body; or made in direct connection with issue under consideration by government body, that is truthful or made without knowledge of falsity are protected.

Under NEV. REV. STAT. § 41.670(2), SLAPP defendant may bring a separate action (SLAPPback) to recover compensatory damages, punitive damages and attorney's fees, and the costs of bringing the separate action.

**New Mexico:** [N.M. STAT. §§ 38-2-9.1 – 38-2-9.2 \(2001\)](#): Statements in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of the state or a subdivision of the state are protected.

**New York:** [N.Y. C.P.L.R. 70-a & 76-a \(2008\)](#); [N.Y.C.P.L.R. 3211](#): Speech that comments, rules on, challenges or opposes an application or permission by the government is protected. Only suits brought by the aggrieved applicant or permittee are covered by the anti-SLAPP law.

N.Y. C.P.L.R. 70-a provides for a SLAPPBack.

**Oklahoma:** 12 Okl.St. Ann. § 1430, Oklahoma Citizens Participation Act: The purpose of the Oklahoma Citizens Participation Act is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

**Oregon:** [OR. REV. STAT. §§ 31.150 et seq. \(2001\)](#): Statements made: in a government proceeding; in connection with issue under consideration by government; in a place open to public or public forum if connected with issue of public interest; or other conduct in furtherance of petition or right of free speech in connection with public issue or issue of public interest.

**Pennsylvania:** [27 PA. CONS. STAT. § 7707 & §§ 8301 – 8303. \(2000\)](#): Communications in connection with implementation and enforcement of environmental

law and regulations made before a government body/proceeding, in connection with an issue under review by government body, or to a government agency, are immune from civil liability.

**Rhode Island:** [R.I. GEN. LAWS §§ 9-33-1 – 9-33-4 \(1995\)](#): Any statement made before or submitted to a government body, in connection with issue under review by government body, or made in connection with issue of public concern, is conditionally immune from civil claims unless said petition or free speech constitutes a sham.

R.I. GEN. LAWS § 9-33-2(d) provides for a SLAPPBack.

**Tennessee:** [TENN. CODE ANN. §§ 4-21-1001 -21-1004 \(1997\)](#): Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern *to that agency* shall be immune from civil liability on claims based upon the communication to the agency.

**Texas:** [V.T.C.A., Civil Practice & Remedies Code § 27.003](#): If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

**Utah:** [UTAH CODE ANN. §§ 78B-6-1401 – 1405 \(2001\)](#): Participation in the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise of the right to influence those decisions under the First Amendment to the U.S. Constitution, is protected. UTAH CODE ANN. § 78-58-105 provides that a SLAPP defendant may recover costs and reasonable attorney's fees, upon a demonstration that

the action involving public participation in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. A defendant may recover other compensatory damages upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution.

**Vermont:** [12 V.S.A. § 1041](#): Protects statements made in the course of or in connection with government proceedings, and statements and conduct in connection with an issue of public interest, unless devoid of any reasonable factual support and any arguable basis in law and harmful to the plaintiff.

### **3. Case law construing anti-SLAPP motions in the HOA context.**

Several California cases have held that a Homeowners' Association's meeting constitutes a "public forum" because they serve a function similar to that of a governmental body. Other states, such as Georgia and New York, have also considered anti-SLAPP motions in the HOA context. In 2010, Florida became the only state to explicitly prohibit suits by individuals, businesses, and governmental entities based on a homeowner's "appearance and presentation before a governmental entity on matters related to the homeowners' association."

Anti-SLAPP motions regarding suits within the context of Homeowners' Associations have been presented to the Courts for more than ten years. In *Harfenes v. Sea Gate Ass'n, Inc.*, 647 N.Y.S.2d 329 (Sup. Ct. 1995), disgruntled homeowners brought

suit against their homeowners' association seeking remedy for the association's alleged wrongful filing of suit in order to keep homeowners from learning the identity of waste haulers that placed material along the seashore without required permits, resulting in cleanup sanctions for the association. The homeowners felt the association should not bear the full cost of these sanctions and sought to uncover the names of the waste haulers and further attempted to keep the Board from getting a loan. The association sued the homeowners for delaying the Board's receipt of loan proceeds intended to repair damage due to storm damage. The homeowners alleged this suit amounted to a SLAPP suit actually designed to keep the identity of the waste haulers from them. Cross-motions for summary judgment were made. At this time, the New York anti-SLAPP statute allowed, "[a] defendant in an action involving public petition and participation ... [to] maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action." An "action involving public petition and participation" was defined as "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." The law defined "public applicant or permittee" as "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body." The Supreme Court held that: (1) the homeowners did not have cause of action in that they were never defendants in an action involving public petition and participation, and (2) the association's application to government for loan was not

required entitlement for use or permission to act. Summary judgment was granted to the association, thus their suit was not a prohibited SLAPP suit.

*Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205 (Ct. App. 2000), is the significant California case that first held association board meetings and newsletters were “public forums” within meaning of the state’s anti-SLAPP statute. The Court stated, “the Board meetings served a function similar to that of a governmental body . . . [a] homeowners association board is in effect ‘a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.’” In *Damon*, the Court held comments made by homeowners by way of the association’s newsletter addressing their concerns with the association’s general manager, as well as similar comments made at Board meetings were protected. The homeowners’ anti-SLAPP motion was granted.

Taking guidance from *Damon*, *Ruiz v. Harbor View Cmty. Ass'n* is another significant California case holding a community association is a quasi-governmental entity, meeting the public forum requirements of California’s anti-SLAPP statute. *37 Cal. Rptr. 3d 133* (Ct. App. 2005), as modified on denial of reh'g (Jan. 11, 2006), as modified (Jan. 13, 2006). In this case, the Mr. and Mrs. Ruiz, the Plaintiffs, filed suit against their community association (“HVAC”), alleging alleges nine causes of action stemming from the denial by association's architectural committee of Plaintiffs' conceptual plans to rebuild their house, which lies within the development subject to the HVCA. In the libel cause of action, Plaintiffs alleged two letters written by the association's attorney defamed Mr. Ruiz. The trial court denied the association's anti-SLAPP motion to strike the libel cause of action on the ground the letters did not come within the definition of an

“act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue” under California’s anti-SLAPP statute. The Court of Appeals reversed, holding the letter “encompasses conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with an issue of public interest.” Further, when the letters were written,

Plaintiffs and HVCA were involved in ongoing disputes over approval of Plaintiffs' conceptual plans, the application of HVCA's architectural guidelines, and Plaintiffs' demands for information and documents. Those disputes were of interest to a definable portion of the public, namely, the members of HVCA, because they would be affected by the outcome of those disputes and would have a stake in HVCA governance. Ruiz's conduct at HVCA board meetings and interaction with board members affected HVCA governance and therefore would also be of interest to community members.

...

The July 11 letter and the October 15 letter were written in the context of the disputes between Plaintiffs and HVCA, were part of the ongoing discussion over those disputes, and “contributed to the public debate” on the issues presented by those disputes.

Thus, the associations’ anti-SLAPP motion in regards to the Plaintiff’s libel claim was granted.

A year later, in *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 39 Cal. Rptr. 3d 547 (Ct. App. 2006), a homeowners’ association filed action against a homeowner for denying association access through her property for weed abatement, and the homeowner cross-complained for defamation in a letter the association sent to all



homeowners concerning the dispute. The lower court denied the association's anti-SLAPP motion, and the association appealed. The Court of Appeals reversed, holding:

[The statute] applies when the challenged cause of action arises from “any act ... in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue ....” The statute defines acts in furtherance of the constitutional right to petition to include “any written or oral statement or writing made in connection with an issue under consideration or review by a ... judicial body ....” This includes statements or writings made in connection with litigation in the civil courts. . . . The statute does not require any showing that the matter being litigated concerns a matter of public interest. Thus, an action for defamation falls within the anti-SLAPP statute if the allegedly defamatory statement was made in connection with litigation.

Thus, the association’s anti-SLAPP motion was granted.

In *Turner v. Vista Pointe Ridge Homeowners Ass'n*, 102 Cal. Rptr. 3d 750 (Ct. App. 2009), development homeowners brought an action against their homeowners' association, alleging various causes of action challenging the association's enforcement of restrictive covenants. Specifically, they asserted seven causes of action: (1) breach of contract; (2) declaratory relief; (3) nuisance; (4) breach of the implied covenant of good faith and fair dealing; (5) violation of [Civil Code section 1378](#), concerning homeowners association architectural review procedures; (6) violation of [Business and Professions Code section 17200](#), pertaining to unfair business practices; and (7) breach of fiduciary duty. The association filed an anti-SLAPP motion to strike the complaint. In its motion, the association argued that each cause of action was based on its activities arising out of

the controversy pertaining to the Plaintiffs' architectural plans. The lower court granted the association's motion, and the Plaintiffs appealed. The Court of Appeals reversed, holding:

In this case, there is no indication that the acts in question were undertaken in furtherance of the right of petition or free speech. The causes of action, as described in the complaint, arose out of the Association's purported unwillingness to grant a variance, demand that money be paid in exchange for a variance, demand that various disputed improvements be removed, levy of a reimbursement assessment, failure to comply with the CC & R's, and demand that the [Plaintiffs] pay to remove a tree located in the common area. It is true that certain Association demands were made in writing. But the mere fact that the demands were put in writing did not convert the Association's acts in connection with CC & R's enforcement into acts in furtherance of the right of free speech.

In *Country Side Villas Homeowners Assn. v. Ivie*, 123 Cal. Rptr. 3d 251 (Ct. App. 2011), a homeowners' association ("Country Side") brought action against a homeowner and others, seeking declaratory relief as to the interpretation of the association's governing documents regarding the responsibility for paying for balcony and shingle siding maintenance on individual units. The homeowner-defendant filed a cross-complaint for damages and declaratory relief, as well as an anti-SLAPP motion to strike, which was denied as untimely. After the association filed an amended complaint, the homeowner filed second anti-SLAPP motion. The lower court granted the motion, and the association appealed. The Court of Appeals upheld the granting of the anti-SLAPP motion, holding:

[Plaintiff] spoke out against the members of her homeowners' association board and management, on matters that affected all members of the association. Specifically, [Plaintiff] complained about Country Side's new decision that the association, not individual homeowners, was responsible for the maintenance expenses associated with balcony and shingle siding repair. Country Side's new position on this issue impacted all members of the association, whether or not their homes had balconies or were in need to siding repair, because the expenses would now be borne by all. Country Side's board was in a position to impact the lives of many individuals through its decision-making process. Therefore, under the rationale of [Damon](#), [Plaintiff's] conduct in criticizing Country Side's actions was a matter of public concern within the meaning of [the statute].

Country Side's assertion that because it is seeking “pure declaratory” relief arising out of an actual controversy about the interpretation of the association's governing documents, the case is not subject to anti-SLAPP protection is misplaced. While it is true Country Side seeks declaratory relief regarding the interpretation of the association's governing documents, it also seeks damages in the form of attorney fees from [Plaintiff].

In addition, the action in this case was filed after Country Side's counsel threatened to sue [Plaintiff] if she continued to refuse to request the financial documents and not sign the confidentiality agreement. [Plaintiff] did refuse to sign the agreement, and continued to speak out against Country Side. In response, Country Side filed suit against her seeking declaratory relief and attorney fees.

It is clear from the evidence that the action in this case arose from [Plaintiff's] exercise of her right of free speech in criticizing and speaking out against the action of Country Side's board.

The Court granted to Plaintiff's anti-SLAPP motion as to all issues.

In *Cabrera v. Alam*, 129 Cal. Rptr. 3d 74 (Ct. App. 2011), Plaintiff, Cabrera, a former board president, filed a defamation action against Alam, a current board member running for re-election. At a homeowners' association meeting, Cabrera stated Alam was a "dictator" who had not taken care of the association's money and had not properly handled the finances. In response, Alam accused Cabrera of stealing a \$100.00 rebate check from Staples, which was owed to the association. In defense of the action, Alam filed an anti-SLAPP motion to strike the claim of defamation. The Trial Court denied the motion, finding Alam had failed to show the defamatory statements made by him arose out of a protected activity. Alam appealed. The issue on appeal was whether statements made at a homeowners' association annual meeting immediately before the election of the association's board of directors could support a claim for defamation. The Court of Appeals reversed the denial of the motion, finding that Alam's statements were a protected activity because the statements were made in a public forum at a homeowners' association's annual meeting and concerned the qualifications of candidates, which is an issue of public interest. Further, the Court of Appeals determined that Cabrera failed to show a probability of prevailing on her defamation claim because she failed to prove that Alam made the statements with actual malice or reckless disregard as to their falsity. The Court's holding in *Cabrera* demonstrates that courts are inclined to protect defamatory statements made in conjunction with association meetings, so long as there is no showing of malice. Further, statements made about a candidate at a homeowners' association meeting are sufficiently public to provide a privilege for such statements.

Most recently, in *Barnett v. Holt Builders, LLC*, 790 S.E.2d 75 (Ga. Ct. App. 2016), *reconsideration denied* (July 26, 2016), a developer's successor-in-interest filed suit against a homeowners' association member for defamation arising out of statements made by the member in an e-mail reply, using the "reply all" function, to an e-mail delivered to all homeowners about the status of the litigation in the homeowners' suit against the successor to prevent the annexation of additional property. The Georgia anti-SLAPP law requires any claim that could reasonably be construed as infringing upon rights protected by the anti-SLAPP law to be accompanied by a written verification under oath. The trial court denied the member's anti-SLAPP motion, and the member appealed. The Court of Appeals reversed on procedural grounds, holding:

Although [Plaintiff] denies filing his defamation suit to discourage [Defendant's] right to free speech or from participating in the Litigation, a party's subjective belief is not the standard for determining whether the verification requirements of the anti-SLAPP statute apply. Rather, the statute applies to any claim arising from any act that "could reasonably be construed" as one done in furtherance of the right of free speech or the right to petition government for a redress of grievances in connection with an issue of public interest. . . . Thus, because [Defendant's] statements regarding the pending Litigation fall within the scope of [the statute], [Plaintiff's] lawsuit initiated in response to those protected statements should have been dismissed with prejudice for failure to file a verification as required by [\[the statute\]](#).

Because the Plaintiff's lawsuit was not accompanied by the required verification, the Defendant's anti-SLAPP motion was granted.

