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Law in Hand

AVOIDING TOXIC MOLD LAWSUITS

Tips on Staying Out of the Courtroom When Faced with the "Mold Monster"

Remember the good ol' days when "like a good neighbor, State Farm was there?" Not anymore. The last few years have demonstrated an alarming trend in the availability of coverage for common interest community and homeowners in general. Large carriers like State Farm and Allstate have announced approval from regulatory agencies for double-digit rate increases in premiums. And, unlike a good neighbor, State Farm announced last year it would write no new homeowner policies in California. Their reason: the dramatic increase in mold and water damage claims.

Mold and water damage claims continue to rise in California-against apartment owners, homeowner associations, and property managers-and insurance companies have begun to exclude coverage. Associations and their managers now find themselves in the precarious position of scrambling for HOA insurance in a rapidly diminishing marketplace, while at the same time fending off claims by homeowners and renters for property damage. How can associations avoid becoming a defendant in a toxic mold lawsuit? Some of the following precautionary steps may be useful.

Know the Enemy

First of all, educate yourself and the membership about mold damage and the current insurance climate. Become familiar with how and where mold grows - for example, it is most prevalent in moist, contained areas, and needs an organic food source to thrive, such as building paper, wood or insulation.

According to Candysse Miller, executive director of the Insurance Information Network of California, water damage claims have doubled in California in the past four years. Jury verdicts for mold litigation and water claims have tripled since 1994. This, combined with the \$30-70 billion cost of the September 11, 2001 tragedy and the downward spiral in the financial markets, has caused insurers like State Farm to re-evaluate their entire business plan.

Homeowners and board members should be made aware of the urgency of the situation and understand that premiums are going up, coverage is diminishing, and associations' efforts to prevent claims must double or triple or they risk being "blackballed" and losing coverage altogether.

Perform Routine Maintenance

This goes without saying, but its importance demands mention anyway. Take the necessary steps to eliminate the possibility of a water leak from occurring in the first place by doing your due diligence monthly. Install water pressure regulators and reinforced braided hoses at your development. Do random site checks of buildings in areas where water can potential cause problems, such as roof eaves, around soffits, below windows, decks and balconies - anywhere water might be leaking. If affordable, hire a general contractor to do an evaluation of your project from the ground up. Be proactive! An inexpensive "checkup" now could lend valuable insight into preventing potential costly problems down the road.

Maintain Detailed Records

This is critical to avoiding lawsuits. Associations that keep detailed records about exactly how they responded to a member's complaint of mold or water intrusion problems are much better off if a claim is filed. Develop your own mold protocol to help you gather important information and document it, whether through printed out e-mails, a telephone log, letters and other correspondence or face-to-face communication. Records to keep include:

1. Time of first report of mold or leaks
2. Response to report (what was done to investigate the complaint)
3. Work done by maintenance staff to mitigate the damage
4. Name, date, and even *time* a specialist contractor was notified for consultation and the time the specialist addressed the problem
5. Certification that the specialist completed the work and corrected the problem

While keeping accurate, detailed records remains important, it is also crucial **not** to include other bits of information that could potentially hurt the association down the road. For example, do not speculate about the cause of mold infestations or leaks, or the possible health effects the mold has had on the homeowner. Misstatements or guesses about where the leak originated have a funny way of creeping into depositions or cross-examinations at trial. If you know exactly where the leak is, great - document it. But you will do your association a huge favor by leaving the speculative opinions and guesswork to the professionals.

Develop a Risk-Management Plan

Reducing your association's susceptibility to claims includes having a legitimate risk-management plan in place. A tougher insurance market might mean retaining more risk than in previous years.

This could include any of the following action items:

1. Raising the policy deductible and changing loss limits;
2. Excluding certain improvements, such as floor and wall coverings, cabinetry - go to a bare walls policy;

3. Submitting only large, essential claims to the insurance company. Remember, carriers are now making it extraordinarily difficult for HOA's to re-insure, and in many instances, are dropping claimants altogether;
4. Reviewing the association budget carefully, eliminating unnecessary expenses, and using the savings to fund a deductible account.

It is also possible to amend the CC&R's to decrease the insurance requirements required under the Declaration, but be forewarned-this is not an easy process. It requires jumping through several hoops, including getting a positive vote from the membership. Consult an attorney if you are interested in exploring this option.

Shop Insurance Carriers

A tougher market does not necessarily mean there aren't options out there. Insurance carriers are generally classified into two categories: "admitted" and "non-admitted" carriers. An admitted carrier will have filed rates and forms, has CIGA protection (an insurance guarantee usually worth \$500,000) and is subject to ISO standards. A non-admitted carrier does not have to file its rates or forms with any agency. This means more flexibility in the policies it can write. Be aware, though, that non-admitted carriers have no CIGA protection, so make sure the carrier is financially sound and has worked in the community association industry for several years.

Finally, when obtaining bids for insurers, be aware that carriers are impacted and will take much longer to a quote than before. Anticipate last minute quotes and begin your bid process at least 90-120 days before your current policy is set to lapse. Do your homework!

Conclusion

Your friendly neighborhood insurance carrier may not be as friendly as in years past, but associations and managers can meet their fiduciary obligations with sound planning, diligence, and a proactive mentality. Add a little good luck, and your association can prevent or defeat the mold monster!

1 The Associated Press, "Water-damage claims up" The Orange County Register, Thursday, June 6, 2002.