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HOA DIVISION

Joel M. Kriger, A.P.C.

Venus

First Quarter Newsletter, 2004

Injured Residents Failed to Prove Property Manager's Liability

Mold, Concealment and Liability

BY LAURI CROCE, ESQ.



The folks at Condominium Consultants, Inc., in La Mesa, California, report that in December 2003, a San Bernardino County jury reached a verdict in favor of the defense in *Hake v. Ackermann*, a case involving causes of action for negligence, breach of contract, breach of warranty of habitability, conversion, concealment and punitive damages brought by injured residents against the manager of a Big Bear residential property.

The Hakes leased a single family home in the Big Bear area in September 2001 and, they alleged, immediately became ill, suffering nausea, diarrhea, respiratory problems, difficulty concentrating, various memory issues, and severe headaches. The property managers moved the Hakes out of the house in November 2001. The Hakes never returned to the home. They left all of their possessions behind (except for a few clothes), believing that the possessions were infested with mold and dangerous to human health. They sued the owners of the home and the property manager for several hundred thousand dollars for bodily injuries and property damages. The Hakes also alleged that because the property manager "knew" of the mold infestation but concealed it, they were entitled to an award of punitive damages.

A month prior to trial, the owners settled the claims against them for

\$20,000. The Hakes' last settlement demand prior to the trial against the property manager was for \$250,000, and they lowered their settlement demand to \$135,000 during trial. The property manager's last, best offer was for \$35,000.

At the trial, the Hakes testified as to their illnesses, which they attributed to mold contamination. Further, they testified that they began to

Most mold cases in California and nationally (at least 99%) never get to trial — they are settled out of court without the issues of liability or severity of injuries and property damage ever being definitively resolved.

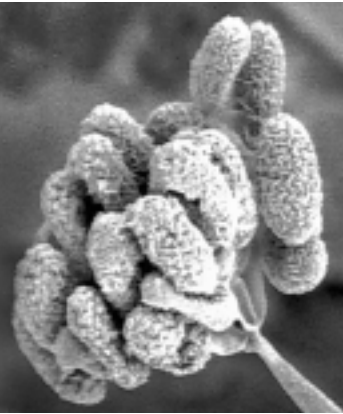


PHOTO COURTESY OF THE THE AMERICAN PHYTOPATHOLOGICAL SOCIETY

recover from their symptoms after they moved out of the house and were completely recovered within several months. The Hakes told their allergist in December 2001 that the home was infested with "massive" amounts of *Stachybotrys* and *Aspergillus* molds. On the basis of the plaintiffs' statements alone, the doctor diagnosed them as suffering from contaminant exposure emitted from the molds. However, cross-examination revealed that the doctor never verified the presence of mold, nor did he take into account Mr. Hake's preexisting allergies and other ailments, including a prior concussion.

Not surprisingly, the Hakes mold expert – a "certified microbial consul-

tant" – supported the Hakes' claim of "massive" mold contamination. But the defense's more qualified Certified Industrial Hygienist refuted the Hakes' experts' conclusions, stating that at best, there were only low levels of microbial matter present.

The jury found for the defense on all causes of action (negligence, breach of contract, breach of warranty of habitability, conversion, concealment and punitive damages), by a vote of 9 to 3 after weighing the evidence introduced at the seven-day trial. Apparently, several members of the jury did not believe that the defendant's property manager concealed a dangerous

condition, or even knew of anything dangerous on the premises. The jurors also did not believe the mold was the main, or only, cause of the Hakes' illnesses; the jurors did not think the Hakes' allergist made a credible witness, and the Hakes' failed to rule out

other potential sources which may have caused or contributed to the injuries.

Despite the *Hake v. Ackermann* outcome in favor of the defense on both the bodily injury and property damage claims, it should be noted that at least half of the mold cases which go to trial result in a property damage award in favor of the plaintiffs. And in Northern California, a jury awarded the plaintiffs \$2.7 million against a property manager because of mold. However, most cases in California and nationally (at least 99%) never get to trial — they are settled out of court without the issues of liability or severity of injuries and property damage ever being definitively resolved. ■

Satellite Dishes and Antennas

FCC Rules Revisited

BY KENNETH H. DILLINGHAM, JR. ESQ.



Since October 1996, rules and regulations adopted by the Federal Communications Commission have pre-empted local and private restrictions against antennas and certain satellite dishes. The rules directly prohibit enforcement by homeowner associations of the restrictions on satellite dishes and antennas that are contained in the recorded restrictions for the community (e.g. CC&Rs or rules and regulations adopted by the Board). Associations attempting to enforce their restrictions against antennas or satellite dishes that violate the FCC rules are subject to complaints and litigation by the affected owner or tenant.

The rules are found in the Code of Federal Regulations, beginning at 47 C.F.R. Section 1.4000, and prohibit restrictions that impair the installation, maintenance or use of antennas or satellite dishes used to receive video programming. The rules apply to video antennas, including direct-to-

home satellite dishes, that are less than one meter (39.37") in diameter (or of any size in Alaska), TV antennas, and wireless cable antennas. The rules prohibit most restrictions that: (1) unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal.

Effective January 22, 1999, the FCC amended the rules so they also apply to rental property where the renter has an exclusive use area, such as a balcony or patio.

On October 25, 2000, the FCC further amended the rules so that they apply to customer-end antennas that receive and transmit fixed wireless signals. This amendment became effective on May 25, 2001.

The FCC rules apply to homeowners and tenants who place antennas and dishes that meet size limitations on property that they own or rent, and that is within their exclusive use or control. This includes condominium homeowners, and their tenants, who have an area where they have exclusive use, such as a balcony or patio, in which to install the antenna or dish. The rules also apply to townhomes and manufactured homes, as well as to single family

homes (e.g. planned developments).

The FCC rules allow local governments, community associations and landlords to enforce restrictions that do not impair the installation, maintenance or use of the types of antennas or dishes covered by the rules, as well as restrictions needed for safety or historic preservation. In addition, under some circumstances, the availability of a central or common antenna can be used by a community association or landlord as a reason to restrict the installation of individual antennas or dishes. In addition, the FCC rules do not apply to common areas that are owned by a landlord, a community association, or jointly by condominium or cooperative owners. Such common areas may include the roof or exterior wall of a multiple dwelling unit. Therefore, restrictions on antennas or dishes installed in or on such common areas are enforceable (for example, a restriction on piercing the common area wall of a balcony to secure a satellite dish is enforceable).

For further information or a copy of the rules, you can call the Federal Communications Commission at 888-CALLFCC (toll free) or (202) 418-7096. The rules are also available via the Internet by going to www.fcc.gov. ■

Pulling out the HOA Division Welcome Mat

Meet Administrator Janet Wilcox

Janet Wilcox joined the HOA Division of Anderson & Kriger in September 2003 bringing years of experience and expertise in office administration. She will be handling all human resources, finances, and overall general administration for Joel M. Kriger, a professional corporation.

Janet's career in management spans over the last thirty years. For the past seventeen years, Janet has been an administrator for business litigation firms. At the start of her legal career with the law firm of Burger & Flaherty, she was instrumental in growing the firm from four attorneys to twenty-two within a span of four years. Janet developed and wrote the firm's policies and procedures manual, computerized and reorganized accounting functions, and purchased new computers and software to increase the firm's productivity. Burger & Flaherty was the first law firm in Sacramento to use a calendaring and document management program.

Additionally, during her tenure as an administrator, she has had primary responsibility for all aspects of personnel



and finances (negotiating leases, construction build-outs, establishing and administering all employee benefits including pension and profit-sharing plans, consultation with outside accountants, all bookkeeping functions, negotiating insurance matters including the terms of professional negligence policies, and administering all accounts, including highly sensitive trust accounts), and, overall general administration. Janet served for three years on the Board of Directors for the Sacramento Valley Chapter of the Association of Legal Administrators. She also won first prize for the best designed law office in Sacramento and was featured in Sacramento Magazine. Janet's college background is in business administration in San Jose, California.

On a personal note, Janet and her husband, Mark, currently reside in La Jolla. Mark is presently the Sales Manager of the San Diego West Marine. They also have two children, Aimee and Jason. Aimee is married and is the director of business development for BDS Marketing, Inc. located in Irvine CA. Jason works for Marriott Hotels and currently manages their Sports Bar and Grill located in the financial district of San Francisco. ■

Get a C.L.U.E.

Insurance Inquiries Can Count Against You

BY PATEE BARTA, EDITOR



Before you decide to access your insurance by picking up that phone to report that leaky roof, stolen motorbike or broken water pipe, remember that many home insurers count inquiry calls like insomniacs count sheep. These calls, simply meant as informal inquiries as to whether their policy will cover certain damages are counted as “unpaid losses” even though the agent verified the damages were not covered.

Loss information for most insurance companies, paid or unpaid, are filed into a centralized database called the Comprehensive Loss Underwriting Exchange or C.L.U.E database. A simple phone call intended to report any damages could get logged into this database as an “unpaid loss.” This is what can happen:

1. The information is on the record for five years.
2. The information can impede a homeowners’

chances of obtaining a standard policy next time they apply for insurance.

3. The insurance company usually orders a copy of the C.L.U.E report when a homeowner applies for a new policy.

How does being listed on this C.L.U.E Report affect the homeowner:

1. Two or more reported losses, depending on severity, could cause the applicant to be charged a double or triple premium, or
2. The applicant could be denied coverage altogether.

One Woman’s Insurance Nightmare

Frances Alessi, a 77-year-old woman living in Tucson, Arizona, bought a new home and had every reason to believe her insurance purchase would go smoothly. She applied for homeowners’ insurance as a longtime insurance customer of Allstate Corp who applied for this insurance at State Farm Mutual. She was signed up by an agent for a \$298-a-year policy with a

nice discount on her auto policy according to her daughter, Diane Arnold. A week later her new policy was cancelled via a letter referencing two unpaid water “losses” in just a few years on her previous home.

Her daughter, Ms. Arnold, looked into the matter and found that, in fact, a State Farm spokesman confirmed that the company had dropped Ms. Alessi’ policy because of inquiry calls made by her mother regarding two small water leaks in the kitchen sink and in a bathroom shower which were determined as “not covered.” Even though damages for both inquiries

RANKING	SCORE
★★★★ GOOD	776-997
★★★ AVERAGE	626-775
★★ BELOW AVERAGE	501-625
★ LESS DESIRABLE	under 500

were not covered, many companies continue to report these calls as losses even though policyholders are asking basic questions about their coverage. It is required by law in California that all inquires be reported.

How to Close the Gap

How the insurers use the information from a simple inquiry can lead to frustration for the consumer. There have been so many problems with information that should not be on their C.L.U.E reports that the National Association of Realtors (NAR) formed a task force to examine improving the C.L.U.E database. Marcia Salkin, NAR’s senior policy representative said, “We don’t believe that inquiries should be counted in any insurance or credit-scoring model.” Even the company that operates C.L.U.E mailed a memo to insurance companies this past summer urging them to report only calls with actual losses revealed - not mere inquiries.

Consumers can do little to fight the battle even as lawmakers in several states try to encourage insurers to remedy this issue. There are, however, steps to take to protect consumer C.L.U.E reports:

1. Know insurance policy specifics and the deductible.
2. Do not call your insurance company on basic coverage questions answerable elsewhere.
3. Avoid preliminary calls. It is unnecessary to contact your insurance company unless filing a claim that you know damage will be covered on.
4. If you must make a call to your insurance company, never mention actual damage unless you are calling to file a claim. Any mention of damage most likely will be recorded as a loss, whether covered or not.
5. When in doubt, call a professional repairperson initially to get a competitive estimate. Before committing to coverage, most insurance companies will often send a repairperson to estimate damages anyway.
6. Check your C.L.U.E

Report. A free copy is available to all consumers affected by their reports. The following Website allows you to purchase your report: www.choicetrust.com

Before putting your home on the market, whether it be single family home or condominium, make sure to order your “Home Insurance Package including the C.L.U.E. Property Loss History and Home Insurance Score” reports. Previous property losses can impact insurance rates and the ability for homebuyers to insure their new homes. By checking your C.L.U.E. score, homebuyers and realtors know up-front that your home’s insurance history is clean. By learning the factors involved in calculating your rates, you can reduce your current insurance rates and those rates on your next home purchase. The graphic at left shows how scores are rated.

Portions of this article were modified from an article written by Liz Pulliam Weston at Money (MSN). ■

Leadership in Legal Education 2004

Attorneys Joel M. Kriger, Lauri Croce and Kenneth Dillingham will teach the following courses in Homeowner Association Law:

CACM Law Seminars

Panel on Reserve Studies – Joel Kriger

Feb 6, 2004 • 8:30am to 4:30pm

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Feb 11, 2004 • 8:30am to 4:30pm

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CACM reduced room rates!
Self Parking \$8

Homeowner Association Law for Board Members and their Managing Agents

Feb 28, 2004 • 9am to 12 Noon

CITRUS COLLEGE • Joel Kriger, Instructor

1000 West Foothill Blvd.
Glendora, CA 91741-1899
Contact: Continuing Education
(626) 852-8022

REGISTRATION COST:

\$45
Book: Condominium Blue Book – \$12
(paid to instructor)

March 6, 2004 • 9am to 12 Noon

SAN DIEGO STATE UNIVERSITY (SDSU)

Joel Kriger, Instructor
Gateway Center, SDSU
5250 Campanile Drive
San Diego, CA 92182-1920

Contact: College of Extended Studies
(619) 594-5152 – Refer to Schedule No.
04SP 9703 ES

REGISTRATION COST:

\$45
Book: Condominium Blue Book – \$12
(paid to instructor)

Parking: Parking Structure Number II –
Above Level One
Use Enrollment confirmation as
permit in car window

April 17 • 9am to 1:00pm

EDP 034F65
Attorney Lauri Croce, Instructor

May 8 • 9am to 1:00pm

EDP 034F66
Attorney Joel M. Kriger, Instructor

June 19 • 9am to 1:00pm

EDP 034F67
Attorney Kenneth Dillingham, Instructor

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Contact: To use VISA or MasterCard, you
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Ponder this...

*You can get everything in life you want,
if you will just help enough other people get
what they want.*

— Zig Ziglar, Motivational Speaker



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