



Weekly Law Resume

A Newsletter published by Low, Ball & Lynch
Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

Issue By: David Blinn

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Homeowners' Association - Judicial Deference to Board Decisions

Affan v. Portofino Cove Homeowners' Association
Court of Appeal, Fourth District (October 29, 2010)

Maintenance of common areas in condominiums or other common developments is a frequent area of dispute and litigation. Courts have adopted a policy of judicial deference to a homeowners' association's decisions as they relate to maintenance issues. This case dealt with whether such deference is given to protect a management company from suit for such decisions, and whether an association was protected from suit in a claim for damages for alleged failure to maintain a common plumbing system.

Akil and Cenana Affan purchased a condominium as a vacation home in the Portofino Cove development in Orange County in 1986. They lived in Arizona and visited a few weeks a year. From 1999 to 2005, they visited nine times, and noted sewage residue in their sink or tub on every visit. They reported these problems to the property manager on each occasion, and reported problems to at least one board member of the Homeowners' Association. On each occasion, the Association would hire a plumber to clean up the back up after they reported a problem.

In 2001 the Association had considered annual maintenance of the main sewer line, and they discussed this again in early 2005. However, the Association did not actually do anything prior to May 3, 2005, when it hired Rescue Rooter to conduct a high pressure "hydro-jet" cleaning of the main lines. Less than two weeks later there was a major sewage backup which caused damage to the Affans' condominium. Initially, the Association assured the Affans that it would "take care" of the situation, and it in fact paid for emergency clean up. However, a dispute arose between the Association's insurance carriers as to who was responsible. Plaintiffs obtained an estimate for approximately \$34,000 to complete repairs. A plumbing expert retained by both the Affans and the HOA opined that the back ups were due to a chronic

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obstruction built up over time in the main lines, and that the clean out by Rescue Rooter was negligent and insufficient.

Plaintiffs filed suit against the Association and the property manager, alleging claims of negligence and nuisance. They also alleged that the Association breached the CC&R's and was negligent per se. Following a court trial, the judge found that the defendants were not negligent based on the policy of judicial deference, but did find liability against the Association for breaching a provision of the CC&R's requiring it to indemnify the plaintiffs "as a result of a casualty loss originating in a common area." Both sides appealed.

The Court of Appeal reversed the rulings in favor of the Association and the property management company, holding that the policy of judicial deference did not apply to property management companies, and that there had been insufficient showing of the pre-requisites for application of judicial deference to the Association's decision-making on the maintenance issue.

The Court noted that the policy of judicial deference to maintenance decisions of HOA boards came from *Lamden v. LaJolla Shores Clubdominium Homeowners' Association* (1999) 21 C.4th 249. In that case, the homeowner's association had problems with maintenance of the common areas, due to termite infestation. There was evidence in the case that the Board had considered complete fumigation of the property, instead of spot-treating the infestations. However, there were health concerns and cost issues, and they decided to stick with spot treatments. The court in *Lamden* held that when a homeowners' board made a reasonable investigation and acted in good faith with regard for the best interests of the association and its members, its decisions as to how to discharge an obligation to maintain or repair common areas should be deferred to by the courts. The justification for this was that HOA boards are better situated than courts to make detailed economic decisions necessary for the maintenance of the development.

In the present case, the Court of Appeal noted that the judicial deference rule did not provide blanket immunity for all decisions of a homeowners' association regarding a maintenance decision. The key was that there must be reasoned decision-making by the Association and consideration of the alternatives. The court also noted that the Supreme Court in *Lamden* had narrowly construed its ruling. Thus, the Fourth District held that a property manager is not in the same position as an Association, and is not entitled to the judicial deference policy.

As to the Association, the court held that judicial deference was an affirmative defense. As such, the Association had to prove the factors entitling it to judicial deference. This included a

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showing that plaintiffs' claims concerned a maintenance decision by the Association. Here, the suit concerned the Association's inaction over 10 years during which it did nothing to maintain the common area plumbing. While inaction might be an acceptable response to a maintenance issue, the court felt that would only occur when there was a showing of a clear weighing and balancing of alternatives, which was not done here. The Association was not entitled to blanket immunity, and the court ordered the matter sent back to trial for consideration of the property manager's and the Association's negligence.

COMMENT

To be entitled to a defense of judicial deference based on a maintenance decision, a homeowners' association must show that it has considered its options and made a reasoned choice to act or not act in a particular manner, rather than simply doing nothing. The court made it clear that a property manager may not raise the defense of judicial deference.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/G041379.PDF](http://www.courtinfo.ca.gov/opinions/documents/G041379.pdf)

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