

L&J QUICK FACTS

COVENANT ENFORCEMENT – THE LAWSUIT

THINGS TO DO BEFORE FILING SUIT

Association boards of directors have a legal duty to enforce community covenants in a manner that is not arbitrary or capricious. The board uses its best judgement to decide how and when to enforce covenants and resolve violations, including, whether and when to sue. Here are suggestions of first steps before suing violators:

- Independently confirm the violation. Try to avoid relying just on reports from third parties, and avoid acting only on unverified anonymous reports
- Consider and try alternative enforcement options and resolution strategies
 - Communicate with violators about the violations, the purpose of the covenant or regulation, and the consequences of noncompliance
 - Suspend privileges, levy fines and consider self-help, when appropriate and authorized by the community legal documents. Review association powers and enforcement strategies with legal counsel and the association's insurance agent before actions
 - Consider mediation and/or compromise to resolve violations
 - Strictly follow all due process procedures in the legal documents
- Gather and preserve all records that will be needed in a lawsuit:
 - The declaration, bylaws and rules
 - Any architectural applications, approvals, denials, etc.
 - All violation letters and correspondence involving the violation (including emails)
 - Photographs of the violation
 - All board/committee meeting minutes discussing the violation
 - The identity of all persons with knowledge of the facts, including board members, committee members, neighbors, vendors, etc.
 - All correspondence between the board or with third parties regarding the issue

Although some of this information may not be used in the litigation, it is imperative that your attorney have all of this information in advance to determine the best litigation strategy. This includes any information which might negatively impact your case. Your attorney must have this information to best advise the board.

FILING SUIT: Armed with all of the facts and documentation, the lawyer will prepare a lawsuit setting forth the claims that can be asserted against the violating owner. In most cases, this includes claims for injunctive relief, fines, attorneys' fees, and if the owner is delinquent, unpaid assessments. Depending on the association's governing documents, the association may also consider a claim for foreclosure. Claims for injunctive relief and foreclosure require signed verification by a person with knowledge that the allegations in the complaint are true and correct, such as the association manager or a board member.

SERVICE: Once the suit is filed, the sheriff or a private process server must personally serve the violating owner, now called the "defendant," with the complaint and a summons which requires the defendant to file an answer with the court within 30 days of the date of service. If the defendant fails to do so, the defendant is in default. The defendant has the right to have the default set aside by filing an answer and paying court costs within 15 days. If after 45 days of service the defendant has failed to file an answer and pay court costs, the association is entitled to a default judgment. The court may require a hearing to prove damages in the case.

DISCOVERY: If the defendant properly files an answer which raises an issue of material fact or asserts a counterclaim, it may be necessary to conduct discovery to obtain information to prove the association's claim and defeat any defenses asserted by the defendant. Both parties are entitled to conduct discovery, and this can include depositions, interrogatories and requests to produce documents. The discovery period usually lasts for 6 months, beginning on the date the answer is filed.

DISPOSITIVE MOTIONS: Once discovery is complete, the association will consider filing a dispositive motion to win the case or portions of the case. This typically is a motion for summary judgment, demonstrating that judgment is appropriate as a matter of law. To succeed, the association must show there is no dispute of any material fact which needs to be determined by a fact trier. If there is no material fact in dispute, the court applies the law to the undisputed facts and makes a determination.

TRIAL: If dispositive motions do not end the case, the parties must prepare a consolidated pretrial order. The parties are required to work together to present the court with a comprehensive order on every issue which will arise in the trial. This includes identification of the facts from both the plaintiff's and the defendant's perspectives, facts agreed upon by the parties, applicable case law, pre-trial motions, potential witnesses, exhibits, and jury issues. This order essentially is a blueprint of the case for both the court and the parties. Prior to trial, legal counsel drafts pretrial motions, meets with witnesses, and prepares exhibits, arguments, examinations, etc. Trial preparation is very time consuming for both the attorney and the board. Settlement discussions often are very valuable at this time to try to direct the outcome of a case through negotiations, rather than gamble on a ruling by a judge or jury.

JUDGEMENT: The court will rule on the case with an order and judgment. But, the judgment itself may not resolve the issues. Even if judgment is awarded in favor of the association, it may be necessary to use garnishments or other process to collect on a money judgment, or use additional motions within the court action to compel the violator to comply with the court order and cease or correct violations.