

# Community Association Management *Insider*<sup>®</sup>

OCTOBER 2007

## IN THIS ISSUE

### FEATURE

#### **Streamline Board Elections Using Online Voting . . . . . 1**

Making the transition to online voting can not only save you time and money but also increase member participation.

### LEGAL COMPLIANCE

#### **Comply with Protections for Returning Iraq War Veterans. . . . . 1**

Know the federal guidelines for employees preparing to report for—or who are returning from—military duty, or risk a DOJ investigation.

### PARKING ENFORCEMENT

#### **Use Clause to Boot Illegally Parked Cars . . . . . 6**

Booting cars may be illegal in some places. Here is how to avoid violating the law, regardless of where your association is located.

➤ Model Clause: Use Clause to Get Members'/Renters' Authorization to Boot Cars (p. 6)

#### **Recent Court Rulings . . . . . 8**

- Further Trial Needed for Architectural Committee Dispute
- Member Wins Award Against Association's Insurer

## IN FUTURE ISSUES

- Responding to No-Match Letter from Dept. of Homeland Security
- Avoid Legal Pitfalls When Emailing Board Business

## FEATURE

### Streamline Board Election Using Online Voting

The growing use of computers and the increasing number of association Web sites have paved the way for boards to switch from paper to online balloting, to save money and streamline the voting process. Although online voting has been around for a long time, it has not caught on as fast as other technological solutions have. Security concerns, the need for bylaw changes to accommodate this type of voting, and computer availability among the members are a few of the problems that have prevented boards from adopting online voting.

Now, however, with better security and more technologically savvy members, more associations are revising their bylaws to accommodate online balloting while continuing to offer voting alternatives to members who don't have online access.

Typically, an association seeking to take its election online will hire a company that specializes in online voting. The online voting company will have its own secure data centers, where votes are gathered and tabulated. An

(continued on p. 2)

## LEGAL COMPLIANCE

### Comply with Federal Protections for Returning Iraq War Veterans

The Department of Justice (DOJ) recently filed a complaint against a Virginia company for allegedly violating the *Uniformed Services Employment and Reemployment Rights Act* (USERRA). The company allegedly fired a Navy reservist without good cause when he returned from Iraq.

Congress is currently increasing pressure for troop withdrawals in Iraq. If this occurs, the DOJ might be fielding more USERRA complaints in the upcoming months as soldiers make the transition back to civilian life.

USERRA is intended to protect members of the guard and reserves from job loss, demotion, loss of seniority, and loss of benefits when they are called to active duty. You may have employees who have reported for duty in Iraq. If so, these employees are protected under USERRA, and the law prevents you from discriminating or retaliating against them for fulfilling their military duties.

"The law applies to all employers, including the federal government, state and local governments, and private employers, regardless of size," says Matthew Quarles, a senior human resources consultant with Watson Wyatt Worldwide.

(continued on p. 4)

PRODUCED IN CONSULTATION WITH

  
**community**  
ASSOCIATIONS INSTITUTE

## BOARD OF ADVISORS

**David J. Byrne, Esq.**  
Stark & Stark, PC  
Princeton, NJ

**Kathryn C. Danella, PCAM**  
Boca Pointe  
Community Assn., Inc.  
Boca Raton, FL

**Robert M. Diamond**  
Reed Smith LLP  
Falls Church, VA

**Richard S. Ekimoto, Esq.**  
Ekimoto & Morris, LLLC  
Honolulu, HI

**V. Douglas Errico, Esq.**  
Marcus, Errico, Emmer  
& Brooks, PC  
Braintree, MA

**Thomas J. Hindman, Esq.**  
HindmanSanchez PC  
Arvada, CO

**Ellen Hirsch de Haan, Esq.**  
Becker & Poliakoff, PA  
Largo, FL

**Benny L. Kass, Esq.**  
Kass, Mitek & Kass, PLLC  
Washington, DC

**Tammy McAdory, CMCA, AMS**  
Kiawah Island  
Community Assn.  
Kiawah Island, SC

**P. Michael Nagle, Esq.**  
Nagle & Zaller, PC  
Columbia, MD

**J. David Ramsey, Esq.**  
Hersh, Ramsey & Berman  
Morristown, NJ

**Gary B. Rosen, CPA, CFE**  
Wilkin & Guttenplan, PC  
East Brunswick, NJ

**Tom Skiba**  
Community Assns. Institute  
Alexandria, VA

**Clifford J. Treese**  
Association Information  
Services, Inc.  
Honolulu, HI

**Jeffrey Van Grack, Esq.**  
Lerch, Early & Brewer, Chtd.  
Bethesda, MD

**Debra A. Warren, PCAM, CMCA**  
Powar Management  
San Rafael, CA

Editor: **Eric Yoo**

Executive Editor: **Heather Ogilvie**  
Copy Chief: **Lorna Drake**

Production Manager: **Kathryn Homenick**

Corporate Marketing Director: **Andrew O'Donnell**

Director of Operations: **Michael Koplin**

Publisher: **Mark Fried**

Editorial Director: **Julie DiMauro, Esq.**

*Community Association Management Insider* (ISSN 1537-1093) is published monthly by Vendome Group, LLC, 149 Fifth Avenue, New York, NY 10010-6823.

**Subscriptions/Customer Service:** To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our Web site, [www.vendomegrp.com](http://www.vendomegrp.com). Subscription rate: \$327 for 12 monthly issues (plus \$15 shipping/handling).

**To Contact the Editor:** Call: Eric Yoo at 212-812-8435. Fax: 212-228-1308. Email: [eyoo@vendomegrp.com](mailto:eyoo@vendomegrp.com)

**Disclaimer:** This publication provides general coverage of its subject area. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional advice or services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The publisher shall not be responsible for any damages resulting from any error, inaccuracy, or omission contained in this publication.

© 2007 by Vendome Group, LLC. All rights reserved. No part of *Community Association Management Insider* may be reproduced, distributed, transmitted, displayed, published or broadcast in any form or in any media without prior written permission of the publisher. To request permission to reuse this content in any form, including distribution in educational, professional, or promotional contexts or to reproduce material in new works, please contact Copyright Clearance Center at [info@copyright.com](mailto:info@copyright.com) or (978) 750-8400. To order high quality custom reprints of *Community Association Management Insider* articles, please contact PARS International at [reprints@parsintl.com](mailto:reprints@parsintl.com) or (212) 221-9595.

## Online Voting (continued from p. 1)

outside vendor allows for voter confidentiality and security in a neutral, third-party environment. This shields the board from possible voter-fraud accusations by disgruntled members whose vote results did not go their way.

## Benefits to Online Voting

Here are the immediate benefits of online voting.

**Cost effectiveness.** Not only will you save money on printing ballots, but you also save with tabulation costs associated with ballot returns. Often, associations will hire an accountant to count the votes and to certify the election results. With an online balloting system, the system will count the votes immediately. It is fully auditable and anonymous.

If your community's governing documents allow you to notify your members of an upcoming election or other vote by email, rather than by traditional mail, you can save on the cost of postage. The United States Postal Service recently raised the cost of a first-class stamp to 41 cents. "If a board that proposes to change a bylaw is required to provide the full text of the governing documents along with its proposal, the cost of postage can be significant," says Raj Naik, vice president of Votenet Solutions, a Web-based voting provider. Notifications through email and attached PDFs of governing documents can save an association in postage.

**Increased voter participation.** Once paper ballots are mailed, it is often difficult to communicate with voters to encourage them to vote and mail the ballots back or to show up at a specific voting site. This method requires work on the voter's part.

An online election system will allow emails to be sent as broadly or as targeted as needed. After sending email notices, you can send targeted email reminders to members who have not yet voted.

On average, Naik has seen a 3 percent to 28 percent increase in voter participation when the client has moved from paper to online balloting. Convenience is a big consideration in the increase. And Naik sees convenience playing a bigger role as technology moves toward mobility. His company is considering other devices, such as cell phones and wireless email devices, to cast votes.

**Everybody is included.** An online balloting system can accommodate paper ballots for those members without access to computers or who choose not to vote online. "About half of our clients still process some amount of paper," says Naik. Votenet Solutions has an administrative section where paper votes can be collected and then manually entered into the system by an administrator.

**Scalable voting systems.** The community associations that work with Votenet Solutions have anywhere from 20 members to 28,000 members. Election vendors can offer different packages depending on the number of members, and in the case of Votenet Solutions, a package can accommodate management companies responsible for multiple associations, thus saving time and money across the board.

(continued on p. 3)

## Successful Transition Indicators

Naik finds that the more Web-based applications an association has adopted, the greater the chance for a smooth transition from paper to online ballots. "When an association already has a Web-based infrastructure in place, that association knows who its members are and has the means to communicate with them through the Internet." A robust association Web site has up-to-date member lists that an election vendor will then input into its own database and customize for a community.

"Also, with a robust Web site, association members are already accustomed to paying dues and receiving e-newsletters online," says Naik. "Online voting for these communities becomes a natural extension of the services offered on the Web site," adds Naik. Election vendors such as Votenet Solutions can offer a hosted application

that can carry the look and feel of the association Web site.

Although Internet security is always a prime concern for election vendors, Naik has noticed that concerns about Internet security have become less of an obstacle for members who are considering using an online voting service. Over time, with more members doing business online, potential voters have become more savvy about Internet security. "They won't input information unless they see that the Web site has a secure HTTP connection. And they know not to input information that might compromise their identity," says Naik.

## Increasing Member Participation

Naik cautions that online voting is not a "build it, and they will come" scenario. "If members are fired up about an election, they will vote

regardless of the medium," he says. As a result, member participation is an outcome of election marketing and how invested the members are in the community.

Ideally, you will have a robust association Web site that gathers current email addresses. These email addresses can be used to explain issues, send newsletters, and, generally, to get the word out about the election. One tip is to set up a voting demonstration at an open meeting. Members can view the sample ballot online and try out the system. This will create a buzz about the move to online balloting.

Software solutions such as online discussion forums can help create a sense of community. The more ways you can reach members and foster a sense of community, the more they will participate and feel engaged in the process. Try following the lead of

(continued on p. 4)



**5 AM:  
IT'S SNOWING HEAVILY  
AND THE BUILDING'S FUEL SUPPLY  
IS PERILOUSLY LOW.  
THE BUILDING MANAGER CALLS  
STUYVESANT.**

**9:45 AM:  
TANK IS FULL!**

Often, when you need a fuel delivery, tomorrow is too late. Relax...Stuyvesant is on the job. With more than 100 GPS equipped delivery trucks and our own deep water oil terminal, Stuyvesant has everything we need to get you what you need, promptly and quickly.

### Stuyvesant puts all its energy into serving you:

- 4th Generation hands-on ownership
- The largest, most knowledgeable and responsive sales force in the industry
- Technicians on call 24 hours a day, 365 days a year
- 100 GPS-equipped delivery trucks
- 23 million gallon local deep water storage facility
- Largest independent Natural Gas marketer in NY
- BTU/Dual Fuel Management
- Innovative, custom tailored pricing plans

A lot of companies promise good service, but our pledge is backed by a family tradition that has spanned four generations. So for reliable delivery, exceptional service and a pricing plan that fits your specific needs, look to Stuyvesant.



**Stuyvesant**  
FUEL SERVICE CORP

THE DIFFERENCE IS OUR ENERGY

642 Southern Blvd, Bronx, NY 10455 • 718.665.5700

• [www.stuyfuel.com](http://www.stuyfuel.com)

Contact Jim Slattery, 718.304.1115  
or Lou Romano, 718.304.1111

**Online Voting** (continued from p. 3)  
 CNN and Youtube.com: They recently co-hosted the Democratic presidential debates. Afterward, the presidential candidates' statements were posted on Youtube.com in online video format.

While hosting a debate might involve too much effort, placing online videos of candidates' statements on your association's Web site could create excitement about the upcoming

election and generate the type of member participation you seek.

Elections are time-consuming, from accepting nominations to publishing the results. However, by using technologies such as online balloting, you can streamline the process and make it more efficient. The printing of ballots and biographies, mailing election packets, collecting them, and finally, tallying, tabulating, and publishing the results, can all be eliminated.

**War Veterans** (continued from p. 1)  
**USERRA Eligibility**

To have reemployment rights following a period of service in the uniformed services, your employee must:

Give advance written or verbal notice. "The employee must give you advance notice of his service, unless there is some military necessity making notice impossible or unreasonable," says Quarles. The law does not specify how much advance notice is required but the Department of Defense advises members of the National Guard and Reserve that they should provide their employers as much advance notice as possible.

**Serve no more than five-year service time limit.** There is a cumulative five-year limit on periods of military service a person can perform while retaining rights under USERRA. "However, service performed during time of war or national emergency is exempt from the five-year limit," explains Quarles.

**Be released from service under "honorable conditions."** If a service member has received a dishonorable discharge, you are not required to reemploy him.

**Report to you, or submit application for reemployment, in timely manner.** Upon returning

from military service, the employee must report back to work within a certain time period, depending on how long he has been on leave, in order to qualify for reinstatement. If an employee misses the deadline for reporting back to work, then the right to reinstatement does not apply. Here are the required time periods:

➤ **One to 30 days.** An employee who has been on leave for one to 30 days must report back to work at the beginning of the first regularly scheduled workday after his release from military service, providing for travel time and an eight-hour rest period, says Quarles.

➤ **31 to 180 days.** An employee who has been on leave for 31 to 180 days must submit an application for reemployment within 14 days after his release from military service.

➤ **More than 180 days.** An employee who has been on leave for more than 180 days must seek reemployment within 90 days of his release.

### Employee's Reinstatement Rights

Once an employee meets the USERRA eligibility requirements, you are required to give him his job when he returns from his military commitment. The two exceptions to this law are for changed circumstances and undue hardships. If an employer's circum-

**EDITOR'S NOTE:** Be sure to check with your attorney before using online voting. Some state laws have specific requirements for board elections. For example, California requires use of a two-envelope system, and Virginia requires election notification by first-class mail.

### Insider Source

**Raj Naik:** Vice President, Votenet Solutions Inc., Washington, DC

stances have changed so much that reemployment of the service member would be impossible or unreasonable, reinstatement is excused.

An example would be a layoff or reduction-in-force that would have included the employee, or filing for bankruptcy, says Quarles. An employer might also be excused if it shows that retraining returning service members or accommodating employees with service-related disabilities would be so difficult or expensive as to cause "undue hardship."

If the eligibility requirements are met and no exceptions apply, the returning employee has four basic entitlements:

**Prompt reinstatement.** An employee who returns after a leave of 90 days or less must be reinstated to the position he held or would have held had he not left to serve in the military, says Quarles. If the employee was serving for more than 90 days, he must be reinstated to the position he held or would have held had he not left to serve in the military, or to a position of like seniority, status, and pay.

This means that if you have filled the employee's position in his absence, you must provide him with a similar position when he returns, Quarles explains.

Go to the Real Estate section of our Web site, [www.vendomegrp.com](http://www.vendomegrp.com), for more information about our publications.

**Accrued seniority, as if continuously employed.** “This is the ‘escalator principle’ that has been a key concept in the USERRA,” says Quarles. The escalator principle requires that each service member step back onto the “seniority” escalator at the point he would have occupied if he had remained continuously employed.

For example, if the employee would have been promoted had he not left to serve, he would be entitled to that promotion upon reinstatement.

**Training or retraining and other accommodations.** If your employee suffered a service-related disability, the employer is required to make reasonable efforts to accommodate the disability, says Quarles. If this is not possible with reasonable employer efforts, the

employer must reemploy the person in some other position he or she is qualified to perform and which is the “nearest approximation” of the position the employee had before, in terms of status and pay, with full seniority, adds Quarles.

**Special protection against discharge except for cause.** Unless the employee has done something that justifies firing a returning employee, an employer can’t fire a reinstated employee without a good reason, says Quarles. Employees who have served 31 to 180 days may be terminated only for cause during a 180-day period after returning to work. And employees who have served for more than 180 days may be terminated only for cause during a one-year period after returning to work.

### **Employee Benefits During Absence**

When an employee is called for military service, USERRA requires you to grant him an unpaid leave of absence. If he requests, he must be permitted to use paid vacation time that had accrued before the beginning of his military service instead of unpaid leave. USERRA also requires that service members who conclude their tours of duty and who are reemployed by their civilian employers receive all benefits of employment that they would have obtained if they had been continuously employed. These benefits include:

**Pension.** You must count the time your employee is on leave as time worked, for purposes of determining when the employee becomes vested in a pension plan and how much the

(continued on p. 6)

## **LET US TAKE YOU TO THE TOP!**

### *smoothly, effortlessly.*

Vertical Systems Analysis, (VSA), is an Elevator and Escalator Engineering firm located in New York City, celebrating its twentieth anniversary. Throughout this time period the engineers and staff of VSA have been actively working with professionals in the Real Estate industry to ensure safe, reliable and efficient elevator and escalator service at their properties.



ELEVATOR & ESCALATOR  
ENGINEERING ■ DESIGN  
FORENSICS ■ CONSULTING  
INSPECTIONS ■ EVALUATIONS

**PLEASE CONTACT US AT:**

TEL: 212.989.5525 • FAX: 212.989.6860  
322 EIGHTH AVENUE • SUITE 201 • NEW YORK, NY 10001  
[www.vsaconsulting.com](http://www.vsaconsulting.com)

We are an established and growing consulting firm and have provided design and engineering expertise to numerous clients since our inception.

Our design and consulting experience has run the entire gamut from providing engineering and new design services for complex elevator systems, performing elevator surveys and audits of prestigious and landmarked properties but we still personalize our services for apartment Cooperatives and Condominiums.

**War Veterans** (continued from p. 5) employee accrued under the plan. You must also make any payments you would have been obligated to make to the employee's pension plan while the employee was on military leave. However, an employee on military leave is responsible for making his own contributions upon his return to employment, says Quarles.

Upon an employee's return, he is given up to three times the length of his leave to make up for any deferred employee contributions but no lon-

ger than five years, says Quarles. And you must make any applicable matching contributions that apply to the deferred payments, he adds.

**Health benefits.** You must continue to provide health benefits for an employee (and his dependents, if applicable) on leave for less than 31 days, at the same cost as an active employee, says Quarles. And you must allow an employee on leave for more than 31 days to buy coverage under terms similar to federal and state COBRA laws, he says.

When an employee returns from military service, you must immediately reinstate health benefits for him (and his dependents, if applicable), even if your health plan normally imposes a waiting period on new or returning employees, says Quarles. This applies whether the employee paid for or dropped coverage while on military service, he adds.

■ Uniformed Services Employment and Reemployment Rights Act: 38 USC §4301 *et seq.*

**Insider Source**

**Matthew Quarles:** Senior Consultant, Watson Wyatt Worldwide, Los Angeles, CA

## PARKING ENFORCEMENT

### Use Clause to Boot Illegally Parked Cars

Community associations face considerable difficulty in enforcing parking rules and conveying to members the importance of following the rules to maintain the neatness of the community. A recent example in a California community association illustrates this problem. Between June and September of last year, the association had sent notices and fines to a member for violating the parking rules, and eventually the fines totaled \$5,500.

The member was fined for parking a large commercial vehicle in his driveway. The association prohibits parking commercial vehicles on association property, and members' vehicles must be parked inside garages. After sending the notices, the association then filed a lawsuit against the member and won a court judgment against him.

Rather than send multiple notices and fines that end up being ignored, associations often have more success by booting the cars of members and renters who violate parking rules. Booting cars is one of the most effective ways to enforce parking rules against mem-

bers and renters who, for example, park in a no-parking zone or another member's space.

However, booting can lead to lawsuits. Members or renters whose cars get booted may sue the associ-

#### MODEL CLAUSE

### Use Clause to Get Members'/Renters' Authorization to Boot Cars

Here is a Model Clause, drafted with the help of Colorado attorney Loura Sanchez, that you can put into your parking contract to get authorization

from members and renters to boot their illegally parked cars. Speak with your attorney before adapting this for use at your community.

#### AUTHORIZATION TO IMMOBILIZE VEHICLES

**a. Parking Rules.** The association has promulgated rules related to parking within the Community, which rules can be found at [*insert appropriate section*]. Among those rules are several enforcement provisions, including provisions relating to the immobilization of cars (also known as "booting") at [*insert appropriate section*].

**b. Booting authorized.** In the event a Member or Renter fails to comply with any of the parking rules, the Association shall have the authority to place an immobilization device, or boot, on the vehicle in violation.

**c. No liability.** The Association shall not be liable for any claims of damage to any vehicle resulting from the installation, utilization, or removal of an immobilization device.

**d. Member or Renter responsibility.** The Member or Renter whose vehicle has been immobilized in each instance shall be responsible for all costs of removing the immobilization device.

**e. Other remedies.** The Association shall also have the right to utilize other remedies available to it at law or under the Association's governing documents in the event of a violation of a parking rule. Such remedies may include, but are not limited to, the imposition of a fine and/or the towing of a vehicle.

Sign up for a FREE Email Update!  
Our E-Alerts get sent to your inbox—  
after you sign up at [www.vendomegrp.com](http://www.vendomegrp.com)

ation, claiming that it does not have the legal right to take that action. And booting cars can lead to confusion and anger, as well, if members or renters did not expect it to occur.

To avoid these problems, include a clause in your parking contracts with members and renters that gives you the explicit authority to boot cars that are parked in violation of your community's parking rules, recommends Colorado attorney Laura Sanchez. If you do not use parking contracts, you can give your members and renters a separate authorization to sign. On p. 6, we give you a Model Clause that you can adapt for use at your community, authorizing the use of booting illegally parked cars.

### Why Clause Is Needed

Because boots immobilize cars, many states and localities consider the practice of booting to be tampering, and have laws that forbid tampering with cars. Associations in these places risk both criminal and civil liability if they take this step.

But most of these laws also state that immobilizing a car is not considered tampering if the owner of the car has consented to it, says Sanchez. Therefore, she suggests adding a clause to your parking contracts that authorizes you to boot illegally parked cars.

Some people in the community association industry say that if the association's "Covenants, Conditions, and Restrictions" contain the right to boot cars as a method of enforcing its parking rules, there is no need to also include this right in the parking contract. When members accept a deed to a unit, say some associations, they accept the declaration and governing docu-

ments as a contract between them and the association and are bound to the policies in those documents.

To an extent, this is true, says Sanchez. But although these policies might cover members, they don't cover renters. And even with respect to members, having an actual written authorization clarifies matters and is, therefore, preferable, says Sanchez.

---

**EDITOR'S NOTE:** Your parking contract should state that renters must comply with the association's parking rules. And you should require renters to acknowledge in the parking contract that they have been provided with and have read a copy of those rules, and that they agree to comply with them.

---

### What Clause Should Say

The clause you include in your parking contract to get the authority to boot cars should do the following:

**Refer to association's parking rules.** "Booting someone's car is likely to produce an outraged, emotional response," warns Sanchez. It's a good idea to remind members that the association has parking rules that everyone has agreed to and by which everyone is bound. Your clause should also refer to the specific part of your governing documents that covers booting, if applicable.

**Give association authority to boot.** Next, state that the association has the specific authority to boot illegally parked cars.

**Explain association is not responsible for any damage to car.** You do not want angry members sending the association bills for damage to the car resulting from installation, utilization, or removal of the boot. State that the associa-

tion will not be liable for any damage caused in this way.

A court might not enforce this provision if you or the company you hire to install and remove boots is negligent in how this is done, Sanchez notes. But she still suggests writing it into the parking contract and leaving it to a court to decide whether it will enforce the provision in any given circumstance. An alternative is to state that the association will not be liable for damage unless it was somehow negligent.

**Require member or renter to pay for removing boot.** Warn members and renters that they will be responsible for paying the cost of removing the boot. Most associations hire an outside company to provide booting services. Having to pay to get the boot removed is one of the main incentives for members and renters to obey the association's parking rules.

---

**EDITOR'S NOTE:** If you are going to hire an outside company for booting services, make sure the company provides services 24 hours a day, seven days a week, says Sanchez. People will get angry enough at having their car booted, but they will get even angrier if they can't get anyone to remove the boot when they need their car. And a court might consider immobilizing a car for a whole weekend, for example, to be unreasonable, she adds.

---

**Authorize association to use any other available remedies.** State that the association has the right to use other remedies available to it, under law or under its governing documents, in the event of a parking rule violation.

### Insider Source

**Laura Sanchez, Esq.:** Partner, HindmanSanchez, Arvada, CO

## RECENT COURT RULINGS

### ► Further Trial Needed for Architectural Committee Dispute

**Facts:** An association's covenants give the architectural committee broad powers to approve or disapprove proposed modifications to members' homes. A member submitted plans to the committee for a guest house and a detached garage on his property. The plans were approved, and the member was advised that any changes would need to be resubmitted. The member then modified the plans to locate the two structures closer to the boundary of the property.

After resubmitting, the committee denied the plans. The member continued with the construction, and the association began to assess a \$500-per-day fine for the alleged violation. The member sued the association. The lower court granted judgment without a trial, deciding that the committee had arbitrarily and unreasonably disapproved the member's plans, and that as a result, the fines were invalid and construction could be completed.

**Decision:** The Arizona appeals court reversed the trial court's decision and sent the case back for retrial.

**Reasoning:** To issue a judgment without a trial, a judge must be presented with no undisputed facts. Here, the appeals court decided that, based on a disputed fact, a judge could conclude that the committee was reasonable in denying the proposed plans. One of the committee's reasons for denying the application was that the garage would affect other members' views. According to the member, the garage would be almost invisible to anyone in the common areas of the community. However, the association submitted affidavits countering the claim, stating that the proposed garage would not be hidden from view.

■ *Tierra Ranchos Homeowners Assn. v. Kitchukov*, August 2007.

### ► Member Wins Award Against Association's Insurer

**Facts:** At a California condo association, individual members do not own the garages, which are located

in the community's common area. When a member pressed the remote garage door opener, the garage door struck the member's guest, who was thrown to the ground and suffered a broken hip. The guest sued the association and the member. The association's insurer provided the association's defense. However, the insurance adjuster denied the association's request to defend the member, even though the accident had occurred in a common area.

The member sued the insurer, claiming that in denying the request to defend the member, the adjuster did not follow proper protocol and did not have the authority to deny the request. Also, the insurer approved the adjuster's conduct after it occurred.

The trial court found that the insurer had a duty to defend the member. The jury awarded \$1.5 million in compensatory damages to the member and approximately \$8.3 million in punitive damages. The trial court conditionally granted the insurer a new trial on the issue of punitive damages, unless the member agreed to a reduction. The member agreed to reduce the punitive damages award to \$1.5 million. The insurer appealed the punitive damage award, and the member appealed the reduction of the punitive damages award.

**Decision:** The California appeals court upheld the trial court's decision.

**Reasoning:** The insurer's decision to deny a defense caused economic harm and emotional distress to the member, and not physical harm. In the spectrum of reprehensible conduct requiring a punitive damage award, the insurer's misconduct was relatively minor. Also, the defense request denial was an isolated incident.

The court saw the compensatory jury award as very substantial. The member recovered all of her economic damages, including attorney's fees. Therefore, the trial court was justified in lowering the punitive damage award.

■ *Walker v. Farmers Ins. Exchange*, June 2007.

## Have you signed up for your FREE E-Alert?

Make the most of your subscription! Go to [www.vendomegrp.com/real-estate.html](http://www.vendomegrp.com/real-estate.html) and sign up to receive one of our highly regarded email alerts. They're filled with breaking news, industry information, and practical pointers—register today!