



Suits in Equity to Enforce CC&Rs No Longer Come With an ADR Pre-Filing Requirement

By Marc Y. Lazo

On January 1, 2005, Civil Code Section 1354 was amended to do away with the pre-filing requirement imposed on homeowner associations (“HOAs”) or their members suing in equity for claims “related to the enforcement of the governing documents.” Usually, such claims are brought to enforce provisions in the covenants, conditions and restrictions (“CC&Rs”) governing the HOA. Under the former statute, an HOA or HOA member suing for declaratory or injunctive relief, either exclusively or in conjunction with a claim for not more than \$5,000 in monetary damages, had to make a demand for alternative dispute resolution (“ADR”) to the prospective defendant(s) before commencing litigation. That demanding party then had to wait 30 days for a response.

If no response to the ADR demand was received within 30 days, the former statute deemed it rejected, allowing the demanding party to commence litigation. If, however, the party upon whom the demand was served agreed to engage in the ADR (the form and impact of which was left open by the statute), the parties then had 90 days to complete it, unless they stipulated to an extension. If the ADR was not successful, litigation could then be commenced.

The party commencing the litigation would then be required to file a certificate with the complaint attesting to compliance with this requirement. The former statute provided that a failure to comply with the requirement could result in a waiver of the right to sue for enforcement of the CC&Rs.

The pre-filing requirement, which became effective January 1, 1994, was abrogated this year. The upside to this abrogation is that suits in equity to enforce CC&Rs may be filed immediately in court. The downside is that courts may be less inclined to award prevailing parties their attorney’s fees in full. Attorney’s fees are recoverable under both versions of the statute. Previously, such fees could only be recovered if the prevailing party complied with the ADR pre-filing requirement. However, under the former statute, the court could consider a party’s refusal to participate in ADR as a factor in awarding attorney’s fees, potentially inflating the award. This factor has now become moot, leaving the prevailing party with one less argument for full recovery.

Further Information

This is a publication of ECG and should not be construed as legal advice on any specific facts or circumstances. The contents are for general informational purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of ECG, to be given or withheld at its discretion. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

Readers are urged to consult their regular contacts at ECG or the principal author of this publication, Marc Y. Lazo (telephone: 949-833-8550; email: MLazo@enterprisecounsel.com) concerning their own situations or any specific legal questions they may have.