



# COMMUNITY MATTERS

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News and Trends in Community Association Law

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- **He Said, She Said:** Handling Misinformation Regarding the Management and Operation of Associations



## Allegations of Discrimination: Potential Liability for Community Associations under New HUD Rule

by | **Teco Proffitt, Esq.**

In 2016, the United States saw an unprecedented increase in the number of reported hate crimes across the country. On October 14, 2016, in attempt to combat these incidents,

the U.S. Department of Housing and Urban Development (“HUD”) issued HUD Rule 24 C.F.R. § 100.7 (the “Rule”) that affected the way in which housing providers interact with owners and tenants in their communities. Titled “Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act,” the Rule created liability under the Fair Housing Act (“FHA”) for housing providers who engage in harassment or create a hostile environment because of a resident’s protected class. The Rule created three categories of direct liability that would affect community associations, including: (1) liability for the housing provider’s own conduct; (2) liability for failing to take prompt corrective action relating to the conduct of employees or agents; and (3) liability for failing to take prompt corrective action for the conduct of a third party (such as another resident). Out of these three categories of liability, number three has the most impact for community associations. This raises the question: Are community associations potentially liable if a resident in the association engaged in discriminatory activities against another neighbor or resident in the community? Before the Rule, we would often recommend that community associations stay out of homeowner-to-homeowner disputes. However, doing this now upon a report of discrimination, leaves community associations exposed to potential liability under the Rule. In our Fall 2016 issue of *Community Matters*, we mentioned that only time and upcoming court decisions would assist in determining liability with respect to the association’s duty to halt discrimination by third parties.

Since then, there have been a few cases that provide bits of clarity for how courts may determine liability for housing providers under the Rule. The main case in point is *Francis v. Kings Park Manor, Inc.*, which was heard on three occasions by the United States Court of Appeals for the

Second Circuit. In this 2021 case, Francis, a Black tenant in a New York residential apartment complex brought action against his landlord, property manager, and a neighbor, alleging continuing pattern of racially discriminatory conduct and harassment in violation of FHA, the Rule, and similar state statutes. Francis reported to his landlord and property manager on multiple occasions that he was receiving racial insults and death threats from his neighbor in the community. In his complaint, Francis alleged that his landlord failed to investigate or intervene despite his reports. In fact, there was alleged evidence that the landlord directed the property manager “not to get involved.” Despite all this, however, the Court ruled in favor of the landlord. In their multiple opinions, the Court expands on the test used to determine liability under the FHA and the Rule. Under the Rule, “the [housing provider] can be held liable only in circumstances where the [housing provider] had the power to take corrective action yet failed to do so. But the [housing provider] escapes liability under the FHA if the appropriate corrective action is beyond the scope of its power to act.” In the Court’s reheard opinion, it stated that an owner would have to be able to show that the housing provider had “substantial control over the harassment.” Meaning, in order for a plaintiff to win on an indifference theory, “a plaintiff must plausibly plead that the [housing provider’s] response to harassment by a third party was clearly unreasonable in light of the known circumstances.” In the facts of the case, because the landlord was aware that the police were involved and investigating (which later led to the neighbor’s arrest and prosecution), this was enough to hold that the landlord acted reasonably.

Although the U.S. Court of Appeals for the Eleventh Circuit (where Georgia is located) is still silent on the implications of the Rule (due to a lack of cases before it which would allow it to interpret the Rule), the Second

Circuit case can provide community associations with insight into how a court might handle these issues. However, unlike the landlord in the Second Circuit case, community associations may have more ability to intervene in racial disputes between homeowners. For example, a community association’s declaration could allow fining for nuisance violations or if an owner erects an unauthorized discriminatory symbol on an owner’s property. The question is whether the Eleventh Circuit would hold community associations to a higher standard than the landlord in the Second Circuit case. Would a court require community associations to fine owners who have been reported harassing another of a protected class if their governing documents allow it? Would contacting law enforcement be sufficient to act reasonable under the circumstances similar to the landlord in the Second Circuit case? Ultimately, a test case within our circuit will need to determine some of these questions.

From a best practices approach, our firm recommends that if the board learns of a dispute between residents, the board should first contact its legal counsel for further direction and attention to these matters. The association, with legal counsel, should investigate the incident involving the dispute and review the governing documents to determine (1) whether the incident constitutes a violation of the governing documents and (2) whether the association is afforded any enforcement remedies to enforce compliance of the violation. Attention should be paid to the language of the governing documents to determine whether certain actions need to be taken to limit exposure to liability under the Rule. Overall, it is important for community associations to not ignore these issues when they arise. Due to the current political landscape, these issues may become more prevalent in the near future. ❖

# He Said, She Said: Handling Misinformation Regarding the Management and Operation of Associations

by | **Elizabeth K. Modzeleski, Esq.**



In a day and age where information can be shared in an instant, disgruntled community association members often take to public platforms to vent their frustrations regarding

the management and operation of their association. From news media to social media platforms specifically designed for homeowners, such as NextDoor, the options for publication are virtually endless, and homeowners rarely shy away from posting online should they find themselves in conflict with their community associations.

When association board members become aware of an association member publishing misinformation regarding the management and operation of the association, the board members often feel inclined to provide a response in a similarly public fashion, either arguing against the validity of the member's statements or making accusations of their own against the complaining member. Though it is natural for a board to become defensive in response to false public statements regarding the association, it is important for boards to handle these matters appropriately and avoid escalating the situation. Discussed below are six simple recommendations for handling and responding to a false public statement by an association member.

**1. Evaluate the statement.** Before responding, the board should evaluate the statement to determine the root of the member's issue. An association's covenants can be difficult to interpret, and a member may believe in the truth of their statement without understanding what is or is not required under the covenants. If the association employs a property management company or has an attorney, the board should consult the association's property manager and attorney regarding the statement and the member at issue to get the full picture of the member's account with the association. Taking the time to look into the member's account can shed light on the false statement and help the board determine the root cause of the member's issue.

**2. Do not engage publicly.** Though the board is dealing with a false public statement by a member, it should not respond to or engage with the member on a public platform. Doing so will only open the door for further public accusations and conflict. Instead, the board may consider reaching out to the member directly to discuss the member's concerns. It may be the case that the member's false statement was based on a misunderstanding which can be resolved through a conversation with the board, and the board may request that the member remove the false statement following resolution of the issue.

**3. Send a community letter addressing widespread concerns.** If the statement raises community-wide concerns, other association members may grow uncertain as to the management and operation of the association. When a false public statement creates community-wide discord regarding the association's management and operation, the board may consider a community-wide letter addressing these concerns. The letter should not mention the member who posted the false public statement or any details of the issues involving that member. Instead, the letter should recognize the widespread concerns and address these issues by explaining the facts and circumstances known to the board and offering solutions to the membership.

**4. Adopt rules and regulations regarding member behavior.** Many associations have covenants which allow the association's board of directors, without a vote of the members, to promulgate reasonable rules and regulations regarding the use of association property and the conduct of association members. If your association's covenants contain

such a provision, the board may consider adopting a rule prohibiting members from publishing misinformation regarding the management and operation of the association. Adopting such a rule may give the association the ability to sanction this behavior in the future.

**5. Contact the association's attorney to discuss sending a cease-and-desist letter.** When a member's behavior in spreading false and harmful information regarding the management and operation of the association persists despite the board's attempts at resolution, the next step may be contacting the association's attorney to discuss whether a cease-and-desist letter is appropriate under the circumstances. A cease-and-desist letter would address the problematic member's behavior, clarify the misinformation being spread by the member, and demand that the member stop publishing or otherwise spreading false and harmful information regarding the management and operation of the association.

**6. Consider potential claims by individual board members.** If a member's false statements pertain to a particular member serving on the board, that board member may have a claim against the member for libel or slander under Georgia law. Such a claim would be specific to the board member at issue and would need to be handled by an attorney hired to represent that board member rather than by the association's attorney.

Conflict with association members is never comfortable. If your association is dealing with members spreading misinformation regarding the association, contact our firm. We are happy to help. ❖



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