

# **OWNER ASSOCIATIONS IN SMALL CLAIMS COURT**

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## **AS PLAINTIFF OR DEFENDANT**

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## **OWNER ASSOCIATIONS IN SMALL CLAIMS COURT**

1. **Owner Association Involvement in Small Claims Court Cases.** An Owner Association may be the Plaintiff or the Defendant in Small Claims Court Cases.
  - a) Owner Association as Plaintiff – Small Claims Court may be used to enforce restrictive covenants on residential property, to collect assessments and for other issues.
  - b) Owner Association as Defendant – An Owner Association might be sued in Small Claims Court.
  - c) Owners Can Sue to Enforce Residential Covenants – Owners also have the right to sue others to enforce residential restrictive covenants and for damages.
  
2. **Owner Association Enforcement of Covenants in Small Claims Court.**
  - a) Cases an Association or Owner May File. Owner Associations may file a lawsuit in Small Claims Court against an owner in violation of a covenant, rule, or guideline. Assessments can be sought, or residential covenants may be enforced, by the Association or Owners. The Association may seek a restraining order to stop the offending action (breach of a residential restrictive covenant) and an injunction to prevent any further violation. The Owner Association may also seek to have the Court force the owner to restore the property to the condition that existed prior to the violation, and to reimburse the Association for any costs incurred in enforcing the restriction, including attorney fees.
  - b) Factors for an Association to Consider Before Filing in Small Claims Court. In determining whether to bring a covenant enforcement lawsuit in Small Claims Court, the Owner Association should consider the following:
    - i) Jurisdictional Requirements. These limitations are discussed below.
    - ii) Complexity of Issues. As a general rule, complex cases are not appropriate for Small Claims Court.
    - iii) Importance of Winning/Consequences of Losing. Cases won in Small Claims Court create a practical (as opposed to legal) precedence on the matter litigated. Therefore, if the Owner Association wins, the matter is typically resolved once and for all as a matter of practice (not of law). Similarly, if the Owner Association loses, the same effect occurs.

- c) How to file/Sue in Small Claims Court:
- i) Actions to be Taken if a Small Claims Lawsuit is Filed. To sue in Small Claims Court, the following actions must be taken:
1. Fill out a "Notice, Claim, and Summons to Appear for Trial" form. Forms may be obtained from the Clerk of the County Court in the applicable county or from [www.courts.state.co.us](http://www.courts.state.co.us) (click on "Forms" Tab at the top then click on "Small Claims" to locate and download the form). Fill out the form completely. Be sure to sign and date the form. File the form with the Clerk of the Court with required filing fee.
  2. In a small claims case to enforce restrictive covenants, all owners of the residence must be named in the complaint as codefendants.
  3. When the complaint is filed, the Clerk will set the date of trial and issue a notice of the claim with the trial date. The trial must be scheduled at least 30 days after the notice.
  4. Subsequent to filing the complaint, the notice, complaint and a summons must be served on the Defendant, at least 15 days before the trial date. The complaint may be served by:
    - A. Hiring a private process server or sheriff to deliver the complaint to the defendant or the registered agent.
    - B. Choosing to have the Clerk of the Court mail the complaint by certified mail, which must be sent at within three days after the action is filed. This service will be provided at a fee. The person who sued should be aware that they might need to hire a private process server or sheriff to deliver the complaint, if the complaint is not successfully delivered or done so timely.
    - C. Once the complaint is served, the person who has started the lawsuit will receive a form proving that service was completed. This form must be filed with the Court prior to the trial date.
- ii) Trial Preparation. Before the trial, determine who would be the most appropriate person to try the case. In preparing a case for an Owner Association, the following steps are recommended:
1. Review the Association's records. This purpose of this review is to locate any documents that may be relevant to the issues involved

whether or not they are helpful to the Association's position. Knowing what documents could pose problems to the Association's case will help the Association be better prepared to address the document should the other party raise it during trial.

2. Preserve relevant documents. Once it becomes likely that a dispute may end up in litigation, the Association has a duty to preserve (not destroy) all relevant documents in its possession, custody or control, including those that may be in the possession of other persons or entities (including emails whether archived or not). The duty ends when the threat of a lawsuit ends or the lawsuit is finally resolved. If documents which may be relevant could be in the possession of other persons or entities, the Association should send out a notice to these other persons or entities demanding that they perform a thorough search of their records for such documents and provide them (or copies of them) to the Association.
3. Prepare all exhibits. This may include the declaration, deeds, photographs, videotapes, recordings, correspondence, emails, and any other documents that will help prove the claim or defense or possibly contradict the other party's position. Verify that you have enough copies of the exhibits. It will be necessary to bring several copies of the exhibits so that copies may be admitted into evidence and given to the person or persons being sued.
4. Prepare and subpoena supporting witnesses. The Clerk of the Court will issue a subpoena, if needed, to assure the attendance of witnesses. Subpoenas should be sought and served at least 48 hours before the trial. Fees for one day's attendance and mileage to and from the courthouse must accompany the subpoena. Witnesses do not need to attend if they have not been served with a subpoena.
5. Prepare to respond. Anticipate and be prepared to respond to defenses or counterclaims raised by the other party.
6. Prepare arguments. Prepare an opening and closing argument summarizing your case.
7. Obtain authority from the Association's board of directors to settle the case. Settlement of a case may be preferred rather than putting the dispute in the hands of the judge. The representative of the Association should obtain authority from the Association's board of directors as to the most the Association will offer or the least the Association will accept to settle the case.

8. Consult. Consider consulting with the Owner Association's attorney to prepare for the trial.
9. If the Defendant does not file a response before the trial date or does not appear at the trial, request the entry of Default Judgment. A Default Judgment is a Court Order against the Defendant for up to the amount requested in the complaint, plus interest, costs and any other amounts allowed by statute. Before entering Default Judgment, the judge will determine if the Owner Association has proven, by appropriate return of service, that proper service was made upon the Defendant at least 15 days prior to the trial date. Although the judge may also require the Association to present sufficient evidence to support the claim, the judge must do so in a covenant enforcement action.
10. Determine if a temporary Order directing the Defendant to immediately comply with the restrictive covenant before trial is needed. If so, the Association can seek such temporary Order from the court even before the complaint is served or before the first scheduled trial. The Association does not even need to notify the Defendant it is seeking such a temporary Order until after the Order has been entered. When making the request, file with the court a motion seeking the temporary Order and attach to the motion a certified copy of the current deed showing that the Defendant owns the property and a certified copy of the restrictive covenant. The motion is supposed to be heard at the earliest time the court has available. To obtain the temporary Order, the Association will have to prove at the hearing that there is a substantial likelihood it will win at trial on the merits (rather than by a technicality) and that irreparable damage will continue to occur to the Association without the temporary Order.
  - iii) The Judgment. The Court must reduce the Court's decision to writing (i.e., an Order enforcing a restrictive covenant on residential property). The Order must be personally served upon every party subject to the Order. If a party that is subject to the Order is already present in the courtroom at the time the Order was entered, the magistrate or judge may serve that party with a copy of the Order at that time.
  - iv) Enforcement of the Judgment. If the Association wins the case, it will be necessary to collect or enforce the judgment. Money judgments are typically enforced by garnishment of wages or bank accounts, by finding out the Defendant's assets, by using the power of the Court to hold a

judgment debtor in contempt for failing to answer where their assets are, and by other means.

### 3. **Limitations of Small Claims Court Lawsuits.**

- a) Jurisdictional Limits for Small Claims Court Cases. Although Small Claims Court actions are not subject to all the procedural requirements that County and District Court lawsuits are subject to, there are requirements that must be met when a small claims lawsuit is initiated. These requirements include the following:
- i) Dollar Amount of Claims. The dollar amount of claims (suits) is limited to \$7,500.00 (exclusive of interest and costs).
  - ii) Limitation on Number of Lawsuits Filed. Plaintiffs may not file more than two (2) claims per month or more than eighteen (18) lawsuits per year.
  - iii) County Where the Association is Located. The county in which the lawsuit is filed must be the county in which the Common Interest Community or Owner Association is located.
  - iv) Failure to Comply. Failure to comply with any one of the above requirements may result in the dismissal of the lawsuit, or an order from the Court to re-file the complaint.
- b) Attorney Representation. Prior to 2001, attorneys were not permitted to appear on behalf of any party in Small Claims Court. However, legislation from 2001 permits a Defendant to hire an attorney, provided that the Defendant first files with the Court no later than 7 days before the first scheduled trial date a "Notice of Representation" that the Defendant will be represented by an attorney. The Clerk of the Court will then advise the Plaintiff of the Plaintiff's right to counsel. If the Defendant hires an attorney, the Plaintiff also has the right to hire an attorney to represent him or her.

Attorneys may also appear in Small Claims Court if:

- i) the attorney is a full-time officer or full-time employee of the Plaintiff;
- ii) the attorney is an authorized full-time employee or active general partner of a partnership;
- iii) the attorney is an authorized active member or full-time employee of a union; or
- iv) the attorney is appearing for themselves, pro se.

c) Representation of the Association by an Officer, Active Member or Employee.  
If the Association does not hire, or is unable to hire, an attorney, then as a nonprofit corporation, an Owner Association, must be represented by one of the following agents:

- i) an officer;
- ii) an active member; or
- iii) an employee of the Owner Association.

d) Questions that an Owner Association might have regarding representation in small claims court:

i) **Can the Property Manager of an Owner Association represent an association?**

*Maybe not. This may depend on the referee or magistrate hearing the case. If the Owner Association's property manager is a full-time officer of the Owner Association, an active member of the Owner Association, or an employee of the Owner Association, they may represent the Owner Association. If the property manager is employed by a management company, the Court may not allow the manager to represent the Owner Association in Small Claims Court.*

ii) **Can the Officer or Member representing the Owner Association be compensated?**

*No. Officers, directors, and members who serve as agents typically cannot be compensated by the Owner Association for representing the Owner Association (see the legal documents for the Community).*

4. **Defense of Lawsuits Brought Against an Owner Association in Small Claims Court.**

Owner Associations have noticed an increase in small claims lawsuits initiated against them. Owners and residents traditionally bring small claims actions against associations because they can do so without the assistance of an attorney and it generally is less expensive to pursue. Despite the frequency with which small claims lawsuits are initiated against associations, many directors and managers are not aware of the rules and procedure for these cases.

a) Summary of Defense of Small Claims Lawsuits. The process is as follows:

- i) The Owner Association will be notified that it has been sued when the Plaintiff serves the Owner Association with a Complaint. Service must occur at least 15 days before the trial date.

- ii) After receiving notice, the Owner's Association must:
1. Determine who should represent the Owner Association at trial. The Owner Association may decide to hire an attorney. If the Owner Association decides to hire an attorney, the Owner Association must file a Notice of Representation at least 7 days before the date set for the first scheduled trial date in the Small Claims Court. The Owner's Association should contact its attorney immediately to discuss possible representation, especially if the Owner Association desires representation.
  2. Search the Owner Association's records and preserve all relevant documents. (See discussion above).
  3. File a response and/or counterclaim before the first scheduled trial date. The response will provide the Owner's Association the opportunity to state the facts and to explain whether the Plaintiff's claim is valid. Failure to file a response or appear in Court prior to the trial date will result in a default judgment (a Court Order against the Owner Association) as long as the Plaintiff can prove, by appropriate return of service, that proper service was made upon the Defendant at least 15 days prior to the trial date.
  4. Prepare a defense. (See discussion above).
  5. Prepare all exhibits. The necessary exhibits will depend on the nature of the claim. Exhibits may include the following: the Declaration, deeds, photographs, videotapes, recordings, correspondence, emails, and any other documents that will help disprove the Plaintiff's claim. It will be necessary to bring copies of each exhibit so that one copy may be admitted into evidence and one copy provided to the other parties to the lawsuit.
  6. Prepare and subpoena supporting witnesses. (See discussion above).
  7. Prepare an opening and closing argument. (See discussion above).
  8. Obtain authority from the Association's board of directors to settle the case. (See discussion above).

9. Consider consulting with the Association's attorney to prepare for the trial.
  - b) Insurance Coverage and Possible Insurance Defense. The Owner Association should analyze whether the Small Claims Court claims are covered by their insurance. In many instances, the damages claimed by a small claims Plaintiff are less than the Association's deductible. For this reason, many Associations do not submit these claims to their insurance carrier. However, prior to making this decision, Owner Associations should be aware of and consider the following:
    - i) There is always a possibility that a small claims lawsuit may "blow up" into something much more serious. Because insurance carriers generally require notification of claims as soon as possible, failure to put the insurance carrier on notice of a small claims lawsuit (after the association is served) may result in the denial of coverage at a later date.
    - ii) The Owner Association can notify its insurers of the lawsuit but not request defense. If defense by the insurers is desired, that defense should be demanded when the insurers are notified. Although the notice can be provided orally, it is preferred to send written notice which will help defend against a carrier's possible contention of no notice or improper notice.
    - iii) Because small claims actions have a tendency to become more involved throughout the process, it is generally recommended that the Owner Association be represented by legal counsel. Legal representation will certainly increase the Owner Association's costs above the deductible amount.
    - iv) Owner Associations should consider consulting with legal counsel concerning these issues before making a decision about submission of an insurance claim on the lawsuit.
5. Additional Resources.
- a) Clinics. Clinics are offered periodically through the Denver Bar Association. The clinics will assist pro-se litigants with specific legal advice or directly assist in completing forms.
  - b) Web. A schedule of upcoming clinics is available at the following web address:  
<http://www.denvergov.org/FreeLegalClinics/tabid/383389/Default.aspx>

- c) Video. A video is available from the Denver Public Library.
- d) Orten Cavanagh Richmond & Holmes – [www.ocrhlaw.com](http://www.ocrhlaw.com) or [info@ocrhlaw.com](mailto:info@ocrhlaw.com) can provide more information; or, contact the Owner Association's attorneys.
- e) Small Claims Handbook – [http://www.courts.state.co.us/userfiles/file/Self\\_Help/smallclaimshandbook%20finaltocourt%204-11.pdf](http://www.courts.state.co.us/userfiles/file/Self_Help/smallclaimshandbook%20finaltocourt%204-11.pdf)