

# HALRIS LEGAL RESEARCH MEMO

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1. [Spanish Court II v. Carlson](#),  
2012 IL App (2d) 110473
2. [Spanish Court II v. Carlson](#),  
2014 IL 115342
3. [Spanish Court CAI amicus  
brief \(Supreme Court\)](#)

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**CAI says HOAs are  
more ‘creatures of  
statute’ than  
contractual**

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**Assessments are like taxes with  
no contractual right to offset  
‘failures to perform’**

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## **A. Spanish Court – overruled appellate opinion**

**(Note: The quotes from the opinion are printed as normal text, but annotations are in *[italics]*. This paper is based on the IL Supreme Court opinion, with reference to the appellate court contrary opinion.)**

- 1. We hold, by analogy to the case law on actions brought under the Forcible Entry Act by landlords for possession of leased property due to unpaid rent, that the unit owner may claim neglect as a defense to the board's suit under the Act. [Emphasis added].**

*[The appellate court held the condo in the same position as a landlord under the landlord-tenant laws, which allow a tenant to withhold rent as a defense against forcible entry.]*

- 2. Plaintiff [HOA] suggests that a board's right to collect assessments is absolute [no exceptions] and that a claim for nonpayment of assessments is not subject to any affirmative defense.**
- 3. [N]owhere does the . . . Condominium Act suggest that the right is absolute." The Condominium Act appears to set the rights of unit owners on par with the rights of the board of managers. Moreover, the rights arise from mutually exchanged promises—on the one hand to pay assessments, on the other hand to maintain the common elements—and so the Declaration and the Bylaws are best seen as contracts. [Emphasis added].**
- 4. [T]he condominium instrument indicates (as presumably most do) that the unit owner's promise to pay assessments is in exchange for the board of managers' promise to use those assessments for the repair and maintenance of the condominium property, the unit owner may claim, as a justification for nonpayment of assessments, that the board of managers breached its duty of repair and maintenance. [Emphasis added].**

*[In short, the CC&Rs and bylaws are a contract and a party may without payments for services not performed by the other party under contract law. The HOA, as seen in the Supreme Court opinion below, claims that the right for HOA members to withhold payments is not lawful. A 'technical' argument is followed concerning whether or not non-payment is a valid argument to stop the HOA's possession of the unit.]*

## **B. Spanish Court -- Supreme Court opinion**

1. [Defendant] claimed that such conduct by Spanish Court constituted a breach of its duties set forth in the condominium declaration, and that Spanish Court was estopped as a matter of law from seeking payment for the monthly assessments.
2. The appellate court held that a unit owner may claim, as a defense to a forcible action [taking possession of the unit by HOA] based on unpaid assessments, that her responsibility to pay assessments was diminished or nullified by the failure of the association to repair or maintain the common elements. [Invalidating taking possession].
3. The appellate court viewed the obligation to pay assessments, and the obligation to repair and maintain the common elements, as mutually exchanged promises, and concluded that under principles of contract law, a material breach of the repair obligation could warrant nonpayment of assessments. [Emphasis added].
4. Spanish Court argues that a unit owner's obligation to pay assessments is independent of the association's obligation to maintain and repair the common elements [payments not based on performance] and, thus, a unit owner's claim that the association failed to fulfill its obligation is not germane to a forcible action based on unpaid assessments. [IL law requires an action to be germane or 'related to' the other act. Emphasis added.]
5. Although these duties [upkeep, maintenance, replacement] may also be reflected in the condominium declaration and bylaws, as they are in this case, they are imposed by statute and exist independent of the association's governing documents. Accordingly, a unit owner's obligation to pay assessments is not akin to a tenant's purely contractual obligation to pay rent, which may be excused or nullified because the other party failed to perform.  
  
*[See CAI argument in C(2) below.]*
6. The relationship between a landlord and tenant is contractual. Although aspects of that relationship may be governed by state and local landlord-tenant laws, the relationship is created through the agreement of the parties. [See C(2) below for *CAI attorney Gary Poliakoff's* argument that

distinguishes the Declaration from a contractual “agreement of the parties.”]

7. Section 9 of the Condominium Act, which establishes a unit owner’s duty to pay assessments, does not provide, expressly or impliedly, that such duty is contingent upon the repair and maintenance of the common elements.

*[The Condominium Act, like all other HOA laws and CC&Rs, does not address any conditions for the non-payment of assessments. “Pay or move out” are the two choices for a homeowner. It is much like a form of indentured servitude, outlawed along with slavery under the 13<sup>th</sup> Amendment, whereby a person agrees to a contract but can only exit the contract after the term of the contract has expired. Unlike slavery, a person can become free at the end of the contract term. Not so with the HOA contract or declaration of covenants, with its ‘pay until you die’ condition.]*

8. [T]he condominium form of property ownership only works if each unit owner faithfully pays his or her share of the common expenses. When a unit owner defaults in the payment of his or her assessments, the resulting forcible entry and detainer action is thus brought “for the benefit of all the other unit owners.”
9. Permitting a unit owner’s duty to pay assessments to be nullified would thus threaten the financial stability of condominium associations throughout this state.

*[Paragraphs 8 and 9 reflect an activist judge’s concern for a better HOA, not a better America, while ignoring the basis of our constitutional system of government to protect private, property rights.]*

10. For the same reason that taxpayers may not lawfully decline to pay lawfully assessed taxes because of some grievance or claim against the taxing governmental unit, a condominium unit owner may not decline to pay lawful assessments.” [See CAI brief in C(1)(c) below.]

*[The court now ascribes public government attributes to the HOA legal scheme without considering checks and balances and other constitutional protections for HOA members found when governed by public entities].*

11. In addition, a unit owner who believes he or she has been aggrieved by some act or omission of the board of managers may take steps to remove

the offending board members; become involved in the management of the association by seeking election to the board; or seek recourse through the courts.

*[Apparently issued with a little help from CAI. See C(1)(c) below.]*

12. Carlson's claim that her duty to pay assessments was nullified by Spanish Court's failure to repair and maintain the common elements is not a viable defense to Spanish Court's forcible action as a matter of law, and is thus not germane to that proceeding. [SC ruling.]

*[The SC overruled the appellate court's opinion that the HOA ~ member relationship was analogous to that of a landlord-tenant relationship and withholding rent for failures to perform was justified.*

*As shown above, it appears that the SC was influenced by the CAI amicus brief and a reference to an activist CAI member attorney's views. CAI argued that*

*1) silence in the statute was equivalent to no exceptions to withhold assessments,*

*2) hardship would befall the other members by not possessing the property, which is difficult to understand since the HOA did not file a claim for the assessments as it had a right to do,*

*3) that the CC&Rs were not really a contract like a rental contract,*

*4) assessments were just like public taxes and must be paid no matter what, again ignoring other alternatives to assessment collections that implies a purely punitive purpose on the part of the HOA, and*

*5) allowing for non-payment of assessments without exception would ruin HOAs throughout the state -- its fear mongering mantra.]*

### C. CAI influence on the Supreme Court

*[In reading the following quotes from CAI documents, and used in the opinion, can anyone truly believe that CAI is representing, as it claims, the best interest of the homeowners? Isn't it a plain conflict of interest to represent both sides of a controversy?]*

## 1. amicus brief

- a. *[CAI filed an amicus curiae brief (a “friend of the court” statement to help the court in understanding the issue on hand) to the IL Supreme Court falsely claiming it speaks for homeowners. In my view, this claim violates its tax exempt status (501(c)6) for a business trade group, whose members are vendors serving HOA consumers and their third-party beneficiaries, the homeowners. HOAs are not allowed to be members of CAI since 2005.*

“The Institute's mission is to serve as a national voice for those involved in community associations, including homeowners, governing boards, service providers, and vendors. . . . The Illinois Chapter's mission is to provide education and resources to Illinois [HOAs] as well as represent their interests and the interests of Illinois community association members on issues of legal importance.” (Emphasis added.)

- b. *Originally, CAI did not include homeowners or HOAs as members. It was not until 19 years later in 1992 that members were included. “Homeowners and community associations remain a largely untapped membership market.” (Community Associations: the emergence and acceptance of a quiet innovation in housing, p. 140-142, Greenwood Press, 2000, funded in part by CAI and ULI).*

*Apparently, as CAI changed to a trade group in order to better lobby state legislatures, it probably felt that admitting homeowners into their “club” would help them sell HOAs to the legislators. And its continued misrepresentations, not only to legislators but to the courts, also, attest to the validity of my assertion.]*

- c. *[In this opinion, CAI goes on to equate HOA assessments to public taxes in order to mandate payments.]*

“The very real impact of the Second District's decision [validating the withholding of assessments for the HOA’s failure to perform] is peculiarly analogous to our government's need to collect taxes free from objection by individual taxpayers. Surely, if people could refuse to pay taxes and then defend against their collection based upon a claim that the government had been negligent in the maintenance of public spaces and providing services, the

**government would find itself in dire financial straits and unable to fulfill its obligations.”**

**“[T]he obligation to pay assessments (like taxes) should remain primary and the complaining member can avail herself, in a separate action, of a claim for breach of the maintenance and repair obligation.”**

*[This is a shameful disregard by CAI for fundamental fairness to not allow a member to withhold payments while negotiating controversies. In regard to “a separate action,” the judicial rules of civil procedure require that matters related to the complaint be included or else they are barred. Like the esteemed CAI attorneys don’t know this. Generally found under compulsory counterclaim, “A pleading shall state as a counterclaim any claim . . . if it arises out of the transaction.”]*

*d. [CAI also brings up its mantra, “it ain’t fair to other members.”]*

**“But, because all members in a community association rely upon the timely payment of assessments by all other members, the decision imposes an undue financial burden on those that timely pay to make up the shortfall created by the failure to pay.”**

**Thus, the real impact of the Appellate Court's decision is to burden the other owners that are paying assessments and, thereby, force them to shoulder the additional burden created by an owner's refusal to pay assessments based on their unilateral dissatisfaction with repairs and maintenance.**

**Accordingly, allowing an association member to avail herself of self-help each time she disagrees with an association's actions or inaction will result in that member's proportionate share of the expenses being shifted to all other paying members.**

**To read the Forcible Entry and Detainer Act as broadly as did the Appellate Court, jeopardizes the entire system of recorded covenants to which ownership in a community association is subject, greatly impacts the ability of Illinois community associations to provide necessary services to all members, unfairly burdens the thousands of unit owners or members that pay assessments, and strains association budgets.**

## 2. CAI advocate, Poliakoff, citation

*[The activist Florida CAI attorney Gary Poliakoff is the author of the cited legal treatise, "The Law of Condominium Operations." He is quoted in this opinion as follows.]*

Although contract principles have sometimes been applied to the relationship between a condominium association and its unit owners based on the condominium's declaration, bylaws, and rules and regulations the relationship is largely a creature of statute, defined by the provisions of the Condominium Act.

Although condominium property statutes vary, the argument that the right to collect assessments is dependent upon the association's duty to maintain the common elements has "not been generally accepted by the courts.

*[The above quotes well demonstrates how unjust, pro-HOA laws and various state Acts play into the hands of the astute CAI lawyers. "Look what the law says judge. It's immaterial that we helped write the laws."]*

The association's ability to administer the property is dependent upon the timely payment of assessments, and "any delinquency in unit owners' payments of their proportionate share of common expenses may result in the default of the association on its obligations or the curtailment of association directed services.





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