



Arizona Homeowners Legal Information Service

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Table of HOA Cases; Restatement (Servitudes)

Note: The following information is not exhaustive nor do the cases represent the final word on the issue in question. These cases are provided as introductory research material.

Table of Authorities

I. CASES.....	2
II. Restatement Third, Property (Servitudes)-- in part.....	8
III. SLAPP statutes.....	8
IV. Secondary Authority.....	9
V. Black's Law Dictionary.....	12

I. CASES

(a) FEDERAL

1. *American Manufacturers v. Sullivan* 526 US 40 (1999) (state action; following statute)
2. *EVERY v. MIDLAND COUNTY*, 390 U.S. 474 (1968) (14th amendment & local government)
3. *Bailey v. Alabama* 219 US 219 (1911) (legislative action)
4. *Board of Regents v. Roth* 408 US 564 (1972) (fundamental rights)
5. ***Bonner v Lewis***, CA(Ariz) 1988 857 F2d 556 on remand 714Supp 420 (federal 9th district court of appeals) “pro se complaints are to be held to a less strict standard than those directed by a lawyer”.
6. *Boos v. Barry* 485 US 312 (1988) (political signs)
7. ***Brentwood Academy v. Tennessee Athletic School*** 531 US 288 (2001) (tests for state action)
8. *Burton v. Wilmington* 365 US 715 (1961) (symbiotic relationship; state action)
9. *Carey v. Brown* 447 US 455 (1980) (equal protection)
10. ***Caron v. Maxwell***, 48 F. Supp. 2d, (D. Ariz. 1999) (FDCPA case against lawyers)
11. *City of Ladue v. Gilleo* 512 US 43 (1994) (political signs ordinance)
12. *Clark v. Arizona Interscholastic Assn.*, 695 F. 2d 1126 (CA9 1982), cert. denied, [464 U. S. 818](#) (1983) (athletic assn as state actor)
13. *Cleburne v. Cleburne Living Center* 473 US 432 (1984) (requirement to show reasons for restricting liberties)
14. *Commonwealth of Virginia v. Rives* 100 US 313 (1879)
15. *Con Edison v. Public Service* 447 US 530 (1986) (political speech; state action)
16. *Dolan v. City of Tigard* 512 US 374 (1994) (eminent domain taking)
17. *El Fundi v. Deroche* 625 F 2d 195 (state action via security guards)
18. *Evans v. Newton* 382 US 296 (1966) (symbiotic relationship; state action)
19. *Federal Communications Commission v. Beach Communications* 508 US 307 (1993) (rational basis of scrutiny)
20. *Flagg Bro v. Brooks* 436 US 149 (1978) (private action not exclusive to municipality; rules for state action; zoning)
21. ***Gerber v. Long Boat Harbour***, 757 F Supp. 1339 (M.D. Fla. 1991) (court enforcement of private agreements in condo declarations is a state action)
22. *Girard v. 94th St.* 530 F 2d 66 (tiered state action for covenants)
23. *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (sign restrictions)
24. *Goldberg v. 400 East Ohio* 12 F Supp. 2d 820 (color of law; distributing materials)
25. *Griffin v. Maryland* 378 US 130 (1964) (private use of police can be a state action)
26. ***Griswold v. Connecticut*** 381 US 479 (1965) (9th amend; privacy)
27. *Hadley v. Junior College Dist* 397 US 50 (1970) one-vote rule to special gov’t agencies)
28. *Holden v Hardy* 169 US 392 (1898) (property rights subject to public good)
29. *Hudgens v. NLRB* 424 US 507 (1976) (functions of a municipality)
30. *Jackson v. Metropolitan* 419 US 345 (1974) (regulation does not constitute state action; exclusive gov’t function)
31. *Kelo v. City of New London*, 545 US 469 (2007) (eminent domain; public purpose).
32. *Lochner v. New York* 198 US 45 (1905) (police power & general welfare; right to contract is fundamental)
33. *Loren v. Sasser* 309 F 3d 1296 (constitutional protections beyond what is appropriate)

34. **Lugar v. Edmondson Oil** 457 US 922 (1982) (courts to restrict their interference with private interests)
35. **Marsh V. Alabama**, 326 US 501 (1946) (company town and public functions)
36. *Meyer v. Nebraska* 262 US 390 (1923) (legislative actions)
37. *Misco* 484 US 42 (court to protect public good)
38. *National Cable v US*, 415 US 336 (SC doesn't question agency on non-delegation of authority)
39. **New York Times v. Sullivan** 376 US 254 (1964) (political speech)
40. *O'Gorman v. Hartford Fire* 282 US 251 (1931) (police powers & commission limits)
41. *Pa. Coal Co.,v. Mahon*, 260 U.S. 393 (1922) (property taking; regulations).
42. *Pierce v. Society of Sisters* 268 US 510 (1925) (legislative action)
43. **Planned Parenthood v. Casey** 505 US 833 (1992) (**Footnote Four Plus**)
44. *Quail Creek v. Hunter* 538 So 2d 1288; 724 F Supp. 884 (disagreed with Gerber, #33)
45. *Railroad Retirement Board v. Alton R* 295 US 330 (1935) (legislation)
46. **Shelly v. Kraemer** 334 US 1 (prohibitive state actions by use of judicial enforcement as state was fully aware of the illegal use of the courts; judicial enforcement harms constitutional rights)
47. **Slaughter House Cases 83 US 36 (1873)** (privileges or immunities clause; 14th Amendment and procedural due process)
48. **State Farm v. Campbell**, 538 U.S. 408 (2003) (excessive punitive damages violate 14th Amendment)
49. **US v. Carolene** 304 Us 144 (1938) (**Footnote Four**)
50. *US v. Darby* 312 US 100 (1941) (commerce clause)
51. *Village of Euclid v. Amber Realty* 272 US 365 (1926) (unreasonable zoning is unconstitutional)
52. *Virginia v. Rives*, 100 U.S. 313 (1879).
53. *Washington & Sandhill v. Bank of America*, No. 2:13-cv-01845 (D.Nevada 2014). Superior liens.
54. *Williamson v. Lee Optical*, 348 US 483, (1954) (rational basis for scrutiny)

(b) STATE

a. Arizona

54. *Ahwatukee Custome Estates v. Bach* 2 P 3d 1276 (Ariz. App. Div. 1, 2000) (AZ. bylaws a binding contract)
55. **Arizona Biltmore Estates v. Tezak** 868 P 2d 1030 (Ariz. App. Div. 1, 1993) (covenants strictly construed against enforcers ; intent of parties)
56. **Cactus Wren Partners v. Arizona Dept. of Building & Fire Safety**, 177 Ariz. 559, 869 P.2d 1212 (App. Div. 1 1993) (OAH judge allowed to order HOA restitution).
57. *Cain v. Horne*, CA-CV 2007-0143 (Ariz. App. Div. 2 2007) (constitutional legislation; school vouchers).
58. *Canady v. Prescott Canyon Estates Homeowners Association*, 60 P.3d 231 (Az. App. 2002) (fair housing and disability).
59. [Cimarron Foothills Cmty. Ass'n v. Kippen](#), 2 CA-CV 2003-0048 , COURT OF APPEALS OF ARIZONA, DIVISION TWO, DEPARTMENT A , 2003 (goup homes and enforcement of covenants).
60. *Copper State Bank v. Saggio*, 679 P.2d 84(Ariz. App. 1984). (Pro Se held to know civil rules).

61. *Desert Palm v. Petta*, CA-CV 13-0376 (Ariz. App. Div. 1 2015). (Excessive punishment award).
62. ***Divizio v. Kewin Enterprises***, 666 P.2d 1085 (Ariz. App. Div. 2 1983)(fiduciary duty; interpretation of covenants; CC&Rs as contract).
63. ***Duffy v. Sunburst Farms***, 604 P.2d 1124 (1979) (AZ. Covenants taken at everyday meaning)
64. ***Everett v. Rea***, CA-SA 14-0094 (Ariz. App. Div. 1 2015) (attorney client waiver).
65. *Facilitec, Inc v. Hibbs*, 80 P.3d 765 (Ariz. 2003) (agency powers and statutes).
66. *Fickett v. Superior Ct.*, 558 P.2d 988, (Ariz. App. Div. 2 1976) (derivative fiduciary suit against attorney).
67. *Fiduciary Servs. v. Shano*, 869 P.2d 1203 (Ariz. 1993) (derivative fiduciary suit against attorney).
68. *Gelb v. Casa Contenta HOA*, CA-CV 09-0744 (Ariz. App. Div. 1 Oct 28, 2010). (Appellate court declares OAH adjudication of HOA disputes unconstitutional).
69. *Gfeller v. Scottsdale Vista N. Townhomes Assn.*, 1 CA-CV 98-0010 (Ariz. App. 1998) (affirmative duty on board to enforce covenants).
70. *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, (Ariz. App. Div1 2005)(unconscionable, adhesion contract law; arbitration).
71. ***Johnson v. The Pointe Community Assn., Inc.***, CA-CV 02-0160 (Ariz. App. Div. 1 2003) (court does not give deference to HOA board)
72. *J. W. Hancock Entr., Inc. v. Ariz. State Registrar of Contractors*, 690 P.2d 119 (Ariz. App. Div. 1 1984). (blending of powers; agency powers).
73. *Kelly v. Nationsbanc Mortgage Corp.*, 17 P.3d 790 (Ariz. App. 2001). (Pro Se held to same standard as attorney).
74. *La Esperanza Town Home Association, Inc. v. Title Security Agency of Arizona*, 689 P.2d 178 (Ariz. App. 1984) (covenants must apply equally to all members).
75. *McLoughlin v. Pima County*, CA-CV 2001-0198, (App. Div.2 2001)(constitutionality of statute).
76. *Nickerson v. Green Valley*, CA-CV 2010-0197, (Ariz. App. Div. 2 2011) (unconscionable & running with the land covenants).
77. ***Powell et al v. Washburn et al***, 125 P.3d 373 (Ariz. 2005) (covenants upheld on basis of intent; Restatement prevails)
78. ***Riley v. Stoves***, 526 P.2d 747 (Ariz. App. Div. 2 1974)(covenants; equal protection; reasonableness; state action; waiver).
79. ***Town of Gilbert v. Maricopa County***, CA-CV 06-0309 (Ariz. App. Div. 1 2007) (constitutionality of statute).
80. *Safeway Ins. Co., Inc. v. Guerrero*, 1 CA-CV 02-0661 (attorney contract interference).
81. *Shalimar Ass'n v. D,O,C, Enterprises* 688 P 2d. 682 (AZ App 1984) (appearance as notice of restriction)
82. ***Shamrock v. Wagon Wheel Park Homeowners Association***, No. 1 CA-CV 02-0403 (Ariz.App.Div.1 08/26/2003) (imposing mandatory HOA on existing subdivision)
83. ***State v. Ramos***, 648 P.2d 119 (Ariz. 1982) (statute presumed constitutional).
84. ***Town of Glibert v. Maricopa County***, CA-CV 06-0309, (App. Div. 1 2006) (constitutionality of statute).
85. ***Vales v. Kings Hill***, 125 P.3d 381, (***Ariz. App. Div. 1 2006***) (***validly enacted amendments***).
86. ***Westwood Homeowners v. Tenhoff*** 745 P 2d. 976 (***Ariz. App. Div. 1 1987***) (***covenants against public policy; group homes***)
87. ***Wilson v. Playa de Serrano***, CA-CV 2005-0072 (Ariz. App. Div. 2 2005) (restricting fundamental property rights requires specific notice of possible restrictions).

b. California

88. *Affan v. Portofino Cove Homeowners Assn.* Cal.App.4th, [No. G041379. Oct. 29, 2010.] (Cal. Judicial deference vs BJR; dicta; precedent overruling).
89. *Chantiles v. Lake Forrest* 37 Cal App 4th 914 (state laws protecting rights of homeowners)
90. ***Cohen v. Kite Hill*** 142 Cal App 3d 642 (1983) (arbitrary decisions; state protections; fiduciary duties & good faith; developer)
91. [*Damon v. Ocean Hills Journalism Club*](#), 85 Cal. App. 4th 468; (2000) (quasi-government; meetings are public forum)
92. GLEN OAKS ESTATES HOMEOWNERS ASSOCIATION v. RE/MAX PREMIER PROPERTIES, INC., No. B229946 (CAL. App. 2nd Dist., Feb. 23, 2012) (real estate agents held liable).
93. *JAMES F. O'TOOLE COMPANY, INC., v. LOS ANGELES KINGSBURY COURT OWNERS ASSN.*, 126 Cal. App. 4th 549; 23 Cal. Rptr. 3d 894 (SECOND APPELLATE DISTRICT 2005). (HOA refused to pay judgment to non-homeowner).
94. *Laguna Publishing Co. v. Golden Rain Found. of Laguna Hills*, 131 Cal. App. 3d 182 (1982) (is Leisure World condo a mini-government)
95. *Laguna Royale Owners' Assn. V. Darger*, 174 Cal. Rptr. 136 (1981) (reasonableness of board action).
96. ***Lamden v. La Jolla Shores Clubdominium Homeowners Assn.*** 980 P.2d 940 (Cal. 4th 1999) (court deference to board judgment)
97. ***OSCA Development v. Blehm***, E032843, Cal. App 4th, DIV 2 (2003) (**Desert Crest case**; validity of CC&R amendments with non-unanimous approval; not for publication)
98. *Pardee Construction v. Rodriquez* Cal App 4th D039273 (2002? 2003?) (adhesion contracts)
99. ***Nahrstedt v. Lakeside Village Condominium Association*** 878 P.2d 1275 (1994) 8 Cal.4th 361 (covenants & public policy; arbitrary; reasonable)
100. *Rancho Santa Fe v. Dolan-King* (2004) D040637/D041486 Cal App (restrictions for good of community)
101. *Sain v. Silvestre*, 78 Cal.App.3d 461 (1978). (constructive/actual notice).
102. *SANTA BARBARA BEACH CLUB, LLC, v. FREEMAN*, No. B212972 (Cal. App. 2 Div. May 3, 2010). (homeowner opposition signs).
103. *Sokolow v. County of San Mateo* 213 Cal App 3d 231 (significant state involvement for state action)
104. *Surfside 84 v. Mullen* Ct. of Special Appeals of Maryland, No. 495 (September 1984) (state action; procedural due process; lack of notice; CAI Reporter).
105. *Telford v. Sagewood HOA*, No. E048483, Cal. App. 4th Dist. (fiduciary violation as a tort; business judgment rule).
106. ***Villa de Las Palmas v. Terifaj***, 90 P.3d 1223 (CAL. 2004) (**amended restrictions are binding on all**)
107. *Villa Milano v. Il Davorge* 84 Cal App 819 (2000) (**CC&Rs are contracts; adhesion contracts**)
108. ***Villa Vicenza v. Nobel Court Dev.***, 191 Cal. App. 4Th 963 (Cal. App. 4th Dist. Jan. 1, 2011) (CC&Rs; jury waiver; constitutional rights; adhesion, constructive notice).
109. ***Wittenberg v. Beachwalk HOA***, NO. G046891 (Cal. App. 4th Dist. June 26, 2013) (equal access to HOA media for members in elections).

c. Other states

110. *Anelli v. Arrowhead* 689 A.2d 357, (PA. Commw. Ct. 1997) (color of law; regulation not state action; for sale signs).
111. ***Armstrong v. Ledges Homeowners Ass'n, Inc.***, 633 S.E.2d 78 (N.C. 2006) (affirmative covenants; reasonable amendments; too broad a purpose not reasonable).
112. *Ashcreek v. Smith* 902 SW 2d 586 (1995) (failure to provide notice of violations)
113. *Beachwood Villas Condo v. Poor*, 448 So.2d 1143 (Fla. Dist. App. 1984) (board authority to act)
114. *Blackburn v. Habitat Development* 57 SW 3rd 378, (quasi govt)
115. ***Brock v. Watergate*** 502 So. 2d 1380 (Fla. 4 Dist. App. (1987)(HOA not a company town; 42 USCA 1983)
116. *Brooks v. Northglen* 76 S.W. 3rd 162 (statutes & contract interference)
117. *Brooks v. Rivertown*, No. W2011-00326-COA-R3-CV, (Tenn. App (2011) (foreclosure court consciences).
118. *Bryan v. MBC Partners* 541 SE 2d 124 (2000) (HO may waive constitutional rights; signs)
119. *Cashio v. Shoriak* 481 S 2d 1013 (LA 1986) (restrictions on signs)
120. *Chalkey v. Roush* 757 A 2 972 (condo not muni govt ??)
121. *Chesus v. Watts* 967 SW 2d 97 (quasi govt)
122. *Committee for a Better Twin Rivers v. Twin Rivers*, 929 A.2d 1060 (NJ 2007).
123. *Covered Bridge Condo Assn. V. Chambliss*, 705 S.W.2d 211 (Tex. App. 14th Dist. 1985) (reasonable covenants are not unconstitutional; age restrictions).
124. ***Dublier v. 2000 Linwood Ave***, (N.J. 2011 069154. 2014). Free speech upheld.
125. *Duvall v. Fair Lane Acres*, No. 2D09-5089, Fla. Dist Ct App., Dec. 1, 2010.
126. *Esposito v. Riviera at Freehold*, Docket No. A-6001-09T1 (NJ App. 2011), (fiduciary duty; bus. Judgment rule).
127. *Everygreen Highlands Association v. West*, 73 P.3d 1 (Colo. 2003) (**amendment to require mandatory HOA**).
128. *Finley v. Glenn* 154 A 299 (PA1931) (constructive notice of covenant)
129. *Foley v. Osborne Court* 724 A.2d 436 (a remand to consider statute an unconstitutional delegation of governmental powers; fines)
130. *Frank v. Spadafora* 447 NE 2d 1250 (what theory to apply –constitutionalism)
131. *Gloriux v. Lighthipe* 96 A 94 (NJ 1915)
132. ***Golden Sands v. Waller***, 545 A 2d 1332 (Md.1988) (upheld HOA notice as valid as civil court adjudicates; prior liens)
133. ***Graziano v. Stock Farm***, 2011 MT 194, No. DA 10-0580 (Mont. 2011)(held CC&Rs could be adhesion contracts).
134. *Harrison v. Lands End*, No. COA09-215, N.C. App., April 6, 2010 (vague covenants are unenforceable).
135. *Hidden Harbour Estates v. Norman* 309 S 2d 180 (1975)
136. *Indian Lake v. Director of Revenue*, 813 SW 2d 305 (not civic organization)
137. ***Inwood v. Harris*** 736 S.W.2d 632 (Tex. 1987) (homestead; covenants running with the land)
138. ***James Foley v. Osborne*** C.A. 724 P.2d 436 (RI. 1999) (remanded case found Act unconstitutional).
139. *Lake James Community v. Burke County*, NC, CA-96-177-4-T (4th Cir. 1998) (waiver of rights; arbitration; contract)
140. *Lee v. Katz* 00-35755 2002 DJDAR 373 (state actions and governmental powers)
141. *Lovering v. Seabrook Island POA*, 291 S.C. 201 (1986) (implied authority & ultra vires)

142. *Lycoming County v. Com. Dept of Labor* 267 A 2d 238 (public funds create public body)
143. *Maatta et al v. Dead River MI* App No. 248848 (2004) (amending CC&Rs without unanimous consent)
144. *Majestic View Condo v. Bolotin*, 429 So.2d 438 (Fla. App. 4th Dist. 1983) (pet restrictions and due process notice).
145. *Mazdabrook v. Khan*, (210 N.J. 482 2012). Waiver of rights.
146. ***Midlake v. Cappuccio*** 673 A 2d 340, Pa. Super. (1996) (condo not muni govt; company town)
147. *Murphy v. City of Seattle*, 647 P. 2d 540 (1983) (cessation of servitudes by purchase)
148. *Neponsit Property Owners' Assn. v. Emigrant Industrial* 15 N.E.2d 793 (1938) (validity of covenants)
149. *New Jersey v. Kolcz* 276 A 2d 595 (constitutional right to free speech for political info)
150. *Ocean Trail unit Owners Assn., Inc. v. Mead*, 650 So.2d 4 (Fla. 1994) (members to pay assessments for unauthorized board acts)
151. *Pittman v. Cohn Communities* 229 SE 2d 526 (1977) (HO protest sign prohibition)
152. *POMPONIO v. CLARIDGE OF POMPANO CONDOMINIUM*, 378 So.2d 774 (Fla. 1979) (impairment of contracts analysis).
153. ***Poris v. Lake Holiday POA***, 983 N.E.2d 993 (2013) (assumption of police powers).
154. *Reynolds v. Schrock*, 107 P.3d 52, (Or. App. 2005) (derivative fiduciary suit against attorney).
155. *Rivers Edge Condo v. Rere*, 568 A.2d 261 (Pa. 1990). (fee offset prohibited in CC&Rs; see Spanish Court).
156. *SFR Investments v. US Bank*, NO. 63078 (Nev. 2014) Superior liens.
157. *S.O.C. v. Mirage Casino-Hotel*, 43 P 3rd 243 (Nev. 2001) (state action; public functions; delegating functions to private persons; commercial advertising on private property).
158. *Sanborn v. McLean* 206 NW 496 (MI 1925) (appearance of community as notice of covenant)
159. ***Spanish Court Two Condo v. Carlson***, 979 N.E.2d 891 (IL App. 2d Dist. 2012) (member can withhold assessments for condo failure to repair).
160. *Terre du Lac Assn v. Terre du Lac* 737 SW 2d 206 (Mo. App. 1987)(not authority for the concept that an association's "quasi-governmental" actions are state actions).
161. *Trustees of the Prince Condominium Trust v. Prosser*, 592 N.E.2d 1301 (Mass. 1992). (cannot offset collection fees; see Spanish Court; same as taxes).
162. *Tulk v. Moxhay* 2 Phil. 774 (Ch 1848) (covenants and early laws)
163. ***Unit Owners Association v. Gillman*** 292 S.E.2d 378 (Va. 1982)(fines are a government power; Act doesn't give such power to Condo)
164. *West Hill v. Abbate* 261 NE 2d 196 (1969) (zoning constitutionality & covenants)
165. *Westphal v. Lake Lotawana* 95 SW 3d 144 (Mo. App. 2003)(no support for "close nexus" state action).
166. *White Egret v. Franklin* 379 So 2d 346 (what theory to apply - constitutionalism)
167. *Wise v. Harrington Grove* NC SC No. 428A02 (2003) (**fines & penalties; covenants**)
168. *Woodmoor Improvement Assn.v. Brenner*, 919 P.2d 928, (Colo. App. 1996) (equitable estoppel against HOA).
169. *Woodside Village v. Jahren*, 806 So.2d 452 (Fla. 2002) (*ex post facto* amendments).
170. *Worthinglen Condo. Unit Owners Assn. V. Brown*, 57 Ohio App. 3d 73 (1989) (retroactive amendments)

171. *Zito v. Gerken*, 225 Ill. App. 3d 79 (1992) (returning HOA to developer did not concern issues of civil governance)

II. Restatement Third, Property (Servitudes)-- in part

Note: The Restatement, formally the Restatement of the Law Third: Property - Servitudes, is not statutory law but common law, which is court made law as a result of prior court opinions. States first look to statutory law and in the absence of pertinent laws will look to common law for persuasive authority. The Restatement is the work of lawyers under the publisher, ALI, who “summarize” numerous court opinions into a workable, understandable set of guidelines to be applied to issues to be decided by the courts. As “persuasive authority”, such restatements are not binding upon the court.

See webpage for selected sections:

http://pvtgov.org/ahlis/restatement_servitudes.pdf

III. SLAPP statutes

1. Arizona

12-752. Strategic lawsuits against public participation; motion to dismiss

A. In any legal action that involves a party's exercise of the right of petition, the defending party may file a motion to dismiss the action under this section. When possible, the court shall give calendar preference to an action that is brought under this subsection and shall conduct an expedited hearing after the motion is filed with the court and notice of the motion has been served as provided by court rule.

B. The court shall grant the motion unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual compensable injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating facts on which the liability or defense is based. At the request of the moving party, the court shall make findings whether the lawsuit was brought to deter or prevent the moving party from exercising constitutional rights and is thereby brought for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the court finds that the lawsuit was brought to deter or prevent the exercise of constitutional rights or otherwise brought for an improper purpose, the moving party is encouraged to pursue additional sanctions as provided by court rule.

C. The motion to dismiss may be filed within ninety days after the service of the complaint or, in the court's discretion, at any later time on terms that the court deems proper.

D. If the court grants the motion to dismiss, the court shall award the moving party costs and reasonable attorney fees, including those incurred for the motion. If the court finds that a motion to dismiss is frivolous or solely intended to delay, the court shall award costs and reasonable attorney fees to the prevailing party on the motion. For the purposes of this subsection, "costs" means all costs that are reasonably incurred in connection with

a motion to dismiss pursuant to this section and includes filing fees, record preparation and document copying fees, documented time away from employment to confer with counsel or attend case related proceedings, expert witness fees, travel expenses and any other costs that the court deems appropriate.

E. This article does not:

1. Affect, limit or preclude the right of the moving party to any remedy otherwise authorized by law.
2. Apply to an enforcement action that is brought in the name of this state or a political subdivision of this state.
3. Create any privileges or immunities or otherwise affect, limit or preclude any privileges or immunities authorized by law.
4. Limit or preclude a legislative or executive body or a public agency from enforcing the rules of procedure and rules of order of the body or agency.

2. California

Section 425.16, subdivision (b)(1), states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16, subdivision (e), defines acts in furtherance of free speech or petition rights in connection with a public issue as follows: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; [or] (4) . . . any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

IV. Secondary Authority

- **Monell Claim:** In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that local government units are "persons" suable (under 42 U.S.C.A. § 1983), for violations of federally guaranteed rights. However, a local government unit may not be sued under a theory of employer liability, but rather only when the execution

of a government's policy or custom inflicts the injury for which the government as an entity is responsible. Therefore, in order to successfully bring a *Monell* claim against a government unit, a plaintiff must plead sufficient facts to show **(1)** the existence of a government policy or custom and **(2)** that the unconstitutional act was taken pursuant to that policy or custom. The primary cause for dismissal of an action brought under this theory is plaintiffs' failure to plead sufficient facts to establish the existence of a policy or custom. (<http://jaildeathlawyer.com/blog/2012/03/30/the-contours-of-a-monell-claim-for-a-policy-or-procedure/>)

- **FOOTNOTE FOUR**: There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced by the Fourteenth. *US v. Carolene*, 304 Us 144 (1938).

- **FOOTNOTE FOUR PLUS**: It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. . . As the second Justice Harlan recognized:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.

Planned Parenthood v. Casey, 505 US 833 (1992)

- **References**

16 C.J.S. Constitutional Law § 82 (waiver of constitutional rights)
 17A C.J.S. Contracts § 213 (agreements in violation of constitution)
 19-SUM Comm. Law 24, Coon, sign restrictions in residential communities (large HOAs are public bodies)
 29 Real Est. L J 322, Womack & Timmons, Homeowners associations: are they private governments? (public functions test)
 30 Val. UL Rev. 509, Rishikof and Wohl, Private communities or public governments: the state will make the call
 31 C.J.S. Estoppel and Waiver § 67 (waiver of rights, statutory rights)
 33 St. Mary's L J 323, Pena, Reigning in property owners' associations' power: Texas' need for a Comprehensive Plan³⁴ Am. Jur. POF 3rd, Violation of restrictive covenants³⁴ Urb. Law 521, Rahe, the right to exclude: preserving the autonomy of HOAs

35 Urb. Law 177, Franzese & Guth, Ramapo looking forward: gated communities, covenants and concerns (state constitution application to property rights)
 65 ALR 5th 1, Privatization of governmental services by state or local governmental agency
 7 J. Land Use & Envtl. Law 203 (constitutionalism & legal failures)
 76 Am. Jur. POF 3rd 89
 86 ABA J 30 (HO complaints)
Am. Jur. 2d Constitutional Law sec 800,926; sec 20 regarding HOA conduct as state action (state actions)
Am. Jur. 2nd, Covenants, Conditions & Restrictions
 Barnett, Restoring the Lost Constitution (2004)
 Barton & Silverman, Common Interest Communities: Private Government and the Public Interest, 1994
Constitutional Law, (West Group Sixth Edition 2000)
 Ellickson, Cities and Homeowners Associations, 130 U PA L Rev 1519 (reasonableness for court decision)
 Epstein, Unconditional Conditions, State Power, and the Limits of Consent, 102 Harv. L Rev. 1 (1988)
 French, Law of Servitudes: Reweaving the Ancient Strands 55 S Cal L Rev. 1261
 Hyatt and French, Community Associations Law, Carolina Academic Press, (Durham: 1998)
 Hyatt & Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owner Associations, 12 Wake Forest L Rev. 915
 Lewis, The Meaning of State Action, 60 Colum L Rev 1083 (1960)
 McKenzie, Privatopia (1994)
Mich. Law Rev. vol. 102, Gardbaum, The horizontal effect of Constitutional Rights (US Cons. supremacy clause leads to no issue of state action)
 Reichman, Residential Private Governments: An Introductory Survey, 21. 43 U Chi L Rev 253 9 (HOAS as a legal trust; voluntary consent)

- **Restatement of Property, Servitudes 3d, Common Interest Properties**
Restatement (Third) of Property, Servitudes, Westgroup, 2000
 § 6.7(3). Absent specific authorization in the declaration, the common-interest community does not have the power to adopt rules, other than those [designed to protect the common property], that restrict the use or occupancy of, or behavior within, individually owned lots or units.
 Rule of Law in Residential Associations 99 Harv. L Rev 472 (1985) (constitutional rights)
- Steven Siegel
 1. Co-author of **AARP amicus brief to NJ Supreme Court** in the 2007 Twin Rivers HOA free speech appeal.
 2. **The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after *Marsh v. Alabama***, vol.6, issue 2, Wm & Mary Bill Rights J., (Spring 1998).
 3. **Trust and Community: The Common Interest Community as Metaphor and Paradox**, Paula A. Franzese and Steven Siegel, vol. 72, Mo. L. Rev., 1111 (2007).

4. *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminate the Legal Requirements to Privatize New Communities in the United States*, **38 Urb. Law. 859 (Fall 2006)**.

The Urban Land Institute, Technical Bulletin No. 50, The Homes Association Handbook
4 Mary Jo Cornish wd. 1964

Tucker, "Of the Constitution", Blackstone's Law Dictionary appendix (179)

Tussman and tenBroek, The Equal Protection of the Laws, 37 Cal L Rev 341 (1949) (equal protection and classification of persons)

V. Black's Law Dictionary

- **arbitrary** 1. depending on individual discretion . . . by judge rather than fixed rules. 2. founded on prejudice or preference rather than reason or fact (usually known as 'arbitrary and capricious').
- **business judgment rule** The rule shields directors and officers from liability for unprofitable or harmful corporation transactions if the transactions were made in good faith, with due care, and within the directors' of officers' authority. [See "negligence" as an alternative].
- **capricious** characterized by or guided by unpredictable or impulsive behavior.
- **good faith** A state of mind consisting of (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing . . . , or (4) absence of intent to defraud or to seek unconscionable advantage.