

What Your HOA Must Know About Construction Defects

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If your condo or homeowners association has uncovered repair problems that may indicate there are construction defects in your community, you need to know the basics of pursuing a claim against your developer. Here's a summary.

Not the HOA's Problem?

Your first thought when you hear about construction defects may be: Why is that an association concern? Why isn't that just the concern of individual unit owners? The answer is that the line between one unit owner's problem and an association problem can be very hard to identify.

"If the association is a townhome, condo, or co-op, a construction defect is usually going to be an association concern because in the vast majority of cases regarding exterior improvements, the association will be charged with the maintenance and control of those areas," explains [Matthew A. Drewes](#), a partner at Thomsen & Nybeck PA in Edina, Minn., who represents associations. "There's a natural conclusion that the association should be involved."

In addition, many states authorize associations to pursue litigation on matters affecting the community, and construction defects often fall within that category. "In Minnesota, the association is charged with the right and authority to begin litigation in its own name on behalf of itself or its unit owners regarding matters affecting common elements or the common-interest community," says Drewes. "So as a practical matter, you've got the party with a vested interest in maintaining those areas, a duty to do so, and the statutory authority to act on it," Drewes says. "It makes the most sense that the association would quarterback the proceedings."

Investigating the Extent of the Problem

The difficult issue for associations, however, is that construction defects can be hard to identify—specifically because it's possible a repair could simply be limited to one or two owners—in the time frame specified under your state's construction defect law.

So where should your association begin when faced with a repair complaint that may signal a construction defect? "That's a question that's really troublesome in a lot of the cases I see because there are statutes of limitation and other timing considerations that will substantially prejudice the association's ability to recover if it doesn't act sufficiently promptly," says Drewes. "If there's an issue with an exterior building component, a structural concern, or something that appears related to the original construction, the association should not only try to understand the cause of the problem but also determine whether the problem exists in other locations."

For instance, improperly flashed or installed windows are common. "However, a problem like that can very quickly result in some fairly significant damage," says

Drewes. "If your association learns of one instance of improper window installation, it might be wise to examine a couple of other windows to see whether they were installed in the same defective fashion."

But Drewes issues a caveat: "I don't want to create the impression that I believe associations have an outright duty to perform a full-blown investigation on discovery of a single issue," he explains. "It's typical and possible that one issue is one issue, and it goes no further. But if board members think they have a problem, they should have a qualified party—preferably an engineer—inspect the situation. There are a lot of construction consulting firms that can do this and help them figure out what the problem is and how to fix it."

Be Careful with Quick Repairs

Another important issue for associations is when to notify your developer of a potential problem. That varies from state to state. "In Minnesota, there are clocks that start ticking as soon as an issue or problem that qualifies as a construction defect is discovered," says Drewes. "It should be disclosed in writing to the developer or the contractor because Minnesota has a version of a notice-and-opportunity-to-repair law. Notice should be provided within six months of discovery or the date the party should have discovered the defect."

But you still have some leeway in how you proceed with your investigation. "If a consultant is experienced in construction defects, he'll understand that he and the association should take pains not to destroy any evidence of the defect," explains Drewes. "Notice doesn't need to go to the developer right away as long as an investigation is being performed and it's being done promptly and properly."

Remember that you need a true expert, not a generalist. "Some people try to rely on a standard home inspector you'd use when you're purchasing a home," says Drewes. "I'd question that because home inspectors are generalists, and they're not trained to perform invasive investigations. In addition, their agreements are often full of disclaimers. On their face, inspectors often state that they're not going to perform any inspection that requires them to move objects or find hidden problems."

The key is preserving evidence so that you can pursue a claim against your developer if warranted. "Don't fix problems right away without providing some notice to the developer and contractors that performed the work," advises Drewes. "Even if it's an absolute emergency, providing 24 or 48 hours' notice can save you a lot of headache down the road."

Without notice, the contractor or developer may claim that you failed to preserve the evidence, leaving them unable to investigate the problem and perhaps easily fix the problem themselves. "That's the best way to ensure you just bought the developer a get-out-of-jail-free card," says Drewes.

"Photos aren't enough," Drewes adds. "People often tell me, 'We took pictures,' or 'I kept some of the moldy drywall or wet insulation.' That evidence might allow your claim to survive, but under some pretty clear case law, the parties being sued have a right to see the actual work in the state in which it was left."

That's why it's critical to choose an investigator who knows how to proceed in potential construction defect cases. "There are certainly contractors qualified to understand the issue," says Drewes. "But others are often concerned with the problem at hand and want to get going on the repair. If all you have is their opinion, it's subject to challenge on the theory that the contractor was looking for work."

The bottom line: "If you think there's a problem," recommends Drewes, "inspect it, use a properly qualified party, and don't try to rely on someone in the association who thinks he understands construction."

Finally, remember that you have to work within your state's time frame for bringing a construction defect suit. A qualified community association lawyer can guide you through your state's deadlines.

Don't be dissuaded from pursuing a claim by a developer's assertion that your warranty has expired. "There are multiple types of claims that arise out of construction defect litigation," says Drewes, "so you shouldn't be deterred from pursuing relief by a claim that your written warranty has expired."