

A blueprint for a construction-defect claim

By **Mark J. Peschel, Johnson & Lindberg, P.A.**

Your association's board has received several reports from unit owners about construction defects and suspects that the problems may be numerous and widespread. What steps should the board take and what recourse does it have?

Step 1—Planning: It is important to have a plan and coordinated effort to investigate and document the problems and protect the association's and unit owners' rights. Depending on the size of the association and the scope of the problems, proper planning may include putting together a team of professionals, such as investigators, engineers, repair contractors, and attorneys.

Once the claim has reached the lawsuit stage, an experienced attorney should provide the board with a detailed estimate of legal fees and expenses. The board should insist on this.

Step 2—Initial Investigation: Take an inventory of and document all of the problems. This may be accomplished through surveys sent to the owners or door-to-door canvassing. Hiring an experienced investigator may be more efficient than relying on volunteers from within the association. If the problems are extensive and there is potential for a lawsuit, the board should also consider getting an attorney involved at the outset to coordinate the investigation, protect confidential communications, and avoid missing critical deadlines that could adversely affect the claims.

Step 3—Notice to the Builder/Declarant: Once the board has determined the scope of the problems, it should act quickly and send a letter by certified mail to the builder advising of the problems and asking that the problems be repaired. This letter serves two purposes: (1) the practical purpose of attempting to get the builder to repair the problems, and (2) to satisfy the six-month notice-of-claim requirement for warranties applicable to new residential construction. The builder has 30 days from receipt of the notice in which to conduct an inspection and make an offer to repair to avoid breaching the warranties.

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Step 4—Inspections: Even if the builder agrees to repair the problems, to protect itself and the unit owners, the board should consider retaining a qualified licensed engineer to conduct an inspection and determine the proper scope of repair, particularly if the problems are complex or extensive. To avoid subsequent claims of destruction of evidence, which can be the death knell for a lawsuit, an inspection should not involve removing, destroying, or in any way altering the conditions unless the builder has been given notice of and an opportunity to attend the inspection. The inspection process, particularly any alteration of conditions, should be well documented with photographs or videotape, which good forensic engineers always do.

Step 5—Repair Bids: Once the scope of repair has been determined, the board should obtain bids from repair contractors to provide to the builder. This gives the builder the option of paying the association for the cost of repair instead of repairing the problems, which the association may prefer if it does not have a good relationship with the builder.

Step 6—The Lawsuit: If the builder refuses to repair the problems or pay the association for the cost of repair, the next step is to start a lawsuit, provided the cost of repair justifies the expense of a lawsuit. The most important issues for an association in a lawsuit are what will it cost, what is the likelihood of recovery, and

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How much will it cost?

The cost of a lawsuit depends on a number of factors, including the length of the lawsuit and the attorney's fee structure. Once the claim has reached the lawsuit stage, an experienced attorney should have a good understanding of the issues and be able to provide the board with a detailed estimate of legal fees and expenses broken down by phases—pre-trial, trial, and appeal. The board should insist on this. The board should also inquire about the attorney's fee options, such as hourly, contingent fee, or a combination of the two.

The Minnesota Common Interest Ownership Act (MCIOA) can play a significant role in helping to defray the cost of a lawsuit because it allows the prevailing party to recover reasonable attorney's fees and other litigation costs for violations of the MCIOA or any provisions of the association's declaration, bylaws, or rules and regulations.

What is the likelihood of recovery? Achieving a recovery depends on the potential sources of recovery and whether there are any roadblocks to recovery. After the association starts a lawsuit, the builder has the right to and generally does add any potentially-responsible subcontractors to the lawsuit. Although increasing the number of parties can add time and expense to a lawsuit, generally speaking, the more parties involved the more potential sources of recovery, both from the parties themselves and their insurance companies. Even when builders and subcontractors have gone out of business, their insurance companies may still be responsible for covering the claims.

Potential roadblocks to recovery

There are several periods of limitation that present potential roadblocks to recovery:

MCIOA warranties: A lawsuit involving a breach of MCIOA warranties must be commenced within six years after the cause of action accrues, which varies depending on the warranty.

New-home warranties: In addition to the six-month notice requirement, new-home warranty claims have a two-year statute of limitations that begins to run from the date of discovery of the breach. In addition, lawsuits involving a breach of new-home warranties cannot be brought more than 12 years after the date on which the initial owner first occupies the dwelling or takes title to the dwelling, provided the breach is discovered before the end of the tenth year.

Other causes of action: Most other causes of action in construction-defect lawsuits, including breach of contract and negligence, must be brought within two-years of discovery of the problems (which generally occurs before discovery of a breach of warranty) and no more than 12 years after substantial completion of construction, provided the problem is discovered before the end of the tenth year.

How long will it take?

The time it takes to resolve a lawsuit can vary greatly depending on the number of parties and whether the lawsuit gets settled or goes to trial and ultimately through an appeal.

Trials in complex construction-defect cases can last several weeks, at great expense and inconvenience to the association. Appeals can take 12 to 18 months before they run their course.

Fortunately, the vast majority of construction-defect lawsuits get settled before trial.

The courts require the parties to participate in some form of alternative dispute resolution, which generally means mediation for construction-defect lawsuits. The parties select a mutually-agreeable mediator, whose role is to try to get the parties to settle. Lawsuits involving numerous parties may require several mediation sessions, but mediation has proven to be an effective way to resolve lawsuits and avoid trial. Even with a settlement at mediation, however, complex construction-defect cases can take two years or more to resolve.

In the long run, proper planning and investigation and putting the right team of professionals together at the outset will help the association avoid roadblocks to recovery, maximize its recovery, and save time and money.

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