

## Success Strategies for Construction Defect Repairs

The legal process for pursuing construction defect litigation can be complicated, technical and time consuming. If your association is involved in a case that will require defect repairs in the future, we'd like to offer this overview on the process so you know what to expect, and you can communicate with and manage your board and homeowners for the best result.

Generally speaking, construction defects refer to issues with design, poor or improper materials and inferior workmanship. If an association wishes to make a claim against a developer or builder for construction defects, it must assert its claim in a timely manner. California law SB 800 requires homeowners associations to provide their builder the right to make repairs to any alleged defects prior to litigation being filed. If the developer refuses to respond, or fails to remedy the defect to the association's satisfaction, you may have recourse through construction defect litigation. Statutes of limitations vary- if you believe you have construction defects, do not delay in speaking to a construction defect attorney.

There are two distinct phases to every case, each with its own tasks, priorities and strategies.

**Phase I. The Legal Case.** When an association, or plaintiff, decides to proceed with a construction defect action, it brings a claim against the developer or builder. Your association's general counsel may or may also litigate construction defect lawsuits. If they do not, ask for a referral to a firm that specializes in these types of legal actions for homeowner associations.

During a defect lawsuit, the defect litigation attorney will recommend experts to retain who will work diligently to identify all defects as part of the lawsuit. The investigations conducted may include water testing and destructive testing, which is disassembly of building components. Based on their findings, these experts prepare recommendations for repair and cost estimates. Concurrently, the defense expert team does the same. There is generally a considerable disparity between each side's findings and cost of repair.

It is a California state law that all construction defect cases pursue mediation as a first step. During mediation, both sides present their findings to the mediator (an experienced attorney or retired judge), and justify their positions and cost of repairs. Of course, it is to the plaintiff's advantage to claim the highest costs, and conversely the defense experts attempt to minimize damages. The result of mediation is invariably somewhere in between- it is said that a good mediation is where neither side is entirely happy. A construction defect law firm will counsel you on when to settle or to fight further. When you settle, remember that the actual amount the association receives will be reduced by the attorney's fees, costs for experts and investigations, etc., meaning you will not net 100% of the settlement. Even if you do not "win" all the funds you believe are due, mediation will save the association the costs of a protracted legal process

and trial, untold stress, and the risk of receiving less than the mediated settlement, or worse, not winning- in which case you could receive nothing and, in addition, be liable for the other party's legal fees.

**Insurance.** The amount of your recovery is contingent on many things, not just the apparent strength of your case. What many people don't realize is that the ability to collect is sometimes more a matter of who has the best insurance, not how egregious the defects are. It is, after all, generally the defense's insurance companies who will be paying the settlement. (As an aside, in your dealings with contractors, this is why it is critical that you pre-qualify and retain only contractors who are properly and well-insured to perform work in your association. If a contractor does not have proper insurance, you will have little practical recourse to pursue them for a defect claim.) In a defect case, part of your settlement could come from a particular subcontractor simply because he has better insurance, and you might not even intend to fix that defective condition. Your attorney will investigate many variables to determine the best options including the willingness of the parties to settle, strength of each of the multiple insurance companies (there could be several insurances and policies for a single contractor), in addition to the relative merits of your case- it can be very complicated.

The vast majority of cases settle in mediation, although it may take a number of meetings over time to accomplish this. With the signature on the mediation settlement agreement, the association will generally receive a lump sum amount, which is not specific to any particular defects. The funds received are net of attorney's fees and expert and other legal costs. The construction defect attorney's role is then typically completed.

**Phase II. Construction Defect Repairs: Change your Mind-Set.** It is rare indeed that the defendants' insurance policies will cover 100% of your repair costs, meaning you shouldn't expect to receive all the monies required to perform every repair on your wish list. This doesn't at all mean your attorney has failed you; it is simply the nature of a construction defect case to reach a mediated, reasonable recovery. It is at this point that a critical shift in perspective should occur. During litigation, the strategy is to maximize the defect costs to maximize the recovery. Following settlement, the perspective shifts to maximizing the scope of work that can be performed within available funds received. The importance of this change in mind-set cannot be overemphasized; often board members and experts have difficulty changing their perspective, particularly after months or years of a struggling with a difficult case. The board shouldn't be limited by pre-conceived ideas of what has to be done.

It is vitally important to retain an independent construction manager to strategize the most cost-effective way to perform the maximum amount of repairs possible within your settlement amount. This planning stage is essential; you cannot achieve best results by simply taking the list of defects produced during the case and going directly to bid with a general contractor. While it may seem counter-intuitive to start a planning exercise two years after you filed your initial claim, this is exactly the type of change in mind-set that is essential to receive maximum value. Your construction manager will evaluate the voluminous information produced and

utilize all the good work the experts have done to understand their perspective on defects. The next step is to triage all information and create a prioritization matrix, complete with associated costs to strategize a scope of repair that can reasonably be accomplished. Sometimes it makes sense to keep the same key experts, such as a structural engineer. Sometimes a retained expert becomes trapped in their perspective on what needs to be done because they've argued for it for two years, and a fresh set of eyes would benefit the association and actually save money.

After looking at all defects claimed, repairs are typically prioritized in major categories such as life-safety, then water intrusion, then those with lower levels of risk. Beware of the term life-safety which is often bantered about during litigation; this can refer to a serious issue such as a structural defect, and as minor an issue as incorrect labeling of circuit breakers in an electrical panel. Beware of shades of meaning when your attorney or expert is using these words strongly during litigation to extract maximum funds, versus how the defects need be prioritized during the repair phase— this is another good example of the need to change your mind-set.

With our experience in overseeing repairs in over 6,000 homes, we've seen all kinds of combinations and varieties of defects. In each case we have skillfully adjusted the scope of repair to encompass the greatest amount of repairs possible from a practical, yet flexible point of view. Often we invoke a variant of the Pareto Principal (the 80/20 rule), which in this case means that typically 20% of the problems create 80% of the cost. If there is a way to redefine the repairs, a great deal more work can be accomplished. For example, at one of our projects, leaking metal windows were a large part of the repair cost and expensive to replace, involving removal of stucco etc. Rather than replacing the windows entirely, we suggested simply drilling out larger weep holes and installation of a special sealant for window tracks. While not a 100% repair, this plan reduced water intrusion to an insignificant level for a fraction of the cost, enabling this association to allocate their dollars to repair other defects.

**Communications.** Managing board and homeowner expectations skillfully and carefully is vitally important to the success of the renovation project. During litigation, typically information was very closely held, discussed by the board in executive session only. Certain disclosures were made to the membership, such as the fact that there was litigation, but necessarily the homeowners were not afforded full knowledge or understanding of the details of the defects. Once the revised repair plan is established, we generally recommend conducting a town hall meeting and preparation of informative newsletters to share information so that homeowners' expectations gradually are brought in line with the reality of what repairs are actually going to happen. For instance, homeowners may assume repairs will be performed because an expert was in their home and noted a defect.

As we know, performing construction work in occupied homes is a particular challenge, and necessitates homeowner cooperation and buy-in. Many homeowners may no longer be amenable to yet another period of construction required for renovations. It is our experience that focusing heavily on education, transparency and open communication regarding project expectations creates good will and a sense of excitement about improvements moving forward.

The construction defect process can be complicated and protracted. Our homes represent probably the largest single investment most people will make in their lifetime. No homeowner association would dream of representing themselves in a construction defect lawsuit; neither should they try to manage the actual repairs without professional assistance.

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