



HindmanSanchez

DIRECTORS GUIDE: CONSTRUCTION DEFECT CLAIMS

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How This Guide Helps You

The purpose of this guide is simple: *to help you better understand*

- construction defect claims; and
- the usual steps our law firm takes to resolve these claims

This guide is based on a "typical" case, but every construction defect dispute develops differently. For this reason, the work we do on your case may not include all the steps described in the guide or may include additional steps.

If you have any specific questions, we would be glad to answer them. Over the years, we've assisted dozens of community associations with construction defect claims.

Making the Initial Review

After your association hires our firm, we investigate the suspected defects and evaluate the association's legal position. The initial review often includes the following:

- Sending a detailed questionnaire to homeowners and analyzing their responses
- Inspecting documents filed by the builder or contractor with the appropriate Building Department
- Analyzing and summarizing various association documents, including the CC&R's, minutes, and repair records
- Attending on-site investigations with both your property manager and qualified experts such as architects and engineers
- Reviewing the expert's preliminary findings about defects with the board of directors.

If the review discloses probable construction defects, we often recommend a joint settlement approach. Under this approach, the association offers to hire jointly, with the builder or contractor, qualified experts whom both sides trust. These experts are given a list of suspected deficiencies and told to investigate them. If defects exist, the experts recommend the best method for making repairs and bid out the repair work to qualified subcontractors. The defects are then fixed, with the builder or contractor paying for both the repairs and all related expert fees.

This approach eliminates the need for a lawsuit. But if the builder or contractor doesn't agree, we help the board decide whether to proceed with a lawsuit and we prepare the formal papers required for this step.

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Working with the Experts

For a construction defect case, your association needs a team of experts that can do the following: (1) determine the nature and extent of the defects and the notice to be given to members; (2) consider alternative methods of repair; (3) prepare the drawings and specifications needed for the repairs; and (4) calculate the cost of the repairs and other losses, such as the money spent by any homeowner who must move out while repairs are made.

As a minimum, most associations need a civil engineer, a general contractor, and often an architect. If the case is complex, and many construction defect cases fall into that category, your association may need other types of experts, including a geologist, a structural engineer, and insurance coverage specialists.

Our firm has worked with experts from Colorado as well as other parts of the country. Using our contacts and experience, we can help your association choose qualified experts.

Once your experts are selected, we typically coordinate and participate in the following:

- On-site inspections with the experts
- Supervise the experts (to obtain efficient and cost-effective investigations)
- Help the experts evaluate compliance with construction codes (like the Uniform Building Code and the Uniform Plumbing Code)
- Review drawings and specifications prepared by the experts
- Assist the experts in analyzing construction industry standards
- Prepare the experts for trial, so their testimony can be made in a convincing, easy-to-understand manner

Keeping You and the Homeowners Informed

As a director you need to be kept informed about the progress of the case, if litigation is started. To ensure you are informed, we communicate regularly with both the board and your property manager. Our communications include frequent correspondence and a monthly statement describing all legal work done during the prior month by our firm. We also meet with the directors to provide status reports and to update the board about significant developments.

During a construction defect case, homeowners usually have a number of concerns. We can help the board address these concerns by:

- Responding to individual homeowners calls about the case and about repair problems
- Preparing and mailing out status letters to the homeowners
- Answering questions from realtors, potential buyers and financial institutions
- Preparing written information about the case that can be used in announcements and newsletters
- Attending annual or special meetings of the homeowners

Providing Expert Advice

A construction defect case can raise a number of tough issues for your association. For example, the association may have to decide whether a special assessment is necessary, and if it is, how to enact and enforce the assessment. Questions may also arise about making repairs for construction defects that are part of the case. We provide qualified, experienced advice on these issues.

Reviewing and Producing Documents

After a construction defect case is filed, each party is entitled to find out or “discover” information from the other party(ies) to the case. Much of this information is contained in documents possessed by the builder or contractor and design professionals that helped build your complex.

Association Documents

Before complying with any requests of the developer for association documents, our firm reviews the documents, to protect against an inadvertent disclosure of any confidential information. We also go to court whenever necessary to resist unwarranted document demands.

Builder and Third Party Documents

In building a case, it's essential your association obtain a variety of documents from both the builder and any subcontractors, including unit/lot files, customer complaint files and the plans, drawings, and specifications used during construction. It is also essential to obtain documents from third parties, which may include the local building department. Our firm prepares the legal papers necessary to obtain these documents. We also take whatever steps are necessary to force compliance with our document requests.

Interrogatories

In most lawsuits, the parties serve their opponents with written questions called “interrogatories.” Like document requests, interrogatories are designed to obtain information from the other side.

Our firm prepares and sends interrogatories to the developer and to the other parties in the suit. We also prepare responses to interrogatories directed to your association.

Taking and Attending Depositions

Deposition can play a key role in your construction defect case. A deposition is a proceeding at which an attorney asks a party or another witness questions under oath. Both the questions and the answers are recorded by a court reporter, and this testimony can be used later at trial.

In some construction defect cases, the builder or subcontractors take the depositions of every single homeowner. If that happens, our firm helps the homeowners prepare for their depositions, and we attend the depositions. We also:

- Prepare the association's experts for their depositions
- Take the deposition of the other side's experts, in-house personnel of the developer, and subcontractors
- Locate, interview, and depose other key witnesses, who may include former employees of the developer

Overseeing Site Inspections

From time-to-time, experts from both the association and the other side need to inspect the complex. Some inspections may involve destructive testing of a homeowner's unit, which means that the unit is damaged by the testing and must be repaired after the testing is completed.

We review all site inspection requests, especially those seeking entry into the interior of any homeowner's unit. We also:

- Negotiate limitations on the scope of any inspection required by the developer, including the extent of destructive testing and follow-up repairs
- Communicate directly with homeowners and residents about such issues as access and subsequent repairs
- Attend site inspections whenever necessary

Attending Pretrial Proceedings

During a construction defect case, our firm usually makes a number of court appearances. Some of these are routine conferences designed to keep the court advised about the progress of the case. Others are hotly contested proceedings that involve such critical issues as whether the deposition of an important witness can be taken. Often these appearances require our firm to prepare extensive legal papers.

Dealing with Multiple Parties

Although an association usually sues only the builder of the defect items, that party often brings the subcontractors into the suit. As a result, a construction defect case can involve a dozen parties, and many cases involve more parties than that.

The larger the number of parties in a construction defect case, the more our firm must deal with the lawyers for these parties. These dealings include (1) reviewing correspondence, (2) processing site inspection requests, and (3) scheduling deposition dates, court hearings, and settlement discussions.

Negotiating a Settlement

From the time you hire our firm, we have one overriding goal:

To resolve your association's construction defect claims as quickly and successfully as possible.

To accomplish this, we constantly look for ways to resolve the case short of a trial.

During the course of a case, we may attend a court-mandated or voluntary settlement conference. We prepare extensively for these conferences, and make every effort to settle the case on favorable terms.

Many of our cases have been resolved through non-binding mediation. This is a way of handling conflict in which the parties to a dispute meet with a trained, impartial third party to work out their differences.

Collecting from the Builder

Construction defects can cost hundreds of thousands, often millions, of dollars to fix. That's why we assist your association in taking a hard look at the builder's assets and its ability to pay the costs of repair. We also investigate indemnity arrangements that obligate the subcontractors to pay for your association's construction defect claims.

Insurance Coverage

Builders and subcontractors often carry liability insurance. Our firm uses the discovery process to obtain copies of any policies the builder or subcontractor may have that cover construction defects. We analyze these policies to determine which ones provide coverage for your claims. We also:

- Organize your case in a way that maximizes the association's chances of obtaining insurance coverage
- Work with attorneys for the builder and the subcontractors to find coverage from their insurers
- Sue, if necessary, any insurance company that fails to live up to its coverage obligations
- Deal with adjusters, claims personnel and other insurance company representatives

Handling Post Trial Matters

Some construction defect cases end after a settlement is reached or a trial is concluded. Many cases, though, require extra legal work at this stage. For example, settlement negotiations between the parties often continue after a trial, but before an appeal is filed.

Other post-trial steps taken by our firm include:

- Asking the court to properly allocate trial costs among the parties
- Appealing an unfavorable trial court decision to a higher court
- Defending an appeal by the builder or the subcontractors

Additional Services

Even after a case is finally over, we continue to help. For example, we can prepare a written summary of the case for distribution to owners. We have found that many homeowners appreciate receiving a final case summary, especially those planning to resell their homes. We also help associations set up repair programs. To make such a program successful, our firm:

- Meets with the board to devise repair steps and help the association move into the repair phase of the case
- Works with the association's experts and any committee created to assist the directors in making the repairs
- Makes sure pertinent files, documents, and other materials are transferred to the board