



The Overlooked Risks in Avoiding Construction Litigation

By Shani O. Zakay, Esq.

Litigation is bad, but avoiding litigation can be worse.

For many associations, the three word combination—construction defect litigation—is a scary one. The idea of experts, inspections, depositions and court appearances would give most people some anxiety, including board and association members. Even more nerve-racking is the thought of having to disclose the litigation to potential purchasers of units within the association. So naturally, boards are reluctant to pursue construction litigation, even when it appears necessary.

Most would agree that entering into construction defect litigation presents some obstacles to the smooth operation of the association. What most homeowners do not understand is the significant negative consequences the association can face if it avoids litigation when it becomes necessary.

Takes this scenario as an example: an association repeatedly receives complaints from homeowners about plumbing issues in their unit (or window leaks and fogging, stucco cracks, etc.). The board hires an expert to inspect to problem, and the experts concludes the buildings suffers from construction defects. The board is hesitant to enter litigation and chooses not to pursue legal action. Two years later, the statute of limitations has run, but the problem has gotten worse. Legal action is no longer an option, but the plumbing (windows or stucco) are still malfunctioning. As the complaints stack up, the Board obtains a proposal to repair the plumbing system in the building. The cost is significant, and the association lacks to funds. So, it imposes a *special assessment* on each and every unit-owner--\$10,000 per unit.

The homeowners are upset, and for good reasons. They are now responsible for a large special assessment they did not anticipate. If they want to sell their units, they have to disclose (1) that defects exist in the association, and (2) that a special assessment has been imposed on the membership. They look to the board for its negligence and failure to deal with the construction defects when litigation was still an option. The tables have turned, and the legal action is now directed at the board.

This story may be hypothetical, but stories similar to this one are not uncommon. Construction defect litigation often scares boards into ignoring real issues in their development. These issues end up costing the associations thousands of dollars in special assessments. Boards must not only be aware of the consequences of litigation, but also of the consequences of avoiding litigation.

Sure, construction litigation creates some issues, but those issues can be overcome. Silldorf & Levine provides hands-on representation during the construction defect litigation. We

utilize the pre-litigation procedures effectively to obtain resolution for the association without initiating litigation in the first place. We control the experts and minimize inspections and interference with the owners' ability to enjoy their community. We support the association during membership meetings and participate in town-hall meetings to educate and encourage the members that the association is doing the right thing. We undertake the responsibility to address the concerns of sellers, potential buyers, and their respective agents, and we provide those individuals with information about lenders who specialize in lending during litigation.