



Ask a Lawyer

By Jesse Witt, Esq.
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Question:

My condominium association is currently suing its builder over window leaks. Should we also look for other latent problems, such as defective firewalls?

Answer:

That question raises a number of complicated questions that you should discuss with your litigation counsel, but here are some general principles to keep in mind.

Most building codes in Colorado require fire-resistive construction between the units in a multifamily dwelling. These assemblies help protect the residents by slowing down the rate that a fire can spread from one unit to the next. If a builder fails to adhere to these codes and

construct the proper firewalls, the law allows a homeowner association to sue the builder for the cost of repairing the life-safety risk.¹

Often, an association that brings defect claims will only get “one bite at the apple,” such that the association may lose any defect claims that it does not assert in that case. Thus, one school of thought suggests that an association should investigate all possible defects as soon as it makes the decision to file a lawsuit. Under this rationale, even if the association has no reason to suspect problems with the firewalls, the board should nevertheless retain experts to determine if the builder made any errors in these areas. If they find that the firewalls were not built correctly, this may increase the amount of damages the association can recover at trial.

This view is not universal, however. Another school of thought would reason that an association should not look for latent firewall defects, because discovery of such issues could ultimately hinder the association’s ability to resolve its suit. Although this may seem paradoxical, one must consider that many liability insurance carriers refuse to pay for defects that have not yet caused any property damage as defined in their policies. Sadly, if a fire destroys a building and causes bodily injuries or property damage, the carriers will compensate the victims, yet these same carriers typically offer little or nothing to cover preventative measures such as fixing inadequate firewalls.² If the builder itself is bankrupt or insolvent, the carrier may be the only source of payment for a claim and the association’s board may therefore make the strategic decision to concentrate its investigation on those defects that will trigger the most insurance money. Otherwise, the association risks winning a large verdict that it can never collect.

While these issues are complicated, one thing is clear: once an association decides to investigate life-safety issues, it should be prepared to fix any defects that it finds. A recent case against the Sunridge Condominium Association in Pennsylvania illustrates this. There, flames from a fireplace allegedly ignited creosote in the chimneystack, setting the structure ablaze and killing two.³ In a subsequent wrongful death suit against the homeowner association, families of the victims alleged that the association was partially responsible because the board knew that the fireplace was improperly designed and constructed yet failed to make timely repairs.

So, is ignorance bliss? Would your association be better off not knowing if any latent life-safety defects exist? The answer depends on many factors, including your overall confidence in your builder’s construction methods, whether your builder has sufficient assets to pay for repairs that may not be covered by insurance, whether your association could afford repairs outside of the litigation, and how much your association’s members value the peace of mind that comes from knowing that their homes are safe. My advice is to discuss these issues promptly with your attorney and your fellow board members, and decide what makes the most sense for your community. ⬆

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*1 Colo. Rev. Stat. §§ 13-20-802.5(2), -804(1)(d); 2 Whether this argument would actually hold up in a coverage action is debatable, but that subject is beyond the scope of this article; 3 Michelle Ganassi, “Family files suit in deadly Seven Springs fire,” *Somerset County Daily American*, Jan. 23, 2009, <http://tinyurl.com/7omynv8>.*

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