



Legal Corner:

Holding Builders Responsible For Their Subcontractors' Acts

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When a homeowner association files a construction defect lawsuit, the developer, builder or general contractor often attempts to shift liability to its subcontractors. Community leaders and residents may wonder how this is possible and question why a builder should be permitted to blame someone else for its own errors. Fortunately, even when a builder attempts to shift its liability to another, the task is not an easy one. The builder has the burden of proving its claims against any subcontractors, and some courts have found that it owes independent, nondelegable duties of care that make it liable for any negligence on its jobsites. Below is a brief discussion of some of the tactics and theories most commonly argued under Colorado law.

Third-Party Action

The simplest way for a builder to involve its subcontractors in a homeowner association suit is to file a complaint naming the subcontractors as third-party defendants. This essentially argues that, if the jury finds that the builder is liable to the association, the subcontractors must reimburse the builder for whatever money it has to pay. Technically, this tactic does not shift liability, since the builder still owes damages to the association, though it may have the same effect in practice: if the subcontractors have sufficient assets or insurance, the builder will not have to use its own funds to satisfy a judgment. To be successful, however, the builder must prove that the subcontractors are responsible for any and all defects that the association is claiming.

A challenge of the third-party approach is that the builder often must argue that there are no construction defects, while simultaneously trying to convince the jury that the subcontractors bear responsibility for any defects that do exist. As third-party defendants, these subcontractors participate in the pre-trial proceedings and are present at trial to defend against the builder's allegations. In defending the claims against them, these subcontractors are often more than willing to place the blame right back onto the builder and argue that they were simply doing what they were told.

Nonparty Designation

Another option for the defendant builder is to designate the subcontractors as "nonparties at fault." This tactic can be more problematic for the plaintiff association, because

it allows the jury to reduce their verdict by the percentage of fault assigned to the nonparties at the time of trial. For example, if a jury awarded \$100,000 and apportioned 60% of the fault to the developer and 40% to the subcontractors, then the association would only recover \$60,000.

This tactic has its limitations, however. First, a nonparty designation only applies to tort claims (such as negligence). Thus, this designation should not change a builder's liability for any contract or warranty claims. Second, juries may be reluctant to pin liability on an "empty chair," an entity that has not participated in the trial or appeared in the courtroom. Third, while designated nonparties do not actively participate in a case, the builder must still present evidence of their responsibility at trial in order to have the jury consider their potential fault. In other words, the builder must be prepared to make a persuasive case against the subcontractors and prove the same elements as if it had sued the subcontractor directly. When a builder is busy defending the association's claims, the requirement to prove its own case against the designated nonparties can easily get lost in the mix.

Independent and Nondelegable Duties

It is also important to recognize that, even when a builder shows that its subcontractors' actions caused the construction defects, the builder may still be held responsible if the court determines that the builder breached an independent or nondelegable duty.

Colorado law has long recognized that builders owe home buyers an independent duty to construct homes with reasonable care. In some cases, this duty may require that the builder properly supervise and schedule its subcontractors. For example, if a general contractor brings its subcontractors to the site in the wrong sequence and thereby causes a home to be waterproofed incorrectly, the builder should be held liable for any resultant damage.

Moreover, this independent duty, and the importance that the courts have placed on it, suggests that a builder's duty to prevent negligent home construction may not be a responsibility that can be delegated to subcontractors. If so, then builders should be held accountable for all construction defects on their projects, and jurors should be instructed that builders cannot avoid their obligations by subcontracting out the work to other parties. Although Colorado courts have not yet settled this question, other jurisdictions have come to this exact conclusion:

It would be too easy for a builder-seller of a house to avoid liability by hiring inexperienced crews, providing little or no supervision, and then claiming the culprit of any negligence was an independent contractor. The contract to build, with its attendant obligations, is between buyer and builder, not the buyer and any independent contractor. As for a negligence claim, having held himself out as having the ability to build a fit and proper house, the builder generally cannot abdicate to an "independent contractor" his duty to do it. The right to direct and control the work is assumed and retained by the builder in these cases.

The rationale behind this rule is that because the builder has accepted this independent duty by proceeding with its development and construction activities, it should not be permitted to avoid its duty by hiring subcontractors, competent or otherwise, to perform the activities, and then argue that it was all the subcontractors' fault.

A builder's independent duty may also be deemed nondelegable because the duty is confirmed by public policy and statute. In similar situations, Colorado courts have

recognized that "the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Under this rationale, building codes, which are enacted to ensure construction is done properly for the community's protection, impose a nondelegable duty on all builders, and this duty may not be shifted onto the subcontractors who were assigned a portion of the work.

Conclusion

When a builder tells a homeowner association that construction defects are its subcontractors' responsibility, the board should not assume that this is an airtight defense. Although Colorado law does provide mechanisms for shifting some liability onto subcontractors, this seldom provides a complete defense. The builder must still demonstrate that it did not breach any duties on its own, and it must affirmatively prove that it was the subcontractor who actually caused the damage. As always, boards should promptly consult qualified legal counsel whenever they think that they may need to assert a construction defect claim. ⬆



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