

What Obligations Arise When an HOA Settles a Construction Defect Suit?

With more and more builders moving to Colorado to cash in on the demand for multifamily housing, more and more HOA's are becoming plaintiffs in lawsuits over poor construction. A question that often arises when such a case settles is whether the HOA incurs any obligation to make repairs to the alleged construction defects. Typical settlements merely require the builder to pay a lump sum of money to the HOA in exchange for a release of liability. The HOA can spend these funds however it wants, subject only to its governing documents. These documents, of course, likely require the HOA to maintain

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to bring suit in their own name on behalf of two or more owners on matters affecting the community. Although some trial courts initially refused to apply this statute to construction defect disputes, the higher courts have ruled that CCIOA specifically confers standing on HOA's to assert claims for construction defects in individual units. The court decisions leave unanswered, however, whether an HOA gains any new responsibilities when it invokes standing to assert claims on behalf of its members.

Example: *An HOA brings suit against a developer over drainage problems in the common elements and plumbing leaks inside the units. The HOA settles with the developer before trial, and the homeowners ask the HOA to fix their plumbing, despite covenants that only require the HOA to maintain the common elements. Must the HOA agree?*

In this scenario, the HOA probably does have an obligation to make some repairs to the plumbing. Although it has no contractual responsibility to maintain the units, the HOA received a benefit from the developer in consideration of the plumbing defect claims, and the HOA's settlement would likely preclude the individual owners from later pursuing the builder for these defects. Principles of unjust enrichment and simple fairness would therefore seem to mandate that the HOA now address the plumbing problems.

That said, the specific action to be taken would be subject to the discretion of the HOA's officers, who are protected by the business judgment rule, CCIOA's limitations on personal liability, and the reality that the members of the community have invariably agreed to be bound by the decisions of the HOA's

the common elements of the community, and most HOA's will use the settlement money to repair the defects in these areas.

The situation becomes more complicated, however, when the HOA asserts claims for defects in individual units as well as the common elements. The Colorado Common Interest Ownership Act, or "CCIOA," allows HOA's

board. Thus, while equity may demand that individual owners receive something for their claims, it would be up to the board to determine, for instance, how much of any settlement might be earmarked for individuals. The HOA in the foregoing example, could, for instance, choose to pay its members a stipend to be used toward fixing any damage inside their units. Even if the stipend was less than the actual repair cost, it would be difficult for the owners to challenge this decision.

In sum, CCIOA provides powerful tools for HOA's to help their members seek redress for shoddy construction, including construction defects in individual units. If an HOA asserts these rights, however, it must be careful not to forget about the homeowners' claims when the case settles.

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