The Miller Law Firm, Construction-Defect Litigation

Denys Arcuri, Palm Springs Life's Professional Profile

January 1993 - There is good news and bad news for California homeowners associations, their boards of directors and homeowners themselves. The good news is homeowners do have legal recourse when the roof leaks or the stucco is cracked - even though the builder may have said, "You're on your own after the first year."

The bad news is the law says homeowners must comply with strict time limitations in order to hold the builder culpable for defective work.

More good news: One of the preeminent construction-defect attorneys in the state handles the lion's share of homeowner association cases in the Coachella Valley. Thomas E. Miller, with offices in Palm Desert, Los Angeles, Del Mar and Orange County, has parlayed an extensive legal background in the subject of defective construction into a highly successful career protecting homeowners' rights. A list of multimillion-dollar settlements and jury verdicts are testament to his specialty in the area of homeowners associations. The most recent: An imminent $10 million settlement for a 252-unit Los Angeles area condominium development with a host of built-in defects.

Miller has recovered more than $75 million for grateful homeowners since 1987 alone. In fact, he wrote the book on the subject, and the second edition of Construction Defect and Land Subsidence Litigation has just been published.

By and large, says Miller, California law is on the side of associations which face problems because of inadequate construction techniques or materials, but there are two important caveats: They must be vigilant in discovering defects, and they must pursue litigation promptly.

Members of the boards of directors for homeowners associations carry many of the same responsibilities of other publicly elected officials. They can't merely shrug their collective shoulders and hope a problem goes away. A board may be forced into litigation measures in order to protect the rights of the member homeowners.

Miller says homeowners associations got a boost from a precedent-setting case about ten years ago, which established defects as "strict liability" matters, rather than the prior "negligence theory".

Prior to the 1981 case, negligence on the part of the builder was necessary to prove a defect; since that landmark decision, the builder is liable for any defects in workmanship and materials that cause damage.

"In other words, all we have to do now is show that the builder put a product on the market that didn't work right," says Miller. "And if it doesn't work right, it's called a 'defect', and

the builder has to fix it."

The distinction between a "defect" and a "maintenance problem" is not always clear, but it's crucial to the individual homeowner and the homeowner association. Oftentimes it takes an expert to figure out whether the problem is a true defect of construction or if improper maintenance was the cause. A wrought-iron fence that rusts for want of paint is a maintenance problem, but badly cracked stucco is a defect, and, cautions Miller, the builder is usually not the person to go to for the answer to the maintenance-versus-defect question.

"There's a real pitfall here," he says. "You can't rely on the builder coming in and doing the fix, because he's the guy who created the problem in the first place." Not only that, the builder is likely to attempt Band-Aid fixes that will get him around two time statues; a ten-year limit that starts when the project is completed, and a three-year clock that begins ticking when the defect is discovered. He may even tell the association that the problem is not a defect - and that they are responsible. What then?

Here, the board member of a homeowner association can find its collective self between a rock and a hard place. You can't trust the builder because it's like the fox guarding the hen house, and the cost of hiring an expert to assess the damage is prohibitive - what if he says it's a maintenance problem and not a defect? The board members have some explaining to do if they've wasted money finding out there's no recourse, but they can be individually sued if they fail to act promptly on the homeowners' behalf. It's for exactly these situations that Miller's staff includes a licensed general contractor who will assess the problem for the association at no cost. The staff contractor, available to any homeowners association with a problem, will conduct a survey and then tell the board whether it appears to be a defect or a maintenance item.

Roofs are a very common problem, indeed. And, Miller says, since a roof is expected to last fifteen to twenty years or more, a leaky roof within the first decade of a home's existence is a very likely candidate for defect litigation. But roofs are not the only problems homeowners can seek legal relief for. Homeowners associations have received settlements, thanks to Miller's intervention, for defects such as poor drainage, water intrusion through windows and doorways, cracked foundations, plumbing leaks, noise attenuation defects, inadequate lighting, dry rot, structural framing, land and waterscaping problems and a host of others.

Just about any problem with a condominium development's common area should be evaluated for a potential defect. But first it's handy to know what the common area of a condominium development is, and what the two primary types of construction defects are, according to the courts.

A condominium owner typically owns the airspace inside the unit. Floor and wall coverings, and everything not nailed down, are included. Everything else is "common area", and the association board of directors is, as a rule, charged by law to maintain it. This includes the slab, sidewalks, patios, plumbing, drywall, roofing, fencing, etc. About 75 to 80 percent of condominium projects in California are "airspace" units. The other 20 to 25

percent are called "planned unit developments". In the latter case, the common area is defined by the association's Covenants, Conditions and Restrictions, or CC&Rs, but in either case the builder is liable for construction defects and association boards have an obligation to effect remedies for common area problems.

According to law, the two primary defect categories are those of construction and design. There are deficiencies with the structure and with flaws in the soil that support the structure.

"Think about it: One, from the ground up - you have problems with the buildings. Two, from the ground-level down - you have problems with the soils." A roofing problem is a defect encounter of the first kind. A home with a cracked slab is a defect of the second kind.

At any rate, the message that Miller would like to get out to the condominium-dweller in the desert is that help is available. While association directors are saddled with the burden of vigilance and responsibility to act promptly, there is help in new laws that protect against defects and in the power of a specialist here in the desert who currently represents more than two thousand individual homeowners. Thomas E. Miller not only has a reputation for resolving cases in favor of the association long before they reach court, but also will provide a licensed general contractor from his staff who will assess association problems free of charge and recommend a course of action.

"Anybody who suspects a problem has to really investigate it," Miller says. "The biggest problems we see are people waiting too long, or letting the builder 'fix' it and signing a release of rights, forever barring them from future claims. But homeowners don't have to be at the mercy of the builder any more, and as a result more and more association board members are sleeping soundly these days."