

Selling or Financing a Home Involved in Construction Defect Litigation

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July / August 1998 - One of the first thoughts to enter a homeowner's mind upon hearing the words "construction defect litigation" is an impossibility of selling and a decline in property values. While this may be true in some cases, in most instances, it should be neither difficult nor impossible to sell or finance a property, provided certain steps are followed.

Once an Association enters into litigation, and testing to determine the scope of defects is completed, the law firm should provide homeowners with a quarterly updated "Construction Defect Litigation Disclosure Statement." This disclosure statement should be distributed to the homeowners periodically, and outlines the Status of the Litigation, Nature of the Claim, Parties to the Action, Nature of Alleged Defects, Legal Representation, and Use of the Disclosure Statement. This written disclosure should be utilized by the homeowner and/or real estate agent during the marketing and escrow period.

During the marketing period, the homeowner/agent should actively work on researching which banks will finance a loan for the buyer; many banks will not finance a loan when there is litigation. Discovering the bank will not finance the loan near the end of the sales transaction could literally mean "the end of the transaction." Every banking institution to consider financing the loan, will request the Litigation Disclosure Statement to examine the nature of the claim, and the alleged defects.

The list of banks who will finance the home purchase should be given to the buyer/real estate agent when an offer is being negotiated and/or accepted. It is important to inform the buyer of the litigation, and the alleged defects, at the beginning of the transaction. The litigation can be disclosed in the purchase agreement and the Transfer Disclosure Statement. The most current Litigation Disclosure Statement from the law firm should definitely be referenced on the Transfer Disclosure Statement and attached to the document when given to the buyer.

It is very important to educate the buyer at the same time the disclosures are being made. Inform the buyer of the facts about the quality of most construction, and the statistics that one in every two to three associations has been or will be involved in construction defect litigation. It is also important the buyer understands that in most cases the motivation behind the litigation is to take a positive step toward obtaining funds to correct the defects. There is no guarantee that all buyers will view the litigation in a positive light. And, realistically, there will be buyers who will select another property as a result of the litigation. In the real estate market we are currently experiencing, however, where there is an abundance of buyers, and not enough inventory on the market, another buyer who can logically analyze the situation will be waiting down the block. In 1991, 1992, 1993, 1994, 1995, there were so few buyers, losing one buyer could mean the property would continue

to sit on the market. In today's market, "sitting" on the market would be highly unlikely.

During the litigation, it is very important the association has a specific policy on repairs to the exterior of the unit, even if it is, for example, a roof leak. Having a clear policy, and disclosing this policy up front, leaves no expectation of the buyer and/or seller that a repair will take place prior to the close of escrow.

Being proactive in addressing potential complications that can surface is advice worthy to remember to ensure a smooth transaction. Selling a property involved in construction defect litigation does require more effort, and it does require a little more research. Overall, however, it is a very straightforward process, and it is certainly not impossible to accomplish.