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NEW LAWS PERTAINING TO CONSTRUCTION DEFECT ACTIONS

During the past few years, Arizona has seen an unprecedented building boom. A tremendous number of new homes have been built in a very short period of time. During this time, a shortage of skilled labor has made it very difficult for builders to find and keep quality workers. The result has been an epidemic of construction defects throughout the valley.

Most homeowner associations are responsible for maintaining the common areas. If the common areas have construction defects, the board has two choices. The board can either fix the defects with available association funds or the board may recover the money necessary to make the repairs from the developer. Most associations do not have enough money in their operating budget to make the necessary repairs. Not surprisingly, we are seeing more and more suits filed by associations against developers.

If an association is considering filing suit as a result of construction defects, the association needs to be aware of several new laws. The failure to comply with these laws could jeopardize an otherwise meritorious claim.

The first law to be aware of is A.R.S. § 33-2002. This law provides that an association must meet three requirements before filing an action. First, the board must provide a full disclosure in writing to all members providing the material information relating to the action. The material information must include a statement that describes the manner in which the action will be funded and a statement describing any demands, notices, offers to settle, or responses to the offers to settle made by either the association or the developer. Next, an association must hold a meeting of its members to discuss the action. Finally, the board of directors must authorize the filing of the action. The statute contains a tolling provision that allows the association to comply with the above requirements without violating the statute of limitations.

A.R.S. § 33-2002 also imposes requirements upon associations that receive money as a result of construction defect litigation. Specifically, the board must disclose in writing to the members a plan that describes a manner in which the proceeds will be spent. The plan must be disclosed within 30 days after the association recovers the money. While the plan is not binding on the association, the board must disclose any material changes to the plan within 30 days after making the changes. Finally, the association must keep its records with respect to the repairs for a period of five years.

A.R.S. § 12-2602 requires that an association file a written statement stating whether or not expert testimony is necessary to prove a violation of a licensed professional's standard of care or liability. If the association files such a certification, the association must serve a preliminary expert opinion affidavit with the initial disclosures that are required by Rule 26.1 of the Arizona

Rules of Civil Procedure. The preliminary expert opinion affidavit must contain the following information: (1) The expert's qualifications to express an opinion on the licensed professional's standard of care liability for the claim; (2) The factual basis for each claim against a licensed professional; (3) The licensed professional's acts, errors, or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability; and (4) The manner in which the licensed professional's acts, errors, or omissions caused or contributed to the damages or other relief sought by the association.

Finally, Rule 16(g) of the Arizona Rules of Civil Procedure now requires that the parties to a lawsuit meet no later than 90 days after the appearance by the defendant to discuss alternative dispute resolution. In construction defect cases, the most typical form of alternative dispute resolution is mediation. Since construction defect cases are unique, the selection of a mediator is very important. In addition to good mediation skills, a construction defect mediator must understand both the construction process and insurance coverage.

The new laws mentioned above now impose a few more hurdles that an association must jump over in order to successfully complete a construction defect litigation case. Since the construction defect case may be the association's only opportunity to recover enough money to make necessary repairs, it is crucial that the association comply with these new laws.

The foregoing is a general overview of an issue and is not intended as specific legal advice regarding any particular situation. Associations are advised to seek competent legal counsel when confronted with legal issues. If you have any questions, please contact Ekmark & Ekmark at 480-922-9292.