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Litigating the Common Interest Community Construction Defect Claim:

Strategies and Pitfalls

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What is a Common Interest Community?

- Housing development consisting of individually-owned living units (“Units”) and jointly-owned common areas (“Common Elements”)
- Created by a “Declaration” drafted by the developer/declarant, which may change according to the community's needs.
- Governed by statute, particularly the Minnesota Common Interest Ownership Act, Minn. Stat. 515B.



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What is a Common Interest Community?

- Homeowner associations (HOAs) are non-profit corporations created under Minn. Stat. 317A to operate and maintain the CIC.
 - HOAs operate by and through a Board of Directors elected by the homeowners. Minn. Stat. 515B.3-103.
 - Unless otherwise provided by the CIC's Declaration, a HOA is responsible for maintaining and repairing the CIC's common elements, and unit owners are responsible for maintaining and repairing their individual Units. Minn. Stat. 515B.3-107.
 - A HOA has statutory authority to file suit on their own behalf and on behalf of two or more similarly situated homeowners. Minn. Stat. 515B.4-116.



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Anatomy of a Community Association Lawsuit

- Pre-Suit Investigation
- Complaint
- Answer / Third-Party Complaint
- Discovery and Motion Practice
- Alternative Dispute Resolution
- Trial



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Pre-Suit Investigation

- Common construction problems:
 - Improper installation of windows, siding and roofing
 - Water intrusion and damage
 - Grading and drainage problems
- Forensic engineer will help identify potential construction problems, their causes, and their solutions.



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Latent or Hidden Construction Defects and Damages



- Construction defects may not be readily apparent to a layperson.
- Property damage caused by construction defects may be hidden behind the building envelope or otherwise concealed.



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Latent or Hidden Construction Defects and Damage

- Forensic testing may be necessary to identify problems
 - Moisture probe testing
 - “Test cuts” into building envelope
 - Window spray testing
 - Sound testing



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Latent or Hidden Construction Defects and Damage

The Bottom Line:

Hire an appropriate expert (usually an engineer) to help you determine the existence and extent of construction problems and resulting damages.



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The Complaint: Stating Your Claims

- Common Law Claims
 - Negligence
 - Breach of Contract

- Statutory Claims
 - Express and Implied Warranties under Minnesota Common Interest Ownership Act (MCIOA) – Minn. Stat. 515B.4-112 and .4-113
 - Minnesota New Home Warranty – Minn. Statute 327A.02



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Negligence

- Contractors has a non-delegable duty to build in a “good and workmanlike manner.”
 - *Brasch v. Wesolowsky*, 272 Minn. 112, 138 N.W.2d 619 (1965)
 - *Arden Hills North Homes Assoc. v. Pentom, Inc.*, 475 N.W.2d 495 (Minn. Ct. App. 1991)
 - *Julian Johnson Construction v. Parranto*, 352 N.W.2d 808 (Minn. 1984)

- Contractors have a duty to comply with building codes.
 - *Gradjelic v. Hance*, 646 N.W.2d 225 (Minn. 2002)
 - *Pacific Indemnity Company v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977)
 - *Raymond v. Baehr*, 163 N.W.2d 51 (Minn. 1968)
 - *Thies v. St. Paul's Evangelical Lutheran Church*, 489 N.W.2d 277 (Minn. Ct. App.1992)

- Contractor can be held liable for breaching these duties.



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Breach of Contract

- Direct breach of contract vs. third-party beneficiary.
 - Direct breach of contract.
 - Ex. 1: Purchase agreements between homeowners and developer.
 - Ex. 2: Violation of Declaration.
 - Third-party beneficiary: Association and/or homeowners may bring claims for breach of contract between third parties if they are the intended beneficiaries of those contracts.
 - *Cretex Companies, Inc. v. Construction Leaders, Inc.*, 342 N.W.2d 135 (Minn. 1984).
 - *Julian Johnson Construction v. Parranto*, 352 N.W.2d 808 (Minn. 1984)



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MCIOA Warranties

- Express Warranties: Minn. Stat. 515B.4-112
 - Construction will conform to promises made by builder.
 - Construction will conform to plans, specifications, and models provided by builder
- Implied Warranties: Minn. Stat. 515B.4-113
 - Units and common elements will be suitable for ordinary use
 - Construction will be free from defective materials
 - Property will be constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.
- Attorney Fees: Minn. Stat. 515B.4-116



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Statutory New Home Warranty Claims

- Minn. Stat. 327A.02
 - 1-year “bumper to bumper” warranty - non-compliance with building standards.
 - 2-year mechanical systems warranty - faulty installation of plumbing, electrical, heating and cooling systems
 - 10-year structural warranty - “major construction defects”



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Statutory New Home Warranty Claims: A Procedural PITA

- Minn. Stat. 327A.02
 - Must give contractor notice of the defects and an opportunity to inspect before filing suit.
 - Contractor has 30 days to inspect property.
 - Contractor has 15 days from date of inspection to provide written repair proposal.
 - This inspection process tolls the statute of limitations.



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Statutory New Home Warranty Claims: A Procedural PITA

- Minn. Stat. 327A.051
 - Notice to Dept of Labor of dispute.
 - Within 10 days Dept of Labor must identify 3 neutrals to hear claim
 - Parties must select from the list of neutrals within 5 days
 - Each party provides documentation
 - Neutral must mail a decision within 10 days of the submission



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The Answer: Contribution and Indemnity, and Asserting the Right Affirmative Defenses.

- Defendant should bring in all potentially liable parties - e.g., subcontractors, design professionals, suppliers
 - Contribution and/or indemnity
 - Additional insured status?
- Defendant should always assert critical affirmative defenses
 - Statute of Limitations / Repose
 - Comparative Fault / Contributory Negligence



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~ Potential Pitfall ~

The Tripartite Relationship: Doing Right by Your Client.

- Insurance carriers generally defend their general contractors and subcontractors under a reservation of rights.
- Attorney hired by insurance carrier to defend its insured represents the insured, not the insurance carrier.
- Attorney hired by insurance carrier to defend insured owes a duty of undivided loyalty to the insured and must faithfully represent the insured's interest. *Crum v. Anchor Cas. Co.*, 264 Minn. 378, 119 N.W.2d 703 (1963).
- Defense lawyers: are you encouraging insured to obtain personal counsel when there are unresolved coverage issues?
- Defense lawyers: are you taking positions that are in the best interest of the insured or are you building the insurance carrier's coverage case?



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Applicable Statutes of Limitations / Repose

- Common Law Claims: Minn. Stat. 541.051.
 - 10-year repose period – i.e., claim for defective construction must arise within 10 years of completion of construction.
 - 2-year limitation period – i.e., claim for defective construction must be brought no more than 2 years after actionable claim is discovered, as long as discovery occurred within the 10-year repose period.
 - Claims arising outside of the 10-year period are time-barred.
 - Claims that are not brought within 2 years of discovery are time-barred.



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Applicable Statutes of Limitations / Repose

- Common Law Claims: Minn. Stat. 541.051.
 - Statute of limitations begins to run when an actionable injury is discovered or, with due diligence, should have been discovered. *Dakota Cty v. BWBR Architects*, 645 N.W.2d 487 (Minn. Ct. App. 2002).
 - If reasonable minds can differ about when an injury was discovered or should have been discovered, then the discovery date is a fact question that must be resolved by a jury. *Thorp v. Price Bros. Corp.*, 441 N.W.2d 817 (Minn. Ct. App. 1989) rev. denied (Minn. Aug. 15, 1989); *Lake City Apartments v. Lund-Martin Co.*, 428 N.W.2d 110 (Minn. Ct. App. 1988), rev. denied (Minn. Oct. 19, 1988); *200 Levee Drive Assoc. v. Bor-Son Bldg. Corp.*, 441 N.W.2d 560 (Minn. Ct. App. 1989).



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Applicable Statutes of Limitation / Repose

- Exception: Breach of Warranty Claims.
 - Under Minn. Stat. 541.051, breach of warranty claims must be brought within two (2) years of the date of breach - i.e., when the claimant knows or should know the contractor will not honor the warranty.
 - Claims arising outside of the 10-year period are time-barred.
 - Claims that are not brought within 2 years of discovery are time-barred.
 - Applies to common-law warranty claims and statutory new home warranties under Minn. Stat. 327A.
 - MCIOA warranty claims have their own limitation / repose period.



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Applicable Statutes of Limitations / Repose

- MCIOA warranty claims: 6-year statute of limitations / repose.
 - For warranty claims involving a “unit,” 6-year period begins to run on the date the unit is first sold. Minn. Stat. 515B.4-115(c)(1).
 - For warranty claims involving a “common element,” 6-year period begins to run on the latest of:
 - (1) the time the common element is completed;
 - (2) the time the first unit in the common interest community is conveyed to a bona fide purchaser;
or
 - (3) the termination of the period of declarant control. Minn. Stat. §515B.4-115(c)(2).



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Applicable Statutes of Limitations / Repose

- MCIOA warranty claims: analysis
 - Determine whether defect involves “units” or “common elements” because this will determine the statute of limitations.
 - Consult the governing documents.
 - If necessary, get a legal opinion.
 - Remember! The 6-year statute of limitations / repose for MCIOA warranty claims operates independently of the Minn. Stat. 541.051 statute of limitations / repose applicable to common law claims and statutory new home warranty claims.



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Hypothetical: *Unicorn Grove Association v. Rexitall Builders, Inc.*

- Factual Background:
 - Unicorn Grove is a 20-unit condominium building built in 2010.
 - Rexitall Builders, Inc. (“Rex”) was declarant and general contractor.
 - Rex turned over control of association in January 2012.
 - In September 2014, homeowners begin reporting leaks around the windows, cracks in the drywall in their units, and heaving sidewalks on the building’s perimeter to the Association’s management company.



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Hypothetical: *Unicorn Grove Association v. Rexitall Builders, Inc.*

• Which Claims to Pursue?

- Common law claims?
 - Any statute of limitations problems?
- MCIOA claims?
 - Any statute of limitations problems?
 - Are these unit claims or common element claims?
- Statutory home warranty claims under Minn. Stat. 327A.02?



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Hypothetical: *Unicorn Grove Association v. Rexitall Builders, Inc.*

- Association Goals vs. Individual Owner Goals
 - Potential conflict of interest?
 - Consult governing documents, applicable law



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Discovery: What Are the “Hot Docs?”

- Association governing documents
 - Articles of Incorporation
 - Declaration
 - Bylaws
 - Rules and Regulations
- Association corporate documents
 - Board meeting minutes
 - Annual meeting minutes
 - Special meeting minutes



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Discovery: What Are the “Hot Docs?”

- Association maintenance and repair records
 - Records of all warranty repairs made by builder and its subcontractors
 - Records of all maintenance and repairs that have been made to the property
 - Records of all insurance claims submitted for the building components at issue



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Discovery: What Are the “Hot Docs?”

- Other stuff that makes Tony cringe:
 - Reserve studies
 - Property management records (logs, e-mails, etc.)
 - Board Members’ electronic correspondence



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Discovery: To Depose or Not Depose?

- Plaintiff:
 - Need for depositions is usually limited, as case usually turns on strength of expert testimony as to existence of construction defects and resulting damages.
- Defendants:
 - Need for depositions is greater, as they may establish a viable statute of limitations / repose defense.
 - Defendants should consider deposing people who may bolster such a defense
 - Board members
 - Property manager
 - On-site caretaker
 - Repair contractors / vendors
 - Homeowners?



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Alternative Dispute Resolution

- Mechanism
 - Mediation
 - Arbitration
- Timing
 - Plaintiffs: recognize that Defendants and their insurance carriers generally will not mediate until discovery is complete (or mostly complete).
 - Defendants: recognize that Plaintiffs want their case mediated yesterday.



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Alternative Dispute Resolution

- Preparation

- Plaintiff: Set Expectations for All Parties.

- Do the Defendants / Third Party Defendants have your expert reports and opinions? All of your expert reports and opinions?
 - Do the Defendants / Third Party Defendants have your repair estimate? Does the repair estimate line up with your experts' opinions?
 - Have you had the "Rolling Stones" conversation with your client?



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Alternative Dispute Resolution

- Preparation

- Defendant: Set Expectations for Your Carrier, Your Client and Plaintiff.

- Have you provided the insurance carrier and your client with a fair evaluation of the strengths and weaknesses of the case?
 - Have you disclosed your expert opinions and repair estimates to Plaintiff? In time to allow the Plaintiff to meaningfully evaluate them?
 - Have you encouraged your carrier and client to consider cost of defense?
 - If there are coverage issues, have you encouraged your client to obtain personal counsel?
 - How much "push" are you willing to give the insurance carrier when advocating for your client?



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Questions?

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