

## Sue or Be Sued

### *Condo Association Can Be Liable to Its Members For Failing to Take Legal Action Against Developer For Construction Defects*

By: Nicholas D. Cowie

The Maryland Court of Special Appeals, recently issued an opinion in *Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc.* finding that an association can be sued by its unit owner members if it fails to take timely legal action against a developer. In that case, the association was aware of construction defects, but failed to take action to preserve its claims and then filed a lawsuit against the developer too late, after the statute of limitations expired. As a result, the suit against the developer was dismissed and the association was forced to assess its unit owner members for the \$1 Million in repair costs. Some of the unit owners then sued their association, seeking to recover the cost of their assessments on the ground that the association was negligent in failing to pursue a timely legal action against the developer.

On appeal, the court was asked to decide whether state law permits owners to sue their condominium association for negligently failing to sue a developer for common element construction defects. The court, in an unpublished opinion, found that an association could be held liable to its members. The Court said: “The duty to maintain, repair, and replace the common elements together with the exclusive right to initiate litigation regarding the common elements [which was stated in a provision of the association’s by-laws] creates a concomitant obligation on the part of the [Association] to pursue recovery from [the Developer] on behalf of [the unit owners] for damage to the common elements caused by [the Developer’s] negligence, breach of contract, or violation of any applicable law.”

The particular effect of the court’s opinion on other condominium associations remains to be seen. The opinion is unpublished, meaning that although written, it does not become controlling law. It does, however, provide guidance for how trial courts should apply the law. It also appears that court’s opinion was based in part on the fact that the association’s by-laws provided it with an “exclusive” right to sue for common element defects. Although existing Maryland law recognizes the right of individual unit owners to sue for common element defects, this law was not addressed in the documents filed by the parties in the case or the court’s opinion. In addition, because the court ordered that a trial be conducted to determine whether the association was negligent in that case, it is not yet known whether the association will actually be made to pay damages.

One take-home lesson from the court’s opinion is clear: whenever construction defects are discovered at a condominium, an association should discuss its legal obligations and options with an attorney as soon as possible. As a general matter, condominium associations should conduct a professional evaluation of the construction of the condominium so that potential warranty claims can be brought to the developer’s attention before they expire. Whenever there is evidence of common element construction defects, an association should take immediate action with the developer to protect its unit owner membership by preserving warranty claims so that the statute of limitations does not expire while negotiating repairs.

For more information regarding this case and strategies for preserving warranty claims without having to resort to litigation, please sign up for my next seminar entitled “*Successful Strategies for Resolving Construction Defect Disputes with Developers*”. The location and date for the seminar are currently being scheduled. In the meantime you may contact Jessica McMillen ([jmcmillen@cowiemott.com](mailto:jmcmillen@cowiemott.com)) if you would like to preregister or receive notification of the seminar schedule.

**-Nicholas D. Cowie, Esq.**

**Nicholas Cowie is a partner in the law firm Cowie & Mott, P.A. and a member of the Chesapeake Region Chapter of the Community Association Institute. Mr. Cowie established the construction law course at the University of Baltimore where he served as an adjunct professor of construction law. Mr. Cowie has been practicing construction defect law for over 20 years and his legal work in the courts and legislature has greatly strengthened the rights of condominium associations and their members in construction defect claims. Mr. Cowie and the law firm of Cowie & Mott, P.A. have no involvement with the case which is the subject of this article.**