

Construction Defect Litigation and Housing Affordability

The purpose of a community association is to promote the community interest. Resources to meet this demand include statutory law, the declaration of covenants (master deed and/or master lease), other community documents, and the association’s board of directors.

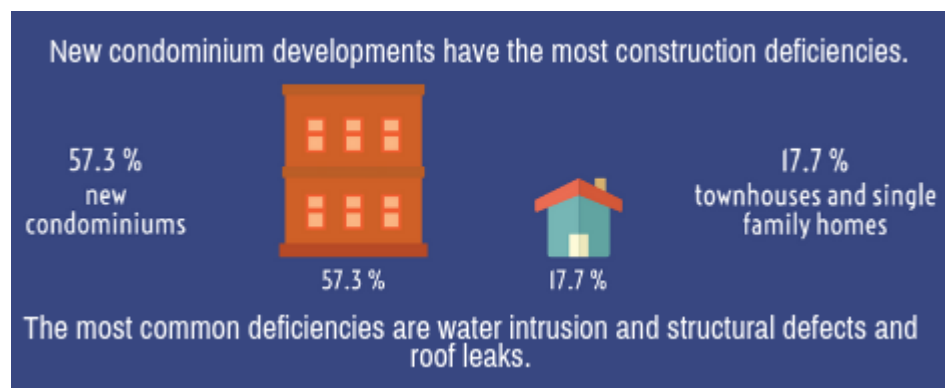
A community association’s board of directors is empowered and burdened by law and the association’s governing documents to act in the community interest. Board enforcement of agreements and exercising the association’s rights in disputes is fundamental to the community association housing model. Efforts to erode the ability of association boards to act on the community interest are counter to the community association housing model.

Preserving Community Interest in Seeking Remedies for Construction Defects

CAI members were surveyed in 2017 on the prevalence of construction defects and association board actions to remedy faulty construction. The survey inquired of construction defects by community association type, construction type, common defects, financial impacts on associations and homeowners, and remedies sought by associations. CAI’s study on construction defects is appended to these comments as Appendix A. Construction defect data referenced in following sections are derived from the CAI survey.

Reported Construction Defect Rates

Survey data revealed 57.3 percent of new condominium projects had a construction deficiency. Compared to construction defect report rates in townhome



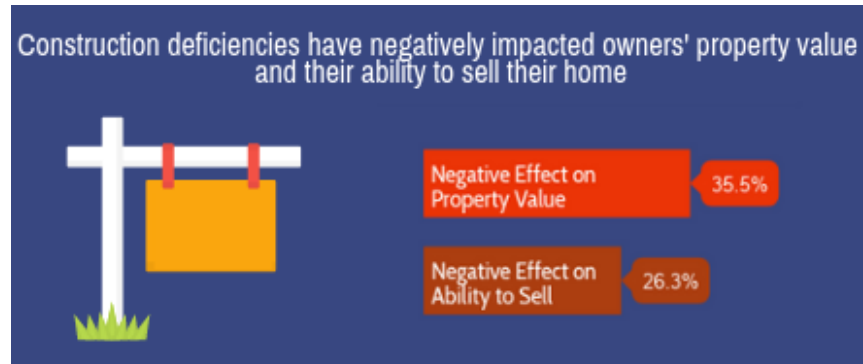
communities (17.7 percent) and single-family homes (9.5 percent), the reported defect rate in new condominium projects is an outlier and signal to policymakers of needed public and private investment in building trades unique to condominium construction. Across all respondents reporting construction deficiencies, 81.3% indicated poor workmanship as the underlying cause of defects.

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The most common construction deficiency reported by CAI members was water intrusion, accounting for 48.2 percent of reported defects. Roof deficiencies were reported by 38.6 percent of respondents and 38.5 percent reported a structural deficiency (e.g., cracks in foundation).

Impact of Construction Defects on Association Households and Associations

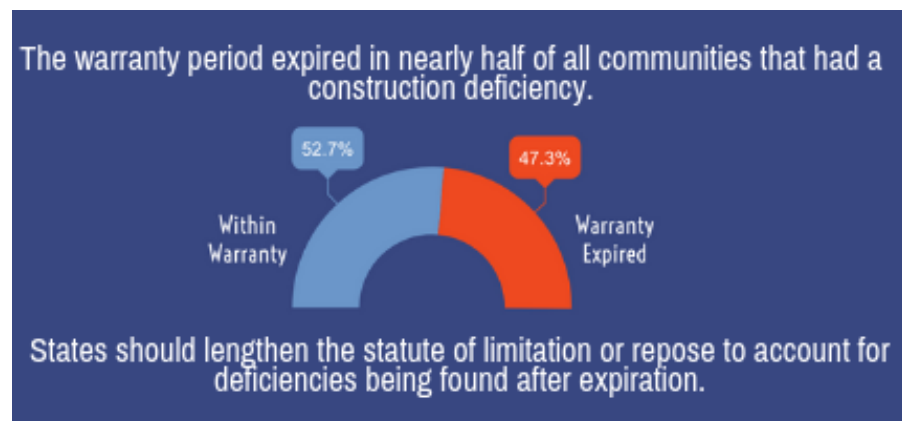
Approximately 26 percent of respondents indicated a construction deficiency negatively impacted the ability to sell a home or unit in their association. A greater percentage of respondents, 35.5 percent, reported a negative effect on community property values.



Individual respondents reported “When the board disclosed the situation, property values were slashed in half.” Another respondent wrote, “Realtors did not want to show or even list the home because of construction issues.” The impact of construction defects was quantified by a respondent who shared, “Two possible sales lost. Original cost \$249,000. Now one unit on sale for \$99,000.” The community interest requires association boards to seek remedies from responsible parties as authorized by law and contract. Equity demands homeowner concerns be addressed.

Timeline of Construction Defect Discovery and Community Impact

Survey respondents reported a significant percentage of construction defects were revealed after expiration of a warranty period. Approximately 47 percent of communities reported discovery of a



construction defect post-warranty. This may indicate statutes of limitations may be too narrow.

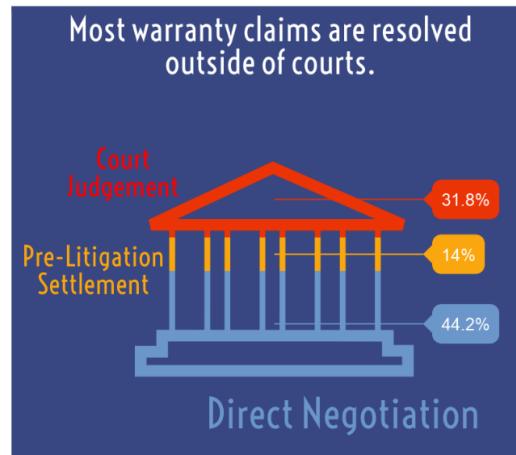
In communities where a defect was revealed after the statute of limitations had passed, 44.4 percent adopted a special assessment on homeowners to repair the construction deficiency.

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Special assessments are levied against homeowners and are a known source of household financial distress. An almost equal percentage of respondents, 43.1 percent, indicated no action to correct the construction deficiency was taken when discovered after the statute of limitations had expired.

Association Construction Defect Claims and Claim Timelines

Survey respondents reported most construction defect claims were settled outside of court. Direct negotiation with the responsible party settled 44.2 percent of claims and 14 percent were resolved in pre-litigation settlements. Only 31.8 percent of claims were settled through court-ordered judgements. These data show most construction defect claims are resolved without litigation and rebut presumptions that community associations file frivolous lawsuits.



Recovery times for construction defect claims are lengthy, straining homeowner and association resources. Respondents reported only 12 percent of damages were recovered in less than one year. Data show 34.9 percent of damages were collected in 1 to 2 years and 19.3 percent within 3 to 5 years. 8.4 percent of respondents reported damage recovery took in excess of 6 years.

Construction Defects and Housing Affordability

Some have sought to establish a direct link between construction defect litigation and the lack of housing production. This argument suggests new construction—condominiums in particular—is impeded due to construction defect litigation risk and high insurance premiums that make projects uneconomic. The proposed remedies for deficient construction offered by such groups generally fall in three categories (1) shorten the statute of limitations for construction defect litigation, (2) mandate arbitration prior to litigation, and (3) impede association litigation authority. These remedies do nothing to address the underlying cause construction defects: poor workmanship.

The USG Corporation + U.S. Chamber of Commerce Commercial Construction Index (CCI) offers insights into the main driver of construction defects. The Q4 2019 CCI report showed almost universal concern among commercial builders over the availability of skilled labor. An astonishing 92 percent of contractors reported at least moderate concern over laborer skill levels with 50 percent reporting a high level of concern. Most contractors believe difficulty hiring

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appropriately skilled workers will continue with only 1 percent of respondents expecting the issue to improve.¹

The CCI data aligns with data produced from surveys conducted by the Associated General Contractors of America (AGC), the leading association in the construction industry. In August 2019, AGC released results of a national survey of general contractors on key issues facing the construction industry. The AGC study revealed that 80 percent of general contractors experienced difficulties in hiring skilled craft positions. Consistent with the CCI data, 73 percent of respondents projected it will be more difficult to find skilled hourly construction labor in the coming year.²

Travelers Insurance Company has cited the lack of available skilled workers as a leading cause of construction defects. Traveler's indicated 74 percent of its insureds faced difficulty hiring skilled labor and identified heightened risk of construction defect litigation associated with the use of unskilled labor in construction.³

These data show almost universal concern over the lack of workers with skills required to meet minimum construction standards. Rather than address the root of the policy problem, some parties propose to constraint the authority of association boards to act on the community interest. Proposals to constrain boards include removing the decision to pursue litigation from the board and imposition of super-majority homeowner voting requirements to initiate litigation. Other proposals include lengthy mandatory arbitration that CAI members report exhausts state statutes of limitation. These are not affordable housing policy solutions.

Removing liability for poor workmanship and foisting on homeowners the responsibility to repair poorly constructed roofs, incorrectly installed and leaking pipes, cracked foundations, and dangerous decks, patios, and stairwells contravenes Executive Order 13878. Such a policy will only compound the affordable housing crisis.

¹ Q42019 USG Corporation + U.S. Chamber of Commerce Commercial Construction Index (Rel. Dec. 10, 2019).

https://www.usg.com/content/dam/USG_Marketing_Communications/united_states/product_promotional_materials/finished_assets/usg-commercial-construction-index-report-en-2019-q4.pdf

² Associated General Contractors of America, Press Release, "Eight Percent of Contractors Report Difficulty Finding Qualified Craft Workers to Hire as Firms Give Low Marks to Quality of New Worker Pipeline," August 27, 2019. <https://www.agc.org/news/2019/08/27/eighty-percent-contractors-report-difficulty-finding-qualified-craft-workers-hire-0>

³ Travelers Corporation, The continued evolution of construction defect, p. 4-5.

<https://www.travelers.com/iw-documents/resources/business-industries/construction/Continued-Evolution-of-Construction-Defect.pdf>

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It should be the policy of the national government to support efforts to ensure adequate investment in the construction trades, domestic production of quality building materials, proper inspection and controls of imported building materials, development of building codes, and code inspection during all phases of construction. Unintentionally incentivizing production of shoddily constructed homes cannot be the national government response to the affordable housing crisis.