

The following article appeared in the July/August, 2006, edition of *Minnesota Community Living*, a publication of Community Associations Institute, Minnesota Chapter.

PROTECTING ASSOCIATION STATUTORY WARRANTY RIGHTS AGAINST DEFECTIVE CONSTRUCTION

By Jonathan A. Edin © 2006

The Minnesota Common Interest Ownership Act applies to all condominium, townhome, Co-Op Housing and other common interest communities created within Minnesota on and after June 1, 1994. It also applies to certain condominiums created prior to June 1, 1994, but only with respect to events and circumstances occurring on and after that date.

Under this Act a Declarant (developer) warrants to a purchaser that a unit and the common elements in the community are suitable for the ordinary uses of real estate of its type. With regard to improvements made by or on behalf of the Declarant, there is an additional warranty with respect to units and to common areas which are subject to use rights by unit owners that improvements made by or on behalf of Declarant will be (i) free from defective materials and (ii) constructed in accordance with applicable law, according to sound engineering and construction standards and in a workmanlike manner.

Theoretically, there is a six year period within which an association can take legal action to enforce these very broad warranty rights. Unfortunately, there is a loophole in the Act which allows Declarants to reduce that six year warranty period to as little as two years, if original purchasers execute a separate instrument providing for the shorter warranty period. Nearly all Declarants require buyers to sign such an instrument. So, as a practical matter, the result is that the six year statute of limitations for enforcement of the Act's warranty rights is usually reduced to two years.

Under the Act, that two year period starts to run, with regard to common area defects, on the latter of the sale of the first unit, completion of the building component in question, or termination of Declarant control. The statute of limitations runs regardless of whether unit owners or the association Board have any knowledge of any defects. Since many defects remain hidden for at least several years, associations often don't learn about defects until it is too late to make a claim under this Act.

This may force an association to look for relief under Minnesota Statutes, Chapter 327A, which also contains warranties of construction quality. The statute of limitations under that Act is two years, and the limitations period does not start to run until the warranty breach is or should have been discovered (with a ten year cut-off date for discovery).

However, there are two potential problems in proceeding under this latter statute. One problem is that Chapter 327A requires the claimant to notify the developer of defects within six months after the defects were or should have been discovered. A second problem arises from several appellate court decisions that have held that the “discovery” date for all defects can in certain circumstances be the discovery date of any defect.

For example, if the roof surface has seriously deteriorated over a long period of time, a court may say that the deterioration should have been discovered long before a roofing contractor or home inspector inspected the roof and noticed the deterioration. If the Court draws that conclusion, the Court might rule that the six month notice period expired before the association even had knowledge of the roof defect.

If other defects such as improper window installation are later discovered, the Court might even reach the conclusion that the six month notice period for all defects ran out within six months after the roof defect should have been discovered.

The lesson to be learned is that in order to adequately protect its statutory warranty rights, an association would be well advised to do the following:

1. Obtain an evaluation of the construction quality of the entire common interest community project sooner rather than later, and preferably as soon after termination of Declarant control as possible;
2. Give Declarant (the developer) written notice of all defects discovered as a result of that investigation or otherwise known by the Association;
3. Take legal action against Declarant before the expiration of the Association’s warranty rights unless the Association has obtained a written agreement from Declarant that Declarant will perform all necessary corrective work as determined by the Association’s consultants.

While Minnesota law provides strong statutory warranty protection against construction defects in condominium, townhome, Co-Op and other common ownership projects, association rights are easily lost if not promptly exercised. Every association incorporated within the last ten years should consult with an attorney regarding what statutory rights it may still retain, and how it can preserve them.

Jonathan A. Edin is the managing attorney of the Minneapolis office of Levin & Edin, a law firm specializing in the resolution of construction defect claims on behalf of condominium, townhome and Co-Op Housing associations. He can be reached at (612) (612) 222-2155 or jedin@mncondodefacts.com.