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Standing on Shaky Ground

As a general prerequisite to bringing an action, one must having "standing to sue." Properly understood, "Standing to sue" is the fundamental requirement that the party bringing suit has a sufficient stake in an otherwise justiciable controversy to obtain a judicial resolution of the controversy. The requirement of standing is met if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation.

In the context of multi-family and mixed used developments, "standing to sue" quickly becomes a confusing and circuitous inquiry. However, if there are valid grounds, challenging a claimant's standing to bring a case may dispose of an action before it even starts.

1. THE CRITICAL INQUIRIES

A. Know your Claimant

It is critical to first identify who is bringing the claim, as different issues and considerations are relevant depending on the claimant. While the ownership association (i.e., homeowners association, commercial association, and/or master association (collectively, "associations")) are often the moving party, class actions and multi-claimant actions are on the rise.

B. Research the recorded documents and grant deeds

Once the claimant is identified, it is imperative to determine exactly what the claimant legally owns, and the nature of the project. Condominium, townhouse and mixed use projects are often look identical. The grant deeds, together with the recorded documents for the project, will help determine what the moving party actually *owns*, which can vary greatly depending on the nature of the project. Title to the individual units and common areas in a project can vary from individual ownership to joint tenancy to associational ownership. Fundamental to standing is the simple question: does the claimant *own* the property at issue?

C. Research the governing documents

When it comes to multi-family and mixed used developments, the project's unique governing documents are critical. A project's Covenants, Conditions, and Restrictions (CC&Rs) and/or Master Declarations will often explicitly delineate the obligations and maintenance responsibilities of the respective parties, a crucial element of the standing analysis. These documents may also include conditions requisites a claimant must satisfy prior to filing a claim. A claimant's failure to comply with their own governing documents can often be an additional avenue to challenge the validity of the action itself.

D. Assess local laws on standing

As each jurisdiction has its own set of laws determining who is legally entitled to bring a claim, understanding the relevant laws on is key. Often, the claimant may not have standing to bring some, or all, of the claims. For example, while a claimant may have standing to bring claims regarding roofs, he/she/it may not have standing to bring window claims. Examination of the local laws may provide a basis to eliminate many of claimant's costly line items.

E. Evaluate potential coverage and liability pitfalls

Depending on the nature of the policy, coverage for the alleged claims may potentially fall into more than one policy and/or policy year. Evaluating these issues early can often alleviate tension – and surprises – from erupting down the road.

F. Determine best approach on trigger dates given applicable policies

Given the complexity of construction and development, insurance policies for multi-family and mixed used developments may not be clear on the exact "trigger date." Multi-phase projects often have rolling close of escrow and turnover dates, with different phases deeded on different dates, over the course of several calendar years. Moreover, policies often cover more than just the project that is the subject of the litigation. What might seem like the best option for the project at issue may substantially increase liability if claims are brought at another project in that same policy year. Adjusters and developers alike should therefore consider each relevant approach – and the potential ramifications at other projects – before articulating a coverage position.

G. Assess procedures to leverage standing issues

Even if it is determined that the claimant does not have standing to bring some or all of its claims, the timing of *when* the issue is raised can be a powerful litigation tool. While challenging standing at the inception can immediately narrow the scope of the claim, waiting to challenge standing can as act a "pocket ace" to use in settlement negotiations.

H. Be careful not to create multiple claims where it will increase exposures

Sometimes the smartest approach is to not challenge standing at all. Consider if the challenge will actually eliminate the claim, or simply give other potential claimants grounds to sue.

I. Keep your eye on the ball in settlement mode

When settling a claim with potential standing issues, be sure that the claim is fully released in any settlement. Settling with a party that does not have standing to bring a certain claim will not prevent future litigation from the real party in interest. If there are standing concerns, a full and complete release of the claim may not be possible. Consider an indemnity provision or similar language to protect against future claims.

2. REMEMBER TO KNOW YOUR LOCAL JURISDICTION

Standing to bring a claim is largely dependent on ownership of the property at issue. Under nearly every circumstance, the property owner will have the right to bring a claim. However, even if the claimant does not own the property, it may still have grounds to bring certain actions. Review the laws in your local jurisdiction to determine when a non-property owner (i.e., owners association) has the right to bring a claim.

A. *California*

In California, An association's right to bring an action in its own name is codified at California *Civil Code* section 5980, which provides that an association has standing to sue in matters pertaining to:

(a) Enforcement of the governing documents.
(b) Damage to the common area.
(c) **Damage to a separate interest that the association is obligated to maintain or repair**.
(d) Damage to a separate interest that arises out of, or is integrally related to, damage to the common area or a separate interest that the association is obligated to maintain or repair.

(*Id*., ***emphasis added***.)

Accordingly, with regard to the separate interest property, the HOA only has standing to bring claims for damage to separate interest property it is obligated to maintain or repair. (See, e.g., *Seahaus La Jolla Owners Association v. Superior Court* (2014) 224 Cal.App.4th 754, 772; see also *Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 921.)

B. Florida

In Florida, separate laws govern rules that apply to condominium associations and homeowner's associations generally. Specifically, with respect to a condominium association, after control is obtained by unit owners other than the developer, Florida law provides:

> **3) Power to manage condominium property and to contract, sue, and be sued.--**The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property. After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities and on units; and may defend actions in eminent domain or bring inverse condemnation actions. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action without participation by the association which may otherwise be available.

(Fla. Stat. § 718.111(3).)

Comparing that provision to the Florida HOA law, after control of the association is obtained by members other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members, including, but not limited to: the common areas; roof or structural components of a building, or other improvements for which the association is responsible; mechanical, electrical, or plumbing elements serving an improvement or building for which the association is responsible; representations of the developer pertaining to any existing or proposed commonly used facility; and protesting ad valorem taxes on commonly used facilities. (Fla. Stat. §720.303 (1).) The association may defend actions in eminent domain or bring inverse condemnation actions. (*Id.*)

Unique to Chapter 720 homeowner association claims is the requirement for a vote by the members as a condition to commencing certain litigation. *Id.* In particular, section 720.303(1), *Florida Statutes*, provides:

> Before commencing litigation against any party in the name of the association involving amounts in controversy in excess of $ 100,000, the association must obtain the affirmative approval of a majority of the voting interests at a meeting of the membership at which a quorum has been attained.

In fulfilling this obligation, it is important to confirm that quorum is met- often a tall task if the bylaws are followed. The quorum burden is somewhat eased by section 720.306, *Florida Statutes*, which reduces the percentage of voting interests required to constitute a quorum at a meeting of the members to thirty percent of the total voting interests if the governing documents are more restrictive. Decisions that require a vote of the members must be made by the concurrence of at least a majority of the voting interests present, in person or by proxy, at a meeting at which a quorum has been attained. (*Id.*)

Lawsuits are often inadvertently begun in violation of these statutory requirements. Failure to obtain the requisite vote invites a motion to dismiss the action by a defendant or perhaps a member of the association who opposes the institution of litigation. (See, e.g., *Lake Forest Master Community Ass'n, Inc. v. Orlando Lake Forest Joint Venture* (Fla. Dist. Ct. App. 2009) 10 So.3d 1187, 1196.)

C. Texas

In Texas, The Condominium Act states at Section 82.102(a) that an association, acting through its board, may:

> * * *
> (4) institute, defend, intervene in, ***settle or compromise*** litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the [Complex];
> * * *
> (20) exercise any other powers conferred by the declaration or bylaws;
> (21) exercise any other powers that may be exercised in this state by a corporation of the same type as the association; ***and***
> (22) ***exercise any other powers necessary*** and proper for the government and operation of the association.

(TEX. PROP.CODE ANN. § 82.102(a) (Vernon 2007) (emphasis added).).

However, there are questions as to what constitutes "matters affecting the condominium." What is the extent of the Association's power to pursue claims? Does "matters affecting the condominium" only apply to construction defects to the common elements or to both the common elements and the Units? Does this include

representations made to the Unit Owners during the sales negotiations? What about problems with the common walls of the building? Problems with the parking garage concrete? Wood floors inside the units? Windows of the units? Ventilation systems in the units? Texas courts have not addressed the scope of this provision under the Condominium Act.

3. CASE STUDIES

Britton Place at Sunnyvale—Townhomes

The Boardwalk at Lakeside – Condominiums

Fillmore Center – Mixed Use Developments