The Uniform Common Interest Ownership Act Unplugged

The Risks of Multi-Unit Residential Construction Litigation

By Teresa J. Dumire and Shannon P. Smith

While maintaining optimism that forthcoming rulings will resolve many uncertainties, defendants must remain wary of current pitfulls caused by gaps in the UCIOA.

Under the Uniform Common Interest Ownership Act (UCIOA), a homeowners' association can sue on its own behalf and on behalf of its members and individual owners. Gaps in the UCIOA, however, create difficulty in litigation for developers, design professionals, contractors, and suppliers involved in constructing multi-unit residential housing. These statutory gaps coupled with minimal case law interpreting the UCIOA have permitted homeowners' associations to attempt to hold themselves out as adequately representing each unit owner member for alleged defects contained solely in non-common areas such as the inside of an individual owner's unit, and the associations likely will continue to do so. This position drastically increases the financial risk faced by developers, design professionals, contractors, and suppliers dealing with lawsuits initiated by homeowners' associations claiming to represent entire housing developments and does not allow them to resolve cases free from the risk of future lawsuits by individual owners.

To complicate matters further, homeowners' associations frequently object to producing all individual unit owners for depositions leaving sued developers, design professionals, contractors, and suppliers wondering further whether the associations truly represent the interests of the individual unit owners. Defendants must have the ability to depose each unit owner because their complaints often will vary in type and degree and because each one unquestionably possesses information relating to the claims asserted in lawsuits.

Arguably, the biggest concern to defendants in these cases involves the ability of homeowners' associations to settle or to resolve unit-specific complaints on behalf of unit owners. Removing the unit owners from litigation makes it realistically impossible for a defendant to settle an action comprehensively or even to try a case to a verdict with the benefit of res judicata. Although the UCIOA conveys standing to a homeowners' association to sue on behalf of unit owners, it does not adequately address consent by and authority to negotiate or lit-

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igate on behalf of all unit owners in lawsuits negotiating or litigating unit-specific claims during a trial or whether a settlement or a verdict dealing with unit-specific allegations to which an association agrees binds individual owners in those cases. To protect defendants from the substantial risk of future litigation that possibly would result in inconsistent adjudications, individual unit owners should be included as necessary parties to the lawsuits that involve multi-unit residential construction.

Inadequate Representation

Under the UCIOA, a homeowners' association may institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters *affecting* the common interest community. Homeowners' associations generally contend that the UCIOA authorizes them to sue for damages to the common areas *and* to the interior of individual units. To the contrary, while the UCIOA may confer standing to a homeowners' association to institute an action, the homeowners' association nonetheless is an inadequate representative for unit owners seeking damages unique to individual units.

In UCIOA litigation, developers, design professionals, contractors, and suppliers as defendants must request that courts prevent homeowners' associations from pursuing claims for unit-specific damages. Notably, at least one court has interpreted the language in the state equivalent of §3-102 to mean that a homeowners' association may bring an action asserting claims of its members on the common elements as opposed to matters affecting the common interest community. *Piper Ridge Homeowners Ass'n, Inc. v. Piper Ridge Associates*, 2006 WL 6047597, *2 (Vt. Super. Ct. 2006) (citing Vt. Stat. Ann. tit. 27A, §3-102(a)(4)).

Defense attorneys should challenge broad definitions of the phrase "matters affecting the common interest community." The plain language of this clause means that a homeowners' association cannot pursue a lawsuit alleging the damages claims of individual unit owners. When a homeowners' association asserts claims that may affect only one or two units, making the distinction between "matters affecting the common interest community" and "unit-specific" damages is necessary for evidentiary purposes. Defendants cannot defend themselves against such claims without knowing specifically which individuals from which units have alleged which claims. As a result, defense attorneys must argue that courts should consider "unit-specific" damages separately from "matters affecting the common interest community" as contemplated by §3-102. For example, "unit-specific" allegations could include faulty construction claims pertaining to damage contained wholly within a "unit," but the allegations should exclude "common elements." A "unit-specific" harm that could warrant damages also might include a financial loss claim of an individual unit owner for lost rent since that would not "affect the common interest community."

Furthermore, a defense attorney should argue that a homeowners' association is not an adequate representative to allege claims that are exclusively related to individual units that do not affect the common interest community. The possibility for conflicting interests exists, not only between individual unit owners, but between a homeowners' association's desire to rectify common area complaints before, or instead of, unit-specific complaints, and unit owners' interests in having issues related to their individual units resolved first.

Is Class Action Analysis the Answer to UCIOA Uncertainty?

Some courts have found that other procedural rules may limit a homeowners' association's capacity to represent individual owners. In *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 215 P.3d 697 (Nev. 2009), the homeowners' association sued the developer of the community claiming "that both the individual units and the common areas of the community have constructional defects and deficiencies to, for example, the design and manufacturing of the stucco, drainage, and roofing." 215 P.3d at 699. The Supreme Court of Nevada concluded that

> a homeowners' association has standing to assert constructional defect claims in a representative capacity on behalf of individual units. However, because damages are awarded for claims within individual owner units, such actions are subject to class action principles discussed in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 854–57, 124 P.3d 530, 542–44 (2005).

Id.

Because class action principles apply to determine a homeowners' association's capacity to sue for damages to individual units, the court found that the defendant developer, had standing to challenge the homeowners' association's representative capacity. *Id.* at 701.

Importantly, the *D.R. Horton* court emphasized that "the statutory grant [of standing to the [homeowners' association]] must be reconciled with the principles and analysis of class action lawsuits and the concerns related to constructional defect class actions." *Id.* at 703. The concerns noted by the court had to do with the unique status of real estate and that offering generalized proof of harm to individual units to establish damages could not adequately establish those damages. Ultimately, the court remanded the case to the trial court to determine whether the trial court should certify a class, but it noted that

> "because constructional defect cases relate to multiple properties and will typically involve different types of constructional damages, issues concerning causation, defenses, and compensation are widely disparate and cannot be determined through the use of generalized proof." Rather, individual parties must substantiate their own claims and class action certification is not appropriate.

Id. at 703–04 (quoting *Shuette*, 124 P.3d at 543). *See also Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Estates Owners Association*, 214 P.3d 451, 457 (Colo. App. 2008) (finding that Colo. Rev. Stat. §38-33.3-302(1)(d) confers standing on the association but "does not address the need to protect absent owners.")

The application of class action principles to claims involving "matters affecting the common interest community" also comports with the statutory language of the UCIOA. The definition of "common interest community" distinguishes between the ownership interests of the "common interest community" and those of the individual unit owners. By definition, the "common interest community" refers to that "other real estate" within the property for which unit

owners jointly have responsibility for maintenance and improvement. Thus, "matters affecting the common interest community" must deal with the common community elements for which the unit owners jointly are responsible. After all, a homeowners' association would not have an interest in repairing items in a specific, individually owned unit. A homeowners' association, by its nature and as generally defined in its by-laws, should accept responsibility only on behalf of the larger group to repair or maintain the elements common to all unit owners, which leads to the conclusion that a homeowners' association cannot adequately represent all unit owners when the entire association membership does not share in common claimed damages.

Contrary to other simplistic analyses, just because a unit is located in the common interest community does not mean that a matter "affects" the community. Discrete damage to a unit interior would not "affect" the community, for instance. As the plain language of the UCIOA makes clear, a "matter" at issue must "affect" the common interest community. Damage to the interior of a unit can only "affect" the individual unit owner since a homeowners' association does not have a duty to maintain or repair the unit interior. Consequently, because a unit owner, by necessity, must participate in litigation involving a unit-specific claim, a homeowners' association cannot serve as an adequate representative for a unit specific claim.

History and Applicability of the UCIOA

The UCIOA was adopted in 1982 at the Annual Meeting of the National Conference of Commissioners on Uniform State Laws. It combined three uniform laws: the Uniform Condominium Act (1980), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981)—in a single comprehensive law. After the 1982 enactment, the UCIOA became the law in five states: Alaska, Colorado, Minnesota, Nevada, and West Virginia.

State	Effective Date	Statutory Citation
Alaska	1-1-1986	Alaska Stat. §34.08.010, *et seq.*
Colorado	7-1-1992	Colo. Rev. Stat. §38-33.3-101, *et seq.*
Minnesota	6-1-1994	Minn. Stat. §515B.1-101, *et seq.*
Nevada	1-1-1992	Nev. Rev. Stat. §116.001, *et seq.*
West Virginia	7-1-1986	W. Va. Code §36B-1-101, *et seq.*

After amending in 1994 and 2008, three more states adopted the UCIOA: Connecticut, Delaware, and Vermont.

State	Effective Date	Statutory Citation
Connecticut	7-1-2010	Conn. Gen. Stat. §47-200, *et seq.*
Delaware	7-1-2009	Del. Code Ann. tit. 25, §81-101, *et seq.*
Vermont	1-1-2012	Vt. Stat. Ann. tit. 27A, §1-101, *et seq.*

The Uniform Condominium Act still exists in at least 15 other states: Alabama, Arizona, Kentucky, Louisiana, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia, and Washington.

State	Effective Date	Statutory Citation
Alabama	1-1-1991	Ala. Code §35-8A-101, *et seq.*
Arizona	1-1-1986	Ariz. Rev. Stat. Ann. §33-1201, *et seq.*
Kentucky	1-1-2011	Ky. Rev. Stat. Ann. §381.9101, *et seq.*
Louisiana	9-7-1979	La. Rev. Stat. Ann. §9:1121.101, *et seq.*
Maine	1-1-1983	Me. Rev. Stat. tit. 33, §1601-101, *et seq.*
Missouri	6-15-1983	Mo. Rev. Stat. §448.1-101, *et seq.*
Nebraska	1-1-1984	Neb. Rev. Stat. §76-825, *et seq.*
New Hampshire	9-10-1977	N.H. Rev. Stat. Ann. §356-B:1, *et seq.*
New Mexico		N.M. Stat. Ann. §47-7A-1, *et seq.*
North Carolina	10-1-1986	N.C. Gen. Stat. §47C-1-101, *et seq.*
Pennsylvania	7-2-1980	Pa. Cons. Stat. §3101, *et seq.*
Rhode Island		R.I. Gen. Laws §34-36.1-1.01, *et seq.*
Texas	1-1-1994	Tex. Prop. Code Ann. §82.001, *et seq.*
Virginia		Va. Code Ann. §55-79.39, *et seq.*
Washington	7-1-1990	Wash. Rev. Code §64.34.010, *et seq.*

The Uniform Planned Community Act remains the law in Pennsylvania. Pa. Cons. Stat. §5101, *et seq.*

Joinder of Individual Unit Owners May Be Necessary

If a homeowners' association cannot adequately represent homeowners, joining the unit owners as necessary parties to the lawsuit becomes necessary. Without the individual owners, a defendant generally cannot completely resolve all claims against developers, design professionals, contractors, and suppliers related to the construction of a multi-unit residential development. If individual unit owners have unit-specific claims, defense attorneys must argue that disposition of the litigation with a homeowners' association without those individuals may not protect the individuals' interests. If a homeowners' association does not represent the interests of the individual unit owners adequately, those individuals will have the ability to pursue separate litigation against developers, design professionals, contractors, and supplies. This separate litigation exposes those defendants to having to defend multiple cases that may lead to inconsistent verdicts.

When a homeowners' association asserts unit-specific damages, without joining all unit owners to the litigation, it would become realistically impossible for the defendants involved to dispose of the litigation with a comprehensive settlement or to try a UCIOA case to a verdict with the benefit of res judicata. Generally, joining all persons with material interests in the subject matter of a lawsuit who the proceedings will affect, would offer the best results for everyone. Defense attorneys can argue that public policy principals require the joinder of individual unit owners in these cases.

One public policy argument is that the joinder of individual unit owners as parties in these types of cases not only furthers the interests of the current litigants but also benefits the public by curtailing recurring lawsuits involving the same issues. *See Int'l Union of Electronic v. Murata Erie North America, Inc.*, 1990 WL 310625 (W.D. Pa. 1990). As one court pointed out, a single litigation should end every judicial controversy. *See Dixon v. American Industrial Leasing Co.*, 205 S.E.2d 4 (W. Va. 1974).

One Colorado court has concluded that a lawsuit required joining unit owners to the litigation as necessary parties. *Clubhouse at Fairway Pines, L.L.C.*, involved a planned unit development that included residences, a golf course, and a clubhouse, among other features. *Clubhouse at Fairway Pines, L.L.C.*, 214 P.3d at 453. The development operated a temporary clubhouse on one lot, although the plans contemplated constructing a permanent clubhouse on a different lot. The organization that operated the temporary clubhouse sued the homeowners' association seeking to require the association to collect dues for the benefit of the clubhouse operator. The homeowners' association counterclaimed seeking a reformation of the term "club" in the development's governing documents. *Id.* In essence, the parties sought a declaratory judgment to resolve whether the club referred to in the operating documents was the one currently operating and entitling the operator to dues payments, or only to a clubhouse constructed on the lot designated for that purpose in the operating documents. The trial court found that the clubhouse operator was entitled to payments for operating the "temporary" club; the development plans contemplated building a permanent club on the separate lot; and once that permanent club was constructed, the association should split members' dues between the two clubs. *Id.* at 454. On appeal, the homeowners' association argued that the court should vacate the judgment for failure to join necessary parties. *Id.* at 454–56. The court accepted this argument finding that adjudicating the claims first required joining the owners to the litigation. *Id.*

The Colorado Court of Appeals found that under Colorado Rule of Civil Procedure 19 the owners were necessary parties to the litigation. *Id.* at 456. In addition to determining that the owners were indispensable parties, the court considered whether the homeowners' association adequately represented their interests. *Id.* As did the Nevada court in *D.R. Horton*, the Colorado court found that Colo. Rev. Stat. §38-33.3-302(1)(d) conferred standing on the association but did "not address the need to protect absent owners." *Id.* at 457. After considering the facts, the court found that the association did not represent the homeowners adequately because the parties could have conflicting interests. For instance, "some owners may prefer to avoid the financial burden of continuing to fund Clubhouse pending construction of a permanent facility, while others may want to assure ongoing services from Clubhouse until the permanent facility is built." The competing interests of the homeowners' association and the owners in applying future dues created a conflicting interest between the parties that could impair the owners' ability to protect their interests. *Id.*

The lesson here is that a settlement or a damages award could create a conflict between individual owners and a homeowners' association due to the amounts intended for individual property use as opposed to common property use.

Testimony Should Not Be Limited to a Representative Sample of Unit Owners

Defense attorneys should approach warily suggestions that a representative sample of unit owners can provide adequate testimony regarding the allegations and claims for damages raised by a homeowners' association under the UCIOA. Limiting discovery to a representative sample of unit owners prevents defense attorneys from fully exploring the possibility of conflicts and competing interests between individual unit owners and the interests of a homeowners' association.

Discovery is meant to be broad and liberal to aid litigants in the quest for potentially relevant and discoverable information. When a homeowners' association alleges a wide variety of claims in a lawsuit many will require specific proof that relying on a representative sample of unit owners cannot satisfy. For example, when a homeowners' association claims damages based on an alleged faulty public offering statement, the first problem is that a homeowners' association represents only current unit owners, some of whom inevitably will not have owned the units originally. The UCIOA is clear that subsequent purchasers are not entitled to damages under §4-108. Additionally, the original purchaser is charged with showing that he or she has suffered actual damage as a result of the alleged faulty offering statement. A representative deponent cannot meet this burden for each original purchaser.

The ability to discover facts related to all claims raised by a homeowners' association is paramount to providing an adequate defense for a developer, design professional, contractor, or supplier in multi-unit residential construction litigation. The testimony of the current and original owners of each unit is relevant, discoverable, and necessary. These individuals may have factual information regarding their expectations for completed units based on viewing the models, their experiences with the alleged deficiencies in and around the individual units, and the problems, if any, that they experienced leasing the units after they were constructed. Allowing a homeowners' association simply to draw an arbitrary line for a representative sample would greatly prejudice defendants and completely disregards the purposes of the discovery rules. Allowing a homeowners' association to hand-pick the "representatives" of each unit creates the potential for biased testimony from only those individuals who will help the association's case while hiding from discovery the testimony of individuals who may not help its case. The discovery rules do not allow one party to hold all of the cards when it comes to deciding who can and cannot be deposed. Defendants have the right to search for the truth from relevant individuals, and that means that a homeowners' association cannot limit that search by hand-picking representatives who may or may not have complete information. Thus, limiting testimony so that only a representative sample of unit owners offer it simply will not sufficiently meet a homeowners' association's evidentiary burden and would severely impair the fact-finding ability of a defendant.

Protecting Defendants in Settlement Scenarios

Substantial case law exists questioning the

authority of homeowners' associations to settle or resolve unit-specific complaints on behalf of unit owners. This authority alone commands joining each individual unit owner to litigation in order to protect defendants from multiple or inconsistent obligations. The law is not clear whether or not accepting a settlement of claims by a homeowners' association precludes an individual owner from asserting claims for damages to his or her individual unit based on the same conduct that the settlement seeks to resolve. In fact, no state that has adopted the UCIOA appears to have case law addressing a homeowners' association's authority to settle claims that it pursues on behalf of unit owners. As a result, defense attorneys must assume that individual owners may file future lawsuits to litigate their individual interests even after a defendant has agreed to a full settlement with a homeowners' association or after a trial has led to a verdict.

Defense attorneys should challenge broad definitions of the phrase "matters affecting the common interest community."

The Supreme Court of New Jersey has interpreted one section of New Jersey's Condominium Act authorizing a homeowners' association to "'enter into contracts, bring suit and be sued'" in a way that leaves defendants exposed. *Siller v. Hartz Mountain Associates*, 461 A.2d 568 (N.J. 1983) (citing N.J.S.A. §46:8B-15(a)). In *Siller*, the homeowners' association negotiated a settlement with the developer for construction defects involving "heat, air conditioning and insulation; noise, leaks and erosion; and inadequate parking, clubhouse, swimming and marina facilities." *Id.* at 575. The homeowners' association gave the developer a general release, but some unit owners maintained individual actions against the developer seeking damages for defects in the individual units. *Id.* The court hearing the appeal found that the homeowners' association had the exclusive authority to settle claims related to the common elements based on its exclusive responsibility to maintain those elements. *Id.* at 573. However, the court found that the settlement did not bar the unit owners' claims for damage to individually owned property because each owner had "primary rights to safeguard his interests in the unit he owns." *Id.* at 574. Consequently, the court permitted the individual lawsuits against the developer to proceed despite the general release that the developer had obtained from the homeowners' association as part of the settlement.

The *Siller* decision is relevant to this discussion even though New Jersey has not adopted the UCIOA because the UCIOA does not specifically limit the authority of a homeowners' association to sue or for another party to sue it. In *Siller*, the court found that a settlement by the homeowners' association could only bar later claims based on areas in which the homeowners' association had the *exclusive* right to act. *Id.* at 573–74. Section 3-102 of the UCIOA does not make clear whether a homeowners' association bringing a claim on behalf of the unit owners has the exclusive right to settle the claim. In fact, courts considering whether a homeowners' association adequately represents individual owners focus in part on whether conflicting interests exist between the two regarding recovery for damage to individual units. *See D.R. Horton*, 215 P.3d 697; *Clubhouse at Fairway Pines*, 214 P.3d 451.

Similarly, the Supreme Judicial Court of Massachusetts has held that a homeowners' association's release to a contractor for "any responsibility and liability in connection with the repair, maintenance, improvement or replacement of the roofs and alarm system for the condominium units" did not bar an individual owner's lawsuit for damages to her unit that were caused by roof leaks. *Golub v. Milpo, Inc.*, 522 N.E.2d 954, 956 (Mass. 1988). In *Golub*, the holding was based in part on the statutory language permitting the trustees of the homeowners' association "[t]o conduct litigation and to be subject to suit as to any course of action involving the common areas and facilities." *Id.* at 957 (internal citation omitted). Thus, when a homeowners' association only has authority to litigate disputes over the common areas, a release consented to by the association will not prevent individual owners from litigating in the future seeking damages related to individual units.

Some states, including Virginia and Florida, expressly provide by statute that homeowners' associations have the authority to settle litigation on behalf of individual owners. Va. Code Ann. §55-79.80(B); Fla. Stat. §718.111(3). The Supreme Court of Virginia has considered whether a settlement to which a homeowners' association agreed barred individual owners from proceeding with claims against the developer regarding alleged deficient easements in a parcel of property that was next to, but not in, the condominium complex. *Frantz v. CBI Fairmac Corp.*, 331 S.E.2d 390 (Va. 1985). The owners asserted that the developer misrepresented to them individually that the developer would improve the parcel when the developer really intended to sell it for commercial use. The court held that the settlement barred the individual claims because the homeowners' association members as a whole would enjoy the easements over the property. *Id.* at 395. The court noted, however, that the settlement precluded individual claims only because it settled a dispute about a common right rather than an individual right. *Id.*

The only reported Florida decision bearing directly on a homeowners' association's settlement authority found that when the homeowners' association settled a claim with its insurer related to an unauthorized purchase of real estate the settlement was valid and did not require court approval because it was "within the discretion of the officers and board of directors acting for the association in managing and operating the condominium property." *Ocean Trail Unit Owners Ass'n, Inc. v. Mead*, 650 So. 2d 4 (Fla. 1994).

Reviewing the case law does not make it clear whether or not statutory provisions authorizing homeowners' associations to institute litigation on behalf of unit owners confers authority to the associations to settle claims related to individual units even when that damage occurred due to defects in the common areas. *See Golub*, 522 N.E.2d at 958 ("[A] faulty roof may

Multi-Unit, continued on page 72

Multi-Unit, from page 66

result in personal property damage in the unit. The unit owner's right to maintain an action for compensation for that loss against the wrongdoer is not extinguished or abridged by the association's exclusive right to seek compensation for damage to the common element.") (citing *Siller*, 461 A.2d at 568). The Restatement (Third) of Property states that when common property is not involved, "the association functions much like the plaintiff in class-action litigation, and questions about the rights and duties between the association and the members with respect to the suit will normally be determined by the principles used in class-action litigation." *Restatement (Third) of Prop.: Servitudes* §6.11, cmt. a. According to Wright & Miller's Federal Practice and Procedure, "[i]t always has been recognized that absent class members have a right to object to a proposed settlement and to present their objections to the court before it decides whether to approve it or not." 7B Wright, Miller, & Kane, Federal Practice & Procedure §1797.4 (3d ed. 2005).

A homeowners' association does not have the authority under §3-102 of the UCIOA as adopted by different states to settle and release the claims of the unit owners. Thus a defense attorney should tread carefully and seek court guidance anytime a homeowners' association argues that it has that authority.

Conclusion

In West Virginia, defendants soon may have clear answers to all of the unanswered questions raised in this article. The following six questions have been certified to the Supreme Court of Appeals of West Virginia by the Circuit Court of Monongalia County, West Virginia. As of the date of submission of this article, the Supreme Court of Appeals of West Virginia has not yet decided whether it will accept these questions.

1. Is a Unit Owners' Association an adequate representative when a lawsuit is instituted by a Unit Owners' Association on behalf of two or more unit owners pursuant to W. Va. Code §36B-3-102(a)(4) and the damages sought include unit specific damages affecting only individual units?

   Circuit Court's Answer: West Virginia Code §36B-1-103(7) defines "common interest community" as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration." Section 36B-3-107 states that an owners' association "is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit." Accordingly, the Court defines "unit specific" damages to include the following: 1) faulty construction claims to the extent that resulting damage is wholly within the "unit boundaries" as defined by W.Va. Code §36B-2-102, including, but not limited to, HVAC complaints, leaks, cosmetic issues and faulty appliances, but excluding "common elements," also defined in W.Va. Code §36B-2-102; and 2) any personal unit owner financial loss claim, including, but not limited to, marketing, insufficient public offering, lost rents or inability to sell.
2. If the Unit Owners' Association is an adequate representative to institute litigation pursuant to W. Va. Code §36B-3-102(a)(4) on behalf of individual unit owners for unit specific damages affecting only individual units, is a unit owner nonetheless a necessary and indispensable party pursuant to Rule 19 of the West Virginia Rules of Civil Procedure?

   Circuit Court's Answer: No.
3. If individual unit owners are not named Plaintiffs in a lawsuit instituted on their behalf by a Unit Owners' Association and are not necessary and indispensable parties to the suit, does the Association have the authority under §36B-3-102(a)(4) to settle and release any and all claims of the unit owners where said individual unit owners have been provided reasonable notice of, and have made no objection to, said settlement and release? If so, what constitutes sufficient notice?

   Circuit Court's Answer: Yes.
4. Whether matters pertaining to a unit owners' claim for lost rent or inability to rent are matters that affect the common interest community for which the Unit Owners' Association may institute litigation pursuant to §36B-3-102(a)(4)?

   Circuit Court's Answer: No. However, if the Supreme Court of Appeals of West Virginia finds to the contrary, this Court would submit the "Agreed Order Establishing Procedure for Resolving Claims" entered on December 17, 2010, as the procedure for providing sufficient notice.
5. Pursuant to §36B-3-102(a)(4), what constitutes a "matter affecting the common interest community" and what constitutes a "unit specific" element?

   Circuit Court's Answer: No.
6. Is a representative example of unit owners sufficient to offer deposition testimony and trial testimony in this matter to establish defects and damages that are common to all units?

   Circuit Court's Answer: No.

Until definitive answers are provided to the various questions set forth in this article, attorneys representing owners, developers, design professionals, contractors, suppliers and any other defendants in multi-unit residential construction litigation should be wary of the pitfalls open to our clients due to the gaps contained in the UCIOA. We are optimistic that once the Supreme Court of Appeals of West Virginia issues its answers to the above certified questions later this year, the uncertainty surrounding certain aspects of UCIOA litigation will be resolved. FD