

Class Recourse for Individual Home Owners Suffering from Construction Defects

by Gene Markin Esq.

Nevertheless, despite the significant differences among the construction defects, there remained a "strong commonality in the nature of the claimed defect – fire safety hazards in HVAC return systems." Seeing the forest instead of the trees, the court focused on whether construction of the HVAC cavities met the applicable code rather than on the differences in materials and construction methods used.

According to the court, Plaintiff's satisfied the commonality requirement because even though the improper construction varied from home to home, the effect of that construction remained the same. The court also found that common questions of fact and law predominated over individual differences between the claims. The significance of the common thread i.e. improper return cavity fireblocking, outweighed the relevance of the individual issues of damages i.e. repairs. As a result, class certification was appropriate.

Recognizing the economic realities deterring individual claimants from pursuing individual lawsuits or arbitrations, the Appellate Division agreed that the class action device was particularly useful in this case. Efficiency and consistency weighed heavily in favor of class certification, as did fairness to the class members and a lack of prejudice to Hovnanian.

This case sets important precedent for individual homeowners, especially those living within planned developments built by the same developer. Members of homeowners' associations now



have a potentially viable option of pursuing litigation as a class to recover for construction defects. Whereas expert fees and litigation costs are nearly insurmountable for individual homeowners, the class structure allows members to share those costs while still seeking full recovery of their damages. While the D'Andrea decision has opened the door for construction defect cases to be brought as class actions, time will tell exactly how large that opening is. For the time being, however, it appears that homeowners, whose homes suffer from a common defect having the same adverse effect, are suitable candidates for class membership in a class action lawsuit.

Gene Markin is an associate in Stark & Stark's Construction Litigation Group where he concentrates his practice in complex construction litigation claims on behalf of community associations, developers and other plaintiffs. www.stark-stark.com.

Until now, owners of single-family homes were left to their own devices and resources in seeking redress for construction defects. Class suits were thought to be unavailable to homeowners despite their homes having been built by the same builder and suffering from the same general defects. The differences in subcontractors used, methods of construction, location of defects, time built and nature of resulting damages defeated class certification and deterred law firms from bringing class action lawsuits alleging construction defects. The economics of bringing an individual construction defect suit weighed heavily against litigation and, as a result, homeowners ended up either living with the defects or paying for repairs out of pocket.

Fortunately for homeowners, a recent decision from the Appellate Division captioned D'Andrea v. Hovnanian, 2013 N.J. Super. Unpub. LEXIS 1484 (App. Div. June 18, 2013) has changed that landscape. According to the Appellate Division, the four prerequisites for bringing a class action lawsuit – numerosity, commonality, typicality, and adequate representation – were met by a class of plaintiffs who sued developer K. Hovnanian ("Hovnanian") for fire safety hazards in the HVAC system installed in their homes.

Arguing against class certification, Hovnanian contended that the individualized nature of home construction made such causes of action unsuitable for class certification. Hovnanian pointed out, and Plaintiffs agreed, that there was no single deviation common to each class member's home.

Members of homeowners' associations now have a potentially viable option of pursuing litigation as a class to recover for construction defects.