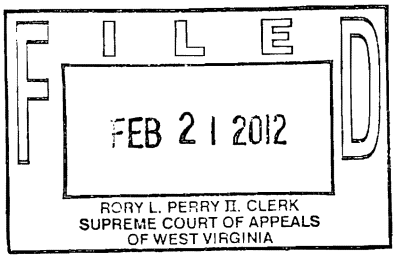
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1577



UNIVERSITY COMMONS RIVERSIDE HOME OWNERS ASSOCIATIONS, INC.,
Plaintiff Below,
Petitioner

vs.)

UNIVERSITY COMMONS MORGANTOWN, LLC; KOEHLER DEVELOPMENT, LLC; COLLEGIATE HOMES, INC.; RICHARD KOEHLER; FRANK KOEHLER; ADAM SHARP; RICHARD DUNLAP; O.C. CLUSS PROFESSIONAL SERVICES, LLC; R.E. CRAWFORD CONSTRUCTION, INC.; POZZUTO AND SONS, INC.; BUILDING CODE ENFORCEMENT OFFICIAL OF STAR CITY; HERRON ENGINEERING; EAGLE INTERIORS, INC.; BUH CONSTRUCTION; TRIAD ENGINEERING, INC.; and UNIVERSAL FOREST PRODUCTS,
Defendants and Third-Party Defendants Below, Respondents

From Order Certifying Questions of the Circuit Court of Monongalia County (09-C-85)

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STATEMENT OF THE CASE

This case is a complex,[1] multi-party lawsuit concerning the development and construction of the University Commons Riverside Condominium complex (hereinafter "UCR Condominium Complex"), an individually-owned, 84-unit residential development in Star City, Monongalia County, West Virginia. The Petitioner, University Commons Riverside Home Owners Association, Inc., (hereinafter "HOA") initiated this action on February 13, 2009, by filing a Complaint in the Circuit Court of Monongalia County. Plaintiff named 13 Defendants – five individuals and eight corporations – and requested damages arising from the alleged defective development, negligent construction, and misleading marketing of UCR Condominium Complex. The Defendants filed cross-claims for indemnity and contribution and filed Third-Party Complaints against various subcontractors.[2] Currently, there are 21 parties in this matter in various capacities. The UCR Condominium Complex's 84 units are currently owned by approximately 147 individuals and/or entities. There have been a total of approximately 182 unit owners of the UCR Condominium Complex since the units were first sold in 2006-2007. The membership of the HOA is exclusively comprised of each individual unit owner of the residential units, parcels, and all common elements comprising the UCR Condominium Complex.

The HOA filed this case on its own behalf and on behalf of its members and individual owners. The individual unit owners were not included as individual plaintiffs even though many unit owners are seeking damages solely relating to alleged unit specific defects. (A.R. 1-8, 52-

[1] As of the filing date of this Response, 44 witnesses have been deposed, 32 experts have been retained by all parties, and almost 100,000 documents have been filed in discovery.

[2] All Defendants and Third-Party Defendants (hereinafter, collectively, "Defendants") join together as Respondents in this Court.

56.) Throughout this lawsuit, the HOA has contended that the Uniform Common Interest Ownership Act, W. Va. Code § 36B-1-101, *et seq.* (hereinafter "CIOA"), conveys standing upon them to bring claims on behalf of unit owners. In its Complaint, the HOA alleges a variety of defects, many of which are set forth as if common to all or most unit owners. However, through the discovery process, it has become apparent that the individual unit owners are seeking a multitude of individual damages specific to only their unit. (*Id.*)

Throughout the deposition process in this case, certain unit owners have intimated their understanding that the HOA may not have actual authority to bind the individual unit owners. Furthermore, the depositions of certain unit owners have conclusively shown that even the unit owners have no knowledge as to the representative capacity of the HOA and, thus, have no knowledge as to whether their interests are adequately, or actually, protected. For example, Nancy Hamilton, unit owner and former President of the HOA, signed a contract with counsel the day before her deposition and "hoped" that the HOA would take care of her individual claims, as well, so that she would not have to pursue further claims:

> Q. Again, I don't want you to tell me privileged communications, but do you have some type of a signed contractual arrangement personally with a lawyer to prosecute claims in this case?
>
> A. I do.
>
> Q. When did you sign that contract?
>
> A. Yesterday.
>
> Q. Is it your understanding then that the claims that are being prosecuted in this case are claims you're bringing as a member of the Homeowners Association?
>
> A. Say that again.
>
> Q. I'll try to rephrase it. Is it your understanding that

at least part of the reason this case is being prosecuted is on your behalf as a member of the Homeowners Association?

A. I'm not sure what you're asking me. Yes, the Homeowners Association is exercising the process for all of us as owners. That's my understanding, yes.

Q. Is it your understanding that this lawsuit will address all claims which might pertain to your unit individually?

A. All claims? Well, "all" is a big word but, as far as I know, yeah, they would address the structural issues that we're concerned about and the safety issues, yes. If I'm understanding your question, yes. I would say my answer would be yes.

Q. I'll be candid with you and the lawyers have struggled with it or at least I have. What we want to know is: Do you intend for this litigation, however it resolves, to be the end of all claims you may have as a member of the big picture as well as all claims addressing your individual unit?

MS. BOYLE: Object to the form.

A. I couldn't tell you what -- would I like to see the result be that that is the end of it; that it's corrected to the point where I say, okay, I'm no longer in the ownership of something that is a giant albatross or that it's been resolved so that it's now what I expected it should have been? I don't know. What is the result going to be? I'm not a fortune teller. I can't tell you.

Q. Well, that's not what I'm asking. I may not be doing a very good job of asking it but, typically, in a lawsuit somebody sues for a remedy. Is that what you're doing in this lawsuit, trying to get a remedy?

A. Well, I'm not sure – I'm not a legal person, so I'm not sure I know the definition of "remedy" as it's used in that sentence but, yes, I want things brought up to Code. I want what was done wrong to be made right as an owner, I guess.

Q. Is it your intention that, after this lawsuit is over, that you would have some individual claim for your unit that would still remain?

MS. BOYLE: Object to the form. Go ahead to the best you understand.

> A. Would my intent be to follow the resolution of this issue with another issue? That would not be my intent. I think the intent of every owner is to get this resolved and to get this resolved fairly and equitably.
>
> So what I would hope to see happen is that it's resolved in a sufficient manner where I wouldn't be left with the need to pursue any other remedy.

(A.R. 728-29 at 44:23-47:9.)

Another unit owner, Stephen Mick, believes that he has not retained counsel at all in connection with his personal claims for damages, such as inability to rent:

> Q. Do you have a contract with the Bailey & Glasser law firm to represent you?
>
> A. Not me personally, no.
>
> Q. Well, do you have any type of contract with the Bailey & Glasser law firm?
>
> A. No.
>
> Q. Do you consider the Bailey & Glasser law firm to be your lawyer?
>
> A. I consider them to be the Homeowners Association's lawyer.
>
> Q. So does that mean you do not consider the Bailey & Glasser firm to be your lawyer?
>
> A. I guess not. Again, no, not me personally.

(A.R. 785 at 75:14-76:1; *see also* A.R. 54; A.R. 782 at 64:8.) Moreover, unit owner Peter Jacavone testified that he could "opt out" of any agreement:

> Q. What is your understanding as to what would occur if your expectations about what should happen in this lawsuit should differ from what the Homeowners Association does with this lawsuit?

MS. BOYLE: Object to the form.

A. I believe, if I accept what the Homeowners Association accepts, then I have to obviously go along with that settlement. I believe that I can opt out of that settlement if I choose to.

Q. What happens if you opt out?

A. Well, I would assume I would have to pursue action on my own.

(A.R. 828 at 74:16-75:2.)

Furthermore, throughout this litigation, the HOA first argued that producing a representative sample of unit owners as witnesses would be adequate to establish its claims and damages. The HOA later argued that it could produce, at most, one unit owner per unit as witnesses to establish its case. However, the HOA's own witnesses have proved this to be a fallacy. For instance, Donna Evans was produced for deposition on December 7, 2010. (A.R. 1096.) Subsequently, the HOA strenuously objected to the Defendants' request to depose the co-owner of Ms. Evans' unit, A.V. Bowman. (A.R. 226.) However, Ms. Evans made it clear that she had not talked to Mr. Bowman in preparation for her deposition, repeatedly deferred to Mr. Bowman on various issues, and commented that she could not speak for Mr. Bowman:

Q. Did you retain a lawyer to review any of the documentation you received from University Commons?

A. I don't remember. I would have to ask A.V. I think it seems like he had someone review it, but I can't be sure. I'd have to ask him.

(A.R. 1102 at 28:20-24.) Ms. Evans also testified of her lack of knowledge of Mr. Bowman's involvement:

Q. After actually taking possession of your three units, have you discussed anything with the developers, made any

specific complaints to them?

> A. I can't speak for A.V. I think he probably spoke to them more than I did, but I had initially, yes, talked to Frank. None of the developers per se, like the contractors or anything like that. Most of my dealings was through Frank or Adam. Like I said, after we took ownership of the condos, it was harder and harder to get a hold of Frank and then he ended up not returning our calls after that, so it kind of faded off after that.
>
> Q. Did you personally ever talk to contractors or subcontractors?
>
> A. I have not.
>
> Q. Do you know if Mr. Bowman did?
>
> A. I do not know.

(A.R. 1114-15 at 77:24-78:15.) There are at least fifteen other instances of Ms. Evans deferring to Mr. Bowman throughout her testimony.[3]

Additionally, the Defendants encountered a similar issue while deposing unit owner Melissa France. Mrs. France co-owns her unit with her husband and was produced as the representative of her unit. (*See generally* A.R. 1369-1404.) When asked how it was determined whether she or her husband would be deposed, she stated that it was based solely on availability. (A.R. 1376 at 27:17-23.) She testified that she had a brief conversation with her husband regarding the problems with their unit the day before her deposition. (A.R. 1376 at 28:8-16.) Mrs. France came to the deposition with a half page of notes to which, she testified, her husband did not contribute. (A.R. 1381 at 49:16-24.) The HOA's disclosures indicated that the Frances had experienced a roof leak. (A.R. 3, 7, 54.) Mrs. France could not say when it occurred, whether it was fixed, who fixed it, if any one of the Defendants had been contacted about the

[3] (A.R. 1101-02 at 25:7-11, 26:16-27:7; A.R. 1105 at 41:9-14; A.R. 1108-10 at 52:7-10, 56:17-23, 58:20-60:5; A.R. 1114-15 at 77:24-78:10; A.R. 1118-21 at 90:14-91:2, 92:22-25, 96:14-97:5, 98:21-99:7, 103:4-7, 104:8-16; A.R. 1123 at 111:18-21; A.R. 1125 at 118:3-6.)

leak, or what the cause of the leak was. (A.R. 1381-82 at 48:22-49:15, 51:14-24.) She testified that her husband or her daughter (who was a tenant) would probably have the requested information. (A.R. 1381 at 48:22-49:15.) Mrs. France further responded "I don't know" to numerous questions and told Defendants that her husband or daughter would know the answers.[4] The HOA's disclosure of unit owner complaints further identified the Frances as having complained that their HVAC system was inadequate. (A.R. 3, 7, 54.) However, Mrs. France testified that she believed the system is sufficient. (A.R. 1384 at 61:3-8.) She specifically stated that she finds the unit temperature comfortable and has never had a complaint from any of her tenants. (*Id.*)

Based upon these facts, multiple legal issues have arisen that have resulted in unresolved disagreement among the parties. As a result of the parties' inability to agree on certain matters, the parties have asked this Court to answer the questions certified to it by the Circuit Court of Monongalia County for further guidance.

SUMMARY OF ARGUMENT

Courts interpreting the language used in W. Va. Code § 36B-3-102(a)(4) find that homeowners' associations are not adequate representatives of the individual unit owners as to claims pertaining to their individual units. Throughout this litigation, the HOA has attempted to limit the Defendants' ability to conduct discovery related to the individual unit owners and has provided inconsistent statements regarding its counsel's representative capacity in relation to the individual unit owners. The Defendants have continuously voiced their concerns over the role of the unit owners in this lawsuit, especially as they relate to the discovery process and eventual

[4] (A.R. 1382-83 at 51:14-24, 53:2-8, 55:9-12; A.R. 1386-87 at 66:22-67:3, 73:14-74:2; A.R. 1391-92 at 86:1-8, 92:13-21; A.R. 1395-97 at 103:15-25, 107:25-108:6, 109:16-110:2, 110:20-111:20, 112:2-11; A.R. 1400-02 at 122:14-21, 129:14-18, 131:5-10.)

resolution of the matter. In seeking standing to bring suit for alleged defects contained solely within a non-common area, such as the inside of an individual owner's unit, the HOA asks this Court to drastically increase the financial risk faced by West Virginia contractors, who would face increased lawsuits by homeowners' associations claiming to represent entire housing developments.

Moreover, the Defendants have serious concerns over the ability of the HOA to settle or resolve the unit specific complaints on behalf of the unit owners. The Defendants fear that the absence of the unit owners from this litigation makes it realistically impossible for the Defendants to enter into any kind of comprehensive settlement of this action or to try the case to verdict with the benefit of *res judicata*. Even if the Defendants agree that the CIOA conveys standing upon the HOA to bring suit on behalf of the unit owners, that does not answer the question as to whether all unit owners have consented and given authority to the HOA to negotiate or litigate their unit specific claims at trial so as to be bound by a settlement or verdict. The unit owners are necessary parties to this lawsuit and, without their involvement, the Defendants are open to substantial risk of incurring multiple suits with the possibility of inconsistent adjudications.

To complicate matters further, the HOA has objected to producing all individual unit owners for deposition, leaving the Defendants wondering further whether the HOA is actually representing the interests of the individual unit owners. The HOA has alleged that it has already produced, or agreed to produce, a representative owner for several of the 84 units. The HOA argues that the depositions taken to date are more than sufficient to provide the Defendants with the requisite facts so they may mount their defenses and be apprised of the extent of damages. The HOA's argument ignores the varying nature of the claims pled and the evidentiary burden

required to support such claims.

If each unit owner were a party to this lawsuit, the Defendants would be entitled to depose them under Rule 30. If they are not made parties to this lawsuit, it is still imperative that the Defendants depose each unit owner because of the varying types and degrees of their complaints and because each one engaged in a contract to purchase a unit at UCR and unquestionably possesses information relating to the claims made in this lawsuit. For example, several unit owners are claiming lost rent as damages, while several others are not.

The mere fact that not all unit owners are experiencing difficulty in renting their units is an issue that must be explored by the Defendants and can only be explored by deposing each unit owner. Arguably, the central focus of the HOA's case has been a claim of defective design and operation of the HVAC system in each unit. The HOA claims that all are defective and must be replaced. However, the HOA's disclosure of unit owner complaints reveals that only 21 of the 84 units have identified problems with their HVAC unit. The HOA has been inconsistent in its representative claims, and the Defendants must be permitted to depose not only those unit owners with complaints but those without complaints in order to determine whether, for example, improper maintenance is a factor in the inconsistent complaints. There is simply no way that the Defendants can be expected to understand the claims of the unit owners without deposing each and every one of them.

In the matter before this Court, the HOA seeks authority to sue for the alleged defects contained within individual homeowners' units. In doing so, the HOA seeks to extend its legal rights, contrary to the language defining the boundaries of property owned by the individual homeowners within the Declaration of Common Interest Community of the UCR Condominium Complex (hereinafter "Declaration"). Such an argument intrudes upon the rights of individual

homeowners to choose whether or not to bring a lawsuit. Finally, in arguing that it has standing to bring suit for unit specific damages, such as HVAC complaints and claims of lost rent, the HOA seeks to take on the right to file a construction defect claim for any issue at the property, while at the same time deferring the responsibility of repairing unit specific damages to the individual unit owners.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Defendants concur with the HOA that this case presents issues proper for consideration by oral argument under Rev. R.A.P. 20(a) in that the certified questions involve issues of first impression. Furthermore, the answers to these questions are of fundamental importance to West Virginia contractors and to those who choose to conduct business with West Virginia homeowners' associations. Therefore, this case warrants oral argument under Rev. R.A.P. 20(a).

ARGUMENT

Standard of Review

This Court reviews "questions of law answered and certified by a circuit court" *de novo*. Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

I. The Circuit Court properly answered that "unit specific" damages cannot reasonably be included in matters affecting the common interest community as contemplated by W. Va. Code § 36B-3-102(a)(4).

Pursuant to the CIOA, 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." W. Va. Code § 36B-3-102(a)(4). Thus, according to the CIOA, the HOA has standing to bring an action on behalf of its Members only as to matters <u>affecting</u> the common interest community.

The HOA contends that the CIOA authorizes it to sue for damages to the common areas and to the interior of the individual units. To the contrary, while the CIOA may confer standing upon the homeowners' association to institute an action, the HOA is nonetheless an inadequate representative for unit owners with regard to damages unique to the individual units. Throughout this litigation, an issue has arisen as to whether unit specific damages are mutually exclusive of matters affecting the common interest community. Specifically, the HOA and the Defendants disagree as to whether certain claims made by the HOA, e.g. inadequate HVAC systems and lost rent, are matters affecting the common interest community or whether they are unit specific damages only.[5]

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." W. Va. Code § 36B-1-103(7) (emphasis added). Section 36B-3-107 states that a homeowners' 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." W. Va. Code § 36B-3-107. Similarly, "unit" is defined in the Declaration as "a physical portion of the Condominium that . . . is designated for separate ownership . . . [and] has the right to the exclusive or non-exclusive use of the Limited Common Elements appurtenant to that Unit."[6] (A.R. 15.) The Declaration defines "Limited Common Elements" as

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[5] Claims for lost rent or inability to rent are further discussed in Section V. *infra*.

[6] The Declaration was created for the HOA pursuant to the CIOA.

> portions of the Common Elements allocated by this Declaration or by operation of the Act for the exclusive use of one or more Units, but fewer than all of the Units. Without limiting the generality of the foregoing, "Limited Common Elements" include, without limitation:
>
> (i) any exterior windows and doors, utility systems, mechanical systems, exhaust and ventilation systems, fireplaces, entrances, exits, walkways, patios, balconies, decks, porches, and other areas and Improvements that are designed to serve fewer than all of the Units; and
>
> (ii) any physical portion of the Condominium that is designated on the Maps as "Limited Common Element" or "LCE."
>
> If any chute, flue, duct, wire, conduit, bearing wall, bearing column or other structural component, any portion of a mechanical system, or any fixture lies partially within and partially outside of the designated boundaries of a Unit, any portion thereof serving only that Unit is a Limited Common Element allocated solely to that Unit, and any portion thereof serving more than one Unit or any portion of the Common Elements is a part of the General Common Elements. . . .[7]

(A.R. 13.)

The HOA would have this Court believe that the alleged defects of the HVAC systems are common to each unit owner in the UCR Condominium Complex and that any damages stemming from alleged failures in the HVAC systems are common to all unit owners. However, each of the 84 units in the UCR Condominium complex has its own HVAC system. Each is located in a storage/mechanical closet on the patio of each unit. Each storage/mechanical closet is only accessible by entering through the front door of the unit, walking through the unit, and stepping out on to the patio off of the back door, where the closet is located. The storage/mechanical closets are locked closets, with the key being

[7] The Declaration defines "Common Elements" as "the General Common Elements and the Limited Common Elements." (A.R. 11.) "General Common Elements" has been defined as "all of the Condominium, other than the Units and the Limited Common Elements." (A.R. 12.)

held by the unit owner and/or unit residents, and have large return air vents leading from the closet into a back bedroom. The HVAC systems lie entirely within the designated boundaries of each unit. Each HVAC system is the responsibility of the individual unit owner on whose unit the system is located.[8] Nevertheless, the HOA has continuously maintained that the HOA is damaged because, it claims, all HVAC systems are malfunctioning. Contrary to the HOA's position, its own chart of unit owner complaints effectively proves that not all unit owners have complaints about his or her HVAC system. (A.R. 1-8; 52-56.) In fact, only 25% of the units are noted to have issues with HVAC. (*Id.*)

The HOA is correct in that the intent of the National Conference of Commissioners on Uniform State Laws in drafting the Uniform Common Interest Act, from which the West Virginia Act is derived, is clear: "the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest." Unif. Common Interest Ownership Act § 3-102, cmt. 3 (1982). This is not the issue in dispute. The issue is the content of the suit and the damages claimed within, i.e., damages for issues arising solely within the interior of a unit and damages for personal financial losses. Notably, at least one court has interpreted the language in § 3-102 to mean that an association may bring an action asserting claims of its members only as to the common elements. *Piper Ridge Homeowners Ass'n, Inc. v. Piper Ridge Associates*, 2006 WL 6047597, *2 (Vt. Super. 2006) (citing Vt. Stat.

[8] Among the HOA's purposes is to "manage, operate, insure, improve, repair, replace, and maintain the Common Elements." (A.R. 17.) Because the HVAC systems are not part of the Common Elements, the HOA has no responsibility to the HVAC systems, and the systems are thus the responsibility of the unit owners. Additionally, the Declaration states that "[e]ach Owner, at such Owner's sole cost and expense, shall maintain in good order and repair its Unit (including all fixtures located therein), and the Limited Common Elements assigned solely to its unit, other than those Limited Common Elements which the [HOA] chooses to maintain for reasons of uniformity or structural considerations." (A.R. 29.) The Limited Common Elements the HOA chooses to maintain is further explained and does not include HVAC systems. (*Id.*) Thus, even if the HVAC systems are determined to be Limited Common Elements, the unit owners, and not the HOA, are the responsible parties for maintenance and/or damage.

Ann. Tit. 27A, §3-102(a)(4)).[9]

It is unlikely the National Conference of Commissioners on Uniform State Laws considered a suit claiming to be on behalf of the owners of 84 units, where the claims were that all units had failed HVAC systems, located wholly within the boundaries of each unit, when, in fact, only a small portion have made such claims, and that some unit owners may have personal financial losses, such as lost rent or failure to sell, as a result of the totality of the damages.[10] The HOA's broad definition of "matters affecting the common interest community" goes beyond the plain language of the statute. "If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995); *see also* Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.")

Notably, the word "affect" is defined as to have an effect, to influence, or to produce a change in. Webster's New World Dictionary (2d ed.). Through the use of the word "affecting," W. Va. Code § 36B-3-102(a)(4) requires that the litigation matter have an effect on or influence the common interest community. This clause contemplates, by its plain language, a broader impact than the damage claims of individual unit owners.

The HOA does have claims affecting the whole of the complex: foundations, roofing, support walls, utility systems, etc., but it also has claims that only may affect one or two of

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[9] Like West Virginia, Vermont has adopted the Uniform Common Interest Ownership Act, making Vt. Stat. Ann. Tit. 27A, §3-102(a)(4) substantively identical to W. Va. Code § 36B-3-102(a)(4). *See* Vt. Stat. Ann. tit. 27A, Refs. & Annos (1994).

[10] Twenty-five of the 84 units have made claims of lost rent, inability to rent, or failure to sell. (A.R. 1-8, 52-56.)

the 84 units. (*See generally* A.R. 1-8, 52-90.) In those situations, a distinction between "matters affecting the common interest community" and "unit specific" damages is necessary for evidentiary purposes. The Defendants cannot adequately defend without knowing specifically which individuals from which units are making which claims. Although the HOA has provided charts of unit owner complaints, the reality is, as more fully detailed in Section II, *infra*, that these unit owners are giving different accounts of their claims during their depositions.

"Unit specific" damages should be separate and apart from "matters affecting the common interest community" as contemplated by W. Va. Code § 36B-3-102(a)(4), and thus, should include (1) faulty construction claims to the extent that resulting damage is wholly within the "unit" as defined by the Declaration and in W. Va. Code § 36B-1-103, including, but not limited to, HVAC complaints, leaks, cosmetic issues and faulty appliances, but excluding "common elements," also defined in the Declaration and in W. Va. Code § 36B-1-103; and (2) any personal unit owner financial loss claim, including, but not limited to, marketing, insufficient public offering, lost rents, or inability to sell. Therefore, the HOA should be precluded from pursuing claims for unit specific damages.

II. The Circuit Court properly answered that the HOA is not an adequate representative of each individual unit owner when the damages sought include "unit specific" damages affecting only individual units.

The HOA is not an adequate representative to allege claims which are exclusively related to individual units and do not affect the common interest community. The HOA contends that, to date, each deposition of a unit owner has resulted in nearly the identical recitation of problems and damages sustained by unit owners at the UCR Condominium Complex; thus, the Defendants have been sufficiently apprised of all the requisite facts and

the extent of damages allowing them to mount their defense(s). The HOA's argument ignores the varying nature of the claims pled and the actual testimony to date.

The "First Amended Complaint" alleges several damages claims that may differ among individual units, including inability to re-sell their units, failure to provide adequate public offering statements to prospective buyers, delivering misleading promotional material to prospective buyers, failing to inspect units, damages from burst water lines, faulty construction, faulty appliances, cracked drywall, and lost rental income. (A.R. 57-90.) The homeowners are not adequately represented by the HOA because the parties could have conflicting interests.

In its "First Amended Complaint," the HOA alleges a variety of defects, many of which are set forth as if common to all or most unit owners. (*Id.*) However, through the discovery process, it has become apparent that the individual unit owners are seeking a multitude of individual damages specific to only their units. (A.R. 1-8; 52-56.) Consequently, the HOA is not the appropriate representative of the unit owners for these unit specific complaints. The possibility for conflicting interests exists, not only between individual unit owners, but between the HOA's desire to rectify common area complaints before or instead of unit specific complaints.

The depositions of certain unit owners have conclusively shown that even the unit owners lack knowledge as to the representative capacity of the HOA and, thus, have no knowledge as to whether their interests are adequately, or actually, protected. For example, Nancy Hamilton, unit owner and former President of the HOA, signed a contract with counsel the day before her deposition and "hoped" that the HOA would take care of her individual claims, as well, so that she would not have to pursue further claims. (A.R. 728-29 at 44:23-47:9.) Another unit owner,

Stephen Mick, believes that he has not retained counsel at all in connection with his personal claims for damages, such as inability to rent. (A.R. 785 at 75:14-76:1; *see also* A.R. 54; A.R. 782 at 64:8.) Moreover, unit owner Peter Jacavone testified that he could "opt out" of any agreement. (A.R. 828 at 74:16-75:2.)

The CIOA adopts the language used in the Uniform Common Interest Ownership Act, which has also been adopted in Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada, and Vermont.[11] The provision that allegedly confers upon the HOA the authority to bring the claims in this action is found at W. Va. Code § 36B-3-102(a)(4), which provides that "subject to the provisions of the declaration, the association, even if unincorporated, may . . . [i]nstitute, 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." *Id.* Thus, the HOA's authority to bring these claims depends on whether they are "matters affecting the common interest community."

As discussed in Section I, *supra*, "common interest community" is defined in W. Va. Code § 36B-1-103(7) 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 <u>other real estate</u> described in a declaration[.]" W. Va. Code § 36B-1-103(7) (emphasis added). Bearing on this determination is the CIOA's definition of a "unit," which is "a physical portion of the common interest community designated for separate ownership or occupancy[.]" W. Va. Code § 36B-1-103(33). The HOA asserts that the definition of units as a portion of the common interest community makes damages to

[11] Unif. Common Interest Ownership Act, Refs & Annos (1982, 1994, 2008); Alaska Stat. § 34.08.010, *et seq.*; Colo. Rev. Stat. § 38-33.3-101, *et seq.*; Conn. Gen. Stat. § 47-200, *et seq.*; Del. Code Ann. tit. 25, § 81-101, *et seq.*; Minn. Stat. § 515B.1-101, *et seq.*; Nev. Rev. Stat. § 116.001, *et seq.*; Vt. Stat. Ann. tit. 27A, § 1-101, *et seq.*

individual units "matters affecting the common interest community" for purposes of W. Va. Code § 36B-3-102(a)(4) and provides the HOA with authority to pursue claims for damage to the individual units as well as the common elements. However, some courts have found that other procedural rules may limit the HOA'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 developer moved for partial summary judgment, claiming that the homeowners' association had no standing to pursue claims related to the individual units. *Id.* In response, the homeowners' association argued that (1) Nevada's Common Interest Ownership Act conferred authority on the homeowners' association to pursue claims for individual units and (2) the developer had no standing to challenge the homeowners' association's authority to act as a representative for unit owners. *Id.* at 699-700. After the trial court denied the developer's motion, the Supreme Court of Nevada considered the above claims on a petition for writ of mandamus. *Id.* at 700. The court held as follows:

> We conclude that under NRS 116.3102(l)(d), a homeowners' association has standing to assert constructional defect claims in a representative capacity on behalf of individual units. However, <u>because damages are awarded for claims within individual owner units, such actions are subject to class action principles</u> discussed in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 854-57, 124 P.3d 530, 542-44 (2005).

Id. (emphasis added).[12] Because class action principles apply to determine the homeowners' association's capacity to sue for damages to individual units, the court found that the

[12] The language contained in Nev. Rev. Stat. § 116.3102(1)(d) is the same language used in W. Va. Code § 36B-3-102(a)(4).

developer defendant 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 HOA] must be reconciled with the principles and analysis of class action lawsuits and the concerns related to constructional defect class actions." *Id.* at 703 (emphasis added). The concerns noted with respect to construction defect class actions relate to the unique status of real estate and the attendant problem with generalized proof of damages to individual units. Ultimately, the court remanded the case to the trial court for the determination of whether a class should be certified, 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), identical to W. Va. Code § 36B-3-102(a)(4), confers standing upon the association but "does not address the need to protect absent owners.")[13] While the Defendants are not arguing for class certification, the analysis

[13] The application of class action principles for claims involving "matters affecting the common interest community" is also consistent with the statutory language of the CIOA. The definition of "common interest community" distinguishes between the ownership interests of the "common interest community" and those of the unit owners. By definition, the "common interest community" applies to that "other real estate" within the property for which unit owners are jointly responsible for maintenance and improvement. W.Va. Code § 36B-1-103(7) (emphasis added). Thus, "matters affecting the common interest community" must necessarily apply to common elements for which the unit owners are jointly responsible. After all, the HOA has not and would not propose to repair items within the confines of a specific unit that is individually owned. The HOA, by its nature, only accepts responsibility on behalf of the larger group to repair or maintain the elements common to all unit owners.

is helpful in understanding why the HOA is not an adequate representative of the unit owners for unit specific complaints.

In West Virginia, "class certification first requires the trial court to determine that the plaintiff has satisfied all four prerequisites contained in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation." *Perrine v. E.I. DuPont de Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). In the instant case, the First Amended Complaint alleges several damages claims that may differ among individual units, including ¶ 56 – two owners' inability to re-sell their units; ¶ 76 – failure to provide adequate public offering statement to prospective buyer; ¶ 80 – delivering misleading promotional material to prospective buyers; ¶ 89 – failing to inspect units, *inter alia*; ¶ 100 – individual units are unmarketable and unable to be sold; ¶ 105 – damages from burst water lines and issuance of certificates of occupancy while units were not in compliance with building codes. (A.R. 57-90.) The claims relating to damage to individual units may require specific proof of the information given to each purchaser and of any damage caused to the individual unit by the allegedly faulty construction.

In its brief, the HOA relies upon the Colorado Court of Appeals for the proposition that the CIOA permits a homeowners' association to bring claims for damages to individual units. *See Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating*, 94 P.3d 1177 (Colo. App. 2003). In *Yacht Club II*, the issue on appeal was whether a homeowners' association could bring negligence claims regarding individual units against the subcontractors who performed the work. *Id.* at 1180. The court held "that § 38-33.3-302(1)(d) confers standing upon associations to pursue damage claims on behalf of two or more unit owners with respect to matters affecting

their individual units."[14] In contrast to the Nevada court, the Colorado court found that the grant of standing was contained within the plain language of the statute and did not require interpretation of an ambiguity. Importantly, the court in *Yacht Club II* did not consider the relation of the CIOA to other statutes or procedural rules, and the opinion contains no discussion of whether the homeowners' association's status as a representative of the individual unit owners is subject to challenge on grounds other than standing. This decision was supported in Colorado by *Heritage Village Owners Association, Inc. v. Golden Heritage Investors Ltd.*, 89 P.3d 513 (Colo. App. 2004), in which the court ruled that the homeowners' association had standing to bring claims against developers, builders, and sellers for damages regarding individual units. *Id.* This decision relied in part on the legislative declaration in Colorado's CIOA that one purpose of the Act is to establish "more certain powers in the association to sue on behalf of the owners," and this legislative declaration is not found in the statute enacted by West Virginia. However, the court stated, as in *Yacht Club II*, that the plain language of the act conferred standing on the homeowners' association, and no analysis was undertaken as to the representative capacity of the association in relation to unit specific complaints and damages.

The "matter" at issue must "affect" the common interest community. Contrary to the HOA's simplistic analysis, the fact that a unit is located within the common interest community does not mean that a matter, such as discrete damage to a unit interior, "affects" the community. Damage to the interior of a unit can only "affect" the individual unit owner since the HOA has no duty to maintain or repair the unit interior. Consequently, the inevitable necessity of participation by the unit owners precludes the HOA from being an adequate representative for interior damage claims, i.e., claims that are unit specific.

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[14] Colo. Rev. Stat. § 38-33.3-302(1)(d) is the equivalent section to WV Code § 36B-3-102(a)(4) and employs identical language.

III. The Circuit Court properly answered that, because of the variety of individual claims being made and the potential for a conflict of interest between the HOA and the individual unit owners, the unit owners must be joined as necessary parties to this lawsuit.

The HOA contends that joinder of each individual unit owner is unnecessary because (1) the CIOA offers an efficient means for the resolution of this matter; (2) *res judicata* will protect the Defendants from multiple or inconsistent judgments; and (3) there is a mechanism in place for objections by unit owners to any settlement agreement reached between the HOA and Defendants. However, the homeowners are not adequately represented by the association because the parties could have conflicting interests. Rule 19 of the West Virginia Rules of Civil Procedure provides as follows:

> A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

W. Va. R. Civ. P. 19(a).

The UCR Condominium Complex's 84 units are currently owned by approximately 147 individuals. There have been a total of approximately 182 unit owners of the UCR Condominium Complex since the units were first sold in 2006-2007. These owners, past and present, are subject to service of process, and their absence in this litigation will preclude complete relief to those already parties. The individual unit owners claim interests relating to the subject of this action (defective design, construction, materials and misrepresentation) and are so situated that disposition of this Action in their absence may impede those persons' ability to

protect their interests and leave those who are already parties to this action subject to substantial risk of incurring multiple, double, or otherwise inconsistent obligations by reason of the claimed interests, not to mention the plethora of additional lawsuits that may severely tax the judicial economy of the Court.

The absence of all unit owners from this litigation makes it realistically impossible for defendants to enter into any kind of comprehensive settlement of this action or to try the case to verdict with the benefit of *res judicata.*[15] Generally, all persons who are materially interested in the subject-matter of the suit and who will be affected by the result of the proceedings should be made parties thereto, and when the attention of the court is called to the absence of any of such interested persons, it should see that they are made parties before entering a decree. *See State of West Virginia ex rel. One-Gateway Associates, LLC v. the Honorable Gary L. Johnson, et al.*, 208 W. Va. 731, 542 S.E.2d 894 (2000). In this case, there is no question that the individual unit owners are materially interested in the subject matter of this suit and will be affected by the outcome. A party should be joined if he has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest. *Id.*

The interests which are furthered by Rule 19(a) are not only those of the parties before the Court but also that of the public in avoiding repeated lawsuits on the same subject. *See Int'l Union of Electronic v. Murata Erie North America, Inc.*, 1990 WL 310625 (W.D. Pa. 1990). The principle which underlies this Rule is that every judicial controversy should, if possible, be ended in one litigation. *See Dixon v. American Industrial Leasing Co.*, 157

[15] The HOA's reliance on the Supreme Court of Utah's holding in *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535 (1983), is flawed. The holding in *Brickyard* is inapposite to this case, as Utah has not adopted the language of the Uniform Common Interest Ownership Act. Unif. Common Interest Ownership Act, Refs & Annos (1982, 1994, 2008).

W. Va. 735, 205 S.E.2d 4 (1974).

A Colorado court has concluded that unit owners should be joined 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. A temporary clubhouse was operated on one lot within the development although the plans contemplated the construction of a permanent clubhouse on a different lot. *Id.* The organization that operated the clubhouse brought suit against the homeowners' association, seeking to require the association to collect dues for the benefit of the clubhouse operator. *Id.* The homeowners' association counterclaimed, seeking a reformation of the term "club" within the development's governing documents. *Id.* In essence, the parties sought a declaratory judgment as to whether the club referred to in the operating documents was the one currently being operated – entitling the operator to dues payments – or only a clubhouse constructed on the lot designated for the purpose in the operating documents. The trial court found that the clubhouse operator was entitled to payments for its operation of the club; that the development plans contemplated a permanent club on the separate lot; and that, once that permanent club was constructed, the members' dues would be split between the two clubs. *Id.* at 454. On appeal, the homeowners' association argued that the judgment should be vacated for failure to join necessary parties under Rule 19. *Id.* at 454-56. The court accepted this argument, finding that the owners must be joined before adjudication of the claims. *Id.*

The Colorado Court of Appeals found that, under Colorado Rule of Civil Procedure 19, the owners were necessary parties.[16] 214 P.3d at 456. In addition to determining that the

[16] Rule 19 of the Colorado Rules of Civil Procedure is substantively identical to Rule 19 of the West Virginia Rules of Civil Procedure.

owners were indispensable parties, the court considered whether the homeowners' association nonetheless adequately represented their interests. *Id.* As did the Nevada court in *D.R. Horton* discussed in Section II., *supra*, the Colorado court found that Colo. Rev. Stat. § 38-33.3-302(1)(d), identical to W. Va. Code § 36B-3-102(a)(4), confers standing upon the association but "does not address the need to protect absent owners." *Id.* at 457. Upon consideration of the facts, the court found that the homeowners were not adequately represented by the association because the parties could have conflicting interests. *Id.* 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." *Id.* The competing interests of the homeowners' association and the owners in the application of future dues created a conflicting interest between the parties that could impair the owners' ability to protect their interests. *Id.* In the instant case, the application of any settlement proceeds or damage award could create a conflict between the individual owners and the HOA based on the relative amounts to be used for individual and common property. In fact, the HOA seeks damages equaling "the full value of the UCR Condominium Complex" based on "a complete and total financial loss on [the owners'] investment." (A.R. 82 at ¶¶ 100, 101.) In light of this demand, a conflict could arise between the HOA and owners concerning whether to repair the existing property or attempt to replace it, the latter of which would require owners to find alternate housing for themselves or their tenants for a significant period of time.

A West Virginia decision similar to *Clubhouse at Fairway Pines*, although not involving a homeowners' association, is *O'Daniels v. City of Charleston*, where this Court held as follows:

> When a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claim an

> interest in the real property at issue are indispensable parties to the proceeding. Any order or decree issued in the absence of those parties is null and void.

Syl. Pt. 2, *O'Daniels v. City of Charleston*, 200 W. Va. 711, 490 S.E.2d 800 (1997). In *O'Daniels*, a landowner brought suit seeking to require the city to remove fencing on a portion of road. *Id.* Because ownership of the property where the fencing was situated was unclear, this Court found that the landowner with a potential competing claim to the real estate must be joined in order for a decision to be entered. *Id.* In the present case, joinder is required because the action "directly affects" the unit owners' interests in real property.

This case directly affects the real property owned by the unit owners, and each unit owner will be affected by the result of the litigation. An absent person is to be joined if failure to do so subjects those that are already parties to a risk of incurring multiple liabilities. *See Capitol Fuels, Inc. v. Clark Equipment Co.*, 176 W. Va. 277, 281, 342 S.E.2d 245, 248-49 (1986). The absence of the unit owners in this case will leave each Defendant open to a substantial risk of incurring a multiplicity of actions and a possibility of inconsistent adjudications. A Defendant could be found liable for contribution or indemnification to the Owner or co-Defendant for a sum certain in this action and then may not be found liable in the next action. The results could continue to vary case by case for each of the unit owners, resulting in multiple liabilities and inconsistent obligations for each Defendant.

Joinder under Rule 19 is the best way to ensure adequate representation of the unit owners' claims and to prevent the risk of the Defendants incurring double, multiple, or otherwise inconsistent obligations. Accordingly, all individual unit owners should be joined as plaintiffs in this litigation.

IV. The Circuit Court properly answered that the HOA does not have the authority under W. Va. Code § 36B-3-102(a)(4) to settle and release any and all claims of the unit owners, but if this Court finds to the contrary, the "Agreed Order Establishing Procedure for Resolving Claims" entered on December 17, 2010, by all parties, is the proper procedure for providing sufficient notice.

Substantial case law exists calling into question the authority of the homeowners' association to settle or resolve the unit specific complaints on behalf of the unit owners, requiring joinder of each individual unit owner in order to protect the Defendants from multiple or inconsistent obligations. Based in part on the questions about the adequate representation of individual interests, the law is not clear as to whether a homeowners' association's settlement of claims precludes an individual owner from asserting claims for damages to his individual unit based on the same conduct. In fact, no state that has adopted the Uniform Common Interest Ownership Act appears to have case law concerning a homeowners' association's authority to settle claims it brings on behalf of unit owners.

Persuasive authority can be found in New Jersey, where the Supreme Court of New Jersey interpreted a section of New Jersey's Condominium Act authorizing the owners association to "'enter into contracts, bring suit and be sued.'" *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 found, on appeal, that the homeowners' association had the exclusive authority to settle claims relating to the common elements based on its exclusive responsibility to maintain

those elements. *Id.* at 573. However, the court found that the unit owners' claims for damage to individually-owned property were not barred by the settlement because each owner has "primary rights to safeguard his interests in the unit he owns." *Id.* at 574. Consequently, the court permitted individual suits against the developer to proceed despite the general release it obtained from the homeowners' association in exchange for settlement.

Although New Jersey has not adopted the Uniform Common Interest Ownership Act, the *Siller* decision is relevant to the CIOA because the authority of the HOA to sue and be sued is not specifically limited by the statute. In *Siller*, the court found that a settlement by the association could only bar later claims based on areas in which the association had the exclusive right to act. *Id.* at 573-74. As stated above, the CIOA permits the HOA to institute litigation on behalf of unit owners for "matters affecting the common interest community." W. Va. Code § 36B-3-102(a)(4). This section does not make clear whether the HOA, by 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 suit for damages to her unit which 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, where the homeowners' association's authority to litigate is limited to the common areas, a release granted by the association will not prevent future claims by owners for damages 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). For instance, Virginia Code states as follows:

> [T]he unit owners' association itself, shall have the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title with respect to the common elements, including without limitation the right, in the name of the unit owners' association, (i) to grant easements through the common elements and accept easements benefiting the condominium or any portion thereof, (ii) to assert, through litigation or otherwise, defend against, compromise, adjust, and settle any claims or actions related to common elements.

Va. Code Ann. § 55-79.80(B). The Supreme Court of Virginia has considered whether a settlement entered into by a homeowners' association barred individual owners from proceeding with claims against the developer regarding alleged easements in a parcel of property not contained within the condominium complex. *Frantz v. CBI Fairmac Corp.*, 331 S.E.2d 390 (Va. 1985). The court held that the settlement barred the individual claims because the easements over the property would be enjoyed by the association as a whole, although the owners had claimed damages as a result of misrepresentations made to them individually. *Id.* at 395. The court noted, however, that the settlement precluded individual claims only because it related to a common, rather than an individual, right. *Id.*

Similarly, Florida provides the following:

> 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.

Fla. Stat. § 718.111(3). The only reported Florida decision bearing directly on the homeowners' association's settlement authority found that, where 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).

Based on the foregoing, it is not clear whether statutory provisions authorizing a homeowners' association to institute litigation on behalf of unit owners give the association the power 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 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, where 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).

The HOA does not have the authority under § 36B-3-102(a)(4) to settle and release any and all claims of the unit owners. However, should this Court find to the contrary, the "Agreed Order Establishing Procedure for Resolving Claims" entered on December 17, 2010, by all parties, is the proper procedure for providing sufficient notice. (*See* A.R. 215-23.)

V. The Circuit Court properly answered that matters pertaining to a unit owner's claim for lost rent or inability to rent are not matters that affect the common interest community for which the HOA may institute litigation pursuant to W. Va. Code § 36B-3-102(a)(4).

As discussed above, unit specific damages are not matters affecting the common interest community. *See D.R. Horton, Inc.*, 215 P.3d 697. Several unit owners are claiming lost rent or inability to rent as damages, while several others are not. (A.R. 1-8; 52-56.) Contrary to the HOA's position, its own chart of unit owner complaints effectively proves that not all unit owners have claims of economic damages. (A.R. 1-8; 52-56.) In fact, only 25 of the 84 units are noted to have these very speculative claims. (A.R. 1-8; 52-56.)

The HOA seeks to recover an amount, somehow, to make the owners of these 25 units whole based upon claims of being unable to fully rent their unit. The UCR Condominium Complex contains 7 buildings, with 12 units in each building. There are 3 floors to each building, with 4 units located on each floor. Each unit is comprised of 4 bedrooms, with

each bedroom having a full bath.

There are, however, some basic facts the HOA continues to ignore. Notably, the UCR Condominium Complex consists primarily of undergraduate students at West Virginia University. The Complex was marketed as student housing, and it is unrealistic to believe that individuals other than students would desire to live there. Additionally, since the completion of construction in 2006, the number of student housing units available in the City of Morgantown has increased substantially and continues to increase. There is more and more competition with bigger and better amenities being offered.[17] Additionally, perhaps one unit is cleaner than another or has less tenant-related damage to it. Thus, there is no way to adequately assess whether all of the lost rent complaints, collectively, have arisen, in fact, from the alleged construction defects as the HOA claims.

Furthermore, the HOA's claims for lost rents are purely speculative and cannot be proved, as a matter affecting the common interest community, with reasonable certainty. In order for the HOA to recover for lost rents or ability to rent, the HOA must prove that such losses proximately resulted from the construction that gave rise to this action. The HOA cannot do so, and even if the HOA could clear that hurdle, it may not recover "based on estimates which amount to mere speculation and conjecture" but must prove its claim "with reasonably certainty." *See* Syl. Pt. 1, *Cell, Inc. v. Ranson Investors*, 189 W. Va. 13, 427 S.E.2d 447 (1992) (lost business profits). The HOA's proof "must consist of actual facts from which a reasonably

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[17] *See* West Virginia University Off-Campus Housing Office (Oct. 14, 2011), http://studentlife.wvu.edu/r/download/107230 for a list of off-campus student housing available in Morgantown. This list does not include the multitude of houses and apartments available to rent that are not owned or managed by experienced companies. *See also* West Virginia University Office of Student Life (Sept. 20, 2011), http://studentlife.wvu.edu/off_campus_housing/off_campus_housing_search. For example, a quick visit to Morgantown Craigslist (Feb. 15, 2012), http://morgantown.craigslist.org/apa/ will provide an expectant renter with additional options.

accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." *Id.*, 189 W. Va. at 14-15, 427 S.E.2d at 448-49 (quoting *State ex rel. Shatzer v. Freeport Coal Co.*, 144 W. Va. 178, 185, 107 S.E.2d 503, 508 (1959), *abrogated on other grounds by Cell*, 189 W. Va. 13, 427 S.E.2d 447). In this case, no such proof can exist by permitting the HOA to act as a representative of the unit owners who have these specific claims of lost rent or inability to rent.[18]

Furthermore, Rule 602 of the West Virginia Rules of Evidence specifically provides that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." W. Va. R. Evid. 602. The HOA cannot act as a representative, produce a witness pursuant to Rule 30(b)(7), and claim that witness has knowledge of speculative damages. Accordingly, even if the HOA can strictly identify the reasons and dates which units were uninhabitable and not capable of being rented due to damage or repair work, it cannot demonstrate with any reasonable certainty whether those particular units would have been actually rented. These crucial uncertainties make the loss of rental income too speculative a harm for which to permit recovery.

Nevertheless, even if the claims of lost rent or inability to rent are allowed to proceed, these damages should be classified as "unit specific" damages. "Unit specific" damages should be separate and apart from "matters affecting the common interest community" as contemplated by W. Va. Code § 36B-3-102(a)(4), and thus, should include (1) faulty construction claims to the extent that resulting damage is wholly within the "unit" as defined by the Declaration of Common Interest Community of the UCR Condominium complex (hereinafter "Declaration") and in W. Va. Code § 36B-1-103, including, but not limited to,

[18] The Defendants maintain the position that, even if each individual unit owner testifies as to such matters, the claims of lost rent and inability to rent are purely speculative.

HVAC complaints, leaks, cosmetic issues and faulty appliances, but excluding "common elements," also defined in the Declaration and in W. Va. Code § 36B-1-103; and (2) any personal unit owner financial loss claim, including, but not limited to, marketing, insufficient public offering, lost rents, or inability to sell.

VI. The Circuit Court properly answered that a representative sample of unit owners is not sufficient to offer deposition testimony and trial testimony in this matter to establish the claims pled by the HOA, and the testimony of each unit owner is both relevant and discoverable.

Discovery is meant to be broad and liberal, to aid the litigants in the quest for potentially relevant and discoverable information. This Court has "traditionally given the Rules a liberal construction favoring broad discovery, because broad discovery policies are 'essential to the fair disposition of both civil and criminal lawsuits.'" *State ex rel. West Virginia State Police v. Taylor*, 201 W. Va. 554, 499 S.E.2d 283 (1997) (citing *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W. Va. 431, 444, 460 S.E.2d 677, 690 (1995)).

As stated above, the HOA is alleging a wide variety of claims in this lawsuit, many of which require specific proof which cannot be satisfied by a "representative sample" of unit owners. For example, the HOA alleges that it and its members are entitled to collect damages pursuant to W. Va. Code § 36B-4-108(c) because the Developer Defendants[19] failed to comply with public offering statement requirements. (A.R. 76-77 at ¶ 76.) Section 36B-4-108(c) states that a purchaser is entitled to such damages "provided, That purchaser must show that he or she has been actually damaged as a result of the failure to provide such offering statement and that his or her action to recover such damage . . . is instituted within three years from the date on which purchaser's right of action shall have accrued." *Id.*

[19] Defendants University Commons Morgantown, LLC; Koehler Development, LLC; Collegiate Homes, Inc., Richard Koehler; Frank Koehler; Adam Sharp; and Richard Dunlap have been known as the "Developer Defendants" during the pendency of this case.

(emphasis added). This particular claim demonstrates the many problems with the HOA's argument. The CIOA provides potential damages against a developer only to the purchaser and only if that purchaser can show actual damage. *See* W. Va. Code § 36B-4-108(c). The HOA represents only current unit owners, some of which are not the original owners. Subsequent purchasers are not entitled to damages under § 36B-4-108(c). Additionally, the purchaser is charged with showing that he or she has suffered actual damage as a result of the faulty offering statement. A representative could not possibly meet that burden.

Just as important as the evidentiary burden of the HOA is the fact-finding ability of the Defendants. The testimony of the owners of each unit, both now and at the time the units were built, is relevant and discoverable. These individuals may have factual information regarding their expectations of what the units would be like based upon their viewing of the models, their experiences with the alleged deficiencies in and around the individual units, and the problems, if any, they experienced in leasing the units after they were constructed. The HOA, so far, has produced only one owner from 19 units and argues that such testimony is sufficient to understand the claims being made.[20] Allowing the HOA to simply draw an arbitrary line at 19 units works to greatly prejudice the Defendants and is completely inapposite to the purpose of the discovery rules. Thus far, the HOA has hand-picked the "representatives" of each unit, which obviously carries with it a potential for biased testimony from only those individuals who will help the HOA's case while hiding from discovery the testimony from individuals who may not help its case. The discovery rules do not allow one party to hold all of the cards in deciding who can and cannot be deposed.

[20] To date, only 15 unit owners have been deposed. (A.R. 612-1449.) These 15 unit owners own a total of 19 units.

While the HOA's requested limitation on discovery is fraught with peril from the outset, it has proved insufficient in practice, as well. Of those 15 unit owners who have been deposed, many have lacked adequate knowledge of their claims. Several of the unit "representatives" have not been able to support their own claims, stating that they would defer to their husband, wife, or co-owner.[21] Additionally, they have admitted that they did not really confer with co-owners to learn all the information for their unit. (*Id.*) Again, these are the representatives who were designated by the HOA's counsel, and they still lack complete information.

In its Petition, the HOA incorrectly relies upon a Maryland case. *Milton Co. v. Council of Unit Owners of Bentley Place Condominium,* 708 A.2d 1047, 1055 (Md. App. 1998). In *Milton*, the issue of taking or limiting depositions was never discussed. Instead, the issue was whether a homeowners' association had to call a witness at trial for every single unit to collect damages for HVAC defects which affected all of the units. *Id.* The answer to that question was no. *Id.* at 1055-56. However, the Court did not rule, did not even imply, that any limitation should be placed on deposing individual unit owners. *Id.* at 1055-57. After all, if contrary evidence was available to the defendants in *Milton*, it follows that the evidence could be brought out in the defendants' case at trial. What the HOA seeks to do here is constrain the Defendants' ability to discover contrary evidence which may exist to combat the claims of the few representatives the HOA will agree to produce. The HOA's attorneys have the opportunity to talk to all of the unit owners so that they can collect factual information and discrepancies to tailor their case for trial. The Defendants are entitled to an equal playing field.

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[21] (A.R. 1101-02 at 25:7-11, 26:16-27:7, 28:20-24; A.R. 1105 at 41:9-14; A.R. 1108-10 at 52:7-10, 56:17-23, 58:20-60:5; A.R. 1114-15 at 77:24-78:15; A.R. 1118-21 at 90:14-91:2, 92:22-25, 96:14-97:5, 98:21-99:7, 103:4-7, 104:8-16; A.R. 1123 at 111:18-21; A.R. 1125 at 118:3-6; (A.R. 1382-83 at 51:14-24, 53:2-8, 55:9-12; A.R. 1386-87 at 66:22-67:3, 73:14-74:2; A.R. 1391-92 at 86:1-8, 92:13-21; A.R. 1395-97 at 103:15-25, 107:25-108:6, 109:16-110:2, 110:20-111:20, 112:2-11; A.R. 1400-02 at 122:14-21, 129:14-18, 131:5-10.)

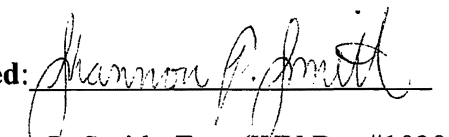
In addition, the *Milton* case dealt with common defects which affected all, or nearly all, of the units within the condominium. In this case, only 25% of the 84 unit owners have complained of problems with their HVAC systems. (A.R. 1-8, 52-56.) When questioned during deposition, one of those owners stated that she does not have a problem. (A.R. 1384 at 61:3-8.) Also, the HVAC claims and the general claims do not come in a one-size-fits-all model. Some of the deposed representatives complained of cracks in the drywall, some complain of leaks, some of frozen pipes, some of lost rents, some of the quality of the dishwasher, etcetera. (*See generally* A.R. 612-1449.) In short, there are a variety of different complaints, and the Defendants should be given an opportunity to explore these differences through the broad discovery process allowed under the West Virginia Rules of Civil Procedure. In addition, there is certainly a value to deposing those unit owners who are <u>not</u> complaining. For instance, a unit owner who says, "I got the product I expected and I disagree with this lawsuit" may be relevant, and there is no proper justification for precluding the Defendants' search for such witnesses.

The parties are entitled to a "liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Sticklen v. Kittle*, 168 W. Va. 147, 163, 287 S.E.2d 148, 157 (1981) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957) (footnote omitted)). A liberal opportunity for discovery is much more than that proposed by the HOA. It may be more expensive to defend additional depositions, but the expense is directly proportional to the scope of the HOA's claims. In this case, the HOA's claims were not limited to only one unit or one unit owner; they extend to all common areas, many different units, and even different periods of time. (A.R. 57-90.) The Defendants are entitled to search for the truth from relevant individuals, and that search cannot be limited to the hand-picked representatives

chosen by the HOA who have not (based upon the depositions taken to date) had complete information. A "representative sample" of unit owners is simply not sufficient to meet the HOA's evidentiary burden and would severely impair the fact finding ability of the Defendants.

CONCLUSION

As detailed above, the Circuit Court's answers to the certified questions were properly answered, and this Court should answer the same equally.

Signed: 

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CERTIFICATE OF SERVICE

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