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The Litigation Committee or, Why You Shouldn't Have All Owners Vote On a Settlement Proposal

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A colleague of mine recently shared a story where a file he inherited had a Condominium Board reluctantly continuing litigation against a Developer. Some time ago the Developer had formally offered a settlement proposal, and this proposal had been put to the owners for a vote. The Board tended to think it was a good idea to accept the settlement proposal, but the owners rejected it. Now they are continuing litigation after spurring the chance to pocket some money and put this behind them.

Condominium Boards may think that it is fair that the owners should get a voice in accepting or rejecting any settlement proposal, particularly a settlement in an action against and developer or contractor involving expensive repair of deficiencies. After all, each owner is a shareholder in the Corproation and the result of the litigation affects their interests. However, I'm here to tell you that this is a bad idea. Unless you live in a very small condominium project such as a 4-plex, a small sub-set of owner should handle all matters dealing with any large-scale litigation.

To understand why, consider the following scenario.

The Condominium discovers that there is building envelope leaking issues that is going to require remediation in the amount of approximately $1 million. They sue the developer over these deficiencies, and in the course of litigation the developer offers a settlement of $600,000.00. This is put to the owners, and they might feel that this is well under what they should be entitled to. After all, the mediation is going to cost them a million dollars. Why should they settle for any less than that?

Well, there may be several reasons why the Condominium may want to settle for a lot less than the full amount of the claim. There might be issues with limitations such that the developer might have a complete defence to the claim and are not liable for anything. There also might be issues with the developer being a shell company or having limits of insurance that are well under the amount of the claim, making collecting upon a judgment an issue. There might also be an issue with the Corporation not taking reasonable steps to mitigate the damage by conducting repairs sooner, as if they did so the cost of repair would be much less. Last, even if the Corporation has a very strong case, they are going to take years of costly litigation including questioning, hiring experts and trial in order to get any sort of Judgment in this matter. In short, there are several reasons why it might be advantageous for a Corporation to accept the settlement, but those reasons might be complicated and

require a fair bit of analysis and explanation.

The above should illustrate that deciding whether to make or accept a settlement offer, or taking any steps in a lawsuit, requires the weighing of several factors. You'll need to have a comprehensive understanding of all the facts and even delve into legal concepts which might be difficult to understand (if you ever want to feel needlessly confused, just Google "doctrine of pure economic loss"). That is not to say this is an impossible taks, and in my experience most Condominium Board members can get an intuitive grasp of legal issues at play if they are explained to them properly and they have the chance to ask questions. It is one thing, however, to explain this to a small group of Board members who are up-to-date on the status of the legal action; it is quite another to explain this to a large group of owners who may or may not know the history.

My typical recommendation to Condominium Corporations when dealing with big litigation matters like developer deficiencies is to appoint a litigation committee of three members. This committee should be delegated unfettered discretion to settle matters by the Board and make decisions in the litigation. The litigation committee members can focus on the litigation and should not be expected to contribute to other Board business to the same extent as the remaining members, who should be expected to pick up a little of the slack given the commitment that the litigation committee may entail. I find three to be the ideal number as there's always a tie-breaking vote if decisions have to be made, and it is small enough so that if each member takes the time to familiarize himself or herself with the action and the issues they should be able to understand what is in play and make informed decisions when the time comes.

This is not to say that the ownership shouldn't be apprised of the litigation. I recommend giving status reports to the owners when each major step occurs in the litigation and a general update on the status at each AGM (being careful not to give away any strategy or privileged information as you have to assume that the opposing side may get their hands on the report). However the major decisions in the litigation should not be put to the ownership at large, and the best response to any owner who is taking a very close interest in the litigation would be to invite them to put their name forward at the next AGM to be a Board member and volunteer their services for the litigation committee.