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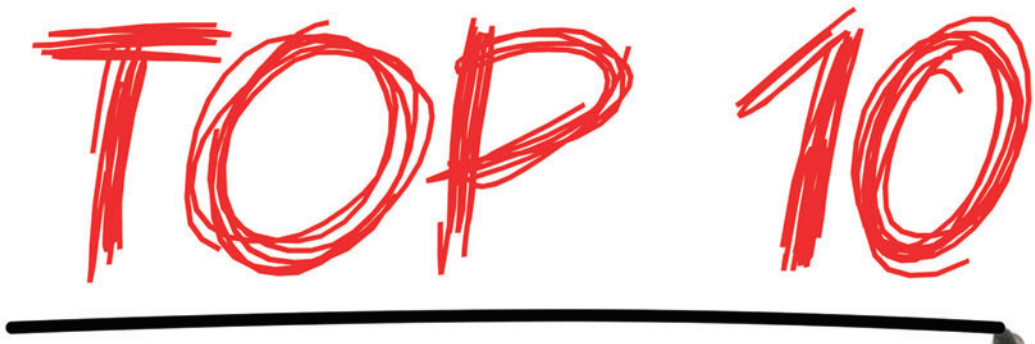

Questions Regarding Condominium Construction Defects

The following are the 10 most frequently asked questions by Condominium Associations that are facing potential claims for construction defects:

By Thomas Code, Esq.
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1 What is a construction defect?

Construction defects can be classified into three categories: defective building material; faulty workmanship; and improper design.

2 Who is responsible for the construction defect?

The developer, design professional, and contractor may all be responsible. Historically, the law has recognized that the various participants in the construction process are liable only for those defects that fall within their respective areas of expertise. For example, a contractor who builds a structure according to the design supplied by the owner generally is not responsible for the adequacy of the design.

3 What warranties should the Association be aware of?

In addition to express written warranties received from the developer and contractors, the Association should be aware of warranties provided by the Condominium Act. The Condominium Act provides implied warranties in favor of individuals who purchase their units from the developer. The warranties as to the developer, run 3 years from completion of the building, (usually measured by the issuance of the Certificate of Occupancy) or 1 year from

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transition of control from the developer to non-developer unit owners but in no event more than 5 years from completion of the building. There is also a common law implied warranty under which the Association can make claims for a period up to 4 years from transition.

4 How do we prove that a construction defect exists?

In most cases, the Association will need to hire the services of an independent expert. Experts are those who have the necessary training, education, and experience to give testimony in court as to the cause of a defect. For example, if your roof leaks, a roof expert who has designed roofs, evaluated other defective roof systems, and knows how roofs should be built would be in a good position to testify. A general or roofing contractor can repair a damaged roof, but he may not be the best person to act as the expert.

5 What kinds of damages can we recover if a lawsuit is filed?

Generally, the measure of damages is the cost to correct, repair, or replace the defective building component.

6 How long do we have to file a lawsuit?

A lawsuit must be filed before the Statute of Limitations expires. The Statute of Limitations as to defects which the Association knew of or should have known of through the exercise of reasonable diligence is tolled until time of transition and then runs for 4 years. If there are latent defects, the Statute of Limitations as to those defects commences when the Association knows or should have known through the exercise of reasonable diligence of the existence of the defect and runs for 4 years with an absolute bar of 10 years from the time the building was completed (Statute of Repose), measured as of the date of the Certificate of Occupancy.

7 How much will a lawsuit cost?

The total cost of prosecuting a lawsuit on behalf of the Association will depend on a number of factors, including the nature and amount of damages, the number of parties, and the attitude of the parties. Some lawsuits are settled within a short period of time, while others are not resolved until just before trial. Construction defects lawsuits can be extremely expensive, and close cooperation between the Board of Directors of the Association, property manager, expert, and attorney is necessary to contain the costs as much as possible.

8 Will the Condominium Association insurance cover damages caused by construction defects?

Probably not. The language in most insurance policies excludes coverage for faulty construction, design, workmanship, and/or defective materials. However, disaster coverage such as coverage for flood, earthquake, and hurricane must be evaluated separately as coverage may be afforded under said scenarios.

9 Is the Association required to make repairs while the lawsuit is pending and can said cost of repair be recovered in the lawsuit?

The Association is required to mitigate damages. That is, the Association must take all required steps to protect the property from sustaining additional damage. These costs are usually recoverable if a lawsuit is filed. However, if temporary repairs are made, said repairs must be carefully evaluated with the Association's expert to assure correct documentation of the temporary repairs. Furthermore, it is recommended that notice be given to all parties of the proposed repairs to be made.

10 Should the Association allow the developer and/or the contractor to make necessary repairs?

The proposed repair should be evaluated by the Association and its expert. If the proposed repair meets the approval of the Association's expert, the Association should allow the repair unless other reasons exist to reject it. The same expert should oversee actual repairs. Once repairs are agreed upon, a proper settlement agreement should be drafted that only releases the developer of liability for the limited and defined repairs being made, and then only after the repairs have proved effective.

Contracting with a Design Professional Requires New Considerations

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New laws govern your rights . . .

Effective July 1, 2013, Florida Statutes Chapter 558 was amended to provide a "safe harbor" to individual design professionals for claims of negligence. Specifically, Florida Statutes §558.0035 states that any design professional "who is employed by a business entity or is an agent of a business entity is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract." Florida Statute §558.0035 also expands the definition of "design professionals" to include geologists in addition to architects, interior designers, landscape architects, engineers and surveyors.

These changes are limited to individual design professionals only, not business entities, and the statute covers only economic damages. The new law does not limit claims for personal injury or property damage. It is also worth noting that §558.0035 will not limit professional negligence claims by parties who have no contract with an individual design professional and/or his or her design firm. The statute does not state that any of these changes are retroactive.

Previously under Florida law, individual design professionals employed by design firms were potentially individually liable for professional negligence, even where the contract for professional services was only between the design firm itself and a property owner. The rationale for originally allowing claims against individual design professionals was based upon the design professional's violation of his or her duty of care to those who may be foreseeably injured.

Now, §558.0035 could significantly limit the types of claims an owner might be able to bring against individual design professionals, provided certain conditions apply. In order for Section 558.0035 to limit liability for professional negligence claims, all five of the following conditions must be met:

1. The contract is made between the business entity and a claimant or other entity to provide professional services to the claimant;
2. The contract does not name as a party the individual employee or agent who will perform the professional services;
3. The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be individually liable for negligence;
4. The business entity maintains any professional liability insurance required under the contract; and
5. Any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

Additionally, the Florida Legislature amended Fla. Stats. §471.023(3), §472.021(3), §481.219(11), §481.319(6) and §492.111(4), to specifically include the limitation of liability contained in Fla. Stat. §558.0035. By incorporating Fla. Stat. §558.0035 into these other statutes as well. A design firm remains liable, up to the full value of its property, for the acts or omissions of its employees, but the individual employees themselves are protected from personal liability if the conditions of Fla. Stat. §558.0035 are met. ***These changes could limit how much an owner may be able to recover for its claims for design defects or professional negligence***.

The statute also places the burden on purchasers of professional design services to negotiate contracts that contain sufficient coverage for potential claims. As a result, property owners, community associations and developers contracting for design services are now burdened with trying to assess the potential liability of the professional design firm.

These issues illustrate just a few of the reasons why owners, associations and developers should consult with a qualified construction attorney before entering into a contract for design services.

Promises, Promises . . .
"GREEN" WARRANTIES
in Construction Contracts

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Many construction contracts contain express warranties. Express warranties are those that are written into the contract (as opposed to implied warranties, which are implied by law). They usually pertain to situations where non-conforming work or materials are found, and may put an obligation on a contractor to fix the issue. The most common warranties are those that cover the quality of materials, the conforming of work to the contract documents (and/or design specifications) and that the work performed is free of defects. Most warranties run for a defined period of time.

Obviously, an owner of a green construction project will want as many warranties as possible, and warranty periods for as long as possible. The contractor will want to be careful as to what it is warranting, and limiting what it has to do if there are problems with the green aspects of the building. For example, contractors may want to avoid promises about the performance and functionality of the building. Statements about better indoor air quality, occupant health improvements, and energy costs may depend in part on factors outside the contractor's control. Similarly, promises that building "green" will make the building more valuable are tougher to keep if the real estate market is poor, or demand for green buildings is not there. These statements may appear in the contract, but might also appear in brochures, prospectuses and other promotional materials.

> *"An ounce of performance is worth pounds of promises."*
>
> Mae West

In addition, both owners and contractors will want to ensure that any manufacturer's warranties for green products are passed on to the owner. If so, contractors should ensure that its liability for those warranties is cut off. Also, many construction disputes concern the issue of whether a defect is the result of poor construction by a contractor, or a failure to maintain by the owner. A third party maintenance contract during the contractor's warranty period may help ensure that the proper maintenance is occurring, and may alleviate the aforementioned dispute.

The above are just several examples of the need for a clear plan when it comes to providing or receiving warranties on a green building project. It is important that the warranty issue is addressed at the very beginning of a project. Also parties should make sure the wording of the warranties is precise and that they comply with state and local laws.