Design Professional Liability: Strategic Moves to Minimize Risk in Condominium Conversions

by Steven B. Lesser*

A design professional that becomes involved with the design of a basic mid to high-rise apartment building has little risk of future lawsuits because many of those risks can be mitigated by a written contract with the owner. For example, contract clauses can be used to restrict recovery to available insurance coverage, specified dollar amounts, and/or a remedy that requires the design professional to correct their mistakes at no additional fee.[1] However, the same is not the case if the apartment building is converted to condominium. Once a conversion occurs, the liability of the design professional expands to face exposure from non-privity owners seeking damages for design defects.[2]

One challenge is to create an opportunity for the design professional to participate in the owner's decision-making process. Very often the decision to convert may be driven by the owner's financial concerns based on market conditions, without regard to the ultimate risk exposure to the design professional.[3] To guard against that risk, one approach would be to negotiate a contract remedy in the event the owner unilaterally decides to convert.

Although there is no fail-safe plan or magic bullet solution, this article will address some strategic options that a design professional should consider when negotiating a contract with the owner. Keep in mind that not all of these concepts can be enforced in every jurisdiction and it is imperative to refer to state specific laws and regulations.

1. *The contract with the owner should require the design professional's written express consent to convert as a condition precedent before the owner changes the use from an apartment building to anything else and provide remedies for failure to do so.* To secure this right, the design professional should insist on certain remedies if the owner decides to convert during the course of a project. For example, should the owner fail to acquire the design professional's consent, certain remedies will automatically be triggered such as: i) an indemnification, hold harmless, and duty to defend obligation; ii) payment of stipulated damages; or iii) the right to an injunction to stop the conversion process from occurring. The contract should also require that in the event of a conversion, the owner must, as a condition precedent, conduct an inspection of the property by an independent third-party architect/engineer to discover the nature and extent of any potential defects that may expose the design professional to liability. This due diligence inspection would ultimately serve as a foundation for discovered defects to be corrected before the design professional is required to consent to the conversion. The contract could also provide for a combination of the above remedies such as for payment of a stipulated damage amount to the design professional in exchange for its consent to convert.

2. *Insist on a clause that prevents assignment of the contractual rights of the owner as to the design professional.* The dynamics of litigation and claims often result in unpredictable events. One option often exercised by an owner is to settle a potential lawsuit over design and construction defects by including an assignment of its contractual rights against the design professional. The assignment is typically included as part of an overall settle-

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ment package with a claimant. To guard against this possibility, the design professional should include a clause in its contract with the owner that prevents any assignment of rights, claims, or causes of action against a design professional.[4]

3. *Indemnification, Hold Harmless, Duty to Defend & Guarantee.* The design professional should obtain from the owner a promise to acquire its written consent to perform a conversion. Lacking such a promise, the contract would require the owner to indemnify, hold-harmless, and defend the design professional from any liability that arises from a condominium conversion that occurs absent the design professional's express written consent. The duty to defend is critical as it is typically broader than the duty to simply indemnify and would then cover defense costs during the litigation as opposed to being triggered once the litigated dispute has been concluded.[5] However, the obligations of the owner as referenced above may provide the design professional with a false sense of security given the current economic climate of real estate development. This is because the owner is often a single purpose entity without assets beyond the investment in the project. To provide greater assurance, it would be best to acquire an individual guarantee of these obligations from a principal of the owner. The guarantee would only be triggered where a conversion occurs without consent of the design professional. The best time to request this accommodation is at the outset of the project. The argument is that *"If you Mr. Owner have no intent to convert to condominium, why not provide me with the assurance?"*

4. *Instruments of Service.* Many times, the project begins as an apartment project and then midway through construction a decision is made to convert to condominium.[6] This action results in an increased risk to the design professional. Unlike past standard form agreements,[7] the current AIA B101-2007[8] does not prohibit the owner from using the design professional's Instruments of Service[9] for altering or adding to the project.[10] To counter standard AIA language, a restrictive clause should be included to prohibit the owner from further use of the "instruments of service" if a conversion occurs. Under that scenario, the design professional has created significant leverage over the owner by the threat of revoking the license to use the instruments of service. If the design professional has the right to revoke the license, the ongoing construction could potentially come to a halt because the permitted plans and /or specifications can no longer be used.[11] Moreover, the design professional would be entitled to assert a variety of remedies against the owner including the recovery of statutory and actual damages, impounding or destruction of the infringing copies, and injunctive relief.[12]

5. *Project Insurance.* Professional liability project insurance would provide some relief to the design professional in the event of a conversion to condominium. This insurance provides coverage for the *specific project being converted* as opposed to a standard professional liability policy which may be depleted due to errors and omissions committed by the design professional on unrelated projects. Certainly the insurance discussion becomes more relevant when the owner has advised the design professional, at the outset of the project, of an interest to ultimately convert to condominium. In order to guard against expanded liability, the design professional may be successful in convincing the owner to either pay the entire professional liability insurance premium or a portion of it in the event of a conversion. The design professional may also acquire comfort by restricting the owner's contractual damage recovery against the design professional to the policy limits of insurance. Although this insurance coupled with a limitation of liability clause in a contract with the owner would not bind third-parties not in privity, the limits may be sufficiently high to cover any resulting claims.

6. *Peer Review or Independent Plan Review.* In some jurisdictions, the Economic Loss Rule (ELR) will not bar statutory causes of action. For example, in Florida, a non-privity participant can pursue the design professional for failure to design in accordance with the applicable building code based on Section 553.84, Florida Statutes. Recognizing this avenue of relief, it may be appropriate to require the owner to undertake a peer review of the design documents to point out

building code design issues, conflict or coordination issues with the drawings and specifications, as well as ADA compliance issues.[13] This process may identify areas of vulnerability to design liability that could be corrected during the design and construction phases. Through this process, potential liability to third parties that reside in a converted condominium building could be eliminated due to code violations.

7. *Study state statutes and common law to become familiar with the ELR.* In general, the term "economic loss" is defined as losses other than those resulting from an injury to the plaintiff, his person, or other property.[14] Essentially, economic losses are disappointed economic expectations.[15] The ELR is a judicially created doctrine adopted by a majority of jurisdictions that prohibits recovery based on tort for economic losses where a contract exists, and no established exception applies.[16] This is because contracting parties are expected to rely on what they originally negotiated and it would be unfair to simultaneously allow a suit in tort that expands rights and remedies beyond those specified in the written contract. In formulating an overall strategy to protect the design professional, counsel must become familiar with applicable state statutes and common law to determine whether a particular jurisdiction will apply a strong or relaxed interpretation of this rule.[17] In some states, the ELR has numerous exceptions including the ability of non-privity owners to recover damages from a "professional"[18] based upon a negligence cause of action or for statutory claims such as for violation of the state minimum building code.[19] In Florida, for example, unit owners of apartment buildings can sue design professionals for negligence in the absence of privity.[20] As discussed, this is significant because the design professional, whose risk was initially fairly limited, suddenly would be exposed to unbridled liability. Other exceptions to the ELR include physical injury, damage to separate property, statutory tort, and fraud in the inducement.[21]

8. *Assess risk by understanding the applicable statutes of limitations and repose in the jurisdiction.* The majority of states have a 10-year statute of repose which requires that any action be brought within 10 years, generally from the date a construction project is completed or the issuance of a certificate of occupancy.[22] Otherwise, the action is time barred. From the design professional's standpoint, and for strategic purposes, it is important to understand and be familiar with *when* the statute of repose begins to run in a conversion. The standard 2007 AIA A201 General Conditions of the Contract for Construction stipulates that the time begins to run on completion, while state statutes often run on the latest of other events such as actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.[23] Still, some jurisdictions have particular statutes that govern the conversion process and provide for certain statutory causes of action or the posting of converter reserve accounts.[24] Some jurisdictions permit a cause of action to be asserted from the general date of conversion as opposed to the date when the building is considered complete. The design professional should negotiate contract language with the owner to define the event that triggers commencement of the statute of limitations and repose to the earliest possible date.[25] In many instances, the statute of repose has long been expired against participants such as the design professional (except the developer) in a conversion setting, but that would not necessarily prevent the developer from asserting a claim against the design professional for indemnification or contribution where jurisdictions permit this practice. In those situations, and as a preventative measure, the contractual disclaimers, indemnity, hold-harmless, and duty to defend obligations as well as limitation of liability clauses should be included in the contract between the owner and the design professional. Note that most states will not allow an exculpatory clause to extinguish liability of a design professional but rather will enforce a limitation of liability clause. Such a clause should be limited to an amount such as the fee paid or "not to exceed $50,000.00."[26]

9. *Use of Notice and Right to Cure Statutes*. Many jurisdictions such as Florida have "Notice and Right to Cure Statutes."[27] In Florida, Chapter 558, Florida Statutes require that a procedure be followed before a lawsuit can be filed. If a lawsuit is filed before the process is complete it must be "stayed" by the court. The procedure applies to all participants to the design and construction unless specifically waived by contract (between the owner and design professional) or by agreement between non-privity claimants and the design professional.[28] The design professional should never waive this process in any contract with the owner, and if possible, he should insist that the owner include the provision in all condominium formation documents to bind purchasers to the process. The notice and right to cure process facilitates an inspection and understanding of the issues before litigation is filed. So if the owner converts and the design professional receives a "Notice of Claim" from non-privity unit owners, this process could provide the design professional with two options. First, an opportunity to understand and negotiate a resolution with the claimant directly, and second, an opportunity to convince the owner to negotiate a resolution of the issue on its behalf. This strategy is best employed when the owner already has a contractual obligation to indemnify, hold harmless and defend the design professional in the wake of a conversion. If a specific jurisdiction requires that a "Notice and Right to Cure" provision be included in a contract to enforce it, then the design professional should insist that the owner include this type of provision in its purchase agreements and condominium documents if, in fact, a decision to convert is contemplated in the future. This approach only works if the design professional has sufficient bargaining power over the owner to demand this relief before the owner decides to convert the project to condominium.

10. *Other Ideas*. Other approaches exist to provide added protection to design professionals in claims brought by owners and potential third parties. For example, the contract between the owner and design professional should provide that if the owner elects to directly pursue claims as to the design professional, that a "Certificate of Merit Affidavit"[29] from another design professional be acquired as a condition precedent to pursuing such a claim.[30] This practice may prevent the assertion of baseless claims. The process may also enable the design professional to more meaningfully assess its liability exposure for errors and/or omissions early in the claims process. The design professional should also suggest to the owner that the documents that ultimately form a condominium association include disclaimers of damages arising from "sound transmission," "mold," "consequential and loss of use damages."[31] In addition, the design professional should insist in its contract with the owner that all ultimate condominium documents prepared in the future require that no lawsuit be brought for design and construction defects in the absence of "75% unit-owner consent."[32] This often poses a huge obstacle to unit owners seeking relief because it is often difficult to obtain that high percentage of consent to allow a lawsuit to be filed. These provisions may also be helpful in discouraging claims by non-privity condominium associations against the owner which in turn, may reduce third party claims ultimately asserted against the design professional. It is important to note that jurisdictions differ as to the enforcement of these types of provisions.

Conclusion

Design professionals should endeavor to negotiate away risk for exposure to condominium design claims in their contracts with owners. This strategy can only be successfully employed at the outset of the relationship when a decision to convert is not on the horizon. By negotiating to include strategic provisions in contracts with owners dealing with limitation of liability, peer review, instruments of service, and third-party inspections, the risk to the design professional in a conversion setting can be mitigated and perhaps eliminated. Special care should be taken by legal counsel to understand how various jurisdictions interpret and enforce the ELR as well as potential tort causes of action and applicable statutes in the wake of a conversion to condominium. Many avenues exist to minimize risk

and the best strategy is to recognize them early and make best efforts to deal with them.

Notes

[1] Courts can reasonably be expected to consult general rules of contract construction and public policy to address the issue of liability limitations:

> Lawyers representing engineers, architects, and contractors can and should minimize the exposure of their clients by drafting and negotiating appropriate protections in construction agreements. Limitation of liability clauses have increasingly become 'a fact of everyday business and commercial life' for allocating unknown or indeterminate risk. Professional engineering societies have approved contractual limitations of liability as an 'acceptable response to the liability crisis that threatens the profession.'

Michael S. Zetlin & Francine M. Chillemi, *Building a Safe Haven: Clauses Imposing Monetary Limits on Designer Liability*, 20 Construction Lawyer 5 (Jan. 2000).

[2] Joseph A. Demkin, *The Architect's Handbook of Professional Practice* 352 (John Wiley & Sons, Inc. 14th ed. 2008) (condominium projects are notorious for generating disputes and claims). It is important to note that the decision to convert could occur at various times during the life of a project. Most frequently the conversion either occurs during construction or following completion but before the expiration of the statute of limitations or repose. In addition, the decision to convert to condominium can be made by a subsequent owner that operates the apartment building for a period of time but later decides a conversion would be advantageous. Although the concepts discussed here could apply, that specific situation is beyond the scope of this article.

[3] The condo conversion climate will play a role in the number of condominium conversions sought by owners:

> Prior to the subprime debacle in 2007, the market for luxury condo conversions was red hot. From 1997 to 2006, the average price for condos and cooperative apartments tripled from $430,000 to a record $1.3 million, according to appraisal firm Miller Samuel. In 2006, the number of condo and co-op conversions filed with the New York State Attorney General more than tripled from 2002, from 299 to 929.

David Jones, *Playing by a New Set of Rules for Condo Conversions*, The Real Deal (Jan. 2, 2008, 1:34 PM), http://therealdeal.com/newyork/articles/8470.

[4] *Allhusen v. Caristo Construction Corp.*, 303 N.Y. 446, 103 N.E.2d 891 (1952) (stating contract prohibiting assignment of rights thereunder is not violative of public policy and a statute providing that a person may transfer a claim does not preclude parties from contracting otherwise).

[5] *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal.4th 541, 9 Cal.Rptr.3d 721, 187 P.3d 424 (2008) (holding subcontractor's defense duty was a continuing one which arose when the action was brought and stating that the insurer's duty to defend is broader than its duty to indemnify).

[6] Fla. Stat. § 718.618(9) provides that implied warranties necessary for new condo construction are not required if a building is converted during construction. While good for the contractor, this does not change the fact that the designer(s) are now exposed to liability in tort from non-privity participants.

[7] The AIA Document B151-1997, which expired in 2009, stated:

> The Owner shall not use the Instruments of Service for future additions or alterations to this Project or for other projects, unless the Owner obtains the prior written agreement of the Architect and the Architect's consultants. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's consultants.

AIA Document B151-1997 § 6.3.

[8] AIA Document B101–2007 is a "one-part standard form of agreement between owner and architect for building design and construction contract administration. AIA Document B101–2007 was developed to replace B141–1997 Parts 1 and 2, and B151–1997 (expired 2009), but it more closely follows the format of B151–1997." *B-Series Contract Documents: Owner/*

Architect Agreements, The American Institute of Architects, http://www.aia.org/contractdocs/AIAS076745 (last visited July 5, 2011).

[9] Defined in the *Architect's Handbook of Professional Practice* to encompass "drawings, specifications, and other documents prepared by the Architect as part of the design process." *The Architect's Handbook of Professional Practice* 726 (John Wiley & Sons, Inc., 15th ed. 2001).

[10] See AIA Document B101-2007 § 7.1 - 7.4.

[11] For a further discussion of ownership or licensing of instruments of service *see* Mary Jane Augustine & Christopher S. Dunn, *Consequences of Ownership or Licensing of the Project Drawings—If You Pay for It, Do You Own It?,* 28 Construction Lawyer 35 (Summer 2008).

[12] 17 U.S.C.A. §§ 502 - 504. Typically, it would be necessary to demonstrate that there is no adequate remedy at law before an injunction is justified. See *Cavanaugh v. Looney*, 248 U.S. 453, 39 S.Ct. 142, 63 L.Ed. 354 (1919).

[13] Peer review or independent plan review allows for an opportunity to evaluate the plans for code compliance prior to submission to the local permitting authority.

> This process can serve as an aid to both design professional and local authority; if the independent reviewer finds the plans compliant with the code, that decision is an affirmation of the originating design professional's work and also gives the local authority the assurance of two design professionals who have addressed the code issues, not just one.

Kristine A. Kubes, *The Design Professional's Project Self-Certification: A Key to Efficiency or Liability?* 26 Construction Lawyer 5 , 8 (Fall 2006).

[14] R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1793 (2000).

[15] *Indemnity Ins. Co. of N. Am. v. American Aviation, Inc.*, 891 So.2d 532 (Fla. 2004).

[16] *Id.* at 536; see also *Alejandre v. Bull*, 159 Wash.2d 674, 153 P.3d 864, 868 (2007): "In short, the purpose of the [ELR] is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the [ELR] applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims." *Amin Realty, LLC v. K & R Construction Corp.*, 306 A.D.2d 230, 762 N.Y.S.2d 92, 93 (2003); *Bocre Leasing Corp. v. General Motors Corp.*, 84 N.Y.2d 685, 621 N.Y.S.2d 497, 645 N.E.2d 1195 (1995); *7 World Trade Co. v. Westinghouse Elec. Corp.*, 256 A.D.2d 263, 682 N.Y.S.2d 385 (1998); *Comsewogue Union Free School Dist. v. Allied Trent Roofing Sys., Inc.*, 272 A.D.2d 360, 707 N.Y.S.2d 657 (2000); *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th 979, 984, 22 Cal.Rptr.3d 352, 102 P.3d 268, 270 (2004); *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 424, 374 S.E.2d 55, 57 (1988).

[17] The ELR is strictly followed (with few exceptions) in Alabama, Delaware, Florida, Hawaii, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin, and Wyoming.

[18] The Florida legislature has declined to define the term "professional" for purposes of the professional malpractice statute. *Pierce v. AALL Ins. Co.*, 531 So.2d 84 (Fla. 1988). Courts in Florida have thus defined "profession" within meaning of statute of limitations for professional liability as "any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida." See *id.; Garden v. Frier*, 602 So.2d 1273, 1275 (Fla. 1992); *Rocks v. McLaughlin Eng'g Co.*, 49 So.3d 823, 827 (Fla. App. 2010); *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999).

[19] Some states allow for tort recovery under certain limited circumstances resulting in a slightly relaxed following of the ELR. These states are: Alaska, Arizona, Arkansas, Georgia, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Rhode Island, Utah, Washington, and West Virginia.

[20] *Moransais*, 744 So.2d at 984; *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So.2d 9 (Fla. 1990).

[21] See *Robinson Helicopter Co., Inc. v. Dana Corp.*, supra note 16, 102 P.3d 268, 270 (ELR does not bar fraud and intentional misrepresentation claims if independent of breach of contract); *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999) (ELR does not bar statutory causes of action);

In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig., No. MDL-1703, 2009 WL 937256, at *9 (N.D. Ill. Apr.6, 2009) (ELR does not bar statutory claims); *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238 (Fla. 1996) (ELR has not eliminated causes of action based upon torts independent of contractual breach); *Park Ave. Condo. Owners Ass'n v. Buchan Developments, L.L.C.*, 117 Wash.App. 369, 71 P.3d 692 (2003) (statutory cause of action cannot be barred under the ELR).

[22] See e.g., N.J. Stat. Ann. § 2A:14-1.1 (West 2011). The AIA has established its own 10-year statute of repose for all claims running from the date of substantial completion of the Work. Generally in line with the majority of states, "the Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7." AIA Document A201-2007 § 13.7.

[23] Compare *id.* with Fla. Stat. § 95.11(3)(c) (2010).

[24] See, e.g., Fla. Stat. § 718.618 (2010); D.C. Code § 42-1904.08 (1991); N.Y. Unconsol. Law § 26-703 (McKinney 1985).

[25] See *Federal Ins. Co. v. Konstant Architecture Planning, Inc.*, 388 Ill.App.3d 122, 327 Ill.Dec. 827, 902 N.E.2d 1213 (2009) (holding that Article 9.3 of the AIA Contract that specified the accrual date of the statute of limitations would control over the statutory accrual date).

[26] *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 198 (3d Cir 1995); *Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316 (11th Cir. 1985). In *Valhal*, the exculpatory clause limited the architect's liability to the fee paid or $50,000 but provided an option to increase insurance liability by the owner paying a surcharge for the increased insurance premiums.

[27] Fla. Stat. §§ 558.001 - .005 (2010); Idaho Code Ann. § 6-2503 (West 2011); Kan. Stat. Ann. § 60-4706 (2010); Nev. Rev. Stat. Ann. § 40.647 (West 2010); N.H. Rev. Stat. Ann. § 359-G:4 (2011); S.C. Code Ann. §§ 40-59-810, - 860 (2010); S.D. Codified Laws § 21-1-16 (2007); Tex. Prop. Code Ann. § 27.004 (Vernon 2011); W. Va. Code Ann. § 21-11A-1 (West 2011).

[28] See Fla. Stat. § 558.002(8). The Florida statute applies to all types of construction projects with narrow exceptions such as those associated with public transportation projects.

[29] See, e.g., Colo. Rev. Stat. § 13-20-602 (2003); Ga. Code Ann. § 9-11-9.1(a) (2002); N.J. Stat. Ann. §§ 2A:53A-27 (West 2003); see also Ellis I. Medoway & William L. Ryan, *The Affidavit/Certificate of Merit Requirement: Avoiding Potential Pitfalls*, 14 Construct! 4 (ABA 2005): "Like New Jersey's Affidavit of Merit Statute, California's Certificate of Merit Statute is intended to serve the dual purpose of insulating licensed professionals from potential damages unless the appropriate affidavit/certificate is timely filed and from incurring the expenses and inconveniences of litigation."

[30] A typical "Certificate of Merit" clause is reproduced below:

> The Client shall make no claim for professional negligence or breach of contract, either directly or by way of cross complaint against Design Professional and employees unless the Client has first provided Design Professional with a written certification executed by an independent consultant currently practicing in the same discipline as Design Professional and licensed by the same state. This certification shall: a) contain the name and license number of the certifier; b) specify the acts or omissions that the certifier contends are not in conformance with the standard of care for a consultant performing professional services under similar circumstance; and c) state the basis for the certifier's opinion that such acts or omissions do not conform to the standard of care. This certificate shall be provided to Design Professional not less than thirty (30) calendar days prior to the presentation of any claim or the institution of any judicial proceeding.

[31] William K. Jones, *Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort*, 59 U. Cin. L. Rev. 1051, 1102 (1991) (In the absence of privity contract doctrines of assignment or third-party beneficiaries should be applied and *disclaimers* should be permitted as long as full disclosure is made). See generally Gregory K. Morgan & Albert E. Phillips, *Design Professional Contract Risk Allocation: The Impact of Waivers of Consequential Damages and Other Limitations of Liabilities on Traditional Owner Rights and Remedies,* 33 J. Coll. & Univ. Law 1, 7 (2006).

[32] Some condominium documents have called for 90% unit owner consent prior to instituting an action. See *Board of Trustees of the Old Stone Bridge Acres*

Condo. Trust v. Longview Realty Trust, No. 06CV3878F, 2008 WL 442334 (Mass. Super. 2008), *aff'd sub nom. Trustees of Old Stone Bridge Acres Condo. Trust v. Terrill*, 75 Mass.App. 1106, 914 N.E.2d 361 (2009).

Architects/Engineers

Continuous Representation Doctrine Does Not Toll Statute of Limitations Where Engineer Was Contacted Over Two Years After Project Was Completed and Asked to Assist With Design Problems

Malpractice Statute of Limitations Applies

City of Binghamton v. Hawk Eng'g, P.C., 85 A.D.3d 1417, 925 N.Y.S.2d 705 (2011)

Holdings

- The malpractice, rather than contract, statute of limitations applies to owner's claim of a defective design.
- The statute of limitations was not tolled by the continuous representation doctrine where the owner had contacted its engineer over two years after project completion and asked it to review its design as part of the owner's efforts to address problems that arose with the structure.
- The malpractice statute of limitations began to run when the engineer submitted its final bill for the design, where the engineer had no administrative obligations.

Summary of Decision

In 2003, a city hired the defendant engineering firm to provide a design for a bridge rehabilitation project. Defendant submitted its plans in September 2005 and submitted its final bill in November 2005. The bridge was completed in October 2007.

In December 2007, the Department of Transportation (DOT) discovered cracking and recommended a check of the design. The city hired another engineering firm to perform tests. The tests revealed inadequate strength in part of the structure. In March 2008, the city reported these findings to defendant and requested that it review its design computations. Defendant retained a third engineering firm to perform a review. The third engineering firm identified design errors and recommended repairs. In June 2008, the city asked defendant to pay for these repairs. The DOT then found additional cracking in the bridge. Plaintiff again asked defendant to pay for the necessary repairs. Defendant turned the matter over to its attorney and insurance carrier.

In April 2009, the city sued defendant for breach of contract, negligence and professional malpractice. Defendant moved for summary judgment based on a three-year statute of limitations applicable to malpractice actions, N.Y. CPLR § 214(6). The trial court granted the motion, finding that the three-year malpractice statute of limitations applied and that the city's cause of action accrued no later than November 2005.

Affirming, the appellate court first ruled that plaintiff's claims were governed by the three-year malpractice statute of limitations, not the six-year contract statute of limitations. Plaintiff argued that the contract statute of limitations applied because defendant had a contractual obligation to correct errors in its plans. The court rejected this argument, pointing out that plaintiff did not allege damages based on a breach of this contractual provision; instead, the city's complaint alleged that defendant breached the contract by violating a contractual "duty and obligation to use ordinary skill, care, and diligence in rendering their professional services." Such a contract claim comes within the malpractice statute of limitations; see *In re R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co., Inc*,, 3 N.Y.3d 538, 788 N.Y.S.2d 648, 821 N.E.2d 952 (2004), 26 CLR 7 (2005) (notwithstanding the owner's claim that its architect breached a contract duty to comply with the building code, the claim sounds in malpractice and is subject to the three-year statute of limitations).

Plaintiff argued that the malpractice claim accrued when the bridge was completed in Octo-

