CONSTRUCTION NOTES

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Recent Developments in Construction Law

Changes to Building Inspection Requirements under Florida's Condominium Act, and Warranty Issues to Consider

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On October 1, 2008, several amendments to the Florida Condominium Act went into effect. For example, Florida Statute § 718.113 will now contain a sixth subsection that requires all condominiums with buildings four-stories or higher to be inspected by an engineer or architect every five (5) years. The engineer or architect will be required to write a report commenting on the required maintenance, useful life and replacement costs of the common elements. (The new inspection and reporting requirement can be waived by a majority vote at a duly noticed meeting.) This new law will force the targeted condominium associations to proactively address ongoing maintenance and repair responsibilities for high-rise buildings and not allow them to bury their head in the sand.

While the new law applies only to associations with buildings four-stories or higher, all condominium associations should consider engaging the services of an engineering or architectural consultant at least every five years to get a report on the physical status of their buildings and the improvements (such as a pool or clubhouse).

Most condominium associations hire an engineer or architect to inspect and report on the status of a building and the improvements immediately after turnover from developer control. The initial turnover report is often used to identify what the developer may have done incorrectly during the construction process. Florida's Condominium Act grants broad implied warranties of fitness and merchantability from the condominium's

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developer to the unit owners and the association (as to the common elements). Identifying construction defects within the statutory warranty period, whether through an engineering report, architectural report or otherwise, is important for such warranty claims.

Nevertheless, there are times when what a developer does incorrectly or fails to do during construction may not manifest itself until the statutory warranty period has expired. For example, some defects are not discovered until someone complains about a problem; such as a roof leak. The association then typically hires a consultant or contractor to address the issue. Condominium associations frequently encounter situations wherein they are making claims on behalf of our association clients for breaches of implied warranties, even though the warranty period has officially "expired." Although we have been successful in arguing that such defects existed during the warranty period, but due to their latent nature were not discovered until the warranty period expired, an association must be careful not to sit on its hands if it suspects or knows there is a problem.

In addition to issues concerning expiration of the applicable statutory warranty as to a construction defect, condominium associations are also subject to what is known as statutes of repose. Simply put, in Florida a statute of repose bars any construction defect claim, whether latent or not, if a lawsuit for such claim is not brought within ten (10) years of issuance of the certificate of occupancy for that particular building. Consequently, another potential issue facing a condominium association is identifying a construction defect before expiration of the applicable statute of repose. Unfortunately, many associations do not conduct follow-up engineering inspections until they know of a problem. Thus, the association may be precluded from bringing a claim against the developer if too much time has passed.

For those condominium associations nearing the ten (10) year anniversary of receiving a certificate of occupancy, it may be prudent to enlist the services of an engineer or architect to inspect the common elements and ensure that there are no latent defects for which the association might have a claim against the developer. For those condominium associations that received their certificates of occupancy within the last five (5) to ten (10) years, now would be a good time to consider hiring a consultant to report on the status of the maintenance, repair and replacement of the common elements. Statue or repose problems may potentially be avoided. More importantly, however, the association can ensure that its building is functioning as intended. ■

News & Notes

Steven B. Lesser, Esq. and **Belinda Bacon, Esq.** co-authored For Better of Worse: The AIA Introduces the Initial Decision Maker in its Dispute Resolution Provisions, which was published in *Dispute Resolution Journal*

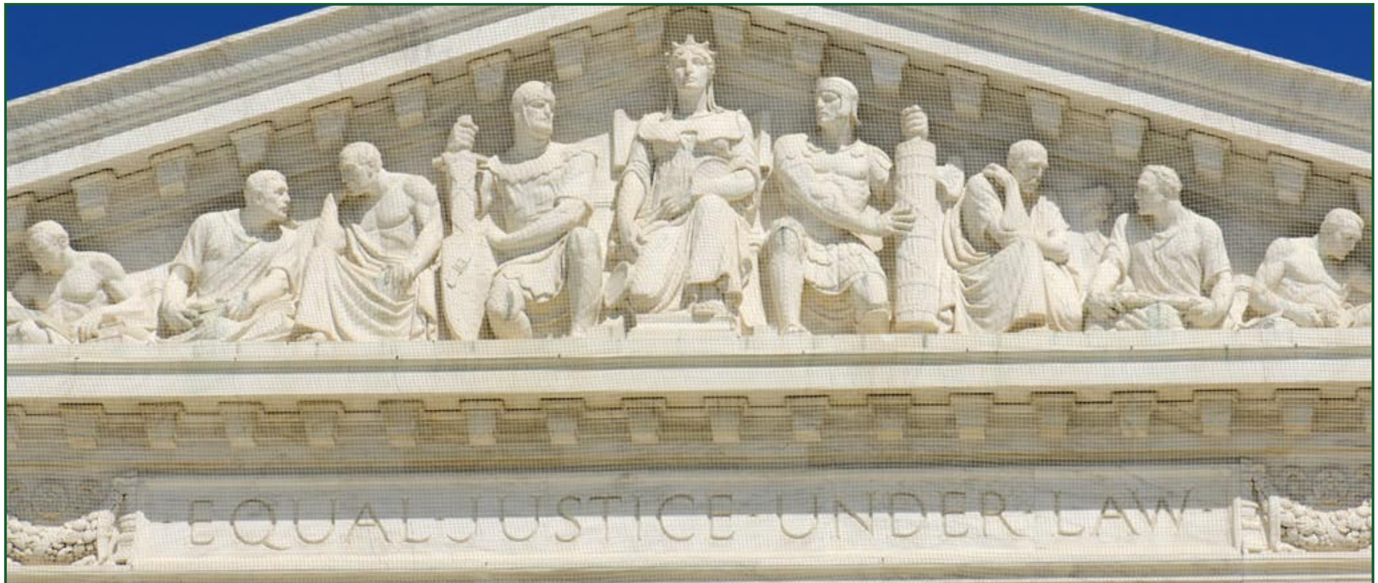
Lee A. Weintraub, Esq. served as chair of The Florida Bar's inaugural Construction Law Institute.

Thomas Code, Esq. recently became Board Certified in Construction Law by the Florida Bar. We are proud to have eight board certified construction lawyers on our team.

William Strop, Esq. obtained a summary judgment in favor of a performance bond surety due to the bond obligee's failure to provide reasonable notice to the surety before unilaterally undertaking to complete the work.

Cases of Note

Important legal decisions that impact owners and construction professionals



Contractor, having a contract with and doing work for a Condominium Association, does not need to sue and serve each unit owner as a separate defendant in a lien foreclosure action – Unit owners, however, may take certain actions with respect to such a lien.

In *Trintec Construction Inc. v. Countryside Village*, 20008 WL 4058013 (Fla. 3rd DCA Sept. 3, 2008), Florida's Third District Court of Appeal considered whether a roofing contractor that entered into a contract with a condominium association was required to sue and serve each unit owner as a separate defendant in a lien foreclosure action.

The contract between the roofer and the Association included a statement that the Association was the governing body for all of the affected buildings, and was signed by the President of the Association. The court found that the Association authorized the roofer to provide the work and was the logical entity to manage and defend the lawsuit relating to that work. Furthermore, the roofing contractor was not required to join the individual unit owners as parties to that lawsuit.

Interestingly, and although not an issue before it, the Court also mentioned that the unit owners were free to intervene in the lawsuit and to exercise their rights to "bond off" their proportionate share of the lien amount to facilitate a sale, refinancing or other transaction.

Contractor's reliance on an exculpatory contract clause to avoid liability for intentional tort or negligence in failing to comply with building code found void and against public policy with respect to personal injury claim brought by injured homeowner.

In *Loewe v. Seagate Homes, Inc.* 987 So. 2d 758 (Fla. 5th DCA 2008), a homeowner entered into a contract with a contractor for the construction of a new home, The contract had a clause titled "Release," which attempted to release the contractor from any liability caused by its construction practices, irrespective of whether the injury resulted from the contractor's negligence, gross negligence, or intentional conduct.

Cases of Note, *continued*

Shortly after moving into the home, one of the homeowners was injured by a bathroom door that fell off its track. The homeowner thereafter sued the contractor, who argued that the exculpatory clause in its contract relieved it of any responsibility in this matter.

Although the trial court dismissed the homeowner's claim with prejudice, the Fifth District Court of Appeal reversed. The Fifth District held that the contractor could not absolve itself of liability for any intentional tort or failure to comply with the building code that caused the homeowner's personal injuries.

In finding this particular exculpatory clause void and unenforceable as against public policy, the court observed that to allow a contractor to absolve itself of liability for personal injury caused by their negligence would undermine the legislative intent to protect the public from unsafe construction practices. The further observed that a builder should not be free to negligently, recklessly, or intentionally construct a residence in a manner that will unreasonably threaten the life, health, or safety of future occupants of the residence.

Developer and its principals not required pre-trial to disclose personal financial net worth information in construction defect case; no claim existed for an accounting or punitive damages.

Capco Properties LLC v. Monterrey Gardens of Pinecrest, 982 So. 2d 1211 (Fla. 3rd DCA 2008) involved a claim by a condominium association against a developer, its principals, and others with respect to a fire protection system that allegedly did not comply with the building code. The association asserted several claims against several defendants, including claims for breach of implied and express warranties, negligent nondisclosure, fraudulent concealment and fraudulent transfer. In support of its fraudulent transfer theory, the association claimed the developer made various cash distributions to its members, thus making the developer insolvent, or in essence, judgment proof.

The association sought discovery of the developer's financial statements, balance sheets, profit and loss statements, tax returns, bank account statements, and distributions and cancelled checks issued by the developer to its members.

Although the trial court allowed this discovery and rejected the developer and its principals' objections and motions for protective order, on a writ of certiorari, Florida's Third District Court of Appeal overruled and quashed the trial court's order allowing this discovery.

Initially, the Third District observed that discovery of financial information is generally not allowed until after a judgment has been obtained against a defendant and the information is needed to recover on such a judgment. Next, the court considered that the association had not brought a claim for an accounting against the defendants. The court also observed that an accounting claim was not appropriate in this matter, since there was no fiduciary relationship between the parties, nor was their any property coming into the hands of the defendant in which the plaintiff has an interest. Last, the court recognized that punitive damages, which provide a basis for discovering financial information, were not being claimed as damages by the condominium association.

Consequently, the condominium association was not entitled to pre-trial discovery of the subject personal financial information from the developer and its principals. ■

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Becker & Poliakoff's Construction Law Practice Group is well known for its knowledge of the construction industry and experience effectively protecting the interests of its clients. The Firm has handled numerous and varied construction-related cases, many of which have involved extremely complex issues with a multitude of defendants and scores of construction defects. Our construction attorneys represent clients in both transactions and disputes ranging from single and multi family dwellings to large commercial buildings, planned unit developments, retail, industrial and governmental projects.

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