



EXPERIENCE COUNTS IN COMPLEX HIGH RISE TRANSITIONS

By Don Brenner, Esq.
Stark and Stark

Transition of control of the board of trustees of a condominium association can be particularly complex when the common elements include a high rise building. In the industry, a “high rise building” is typically a building over 8 stories tall. By virtue of its sheer size and height, a high rise building is subjected to significant stress from a wide variety of forces such as high velocity winds, wind-driven rain and snow, twisting of the building in storms and from settlement, cracking of joints in the building facades, in other building materials during freeze/thaw cycles and from unstable sub-surface conditions, to name just a few. These buildings often have complex plumbing, electrical and HVAC systems that require special care beyond normal maintenance. Roofing systems are often poorly designed and installed. Multiple causes of water infiltration inside high rise buildings can be very difficult and expensive to diagnose and repair. For these and other reasons, it is of critical importance that the association hire a property manager, engineers and attorneys who are very experienced in handling transition of high rise construction.

Statute of Repose and Statute of Limitations

One of the most important considerations for the association involves analysis of how the statute of repose and the statute of limitations affect transition deadlines to file a claim. The statute of repose is a complete and absolute bar to all design and construction defect claims 10 years after substantial completion of the work. There are no exceptions to the statute of repose. Even in instances where the defects were concealed and could not possibly be found, the statute is applied absolutely to bar all claims asserted 10 years after substantial completion of construction. N.J.S.A 2A: 14:1-1. As a starting point, the dates of certificates of occupancy are a guide mark for the start of the

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statute as to the sponsor and certain subcontractors, but there can be many other factors that need consideration.

In contrast to the statute of repose, the statute of limitations applies as a bar to all design and construction defect claims arising within 6 years after the date when the association's Board knew, or, through the exercise of reasonable diligence, should have known of the defects. N.J.S.A 2A:14-1. There is a large body of case law that deals with the statute of limitations, when it begins to run and how the statute may be tolled. As with the statute of repose, this is an issue that can create a veritable minefield of problems if not analyzed and handled correctly.

The statute of repose and statute of limitations are subjects that need to be discussed with counsel at the outset of your transition. Experienced legal counsel who are well versed in litigation of these issues should be consulted so that you do not inadvertently lose your claims.

Understanding Transition Claims That Get Paid

Association board members should always be aware that the sponsor is almost certainly a single asset entity created just to build one project. Once the last unit is sold, the sponsor typically has no assets. The subcontractors and design professionals also typically have very limited financial resources. Therefore, in undertaking transition, the association must realize that insurance is going to be the most likely source of financial recovery

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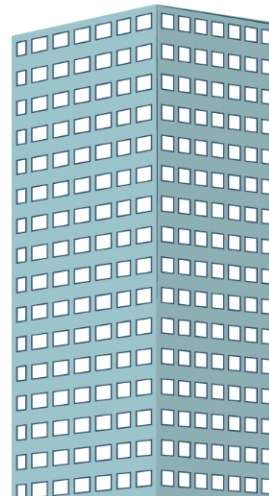
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for any significant claims. At transition time, most associations have limited amounts of money to spend on experts and attorneys. Therefore, in allocating the association's scarce dollars, the association must focus on the issues that are most likely going to be covered by insurance. Otherwise, the association will be spending precious dollars on claims for which it cannot obtain a recovery that justifies the investment being made.

Insurance law is very complex. What you need to know is that in order to get coverage under the type of insurance the sponsor and most subcontractors have (commercial general liability insurance), you need to prove that the negligent work of the insured caused damage to workmanship or property of someone other than the insured. This is known as consequential damage. One simple example of consequential damage which would be covered under a typical CGL policy is the roofer who negligently installs roofing materials, thereby damaging the sheathing which was installed by the framer. Other more complex examples include:

- a high rise building constructed on pilings that is sinking because



"Insurance law is very complex."

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the pilings were not driven deeply enough into the ground to reach bedrock, thereby causing structural damage and/or allowing water infiltration which damages interior walls and ceilings;

- roof systems covered with EPDM or other materials that leak due to negligent installation, causing damage to sheathing, framing and interior finishes;
- parapet walls covered with coping stones that were negligently installed, allowing water to pour inside the walls, damaging sheathing, framing and interior finishes;
- storm or fire suppression system pipes that were negligently installed, causing the pipes to burst or leak, damaging sheathing, framing and interior finishes;
- missing/improperly installed weep screed and termination flashings in manufactured stone veneer systems and stucco/EIFS installations, causing water infiltration that damages sheathing, framing and interior finishes.

And Those That Don't

In a high rise building, associations are frequently confronted with complaints by unit owners of serious and aggravating deficiencies: odors from other units, missing draft-stopping (fire-proofing) between floors, fire suppression systems that do not work, elevators that are not operating properly, heat and air-conditioning systems that are not balanced or otherwise do not function properly, electrical issues, problems with sloppy or miss-

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ing interior millwork, carpeting, paint and other aesthetic issues, indoor swimming pools that have various defects, garages that leak water on cars or flood, substandard emergency discharge pipes, and a slew of other deficiencies. They cause great suffering to many unit owners and tremendous headaches for the board members and property managers trying, without luck, to get the sponsor and subcontractors to repair them.

It is easy to respond to the emotions of the unit owners and board members who are living with these conditions by spending tens or even hundreds of thousands of dollars in expert fees and years of time investigating and reporting on these claims. However, since there is typically no consequential property damage caused by these deficiencies, there is most likely no insurance coverage. Had the association been advised by knowledgeable, experienced counsel and experts, it would have known that it was not wise to allocate large amounts of money to investigating these claims since there is no insurance coverage and therefore no realistic way to recover any money for them.

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Compiling a Competent Team

The association needs a game plan from the inception of transition that includes a legal analysis of the claims for which recovery is likely, and those for which recovery is not likely. This is a highly complex exercise which is greatly complicated by the often daunting array of extremely sophisticated engineering and architectural issues which arise in high rise construction. To do this, counsel need to draw upon years of experience to create a cost-benefit analysis for the client so it can make an intelligent business decision whether to proceed and, if so, for which claims. That requires the attorney understand the engineering and architectural issues, what experts to hire, what the scope of their work should be, how to anticipate and think through the multiple insurance coverage issues that will arise and how all of this is likely to play out in litigation, mediation and, if necessary, at trial. Knowledgeable, experienced, dedicated property managers are also a key to transition as they need to be able to coordinate with counsel, experts, contractors and the unit owners to keep communication working smoothly and ensure access to units and notice of repairs is given. Counsel also needs to be able to deal with the justifiable frustration and outrage of the unit owners and board members who paid hundreds of thousands or millions of dollars for units in a high rise damaged by negligent design and construction work for which they are not responsible but for which they are stuck holding the bag.

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Conclusion

We have all heard about transition nightmares where an association for a high rise condominium, or any other condominium for that matter, spends hundreds of thousands or millions of dollars and does not get a recovery that justifies its financial investment. Transition nightmares happen to associations when there is a lack of planning by attorneys and experts who have tried these cases and have collected multi-million dollar settlements and verdicts. The most successful strategy is to follow the insurance money and hire an experienced team. And consider asking your lawyer to handle your case on a contingent fee basis. If they're not willing to be your partner and put their money where their mouth is, that should tell you something. ■



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