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THE TRUTH ABOUT CONSTRUCTION DEFECTS

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How Creativity Can Efficiently Resolve a Construction Defect Turnover Lawsuit

BY KARA OLESKY
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Nearly all newly elected board members in the state, and their management teams, come across this issue shortly after turnover—whether to investigate and pursue claims for construction defects at their property. Some of the main deciding factors of whether to pursue the claims are the costs and effort needed to do so. Let's be honest—engineers, contractors, and lawyers are not cheap, and dealing with them is not always fun.

In general, pursuing claims for defective construction at the time of turnover (often called "558 claims," "turnover claim(s)," or "defect claims") is a very costly endeavor for an association. These claims are expert driven and require detailed investigations and design review, destructive testing performed by contractors, and a host of experts to opine on the substance of the defective work and the associated damages. Moreover, attorneys' fees can

frankly be overwhelming when claims are pursued against the dozens of parties involved in the design and construction of a project. In addition to the pure cost, pursuing a turnover claim also requires a lot of effort on the part of the board, management team, and members of the association. Time is spent on litigation strategy, management is consistently documenting and working with the involved third parties (engineers, contractors, and attorneys), and unit owners are regularly inconvenienced by inspections, destructive testing, and the assessments to pay for it all. For these reasons, associations sometimes pass on the potential of being able to completely pursue these sorts of claims.

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Kara Olesky is experienced in handling a wide variety of matters in the areas of construction and commercial litigation. Kara represents condominium associations, homeowners, and property owners in matters concerning defective construction and design. In addition, Kara represents associations, property owners, general contractors, and subcontractors in contract negotiations and matters involving payment disputes, delayed claims, insurance, and bond claims. For more information, email kolesky@haber.law.

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However, there are times when opportunities present themselves that lend to some creativity on the part of the parties involved. More specifically, if counsel for the association has an in-depth understanding of how the 558 claims process works, knows how to see the "big picture," and knows how to work behind the scenes, there is a chance that the above-mentioned difficulties can sometimes be avoided or diminished.

Recently, our Firm was able to do exactly that. Despite some of the above-mentioned inherent difficulties in bringing forth a construction defect claim, our team was able to creatively find a way to weave through the process and obtain an efficient and excellent resolution for our client.

Our client, the Chateau Beach Condominium Association (the association) is a luxury condominium in Sunny Isles Beach, Florida, located between Collins Avenue and the Atlantic Ocean. The building was turned over to the association and issued its certificate of occupancy in the summer of 2017. Not long thereafter, the association began the process of initiating its construction and design defect analysis of the building. Our Firm took over the representation of the association in this investigation, placed the potentially responsible parties on notice, and ultimately initiated a lawsuit against the 30 defendants, which included the developer, design professionals, general contractor, and all subcontractors involved in the construction of the project.

From the onset, there was an understanding that this multi-party construction defect litigation could potentially cost the association millions in expert fees, testing costs, and attorneys' fees. However, we understood the same to be true in the reverse.

An understanding of the opposing parties and, more importantly, who the decision makers are and what drives them, is key to finding efficient resolutions in these matters. This is especially true when the construction parties (the developer, general contractor, and subcontractors) are all operating under what is called a contractor-controlled insurance program, otherwise known as a "wrap" or "CCIP" insurance policy, as they were in this case. Under a CCIP policy, one insurance carrier is paying for the defense of the general contractor, every single subcontractor, and oftentimes, such as in this instance,

the developer's defense and liability for the construction defect lawsuit.

With our Firm's working knowledge of how these wrap policies work, an opportunity presented itself for the association when our office began settlement discussions directly with the CCIP's insurance coverage attorney. Having forged relationships with some of the decision makers "behind the scenes" through prior experiences, we were able to explain, and coverage counsel understood, that the insurance carrier was going to spend a lot of money defending this case, yet still have to pay a decent amount of money in the end to the association. We investigated and gained an understanding of the intricacies of the various insurance layers and utilized the anticipated cost of litigation as a negotiating tool with the insurance carrier. The defense carried the same risk as the association, continuing to fund the litigation in a massive, multi-party case. As a result, we were able to negotiate a settlement in the amount of $5.75 million with the developer, general contractor, and all subcontractors for the construction of the project without ever taking a single deposition. In many of these larger 558 lawsuits, that is simply unheard of.

From there on out, we crafted our case against the remaining design professionals and other involved parties. This allowed us to narrow the experts' focus and, once again, reduce the costs associated with the experts in forming their opinions. After limited discovery, we settled with all of the remaining parties. In the end, our client was able to forgo the time, but more importantly the expense, of having to endure the most grueling and expensive portions of the litigation process against a vast majority of the defendants.

Ultimately, it was that ability to see the big picture and understand the driving forces in a case that carried the day. Had this case carried along like many other turnover lawsuits do, the association would undoubtedly have spent millions in fees and costs to see their day in court. Instead, we were able to negotiate an extremely favorable settlement while saving on those exorbitant costs. Creativity and an understanding of how to navigate the playing field of these claims are priceless tools for Firms handling these turnover claims and—more importantly—for their association clients. ■