§ 7:29.50 Project risks—Planning and selection risks—Condominium or multi-family housing developments

Condominium development is back in vogue. The downtown urban areas of many American cities are being revitalized through commercial and residential development. One of the key components to any revitalization program is residential construction. Due to the lack of land, most of this construction is in the form of condominium and other multi-ownership development. Building condominiums and townhomes can be a risky business.[1] Not all townhome and condominium projects present the same risks. For example, "commercial" condominium developments operate much like traditional commercial projects. Time-share arrangements and commercial space present less risk than pure residential condominium developments. Somewhere in the middle are "mixed-use" condominium projects. These projects have a residential component, but also contain commercial elements. In some cases, these "mixed-use" condominiums have better maintenance arrangements than pure residential developments.

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resources, or, perhaps, less sophisticated consumers. They believe the advertisements, promotional materials, and marketing tactics that tend to promise much more than their dollars can realistically buy. Then there are the condominium homeowners associations, whose directors set the budget for maintenance of the common areas and building exteriors. Perhaps because the money must come from their own pockets, associations tend to be reluctant to set dues high enough to cover all the necessary upkeep. The result is poor maintenance, deferred maintenance, or no maintenance at all.

DPIC, The Contract Guide at 57-58 (1993).

Similar client advice is offered by the Victor O. Schinnerer & Company, Inc. on behalf of the insureds of CNA:

> The essence of a successful project is proper client selection. . . The first and most important element of any two-person relationship is communication. Are you and your prospective client able to communicate verbally and in writing? Are you compatible? Are you comfortable with one another, and can your conversation be open and straightforward? Is there mutual confidence, trust, and respect? Do you understand the client's objectives, and are you able to empathize with his problems? Does the client fully comprehend the nature of your services and responsibilities and how you are to be compensated? . . . Your client may have the best of intentions, but is he financially prepared for the building program which you intend to propose? Is his project speculative in nature? Have any of your colleagues ever had a problem collecting fees from this client? Have you been asked to bid for the work? Is he looking to you for assistance in arranging financing for the project?

Schinnerer & Company, Inc., Client Selection, vol. I, no. 9, reprinted in Guidelines for Improving Practice (1987).

[Section 7:29.50]

[1]See, § 7:29 (insurers for design professionals caution their clients about doing this type of work).

Claims data from CNA/Schinnerer for 1999 through 2003 reveals that multi-family housing projects present significant professional liability risks:

> One way to look at the professional liability risks of specific project types is to look at the percentage of claims generated compared to the percentage of reported fees for that project type. When this ratio is above 1 to 1, the project type has a "relativity risk" that indicates that the fees for this type of project may not be appropriate. The disparity between the amount of billings generated by residential design projects and the outlay in claims defense costs and indemnity payments is one indication that residential projects are "risky."
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> According to 1999-2003 claims statistics from CNA/Schinnerer, the "relativity risk" varies greatly across the range of residential projects, which include single-family, short-term, and multi-family residential projects. Multi-family housing projects, which include condos, generate a tremendous volume and cost of claims compared to billings for professional services. Reported billings for multi-family housing projects represent less than 4.5% of the total from all design projects. Claims from these projects, however, represent more than 18% of all claims. Specifically for condo projects in the CNA/Schinnerer program, fees for condo projects represent 5% of all fees, but 20% of all claims dollars. The ratio of the percentage of claims to the percentage of billings—four to one—means that residential projects are considered highly risky.
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> When fees for professional services are being calculated, this "relativity risk" factor should be taken into account. Condo projects are the most severe project type from the standpoint of claims. Even firms experienced in condo design, those that have worked with reputable owners and developers on projects where construction quality was not compromised, have suffered. Although most claims were against architects, there were many structural and mechanical engineering claims. Following is some condo claims data from the CNA/Schinnerer program for 1999-2003:
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> - The average paid condo claim totaled about $190,000 in defense and indemnity costs.
> - The top 25% averaged about $540,000 in defense and indemnity costs.
> - The top 10% averaged more than $820,000 in defense and indemnity costs.
> - Of the top 25 paid claims for condo projects, 7 were on behalf of firms in CNA/Schinnerer's Small Firm program (annual billings less than $500,000) these 7 claims averaged close to $670,000).[2]

There are a number of reasons that account for the special

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[2]Jones, Jr., Risk Management in Condominium Development: The Insurer's View of Design and Construction, American Bar Association, Forum on

risks associated with multi-ownership projects. One of the most fundamental is that fact that the end-users of the project are not involved in its design or construction. Moreover, the representations made during the marketing process may not necessarily square with the realities of residential ownership. These are ripe conditions for disappointed expectations.[3]

The governance of multi-ownership residential communities can also generate litigation exposure. Homeowners associations have a duty to keep common areas in a state of repair. Yet financial assessments to accomplish these responsibilities may not always be adequate. Moreover, the individuals comprising the homeowners association can feel pressure from other unit owners to "take action" to correct perceived deficiencies:

> [A]n HOA [homeowners association] can be sued for damages if it fails to discharge its duty to maintain the common areas in proper condition. For example, the HOA may be sued by individuals who sustain personal injuries as a result of a defective condition existing upon the subject premises. Moreover, actions have often been brought against an HOA by condominium unit owners seeking compensation for property damage sustained in individual units which allegedly occurred because the HOA failed to properly maintain common elements such as roofs. Since an HOA can be

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the Construction Industry, at pp. 4-5 (April 7-9, 2005). The author notes that the top five claims allegations for condo projects in the CNA/Schinnerer program are related to failures of: (1) waterproofing (i.e., water infiltration), (2) HVAC systems, (3) foundations, (4) roofing, and (5) allegations that the project was overbudget due to design negligence. Many condo projects experience water infiltration damage around windows and balconies. This problem is exacerbated due to the fact that many of the projects are located in states with damp climates and windy conditions.

[3]See Kennedy, Discovery of Construction Defects in Planned Unit Developments: The Role of the Homeowners Association, American Bar Association, Forum on the Construction Industry, at p. 16 (April 7-9, 2005) ("Fraud based claims are often asserted against developer/builders. For example, if a developer/builder expressly misrepresents the characteristics or quality of a home, unit, or common area structure, it can be held liable under a theory of fraudulent misrepresentation); see also Kennedy and DeHaan, Litigation Involving the Developer, Homeowners' Associations, and Lenders, 39 Real Prop. Prob. & Tr. J. 1 (Spring 2004); Stott, Stigma Damages: the Case for Recovery in Condominium Construction Defect Litigation, 25 Cal. W. L. Rev. (1988-89); Stark & Cook, Pay it Forward: A Proactive Model to Resolving Construction Defects and Market Failure, 38 Val. U. L. Rev. (Fall 2003). Claims against developer-builders can also be premised upon fraudulent concealment. See Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1st Dist. 1982) (holding modified by, Geernaert v. Mitchell, 31 Cal. App. 4th 601, 37 Cal. Rptr. 2d 483 (1st Dist. 1995)) (failure to inform perspective homeowners of soil instability); Woodlands Land Development Co., L.P. v. Jenkins, 48 S.W.3d 415 (Tex. App. Beaumont 2001) (fraud claim).

held liable and damages for common area defects, the HOA obviously has a great interest in seeing to it that common area defects are repaired as expeditiously.

Given the fact that HOAs are charged with a duty to keep the common areas in good repair and maintenance, the vast majority of jurisdictions if not all, it is now well settled that condominium and HOAs have standing to sue for construction defects affecting the common areas.[4]

Laws covering multi-family development can influence litigation risk. In many jurisdictions, homeowners are viewed as unsophisticated and afforded greater protection than commercial enterprises. At a minimum, the various statutory schemes that influence condominium or townhouse litigation can be complex and confusing.[5]

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[4]Kennedy, Discovery of Construction Defects in Planned Unit Developments: The Role of the Homeowners Association, American Bar Association, Forum on the Construction Industry, at p. 3 (April 7-9, 2005). The author also discusses the dilemma for the developer that results when it controls the HOA board by virtue of owning a majority of the units. If significant construction defects are at issue, a developer-owned HOA may have a conflict of interest and yet owe a fiduciary duty to unit owners. See Hyatt & Stubblefielfd, The Identity Crisis of Community Associations: In Search of the Appropriate Analogy, 27 Real. Prop. Prob. & Tr. J., 589 (Winter 1993); Sandburg & Smith, When the Developer Controls the Homeowner Association Board: The Benevolent Dictator?, 31 Colo. Law R. 91 (Jan. 2002).

[5]Texas is an example. Tex. Prop. Code Chapters 81 and 82, Texas' condominium statutes, do not touch upon the subject of the liability of contractors or subcontractors who build, repair, or remodel condominiums. Residential construction defect claims are governed primarily by Texas Property Code Chapter 27. Texas Property Code, Chapter 27, Residential Construction Liability, defines "residence" as including units "in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system." Tex. Prop. C. 27.001(4). Chapter 27 also defines "construction defect" to include matters concerning the "design, construction, or repair" of not only new residences, but also the "alteration of or repair or addition to an existing residence." Tex Prop. C. 27.001(2).

Special provisions in the Residential Construction Liability Act (RCLA) govern actions in connection with construction defects in residential property. See Prop. C. 27.001 et seq. These provisions apply to claims for damages resulting from construction defects other than actions for personal injury, survival, wrongful death, or damage to goods. These provisions prevail over any other laws including the Deceptive Trade Practices Act, to the extent of any conflict. Prop. C. § 27.002(a). Because of this preemptive language, there is (now outdated) authority that the RCLA preempts claims for negligence, breach of contract, and breach of warranty, though not claims for common-law fraud See Bruce v. Jim Walters Homes, Inc., 943 S.W.2d 121, 123-24 (Tex. App. San Antonio 1997), writ denied, (Oct. 2, 1997). However, the RCLA was amended in 1999 to provide expressly that it does not create any cause of action. See Prop. C. § 27.005. If the RCLA has preemptive force but does not create a cause of action,

A number of jurisdictions' condominium laws require specific warranties.[6] For example, Florida law requires subcontractors

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the plaintiff would be left without a remedy. Accordingly, more recent authority holds that the RCLA does not preempt any otherwise available cause of action, but merely modifies the procedure for and the remedies available under preexisting causes of action. See Sanders v. Construction Equity, Inc., 42 S.W.3d 364, 369-72 (Tex. App. Beaumont 2001) (RCLA neither creates cause of action nor preempts other claims, but instead limits and controls causes of action that otherwise exist with respect to residential construction defects, including negligence, fraud, DTPA, breach of contract, and warranty claims).

RCLA was enacted with the support of pro-builder lobby groups, and was specifically intended to limit the liability of residential builders and contractors. Numerous homebuilder lobby groups heavily supported it in an attempt to curtail what they perceived to be the expansive claims consumers could pursue under the state's Deceptive Trade Practices Act (DTPA). Under RCLA, owners are now required to provide written notice to contractors at least 60 days prior to filing suit, and contractors may make a written request to inspect the subject property and document any defects. The contractor is afforded 45 days after receipt of notice to make a written settlement offer to the claimant. In any case involving damages greater than $7,500, either the claimant or contractor may file a motion to compel mediation, with the costs of mediation to be split between the parties.

RCLA does not limit or bar any defenses otherwise applicable to construction defect causes of action, but adds defenses available to the contractor. In an action covered by the RCLA to recover damages resulting from a construction defect, a contractor is not liable for any percentage of damage caused by any of the following:

1. Negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor;
2. Failure of a person other than the contractor or an agent, employee, or subcontractor of the contractor to take reasonable action to mitigate the damages or to maintain the residence;
3. Normal wear, tear, or deterioration;
4. Normal shrinkage due to drying or settlement of construction components within the tolerance of building standards; or
5. The contractor's reliance on written information relating to the residence, appurtenance, or real property that was obtained from official government records, if the information was false or inaccurate, and the contractor neither knew nor reasonably should have known of the falsity or inaccuracy of the information.

See Prop. C. 27.003.

[6]Ohio's condominium statute, O.R.C. § 5311.25(E), requires condominium instruments to provide that the developer has furnished at least a two-year warranty covering material or workmanship used in structural, mechanical components and common service elements serving the condominium property or additional property as a whole and a one-year warranty for any repair, replacement of structural, mechanical, or other elements pertaining to each unit. These warranties commence on a date the deed or other evidence of ownership is filed for record following the first sale of a condominium ownership interest to a purchaser in good faith for value. All warranties made to the developer that exceed the statutory time period with respect to any part of the units or com-

and suppliers to grant to the condominium developer and to the unit purchasers implied warranties of fitness as to the work performed or materials supplied by them as follows:

(a) For a period of three years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit.

(b) For a period of one year after completion of all construction, a warranty as to all other improvements and materials.[7]

There are strategies for reducing and mitigating the risk associated with developing and constructing multi-unit for residential property. As with all development, pre-construction planning is critical. Selecting experienced professionals to prepare the plans and specifications and governing condominium documents is a necessity.[8] Specific risk management strategies include:

- Hire the right people. This is always an important risk management mitigation strategy for any undertaking, but all the more important for "risky" activities.
- Do business with experienced developers having a successful track record in multi-family housing construction.[9]
- Carefully coordinate design documents.

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mon areas and facilities must also be assigned to the purchaser. See also Point East Condominium Owners' Assn. v. Cedar House Assoc., 104 Ohio App. 3d 704, 663 N.E.2d 343 (8th Dist. Cuyahoga County 1995) (contractor's warranty to developer that all work will be free of faults and defects contain no time limitation, and thus was held to exceed developers two-year warranty, and was assigned to owners).

[7]Fla. Stat. § 718.203(2).

[8]For helpful articles on this topic see Estis, Risk Management in Condominium Development: The Developer's Perspective, American Bar Association, Forum on the Construction Industry (April 7-9, 2005); Kennedy, Discovery of Construction Defects in Planned Unit Developments: The Role of the Homeowners Association, American Bar Association, Forum on the Construction Industry (April 7-9, 2005) (discussing a number of responsibilities and actions to be taken by a homeowners association when confronted with construction defects); Jones, Jr., Risk Management in Condominium Development: The Insurer's View of Design and Construction, American Bar Association, Forum on the Construction Industry (April 7-9, 2005) (offering suggestions to design professionals and contractors on how to manage condominium development risks).

[9]Because condominium development is often performed by special purpose limited liability entities, it is important that the affiliated developer have a successful history in developing similar projects. The same is true for those who design and construct the project. Commercial contractors, while they may be

- Ensure condominium governing documents conform to actual design drawings.
- Ensure that the association's budget is adequate, including reserves for maintenance obligations. Be realistic regarding the useful life and life-cycle costs of the various operating and structural systems.
- Review final-as built documents to determine whether they conform with public offering plans.
- Properly manage the punch list process so that owners are not aggravated by lingering warranty items.
- Ensure that the condominium governing documents (e.g., Master Deed, Declaration of Covenants, Certificate of Incorporation, By-laws) are appropriate for the particular condominium project contemplated.
- Ensure that condominium plan documents and construction agreements contain appropriate risk allocation/management provisions, including:
  - — Limitation of liability provisions[10]
  - — Indemnity agreements[11]
  - — Provisions mandating disclosure of financial data[12]
  - — Arbitration provisions (and other clauses calling for structured dispute resolution such as mediation)[13]

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more than adequate for office or other commercial construction, may be inexperienced when it comes to luxury residential construction. Luxury residential construction is not similar to commercial construction. The expectations of buyers are significantly different. Therefore, it is important to retain design and construction professionals familiar with the type of development being contemplated. It is also important to review the qualifications of project managers and superintendents. These individuals should also be familiar with condominium construction.

[10]See §§ 10:84 to 10:89; 17:98; 19:52.66 to 19:52.72.

[11]See Chapter 10.

[12]Obtaining indemnification is only so good as the financial resources behind the indemnitor's promise. In many cases, the condominium developer is a special purpose limited liability entity with little or no assets. Provisions which require disclosure of financial information are the first line of defense, for without this information it is difficult to determine whether one needs to seek affiliate guarantees to bolster indemnity or other contractual commitments. See § 5:39.

[13]While arbitration is favored, and parties who are not signatories to an arbitration agreement can sometimes be bound to arbitrate, there are limitations. See R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157 (4th Cir. 2004) (general contractor unable to compel homeowners association to arbitrate as it was not a third-party beneficiary of master deed which contained arbitration provision and doctrine of equitable estoppel did not bind association

— Waivers/disclaimers of implied warranties[14]
— Contractually shorten applicable statutes of limitation/ statutes of repose[15]
— Waiver of consequential damages[16]
— Stipulated or liquidated damage provisions[17]
— Waiver of subrogation provision[18]
— Exclusive remedy provisions[19]
— Provisions requiring additional insured coverage[20]
— Mandatory maintenance obligations[21]

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to the arbitration provision contained in the construction agreement between the developer and general contractor). See also Chapter 20.

[14]Condominium lawsuits frequently involve allegations that one or more of the defendants breached a variety of implied warranties, including the implied warranty of habitability, workmanlike performance or specific statutory warranties. The case law is mixed as to whether some or all of these warranties may be disclaimed or waived. Nevertheless, appropriate risk management strategies include attempting to eliminate these warranties and instead rely on tailored express warranties. See Turner v. Westhampton Court, L.L.C., 903 So. 2d 82 (Ala. 2004) (purchasers effectively disclaimed implied warranty of habitability and waived implied warranty of workmanship); Bynum v. Prudential Residential Services, Ltd. Partnership, 129 S.W.3d 781 (Tex. App. Houston 1st Dist. 2004) ("as is" clause in purchase of real property agreement is enforceable); see also §§ 9:33, 9:74, 19:52.61.

[15]This is another mixed-bag. While most states will allow parties to contractually shorten the applicable statute of limitations (or eliminate the discovery rule), where consumers are involved the courts provide more scrutiny. See §§ 5:254, 7:174.60.

[16]These are relatively standard provisions in sale of goods contracts. They are becoming more popular in construction agreements. See §§ 5:115, 9:34, 19:52.54.

[17]These provisions set a predetermined damage measure in place of actual damages. Where delay can result in loss of sales opportunities and ill-defined yet significant actual damages, agreeing to a liquidated sum may well prove to be a wise risk mitigation measure. See §§ 19:52, 19:52.64 and 19:52.65.

[18]These provisions are routinely enforced and place the risk of insured losses at the feet of a property insurer. See §§ 11:100, 19:52.58.

[19]These provisions set out a specific remedy for a particular wrong. They are common in sale of goods contracts where an exclusive repair and replacement remedy is common. See §§ 9:41, 19:52.57.

[20]While the scope of additional insured coverage continues to evolve, it remains important for contracting parties to secure whatever insurance benefits they can under lower-tier contracting parties' insurance. See §§ 11:56 to 11:65, 11:104.

[21]Inadequate or improper maintenance can lead to problems and result in claims. Preparation of a maintenance manual is useful if it is actually followed and may well reduce claims, and if it is not followed, it may provide a defense. A contractual commitment to maintain an adequate maintenance program is a

— Escrow of maintenance funds[22]
— Provisions providing indemnity in the event of condo conversion[23]
— Limit third-party beneficiary status[24]
— Provisions requiring notice of defects and granting a right to repair as precondition to suit[25]

- Require all parties to maintain adequate levels of insurance.[26]
- Avoid inappropriate exterior insulating finish systems (EIFS).[27]

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useful risk management device.

[22]Project owners and developers may be required to pay into a fund for the correction of defects or compensation for misrepresentations in quality.

[23]Sometimes what starts out as a normal commercial project will be converted to a condominium. This, of course, can radically change the risk profile of the project. If a party believes that this is a possibility, it may make sense to negotiate a proposed remedy in the event the project is converted to a condominium.

[24]It is prudent risk management to limit the number of people to which a party may owe a contractual obligation. This is particularly so in states that enforce the economic loss rule in service transactions. See § 5.23.

[25]Litigation is expensive and if repairs can be undertaken before suit is commenced, time and money can often be saved. This is theory behind new construction defects/right to repair laws. See § 9:77.50. Just how successful these statutes are in slowing the growth of multi-housing litigation is yet to be seen. Nor is having the right to repair defects a panacea, as more than one builder has been sued for making inadequate repairs. See Torcon, Inc. v. Alexian Bros. Hosp., 205 N.J. Super. 428, 501 A.2d 182 (Ch. Div. 1985), opinion aff'd, 209 N.J. Super. 239, 507 A.2d 289 (App. Div. 1986).

[26]See Chapter 11.

[27]There is a fair amount of litigation over water infiltration and mold problems associated with unsuitable or inadequately installed EIFS systems (sometimes referred to as "synthetic stucco"). If the exterior finish system is inappropriate or, as often is the case, improperly installed, problems can arise. See Turner v. Westhampton Court, L.L.C., 903 So. 2d 82 (Ala. 2004) ("The warranty on the home expired in February 1997. In April 2001, Mr. Turner noticed that his floor was bowing. After discussions with a co-worker who brought up the possibility of moisture intrusion into the house, the Turners hired an inspector to examine the house. The inspector reported that the EIFS on the house had not been installed according to the manufacturer's specifications and that consequently water had damaged parts of the Turners' house."); DKM Residential Properties Corp. v. The Township Of Montgomery, 182 N.J. 296, 865 A.2d 649 (2005) (failing EIFS system was not installed pursuant to manufacturer's specifications and was in violation of state building code such that code official had the authority to issue notices to the developer even though the developer was not longer in possession of the property). It is important that appropriate systems be specified and critical that they be installed pursuant to the

- Specify appropriate waterproofing and foundation systems.[28]
- Specify appropriate HVAC systems, and provide owners with understandable maintenance and operation instructions.[29]
- Properly designed and constructed roofing system.[30]
- Provide adequate contract administration services by a competent design professional.[31]
- Consider employing a water infiltration expert to review design and/or construction.[32]
- Be mindful and take special precaution when doing business in problematic jurisdictions.[33]
- Maintain good relations and communications with condo as-

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manufacturer's instructions.

[28]Water infiltration problems are a main source of multi-family housing claims. So are settlement problems. Therefore, soil preparation, foundation design and construction, and waterproofing, drain tile, and grading activities are important considerations. Moreover, design details and construction around windows and balconies should be carefully reviewed.

[29]HVAC problems are another important source of claims. The failure of HVAC systems often implicates improper maintenance or operation. It's important that condominium associations understand how their HVAC systems operate and their required maintenance. Developers should avoid skimping on the HVAC system as this can create a host of problems, including negative pressure conditions (potentially a source of moist air and mold infiltration).

[30]Roofing problems are another common source of complaints. Appropriate roofs should be specified and care should be taken to ensure that they are installed pursuant to manufacturer's recommendations.

[31]Many problems can be avoided if the construction process is effectively administered by a competent design professional. See Jones, Jr., Risk Management In Condominium Development: The Insurer's View of Design and Construction, American Bar Association, Forum on the Construction Industry at Page 15 (April 7-9, 2005) ("[P]olicyholders in the CNA/Schinnerer program, defense attorneys, and CNA claims specialists all agree that providing a scope of services that includes contract administration (CA) services is another way to manage the risks associated with condo projects. Many design professionals believe that they minimize their risks by not providing CA services. It is the belief of CNA/Schinnerer that providing CA services benefits the design professional, contractor, and project owner.").

[32]Because water intrusion issues plague many condominium projects, hiring an expert in detecting problems before they cause damage may be a useful risk management tool, particularly in climates where water infiltration is a known issue.

[33]Condominium litigation is particularly prevalent in certain states, including California, Nevada, Arizona and Florida. One can speculate as to just why this litigation is more common in some states rather than others. In some respects, litigation begets more litigation. After a while, an organized bar develops experience in bringing condominium actions. Other states have climate conditions which can present challenges, particularly for condominium developments near water (e.g., beachfront developments). See Jones, Jr., Risk Manage-

sociation management.[34]

- Manage the transfer of control from developer to unit owners.[35]

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ment in Condominium Development: The Insurer's View of Design and Construction, American Bar Association, Forum on the Construction Industry at Pages 7-8 (April 7-9, 2005) ("Washington and Oregon are considered states with high risk due in part to the climate, which tends to be damp and windy. Other problem states include North and South Carolina, Georgia, and Florida. These states have a significant number of ocean front condo projects and experience the same types of moisture and wind issues as projects in the Pacific Northwest. In addition, because many of the condo projects in these states are in resort locations, they are often constructed by project owners and developers that set up "shell corporations" for a particular project and then dissolve the corporation once the project is complete. The "vanishing owner" poses a potential future problem for design professionals and contractors. California is another problem state due in part to the increased number of condos being built to meet California's housing needs. Rapid design and construction increases the likelihood of errors and omissions, which lead to claims. Finally, it is important to note that a state's statute of repose also influences the loss experience for a given state. For example, South Carolina is considered a high-risk state for condo projects, not only because the significant number of ocean front condos and the related moisture and wind issues, but also because South Carolina has a relatively long statute of repose at 13 years."). On the other hand, states with relatively dry climates present a better risk profile. Similarly, states with relatively short statutes of repose provide more protection to those designing and constructing condominium projects. See §§ 7:174.50 to 7:174.62, 7:247 (50-state statute of repose/statute of limitation table). States that allow the application of the economic loss doctrine to construction claims present a more favorable risk management profile for contractors and design professionals than those states that limit the doctrine to sale of goods transactions. Given the importance and pervasive influence that the economic loss doctrine has had on construction disputes, the treatise covers this topic in numerous sections, including §§ 6:37, 9:46 to 9:51, 13:29, 17:88 to 17:97, 19:10 to 19:13.

[34]Maintaining a good business relationship with one's client or former client is always good risk management. See Estis, Risk Management in Condominium Development: From the Developer's Perspective, American Bar Association, Forum on the Construction Industry at Page 8 (April 7-9, 2005) ("More often than not, developers can foreclose or limit their exposure to litigation by simply be responsive to problems brought to their attention by the association and individual condo owners, and not let those problems fester. The developer should expend as much effort on post-closing customer service as it believed it had done on the construction itself. It should address such concerns in a prompt manner. It is to the developer's advantage to communicate openly and in a non-adversarial manner with the association and/or owners and be willing to contribute to the problem's remediation.").

[35]It is in the developer's best interest to encourage unit owners to become involved in association governance at an early stage. Quite frequently, control transfers from the developer to unit owners occur quite suddenly - upon the sale of a unit that gives the unit owners majority control. It is not uncommon for unit owners to be ill prepared to take control and manage the condominium.

- Develop appropriate, realistic budgets for condominium development and management and avoid creating expectation problems by disclosing inadequate assessments based upon unrealistic estimates of management, maintenance, and operation costs.[36]
- Use proven designs and construction techniques, particularly with respect to water infiltration issues.[37]
- When problems do arise, retain specialize consultants to investigate and proactively manage the situation.[38]

Openly communicating with unit owners while still in control and assisting them to be prepared to assume the responsibilities of majority ownership is a wise risk management practice.

[36]See Estis, Risk Management in Condominium Development: The Developers Perspective, American Bar Association, Forum on the Construction Industry at Page 4 (April 7-9, 2005) ("One portion of the public offering plan usually includes a proposed budget for the association when the condominium is fully occupied. The developer may wish to focus attention on this issue by having fiscal analysis performed by either an accountant familiar with condominium development projects or a similarly experienced managing agent. The developer may even wish to engage as an accountant a person or firm that is widely known to represent condominium associations in order to give greater credence to the validity of the budget and its components. In connection with the sales of units, disclosure of the assessment amount is of significant concern because it frequently forms the basis for unit owners or the association having their first dispute with the developer. Condominium purchasers are more likely to remember this information over any other. Developers have not historically handled this issue very well, either inadvertently or purposefully utilizing underestimates, especially to better market the units."); see also Raven's Cove Townhomes, Inc. v. Knuppe Development Co., 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1st Dist. 1981).

[37]Condominium projects are not particularly good developments with which to explore new designs or construction techniques. There are more than enough issues in condominium design and construction to challenge all but the most intrepid developer. Communal living poses a host of security and sound transmission issues that must be addressed. Moreover, managing construction while unit owners are also building out their individual units (sometimes a feature of pre-sold luxury developments) can pose scheduling and coordination concerns. While high-design sells, it must be employed judiciously in multi-housing construction. Museums, entertainment venues, and religious structures usually are better candidates for cutting-edge design work. Successful condominium projects have more to do with paying attention to the fundamentals—quality design and construction that provides lasting value.

[38]If the problem involves water infiltration, it is critical to quickly determine the source or sources to minimize damage. Mold infestation is an all too common result of water infiltration problems. Mold grows and must be timely eradicated to lessen the damage. Retention of appropriate specialists are critical in these situations. See Estis, Risk Management in Condominium Development: The Developers Perspective, American Bar Association, Forum on the Construction Industry at Pages 6-7 (April 7-9, 2005) ("The problem de jure,

While condominium development is "risky," there are proven risk management techniques that experienced developers, design professionals and contractors can take to reduce and mitigate the risk associated with this work and make it rewarding.

§ 7:30 Project risks—Planning and selection risks—Assembling the primary design and construction team

Owners should inquire about the degree of experience and familiarity prospective designers and contractors have with projects of the same type and scope contemplated by the owner. If critical members of the design and construction team are new to the area, it may be prudent to inquire about how the team plans to amass the resources necessary to complete the project (e.g., subcontractor relations and labor availability). If critical team members have not previously worked in similar climatic or geologic situations and the project is particularly susceptible to these conditions, then further inquiry may be warranted. Because people, not companies, actually build projects, it is useful for owners to determine who the actual team members (e.g., project managers and superintendents) will be for the general contractor and the major subcontractors.

§ 7:31 Project risks—Planning and selection risks—Subcontractor and supplier selection

On any construction project of significant size, most of the

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confronting all developers today, to which attention needs to be paid, is the risk and threat of mold due to faulty construction. Any risk management model must include a means of addressing this problem before purchasers purchase and begin to occupy the residences. By the time the purchasers have occupied their new homes, the problems with mold may have been exacerbated and may spawn numerous types of personal injury, or at least claims of personal injury, as well as cause property damage. In the last five years, there has been a traumatic increase in the number of lawsuits involving mold in buildings, including condominium developments. Developers may limit their potential liability by utilizing construction designs that help reduce the levels of indoor mold. Mold remediation is generally an expensive undertaking - the latest EPA estimates place remediation costs at an average $15 a square foot and removal and replacement costs average a minimum of $1.50 per square foot. Although expensive and time-consuming, carrying out mold remediation can save the developer significantly greater future expense inherent in the litigation process."); see also Goldman, Litigating Mold In Condominiums, 6 CAI's J. of Condo. Ass'n. Law (July 2003); Goldberg, Gov't Remediation Guidelines May Affect Property Damage Claims From Mold, 17 Envtl. Comp. & Litig. Strat. 12 (2002); Blundell, Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?, 8 Envtl. Law. 389 (Feb. 2002).