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part 2

Condominium CONSTRUCTION DEFECT Litigation

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Claims for Breach of Common-Law Implied Warranties

Implied warranties of fitness and merchantability apply to the sale of new condominium units. Developers can disclaim or disavow common-law implied warranties with a clear disclaimer that such warranties don't apply. Common-law warranties only benefit owners who purchased directly from the developer, and not subsequent purchasers. However, as explained above, as long as even one unit owner is still in privity with the developer, that unit owner can arguably claim to have a right to recover all damages to remedy all defects in the common elements.



The majority of the case law holds that the common-law implied warranties extend further than mere habitability to impose the responsibility to construct improvements in a workmanlike manner in compliance with the applicable building codes and in compliance with the condominium's restrictive covenants. However, in the case of *Putnam v. Roudebush*, 352 So.2d 908 (Fla. 2d DCA 1977), the Florida First District Court of Appeal held there was no action for breach of warranty for a noisy air conditioning system because the premises met normal standards reasonably to be expected of living quarters of comparable quality (in other words, because they met the habitability standard). The warranty of fitness or merchantability does not extend to a seawall. *Conklin v. Hurley*, 428 So.2d 654 (Fla. 1983).

The defect must be related to an integral part of the unit. Also, the warranties do not apply to improvements to land other than residences and immediately supporting structures, commercial property, leased property, lots on which improvements were constructed, or unimproved lots. However, the courts are not in agreement on the scope of such warranties. See *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. 4th DCA 1981) in which the Court affirmed an award based on a breach of implied warranty for failure to install a decorative aluminum fence with no utilitarian function.

There has been some judicial expansion of the developer's common-law implied warranty of fitness and merchantability towards purchasers of new condominium units to include a duty to construct the condominium in accordance with the plans and specifications.

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LITIGATION *cont.*

However, one court held where unit owners were on notice of a change in the plans and the developer made a good faith attempt to comply with disclosure requirements of the Condominium Act, and without a showing of prejudice, the association did not have a claim for the deviation from the plans. *Beach Place Joint Venture v. Beach Place Condominium Association, Inc.*, 458 So.2d 439 (Fla. 2d DCA 1984). Another court held it was error for the trial court to fail to consider evidence that a change in the plans was necessary because of safety factors or impossibility of performance. *Juno by the Sea Condominium Apartments, Inc. v. Juno by the Sea North Condominium Association (The Tower), Inc.*, 418 So.2d 1190 (Fla. 4th DCA 1982). In *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. 4th DCA 1981), the court indicated an implied warranty existed in favor of original purchasers that the condominium was constructed in compliance with applicable building codes. The relevant question is whether the alleged failure to comply with building codes is material and results in any damage to the association. Generally only substantial compliance is needed. Also, it is important to determine the exact code that applied when the permit was issued.

The courts have been reluctant to enforce disclaimers for common-law implied warranties. Section 718.303(2), F.S., however, provides that "A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision." But *Belle Plaza Condominium Association v. B.C.E. Development, Inc.*, 543 So.2d 239 (Fla. 3d DCA 1989), held that express or common-law implied warranties can be disclaimed by use of a bold and conspicuous disclaimer.

Claims for Breach of Statutory Warranties

Florida's Condominium Act imposes implied warranties extending from the developer to each purchaser of a condominium unit. Section 718.203(1), F.S., provides the warranty that the developer extends to each purchaser of a condominium unit is an implied warranty of fitness and merchantability for the purposes or uses intended. Unlike the common-law implied warranties, the statutory warranty benefits not only the original purchasers of condominium units, but also subsequent purchasers. § 718.203(5), F.S.

The statutory warranty extends to personal property transferred with or appurtenant to each unit, to the roof and structural components of a building or other improvements, and to mechanical, electrical and plumbing elements serving improvements or a building (except mechanical elements serving only one unit), and to other improvements for the use of the unit owners. The reference to other improvements covered by the warranty, in Section 718.203(1)(c), F.S., could be interpreted to include a seawall, tennis courts, or other portions of a condominium beyond the roof or structural, electrical, mechanical, and plumbing elements. Furthermore, the developer

also impliedly promises that the condominium complies with the restrictive covenants for the condominium.

Section 718.203(2), F.S. provides that contractors, subcontractors, and suppliers extend to each purchaser of a condominium unit an implied warranty of fitness as to the work performed or materials supplied. This warranty extends to the roof, 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. Design professionals, on the other hand, have no duty to the association based on the statutory implied warranty provisions of § 718.203, F.S. They were removed from the statute in 1992.

Depending on which property the defect involves, a different statutory warranty period applies. The different statutory classifications are: units; personal property transferred with or appurtenant to each unit; all other improvements for the use of the unit owners; all other personal property for the use of the unit owners; roof and structural components and mechanical, electrical, and plumbing elements serving a building; and all other property conveyed with each unit. In some cases it is not clear which category applies.

Section 718.203(4), F.S. conditions the statutory implied warranties under the Condominium Law on the performance of routine maintenance. The courts typically simply require the developer to assert failure to maintain as an affirmative defense. However, if the developer fails to perform maintenance for elements such as the roof, structural, mechanical, electrical and plumbing elements while it controls the association, especially if it retains control past the expiration of contractor and subcontractor warranties, the association may avoid this affirmative defense.

Claims for Negligence and Claims for Strict Product Liability

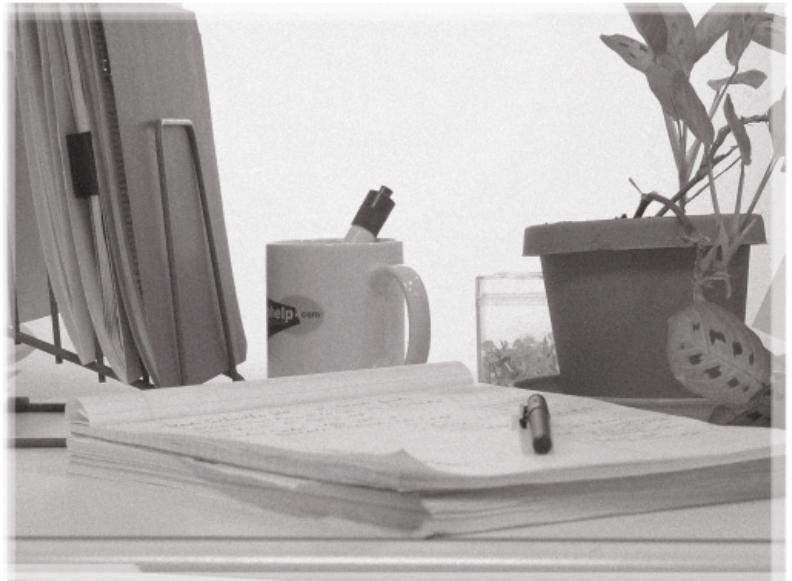
The economic loss rule is a judge-established rule in Florida which bars negligence or strict liability actions for economic losses in certain circumstances. The economic loss rule in Florida bars recovery of economic damages in negligence or strict liability actions for construction defects against parties that were in privity (in a direct contractual relationship) with the plaintiffs. Typically, the developer is in privity with a condominium association and with many or all of the unit owners who make up the class members in a class action by a condominium association. The economic loss rule also generally bars negligence actions against manufacturers or distributors of a product for damage only to the product itself, which caused no injury to persons or damage to other property (material suppliers or manufacturers of building components would fall into this category where the construction defects have caused only economic losses). The economic loss rule bars negligence actions by the association against pre- and post- turnover directors arising from defective design, construction, inspection, repair and wiring of a condominium.

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The Greens of Town 'N Country Condominium Association, Inc. v. The Greens of Tampa, Inc., 653 So.2d 1136 (Fla. 2d DCA 1995).

Design firms and individual design professionals (architects and engineers) who participate in the design of the condominium are liable for their negligence to the aggrieved party regardless of lack of privity even for purely economic losses. The economic loss rule does not bar such claims. Such claims are not even barred when there is privity with the design professional.

The case of *Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So.2d 1349 (Fla. 2d DCA 1992) mentions an exception to the economic loss rule as to general contractors when the economic loss to the association is an expense to cure a latent building defect that creates an immediate and substantial risk of bodily injury or damage to property other than the building.



Florida Deceptive And Unfair Trade Practices Act (FDUTPA)

Chapter 501, Florida Statutes, can apply to condominiums and can authorize a cause of action arising out of a developer's failure to perform as represented in the offering prospectus or condominium declaration or to the extent the developer engaged in sale or advertising promotion which was deceptive or misleading. There is a statutory provision for recovering attorneys' fees. The economic loss doctrine does not bar a claim under this statute. However, Department of Legal Affairs Administrative Rule 2-16.04 which defined as an unfair and deceptive trade practice a developer's failure to perform as represented under the disclosure requirements or to engage in deceptive or misleading sales or advertising was repealed on July 25, 1995. Also, FDUTPA does not apply to claims for personal injury or death or claims for damage to property other than property that was the subject of the transaction, F.S. 501.212(3). FDUTPA does not apply to an act or practice involving the sale, lease, rental, or appraisal of real estate in violation of §475.42 or §475.626, F.S., by a person licensed, certified or registered under Ch. 475, F.S. FDUTPA does not apply to causes of action concerning failure to maintain real property if the Florida Statutes 1) require the owner to comply with applicable building, housing, and health codes, 2) require the owner to maintain buildings and improvements in common areas and 3) provide a cause of action for failure to maintain, including the award of attorney's fees. Damages and fees are not recoverable against a retailer who has in good faith disseminated claims of a manufacturer. §501.211, F.S.

Statute of Limitations

Actions for condominium construction defects have varying statutes of limitation. It is necessary to check Chapter 718 and Chapter 95, Florida Statutes. In an action against a developer for breach of statutory and common-law implied warranty, the statute of limitations is four years. In an action under §553.84, F.S., the statute of limitations is also four years. For latent defects, the action must be filed within four years of when there is an obvious manifestation of the defect, even if its exact nature is not known. *Performing Arts Center Authority v. Clark Construction Group, Inc.*, 789 So.2d 392 (Fla. 4th DCA 2001). But discovery of one actionable defect may not start the statute running as to unrelated defects. *Wishnatzki v. Coffman Construction, Inc.*, 884 So.2d 282 (Fla. 2d DCA 2004). And finding small cracks in a house was not notice of the house being built upon loose sand and muck to start the running of the statute of limitations. *Snyder v. Wernecke*, 813 So.2d 213 (Fla. 4th DCA 2002). Notice of a defect in the common elements as to the condominium association imputes notice of such a defect to the unit owners for purposes of the statute of limitations, because the association is the contractually and statutorily designated agent for the unit owners with respect to maintenance and repair of the common elements.

The statute of limitations will not begin to run for association actions against the developer until the developer relinquishes control of the association to the unit owners. The time periods specified in §718.203, F.S. establish the lifetime of statutory warranties, not the statute of limitations for suing on the warranties, which is set out in F.S. Chapter 95.

In any case, the outside limit on liability for construction defects is based on the statute of repose, which sets 15 years as the limit. The count of 15 years is triggered by the actual date of occupancy, issuance of certificate of occupancy and other events outlined in F.S. 95.11(3)(c). This outside limit on liability is absolute, and is not tolled by F.S. 718.124 or by the defects being of a latent nature.

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Conversions

The Roth Act was enacted in 1980, and is incorporated as Part VI of the Condominium Act. It imposes disclosure requirements on a developer in a conversion of rental units to a condominium, including the condition of the roof, structure, fireproofing, fire protection systems, elevators, heating and cooling systems, plumbing and electrical systems, swimming pools, seawalls, pavement and parking areas, and drainage systems. §718.616(3)(a), F.S. The developer is also required to establish a reserve fund for capital expenditures and deferred maintenance or give warranties as provided in §718.618(6), F.S. or post a surety bond as provided in §718.618(7), F.S.

A conversion is not a new condominium unit, so the common law warranty of habitability or merchantability does not apply. However, a developer that fails to establish the reserve accounts, or post a surety bond per §718.618, F.S., is deemed to provide to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes intended as to the roof, structural components, and mechanical, electrical, and plumbing elements except mechanical elements serving only one unit. §718.618(6), F.S. The warranty is for 3 years beginning with the notice of intended conversion or the recording of the declaration of condominium, or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but for no more than 5 years. This warranty is conditioned on routine maintenance being performed unless maintenance is an obligation of the developer or a developer-controlled association. §718.618(6)(a), F.S. This requirement for warranties from the developer may be satisfied by means of an appropriate insurance policy obtained by the developer.

The developer of a conversion is required to disclose the date and type of construction, the prior use, any termite infestation, the condition of the roof, elevators, heating and cooling systems, plumbing, electrical systems, swimming pool, seawall, pavement and parking areas, and drainage systems, and must substantiate these with a certificate from an architect or engineer. Florida courts have not yet decided if incorrect information in these disclosures will create an action for breach of contract or breach of express warranty even if the contract for sale disclaims express warranties and states the property is sold "as is."

Under §718.506, F.S., any person who pays value towards purchase of a condominium unit has a cause of action against the developer if they reasonably relied on false or misleading information published under authority from the developer in advertising and promotional materials. Such person can rescind the contract prior to closing or collect damages from the developer before or after closing. Also, failure to disclose material facts known to the seller about the condominium can create a cause of action for fraudulent concealment, even if the

seller does not intend to deceive the buyer. Fraud in the inducement is a tort independent of the contract between the individual unit purchasers and the developer and is therefore not barred by the economic loss rule. An action against the developer for negligent disclosure of the condominium's condition, however, would be barred by the economic loss rule. Actions for breach of contract, express warranty or common-law warranty are limited to original purchasers of units in a conversion condominium. However, the statutory implied warranty from a developer of a conversion inures to the benefit of owners and successor owners. §718.618(6)(b), F.S.

Damages Recoverable in a Lawsuits Regarding Construction Defects

Generally the measure of damages is the cost to repair or replace the defective building components, not the diminution in value of the condominium units. However, an association's damages may be prorated to account for increased life expectancy of the new component. Where the cost of correction would result in unreasonable economic waste or the cost of correction exceeds the value of the property, the measure of damages is instead the diminution in the value of the property.

Homeowners Association Claims

Some limitations apply to construction defect claims by homeowners' associations. Like a condominium association, a homeowners' association has standing to bring a class action on behalf of all its members concerning matters of common interest to the members, including, but not limited to, the common areas, roof or structural components of a building or other improvements for which the association is responsible, and representations of the developer pertaining to any existing or proposed commonly used facility. §720.303(1), F.S. However, before commencing litigation involving an amount in excess of \$100,000, the association must obtain the approval of a majority of the voting interests at a meeting of the membership where a quorum has been attained. §720.303(1), F.S. The statute mentioned above, statute §718.124, F.S., which tolls the statute of limitations so that it does not begin running until the unit owners have elected a majority of the board, applies only to condominium associations or to cooperative associations, not to homeowners' associations. Also, unlike a condominium association, which is granted statutory implied warranties under §718.203, F.S., a homeowners' association has no such protection, though common-law implied warranties can still apply if they have not been expressly disclaimed by the developer.

There are a myriad of construction-related issues that can crop up in a community association. For guidance on your particular situation or for more information on any construction-related concerns you may have, be sure to contact your association counsel.