Construction Defects and Deficiencies: Promptly Investigate Problems to Preserve Legal Remedies

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Imagine that you are sitting on the Board of Directors of the XYZ Condominium Association. The owner of a penthouse unit calls to complain of water stains that have appeared on a bedroom ceiling. A quick check of the calendar reveals that statutory warranties have expired for the building. The developer is contacted and sends up a roofer to patch the roof. The leak is temporarily halted.

Four years pass. The developer has been called on occasion to perform remedial roof repairs. But now, the leakage has become so bad that the board hires in a roof consultant to investigate. The consultant performs destructive testing and discovers a major construction flaw necessitating the replacement of the eight year old roof. The board now seeks legal advice to determine whether the Association can proceed against the responsible parties for this “latent” construction flaw. Has the board acted timely?

According to the Florida Supreme Court decision of Kelly v. School Board, 435 So.2d 804 (Fla.1983), probably not! The Supreme Court reaffirmed that it is not the date the cause of a defect or deficiency is determined that starts the limitations clock running but instead, the date the consequence of the defect or deficiency is discovered. This legal principle has been followed by a variety of Florida Courts over the past decade. In the above scenario, the XYZ Board had evidence through the report of the penthouse owner more than four years previously that the roof was leaking. For statutes of limitation purposes, it was on that date, as opposed to the date the roof consultant determined the cause of the roof leak, that the roof defects were discovered. Since more than four years elapsed since the date of discovery, the developer would have a good defense that the roof claim was time-barred. The fact that the developer undertook repairs in the interim does not act to extend the limitations period.

To avoid this dilemma, order a complete engineering investigation for your community even before construction problems are “discovered.” Under 718.203, Florida Statutes, condominium warranties on roofs, structural components, electrical, mechanical and plumbing elements are good for three years from the date of the issuance of the building certificate of occupancy, or one year from the date of transition, whichever is later, but in no event longer than five years. For condominium groups with remaining statutory warranties, this step will provide maximum assurance that serious latent defects are isolated and acted upon during the warranty period. For groups no longer afforded statutory warranty

protection, an engineering investigation could help avoid the consequences of the statutory of repose discussed below. Furthermore, whether an Association has any intent to pursue responsible parties for construction defects and deficiencies, a complete engineering study can be a of assistance by enabling the board to satisfy its maintenance and repair responsibilities.

When a defect or deficiency is “discovered” at your community, it is imperative that a timely engineering investigation be ordered. Even if the developer is willing to come in to “repair” the problem, it is recommended that the Board hire an independent consultant to assure that the problem is not symptomatic of a more fundamental design or construction flaw. Moreover, the study will enable the Board to confirm whether the developer’s proposed repair methodology is appropriate. The engineering study should be provided to legal counsel so that an analysis can be made of available legal remedies and feasibility of recovery from responsible parties.

Finally, a word on the statute of repose. Section 95.11(3)(C), Florida Statutes provides that an action seeking recovery for latent defects must be filed within four years of the date of discovery, but in any event no later than 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, . . or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest. The underlined provision is what is known as the “statute of repose.”

Consider the following scenario. The board of XYZ condominium association is confronted with massive repair expenditures resulting from recently discovered deterioration of reinforcing steel in the unit balconies The certificate of occupancy for the building was issued in February, 1984. A engineer hired by the Association advises that structural reinforcing steel were installed contrary to the building code. Applying the statute of repose, it is likely that, unless the Association file suit by February, 1999, the pursuit of any claims will be barred.

The above scenario points out the need for all Associations whose buildings are nearing 15 years of age to consider an engineering evaluation of structural elements and other major systems to assure that the buildings are free of latent conditions that will require major repair expenditures. This action may perhaps be the only way to assure that the statute of repose will not arbitrarily restrict the Association’s ability to recover for such latent defects.

In conclusion, even if you believe your buildings and improvements to be relatively well-built, an engineering study is still recommended to assure accuracy of such an assessment. If you become aware of a construction problem, have the problem analyzed as early as possible by an engineering firm to determine if the problem is symptomatic of a more fundamental defect or deficiency in the construction. For buildings nearing 15 years of age, it is a good idea to order an engineering check-up before the door is shut on the potential of recovery damages from responsible parties.