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THE CONDOMINIUM CRAZE: Managing the Players, the Project, and the Potential Liability

ALLISON J. SNYDER
PORTER & HEDGES, L.L.P.
Reliant Energy Plaza
1000 Main Street, 36th Floor
Houston, Texas 77002
(713) 226-6622
asnyder@porterhedges.com

— [porterhedges.com

Recent Popularity of Condominiums

- **Florida lawsuits**
 - 1,825 complaints filed in 2004
 - 2,557 complaints filed in 2006
- **Clark County, Nevada**
 - 12 construction defect lawsuits in 1996
 - 200 construction defect lawsuits in 2003
 - 120 of those are condominium projects
- **Texas follows suit**
 - 20 new condominium developments in Dallas alone in 2006

The Rules

- **Uniform Condominium Act**
 - **Codified in Chapter 82 of the Texas Property Code in 1993**
 - **Applies to all commercial and residential condominiums in Texas**
 - **May not be varied by agreement (with a few exceptions)**
 - **Rights conferred may not be waived**

Governing Documents

- **1) Declaration (see §82.055)**
 - Must be filed in county records before any units can be sold
- **2) Organizational Documents of the Association**
 - Articles of Incorporation
 - Bylaws
 - Organizational meeting minutes
- **3) Unit Purchase Agreements and Warranty Deeds**
 - Must accurately describe the unit and the percentage interest in the common elements.
 - The deed must convey both interests

The Players

- **Developer:**
 - **Initiates Condominium Development**
 - **Obtains Property and Financing**
 - **Hires General Contractor and Architect**
 - **Prepares and Records Declaration**
 - **Organizes Unit Owners' Association**

The Players - Continued

- **The Design and Construction Team**
 - Architect
 - General Contractor
 - Subcontractors
 - Suppliers



Home Owners' Association

- **Governed by a Board of Directors**
- **May only act “by and through” Board**
- **Must maintain, repair, and replace common elements**
 - **Often hire Managing Agent to do this**
- **Fund its actions through assessments**
 - **Based on fractional percentage of ownership in common elements**

The Project - Insurance

- **Contractors'/Subcontractor's Insurance**
 - Commercial General Liability (CGL)
 - *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*
- **Architect's Insurance**
 - Errors and Omissions (E&O)
- **HOA's Insurance**
 - Property Insurance
 - CGL
 - Other Insurance Required by Declaration

Potential Liability - Standing

Prior To September 1, 2007:

- **Individual Unit Owners**
 - Could sue for damage to their own unit from defects
 - Could not sue for damage to “common elements” unless:
 - 1) The number/location of co-tenants makes their joinder “impracticable”, or
 - 2) A defendant fails to object to the Plaintiff’s failure to join the co-tenants
 - HB 3147 redefines “Residence” to include common elements – will change the standing debate
- **Home Owners’ Association**
 - Could sue for itself or two or more units owners on “matters affecting the condominium”

2007 Changes - HB 3147

- **Amends Residential Construction Liability Act (“RCLA”) (Chapter 27 of Texas Property Code)**
- **Three Main Changes**
 - **Amends the definition of “contractor” so that it applies not only to a seller or contractor that contracts directly with a homeowner but also to the owner/developer and general contractor that constructs a residential condominium. This means that, even though the general contractor may not have a direct contractual relationship with the individual unit owners or the unit owner’s association, any claims brought by the unit owner or the unit owner’s association against the general contractor for defective construction must be subject to the notice and cure provisions of the RCLA.**
 - **Amends the definition of “residence” so that the statute clearly applies to the construction of both the common elements as well as the individual units in a condominium.**
 - **Exempts a third-party contractor on a residential condominium project from having to include the statutory “consumer disclosure” notice in its construction contract.**



2007 Changes - HB 3147

- **Significant Because:**

- 60-Day Notice of Defects
- Right to Inspect / Right to Cure
- Offer of Settlement

- **Does Not:**

- Require commercial contractors to become licensed under TRCC rules/statutes
- Subject condominium projects to the TRCC administrative procedures



Potential Liability - Limitations

- **Statute of Repose**
 - 10-Years from Substantial Completion
- **Statutes of Limitation**
 - 2-Years – Negligence, DTPA
 - 4-Years – Breach of Contract, Warranty, Fraud, Breach of Fiduciary Duty

Potential Liability – Causes of Action

- **Breach of Contract / Express Warranty**
 - Purchase and Sale Agreement between Developer and Unit Owner
 - Typical “As Is Clause”



Potential Liability – Causes of Action

- **Breach of Implied Warranty**
 - Applies to **Builder**, not necessarily **Developer**
 - *Centex Homes* case



Potential Liability – Causes of Action

- Negligence
 - *Lamar Homes* issues



Potential Liability – Causes of Action

- **Fraud / Fraud in a Real Estate Transaction**
 - Usually Against Developer by Unit Owner
 - *HOW Insurance case*



Potential Liability – Causes of Action

- **Negligent Misrepresentation**
 - Usually Against Developer by Unit Owner



Potential Liability – Causes of Action

- **Deceptive Trade Practices Act**
 - If RCLA properly invoked by general contractor and developer, will limit damages and provide defense to liability



Potential Liability – Causes of Action

- **Breach of Fiduciary Duty**
 - **Board owes duties to Association and to Unit Owners**
 - **Obedience**
 - **Loyalty**
 - **Due care**



Risk Management Ideas - HOA

- Homeowners and Homeowners Associations
 - Gather Documents and Information Immediately
 - Perform all Recommended Maintenance
 - Beware all potential statutes of limitation and plan accordingly
 - Act quickly and decisively
 - Negotiate contract clauses
 - Beware of duties of disclosure by unit owners and the association



Risk Management Ideas - Developer

- **OCIP/CCIP Insurance Policies**
- **Contractor Bonds / Maintenance Bonds**
- **“AS IS” provisions and disclaimers**
- **Buyer Inspection requirements**
- **Retain Ownership in Skin and Roof**
- **Maintenance Fund and Procedures**
- **Directors and Officers’ Insurance**
- **Indemnification for Board Members**
- **Property Management**
- **Promotional Materials**



Risk Management Ideas - Contractors

- **Do Your Homework on the Developer**
- **Receive a Unit as Part of Your Fee**
- **Condominium Conversions**



Risk Management Ideas – Contract Drafting

- Retain Access Rights
- Indemnity Clause
- Mediation / Arbitration
- Limitation of Liability



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QUESTIONS???

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