The importance of an independent engineer for newly turned-over condominium associations in Florida.

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It's been about a year since you closed on your brand new Florida condominium unit. You receive a notice from the developer-controlled association that the association is being turned over to the unit owners at an upcoming meeting, and you put your name down as a candidate for the board. You're elected as President at the meeting and you and your fellow board members, neither with prior experience in this field, are now in control of a several hundred-unit condominium project with approximately 600 unit owners and residents, all looking to you for guidance on how best to manage their property. Luckily for your association and its residents, you hired an independent engineer to inspect your building and provide you with a comprehensive building report.

Florida law provides four years in which to bring an action for construction defects (FS 95.11(3)(c)). For condominium associations, the time runs from the date that the developer turns over control of the association to the unit owners (FS 718.124). If the defect is latent (i.e., not obvious), the time runs from the date on which the association discovered (or should have discovered with the exercise of due diligence) the defect. In any event, however, the action must be commenced within ten years following the developer's turnover of the condominium to the unit-owners (FS 95.11(3)(c)). After that time, the statute of repose as it's called, would effectively bar any such actions.

*(Note: The limitations periods referenced above do **not** apply the same to individual purchasers bringing suit for construction defects, even if they are condominium purchasers. In such instances, they would not get the tolling protections afforded to associations by FS 718.124.)*

Although a leaking roof is the quintessential example of a *non-latent* defect (e.g. when water is dripping on your head, you are pretty much on notice of the defect), the patency or latency of other types of defects are not necessarily that easy to determine. If you're litigating the issue years later, it's likely too late. Further complicating issues are the statutorily implied warranties that come with all new condominiums in Florida. Indeed, Chapter 718 of the Florida Statutes grants purchasers of new condominiums a statutorily implied warranty from the developer, contractor, subcontractors, and material suppliers who furnished labor or materials to the project (FS 718.203). Since the time in which purchasers (or the association) have to make a warranty claim is different from the running of the statute of limitations, there are separate timelines that the association must be aware of (keep in mind that making a claim within a warranty period is completely different from filing suit within the statute of limitations). And since the statutory

warranties expire at different times for different building components, keeping track of the relevant deadlines can be daunting, especially to an inexperienced or ill-advised board.

Consider the following scenario:

A unit owner reports leaking into his penthouse unit from the ceiling above. A routine, non-invasive inspection reveals that the leak might be coming from a small void in the roof above. Your property manager calls out the roofer and a minor patch is applied. The leak in the unit stops. Several years later, the building experiences a major leak in another unit. A survey of the roof reveals excessive moisture below the roofing system, and extensive water damage and mold growth in the space between the roof and the penthouse floor's ceiling. The roofer recommends that remediation work be performed, and then, due to the widespread damage to the roof system, that the roof be completely replaced. With the roof warranty expired, the replacement costs will be staggering, possibly resulting in a large special assessment to each unit owner. You consult an attorney and ultimately bring a claim against the builder for construction defects. The builder defends on the basis that the statute of limitation has expired, since you first knew or had reason to know of the defect years earlier, when the leak first manifested in the other unit.

To help mitigate the possibility of something like this occurring, it is highly recommended that a new unit-owner-controlled board engage the services of a competent licensed Florida engineer to perform a thorough evaluation of its property. Think of it like a physical for the building, and make sure that no stone is left unturned. First, ask around to find the best engineer for the job. Most likely your condominium attorney has worked with engineers before, so he or she may be able to make a recommendation. If not, try and get a recommendation from your property manager or property management company, other condominium or community association board members you may know, or people in the industry that you trust. Once you've located and selected an engineer, develop the scope of work for your specific needs.

At a minimum, your engineer should inspect the property and prepare a comprehensive report covering all building components, including (but not limited to):

- architecture
- structure
- building envelope (including stucco and paint)
- windows and doors
- fire protection
- mechanical
- electrical, and
- plumbing.

Since each project is different, your report may need to include other components as well, such as seawalls, docks, common element recreation areas, etc. The report should include an itemized list of both design and construction issues related to the project, and at a minimum, for each:

- the location(s) where the issue appears;
- a detailed description of the issue;

- an explanation as to the nature of the specific criteria used to evaluate the issue;
- recommendations for repair and remediation, and;
- pictures depicting the issue.

Make sure that the contract with your engineer specifies that a report will be provided with this level of detail.

Although in Florida a condominium developer is required to provide the unit-owner-controlled association with a similar report at turnover, there are two important things to remember about this report. First, it only needs to encompass what the statute requires it to, and one could argue that the statute's coverage is less than that which is provided in a more comprehensive report of the building components. Second, the report is likely being prepared by an engineer selected by, and working for, the developer. Although the report may be 100% accurate and prepared with the utmost of good faith, the single fact that it is being prepared by the developer's engineer gives me pause in advising a unit-owner-controlled association to trust it without independent verification.

With an independent building report in hand, a new unit-owner-controlled board should be prepared to analyze any issues affecting the design and construction of its building. The association should then be equipped to raise warranty and defect claims as may be necessary, and provide those responsible with specific detailed information relating to the possible defects and deficiencies in their work. Finally, both the report and the relationship that has developed between the association and the engineers should enable the association to better maintain the building for years to come.