

Design Professional Newsletter

CONDOMINIUM CASE STUDY

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Great American's Risk Management Department often receives inquiries from our insureds regarding the pros and cons of engaging in condominium projects. Recently, we received a question about entering a project with existing defects. While we aim to provide practical risk management tips, it is imperative that insureds understand the risks involved. A great way to illustrate potential problems is through real-life claim examples. Below is a claim scenario to consider:

Background

This claim relates to a water intrusion issue at a luxury condominium project where the design professional was retained to assist with a stabilization project. The insured was contracted to perform work on the building's façade to ensure it was declared safe and stable, complying with the city's façade ordinance. It is important to note that the building had pre-existing water intrusion issues that were ignored by the HOA due to budget constraints.

The design professional's scope of services did not include a complete restoration of the building's façade. They were hired to identify areas needing repairs, provide drawings based on those findings, and then send them out for bid. While the proposal did not include any remediation for water infiltration problems, the design professional signed and sealed an inspection report discussing the 'water tightness of exterior surfaces.' Additionally, the design professional provided on-site observation services and certified that the remedial work was done in accordance with contract documents. This was done five years before the claim was made.

The Plaintiff's Claim

The plaintiff, HOA, filed a lawsuit against the design professional and general contractor, alleging water intrusion issues in the building. The plaintiff's expert report and photos

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showed interior water damage in the units, efflorescence on the brick façade, and other conditions contributing to water intrusion problems at the apartment complex. The plaintiff's expert criticized the design professional's designs, opining that the plans did not include sufficient repair details to allow a contractor to perform proper repairs.

Damages Alleged

A set of remedial plans was produced for a full façade rehabilitation program, including replacement windows and flashing repairs. The estimated cost to implement the plan was \$1,500,000.

Battle of the Experts

The plaintiff's expert contended that the design professional incorrectly characterized the building façade as a barrier system and failed to recommend probing to determine the cause of leaks in the building. They also failed to include details and sections to address flashing needs per the code and conduct adequate site visits, which, in the expert's opinion, would have disclosed the existing flashing system.

The plaintiff's expert concluded that some of the required repair work was due to the general contractor's faulty construction, in addition to the allegedly deficient design documents. While the design professional would not be primarily responsible for the cost of any faulty construction, if the plaintiff can establish that they should have detected the faulty construction during on-site visits and payment certifications, or that the faulty work resulted from no detailing on the plans (e.g., flashing at shelf angles), a jury could hold the insured accountable for a percentage of any verdict attributable to faulty construction.

The liability expert retained on behalf of the design professional contended that the scope of services was limited to specifying repairs to conform to the city's façade ordinance and that they were not retained to provide a design to make the building waterproof, as alleged by the plaintiff.

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The contractor's expert opined that the insured's structural remediation drawings were insufficient, lacking critical information about the water-resistive barriers and flashing beneath the brick veneer.

Given that the insured was responsible for the façade assessment and performed site visits during construction, and there is evidence of leaks at or around the locations of the repairs, a jury could award a verdict in favor of the plaintiff and against the insured at trial. The plaintiff will likely focus its efforts against the insured at trial since the contractor may not be able to satisfy a verdict. If so, the jury could allocate as much as 50% to 75% in liability against the insured.

Defenses

Our defenses primarily rested on the fact that the design professional's repairs were not intended to make the building waterproof, and the expert provided an opinion stating just that. However, since the contractor issued their expert report stating that the insured's structural remediation drawings were insufficient and lacked critical information regarding the water-resistive barrier and flashing on the building, the design professional likely would have had some exposure should the case have proceeded before a jury.

Result

After four years of litigation, this claim was resolved via mediation for a six-figure amount.

Lessons Learned

The biggest red flag in this situation was the pre-existing defects in the project. Since there were previous water intrusion issues and evidence that the HOA did not follow remediation advice from previous design professionals, the design professional could have required an indemnification clause in their favor in the event that future water issues were discovered.

An example of such language would be as follows: "Client acknowledges existing conditions related to water intrusion issues at the site. Due to the potential risk and exposure of [design professional] to claims that might involve the work of previous

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consultants, the client shall indemnify, defend, and hold harmless [the design professional] against all liability, loss, cost, damage, or expense (including reasonable attorney's fees and cost of defense) and against all claims, suits, demands, or actions arising out of the performance of design, consulting, or engineering services by previous design consultants, and caused by any negligent act, error, omission, or breach of contract (including breach of representation or warranty) by those persons or entities, whether or not the client is liable, including any claim or action based upon violation of any statute, ordinance, building code, or regulation."

Additionally, it is important to know your fellow project participants. Here, the party with the most culpability, the general contractor, had little insurance available to cover potentially substantial damages that a jury could award.