



WHITE PAPER:

**RISK MANAGEMENT IDEAS FOR
CONDOMINIUM PROJECTS**

**PREPARED FOR
THE AIA TRUST**

APRIL 2006

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EXECUTIVE SUMMARY

Here are the highlights of the attached White Paper on risk management as relates to condominium projects:

■ There has been incredible growth in the housing market nationwide. Construction defect litigation has exploded in several states, drawing aggressive plaintiff law firms to what has become a “cottage industry” of filing suits on behalf of condominium owners and Homeowner Associations (“HOA”) against developers, contractors, architects and others for actual or alleged defects. Some architects and contractors have dropped out of the condominium market due to suits and high insurance. Insurers for contractors have invoked exclusions in new policies for any residential construction and insurers for architects charge increased premiums and require a supplemental application for condominium projects. With many condominium projects developed by single-purpose LLC’s, which are dissolved after all the units are sold, the unit owners and HOA’s often have no recourse against the entity who sold them their unit. As a result, many sue the contractor and architect.

■ As of January 2006, a total of 27 State Legislatures have passed “Right-To-Cure” Acts (or Construction Defect Acts) that are aimed to reduce suits by requiring the HOA and the condominium unit owners to give advance written notice of a defect to the contractor prior to filing a lawsuit. In 14 states, the law also protects architects. See **Appendix G** for the full text of these statutes and hot links to the actual laws. These laws set out a pre-claim procedure whereby the contractor (and sometimes the design professional) have the right to inspect the property, conduct testing, and then offer to repair or settle the dispute, or to deny liability, before any lawsuit is filed. In a few states, the HOA must give advance notice to the unit owners and explain the options and the cost of litigation. In at least one state, the HOA board must send the owners a copy of the contractor’s response to the claim and a vote is required before suit can be filed. These laws can greatly assist in reducing costly litigation, however in nearly 75% of the states there is currently no protection for the architect. AIA has lots of work to do in this area. Of the 27 states with “Right-To-Cure Laws”, only 14 of those include design defects or specific mention of architects.

■ The architect most often does not have a direct contract with the ultimate condominium unit owner and is hired, instead, by a developer. However, the “economic loss doctrine” has been adopted by about half the states, which provides some protection against third party claims by unit owners or condominium associations if there is no claim for “personal injury” or for “property damage.” When the claim is solely one for economic damages, including the cost to repair, the unit owners have no direct cause of action against the project architect and must, instead, bring suit against the developer or

seller of their unit. Architects need to check with legal counsel to see if the economic loss doctrine applies in the project state.

■ Under the “Uniform Condominium Act”, adopted in most states, the developer gives an express warranty to unit purchasers as to the physical characteristics of the plans, specs or project – even if the words “warranty” or “guarantee” are not used. This warranty can be excluded or modified by written agreement of the parties. The Act also creates implied warranties of quality, which can be excluded or modified by agreement. A “general disclaimer” of implied warranties is not effective, however, and the developer or seller has to specify the defect being waived. Also, under the Uniform Condominium Act the developer can reduce the statute of limitations on both express and implied warranties from 6 years to 2 years. This has to be evidenced by a separate instrument, executed by the purchaser. These disclaimers and reductions in statutes of limitations can be used to manage risk.

■ Several states still apply the legal doctrine of “Joint and Several Liability”, a legal concept in which all of the defendants in a negligence case can be held “jointly” liable to a plaintiff, such as a condominium unit owner or HOA. This means that if the developer no longer exists or has dissolved its single-purpose LLC, and the contractor has no insurance, the architect might be held liable for the negligence of the developer and/or the contractor. Most states have abolished joint and several liability or limited its application. See **Appendix F** for a matrix of those states.

■ Fifty Risk Management ideas and recommendations are included at the end of this White Paper as **Appendix A**. These may require conformance with applicable state law before they are used in any one state. Whether to use all of these ideas or not on each job is a business decision. Of course, you never get what you don’t ask for. If you get even 10 of these, you are better off than with none. Architects should discuss which ones are “deal breakers” which you must insist on.

■ Standard form contracts do not address the unique liability associated with a condominium project. This White Paper includes as **Appendix B** a set of Supplemental Conditions for use on condominium projects, with cutting edge concepts for risk management and appropriate allocation of liability among the developer, contractor and architect. These are specially tailored contract clauses for review and discussion. Some of these concepts will be limited by state law; therefore, users should consult their attorney for advice before adopting them in their entirety and to determine what state’s law will govern the contract.

I. Introduction to Condominium Claims.

A. The Demand for Condominiums. We are in the middle of the largest construction boom in the past decade. According to the U.S. Department of Commerce, new construction in 2004 was an 11.1% increase over 2003. Construction in 2005 was more than 9% over the record-breaking 2004. The biggest increase is seen in housing construction, up 14% over 2004. A large segment of housing construction is condominiums. Every major city is seeing a dramatic increase in urban condominium projects, from old warehouse and loft conversions to new high-rise and mixed-use projects. *Realtor Magazine* reported in December 2004 that, “*Condos now account for 12.8 percent of the housing market, a 33.3 percent rise over the last decade.*” The March 2005 Multi-family Housing Market Index, published by the National Association of Homebuilders (NAHB), said, “*Condos are the strongest category in multi-family construction.*”

B. The Risk. However, this project type carries with it an unusual risk and higher than average number of claims. Individual residential condominium units often sell for prices ranging from \$250,000 to \$1 million and more. High-end residential construction generally leads to high expectations by purchasers. When you stack 50 to 100 of these luxury homes in a high-rise tower there is the potential for a major lawsuit if the building fails to match up to the marketing materials or, worse yet, contains code violations, leaks or mold. One university study reported that 1/3 of all condominium projects reported construction defects and that almost 40% had “major flaws”. A major insurer reports that one *out of every five* claims (or 20%) against their insured architects/engineers involves a condominium project. The risk of such projects has driven most insurers for contractors to remove standard coverage for all residential construction from the standard CGL insurance policy. But this is not just a risk for designers and contractors, since most claims by Home Owner’s Associations (“HOA”) also involve the developer. The university study, mentioned above, found that almost 14% of the condominium unit owners surveyed had already filed lawsuits against their developers; another 12% had threatened suit. Multi-million dollar claims are not unusual given the sheer number of units in the average condominium project. For example, in July 2005, a Texas-based homebuilder settled a condominium lawsuit in Colorado for \$39.5 million to resolve a 2003 lawsuit over a 246-unit project. The 43-building complex was alleged to have multiple defects in foundations, walls, drainage and windows. The same law firm that represented the condominium owners achieved a \$12 million settlement in April 2005 on a different 104-unit complex in Colorado.

C. Legislative Relief. The result of this rise in condominium litigation has been the passage of new laws in 27 states that require condominium owners to give their contractor (and in some states the architect) a written notice of defects and an opportunity to cure before suit is filed. These laws have been pushed by the National

Association of Homebuilders (NAHB) as their number one legislative effort. Though they protect single family home builders, the real benefit is in multi-family condominium project where these laws require the unit owners and the HOA to give the contractor (and, sometimes the architect) written notice of a defect prior to filing a lawsuit, with the right to cure the defect or settle the claim rather than engage in costly litigation. See more discussion of this in Section III, below.

D. Insurance Impact. A cottage industry has developed among lawyers who now specialize in representation of condominium unit owners and HOA's to sue the developers, contractors and design professionals for design, construction and maintenance defects. With multiple units in one building having the same alleged defects, the amount sought in these suits is regularly in the millions of dollars. Some plaintiff-oriented law firms advertise on the internet their success in representing condominium associations. One firm boasts over \$238 million in awards in 58 different cases in just four years. As a result, some insurers are now limiting the amount of residential work an insured architect can perform, with some capping that work at a fixed percent of overall volume. Professional liability insurers have a Supplemental Application form to be used to evaluate condominium exposure for each insured firm at renewal. The more condominium projects an architectural firm company engages in, the more likely that firm will see an increase in premiums. Some insurers will decline coverage if condominiums are 20% or more of annual revenues. Even 5% is considered high to some insurers and will increase premiums. The revenue from condominium projects can even impact a firm's deductible, with some insurers requiring a "split deductible", for example \$150,000 per claim except condo claims, which have a higher deductible of \$200,000 per claim. Architects are seen as a higher risk than engineers because architects normally hold the prime design contract. Several major architectural firms have chosen simply not to do condominium projects due to the risk and the insurance premium. Large design firms, like large contractors, will be seen as "deep pockets" by plaintiffs' lawyers regardless of insurance coverage.

E. Increased Litigation. There are a number of reasons for these claims, but with an increase in need for housing, especially in urban areas, and reduced availability of land, there will be an increase in condominium construction for the foreseeable future. As a result of this incredible growth in condominium construction, construction defect suits by HOA's is expected to rise since more homeowners are choosing to live in common interest ownership communities. Taking Nevada as an example, Clark County (Las Vegas) reportedly had only 12 construction defect cases pending in 1996; but according to a 2003 article in *Las Vegas Business Press*, Clark County had more than 200 construction defect lawsuits pending. A recent article reported that Clark County alone had over 120 condominium suits currently pending. Another article in January 2001 reported that condominium lawsuit filings in Nevada in 1999 saw a 442% increase over

1998. The risk of suits has not slowed down the market for condominiums in Nevada. A January 2006 article reported that, “There are 60,000 condominiums and 19,000 condo-hotel units currently proposed, planned or under construction in the Las Vegas Valley.” *Engineering News Record*, Jan. 23, 2006, p. 15. Some insurers have chosen not to renew most residential subcontractors. Others are targeting condominium contractors for exclusion. Additionally, some carriers are raising their rates and scrutinizing their underwriting practices more intensely in “hot states”.

It is reported that some contractors have left the condominium market due to high risk. A February 3, 2003 article in *Las Vegas Business Press* reported on a contractor who had built more than 3,500 condominium and townhouse units but who closed his company due, in part, to liability and higher insurance premiums. In 2000, the contractor was hit with a \$15 million construction defect lawsuit by the HOA for a 208-unit condominium complex, which cost only \$9 million to build. After two years of litigation, the contractor settled the suit for \$3.8 million. This caused his insurance premiums to increase. The article said, “Over the past two years, Las Vegas has lost an estimated 60 homebuilders, many citing rising liability and narrowing profit margins.”

II. Specialized Law Firms. Any quick internet search can find numerous plaintiff-oriented attorneys that have web pages dedicated to condominium liability. California has been a hot market for these law firms, but they are expanding to other portions of the country. Some law firms offer free lunch seminars to HOA boards and have offices in hot condominium states (California, Arizona, Nevada, Oregon, Florida). One law firm’s website claims to have recovered over \$400 million for HOA’s. See www.constructiondefects.com The two principals in the firm wrote a book, “*Home and Condo Defects: A Consumer Guide to Faulty Construction*”, which they promote on the website. They provide a checklist for HOA’s to follow to meet the Nevada “Construction Defects” statute. According to the *New York Times*, the firm’s principal partner, Thomas E. Miller, is regarded as “the king of construction defect litigation” and he drives a white Porsche with a license plate that reads: “DEFECT.”

A *New York Times* article in 1996, titled “*The Great Nevada Litigation Rush; Building Is Booming and California Lawyers Are Massing on State Line*” reported that California lawyers are taking the bar exam to practice in other states and “aggressively wooing property managers and homeowners associations”. According to the article, plaintiffs lawyers “troll for clients at trade shows for condominium managers and put on slide shows, prodding homeowners associations to sue their builders. One manager of 130 condominium complexes said she “was deluged with boxes of cookies and other gifts sent by lawyers”. As a result, laws have been passed in a few states (Georgia and Kansas) that make it a criminal offense to offer incentives to property managers, HOA’s and their officers and directors to induce them to make a defect claim. See **Appendix G** to this

White Paper. Georgia and Kansas are not particular hotbeds of condominium litigation, however, and such laws should be passed in other states to discourage such aggressive practices. States considered the “hot states” for condominium claims - ones that have a significant loss ratio – are: Florida, North and South Carolina, California, Oregon and Washington. Nevada is a concern due to the that state’s recent housing boom and the more projects, the greater the potential for claims. Wherever there is a spike in construction of condominium projects, the insurers worry that the accompanying construction defect claims will happen in 2 to 3 years, and the potential is there.

III. State Right-To-Cure Laws.

A. Overview of These Laws. As of January 2006, slightly more than one-half of the states have enacted some type of “Right-to-Cure” law which gives a contractor (and in 14 states the architect) a statutory right to cure defects in the design or construction of a residential dwelling prior to suit being filed. The leading bill was California’s SB 800 (2002), which was heavily lobbied for by The California Building Industry Association and became law January 1, 2003. In most of these states, the laws specifically reference “condominiums” as a type of residential construction and a few states go into considerable detail as to what steps an HOA or its board of directors must take before suit can be filed. These laws have been passed largely with the support of the National Association of Homebuilders (NAHB) and, in a few states, the AIA.

One of the most aggressive states has been the State of Washington, which passed a law in 2003 that required homeowners to give contractors notice and an opportunity to repair before filing suit. In 2004, Washington passed another bill that placed limitations on implied warranties and created a warranty insurance program as an alternative to implied warranties. Topping it all off is H.B. 1848 (2005) which passed last year¹. The Washington bill passed overwhelmingly (House 98-0; Senate 46-1) and includes provisions for “qualified building enclosure inspectors” who inspect the building and certify that the building was inspected during construction and was built per plans. The Washington bill also allows the parties to retain a joint expert after the “meet and confer” stage. It also permits “offers of judgment” which can be made by either side stating the amount they are willing to pay or receive to settle the matter, together with proof of ability to pay. If the party rejecting the offer does worse at trial, they have to pay the offering party’s legal fees. Other states could learn by studying the Washington legislative model.

¹ This bill can be read at: www.leg.wa.gov/pub/billinfo/2005-06/Htm/Bills/House%20Passed%20Legislature/1848.PL.htm

Generally, these statutes require the owner to give the contractor (and sometimes the architect) written notice of a defect, with the option to inspect, repair, settle or dispute the claim. Showing the influence of the NAHB, many of these state laws only include the residential contractor or home builder. The others include architects or “design professionals”, or include persons or entities who “design” residential structures. Nevada is the only state which has a separate section in the Right-to-Cure law which deals exclusively with claims against design professionals (Nev. Stat. 40.6881, et seq.). This is essentially a Certificate of Merit law, like those that exist in many states for any claim against an architect or engineer (residential or otherwise). AIA components should take efforts to amend legislation to give architects at least as broad protection as contractors receive in those states with laws that do not clearly cover architects. See **Appendix G**. In the remaining 23 states and in the District of Columbia, where there is no current legislation the AIA components should take steps to introduce such legislation, taking the best ideas from those states which have already enacted such laws.

A few states have special provisions that apply only to condominium claims. Georgia, Kansas and Missouri have such requirements and Washington (state) has the most comprehensive, aggressive and detailed procedures for condo defect claims. Washington law also requires that any person applying for a building permit submit to the building officials all building enclosure design documents, stamped by an architect or engineer with a certification that the documents meet state law; all multi-unit residential buildings must have the building enclosure inspected by a qualified inspector during construction, who must issue a certification that the enclosure was constructed per the design documents; no condo unit may be sold until the enclosure is inspected; either party can request the court or arbitrator to appoint a “neutral expert”.

States without any current legislation include Alabama, Arkansas, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Wisconsin and Wyoming. The District of Columbia has no such law either.

B. States With Residential Right-To-Cure Laws (Jan. 2006). Appendix G to this White Paper contains the full text of the laws in the following 27 states, highlighting those sections that address condominium liability, with hot links to the official state web site for the actual legislation.

1. Alaska. A.S. §§ 09.45.881, et seq. Covers "construction professionals", which means a registered contractor, *architect*, or engineer who is engaged in the business of designing, constructing, or remodeling a dwelling.

2. **Arizona.** A.R.S. §§ 12-1361, et seq. Covers any action brought by a purchaser against the “seller of a dwelling”; this covers claims arising out of or related to the design, construction, condition or sale of the dwelling. **No specific mention of architects.**

3. **California.** Cal. Civ. Code §§ 895 – 945.5. Covers any action seeking recovery of damages arising out of, or related to deficiencies in, residential construction, including “*design, specifications, . . . planning, supervision, testing, or observation of construction,*” and specifically mentions “*design professional*”. Applies only to original construction of an individual dwelling unit and not “condominium conversions”.

4. **Colorado.** Co. Stat. §§ 13-20.801, et seq. Covers "construction professionals", which means an *architect*, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property.

5. **Florida.** Fl. St. §§ 558.001, et seq. Covers "contractors", which means any person that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling dwellings or attachments thereto. Also covers “*design professionals*”, which means a person licensed in Florida as an *architect*, interior designer, landscape architect, engineer, or surveyor.

6. **Georgia.** Ga. Code §§ 8-2-35, et seq. Covers “contractors”, which means any person, firm, partnership, corporation, association, or other organization that is *engaged in the business of designing*, developing, constructing, or selling dwellings or the alteration of or addition to an existing dwelling, repair of a new or existing dwelling, or construction, sale, alteration, addition, or repair of an appurtenance to a new or existing dwelling. **No specific mention of architects.**

7. **Hawaii.** Hi. Stat. §§ 672E-1, et seq. Covers "contractors", which means any person, firm, partnership, corporation, association, or other organization that is *engaged in the business of designing*, manufacturing, supplying products, developing, constructing, or selling a dwelling. **No specific mention of architects.**

8. **Idaho.** Id. Code §§ 6-2501, et seq. Covers "construction professionals", which means any person with a right to lien pursuant to section 45-501, Idaho Code, an *architect*, subdivision owner or developer, builder, contractor, subcontractor, engineer or inspector, performing or furnishing the design, supervision, inspection, construction or observation of the construction of any improvement to residential real property, whether

operating as a sole proprietor, partnership, corporation, limited liability company or other business entity.

9. Indiana. In. Code §§ 32-27-3, et seq. Covers "construction professionals", which means *an architect*, a builder, a builder vendor, a contractor, a subcontractor, or an engineer, including but not limited to any person performing or furnishing the design, supervision, construction, or observation of the construction of any improvement to real property, whether operating as a sole proprietor, a partnership, a corporation, or another business entity that contracts with the home owner to build the residence.

10. Kansas. K.S.A. §§ 60-4701, et seq. Covers "contractors", which means any person, firm, partnership, corporation, association or other organization that is engaged in the business of constructing dwellings. **No specific mention of architects.**

11. Kentucky. Ky. Stat. §§ 411.250, et seq. Covers "construction professionals", which are defined only as "a builder". **No specific mention of architects.**

12. Louisiana. La. Stat. §§ 9:3142, et seq. Covers "builders", defined as any person, corporation, partnership, limited liability company, joint venture, or other entity which constructs a home, or addition thereto, including a home occupied initially by its builder as his residence. **No specific mention of architects.**

13. Michigan. Mi. Stat. §§ 339.2411-2412. Covers "residential builders" and "licensees", which may include others licensed under the Michigan Occupational Code; architects are licensed under § 339.2001, et seq. Not a true "right to cure" statute; however, if the contract provides for alternative dispute resolution, then the licensing board will not pursue a complaint until the alternative procedures are completed. **No specific mention of architects.**

14. Mississippi. Ms. Stat. §§ 83-58-2, et seq. Covers "builders", defined as any person, corporation, partnership, or other entity which constructs a home or engages another to construct a home, including a home occupied initially by its builder as his residence, for the purpose of sale. **No specific mention of architects.**

15. Missouri. R.S.Mo. §§ 436.350, et seq. Covers "contractors", which means any person, company, firm, partnership, corporation, association, or other entity that is *engaged in the business of designing*, developing, constructing, or substantially remodeling residences. **No specific mention of architects.**

16. Montana. Mont. Stat. §§ 70-19-426, et seq. Covers claims against a “construction professional”, which means a builder, builder vendor, contractor, or subcontractor performing or furnishing the supervision of the construction or remodeling of any improvement to real property. **No specific mention of architects.**

17. New Hampshire. N.H. Stat. §§ 359-G:1, et seq. Applies to “contractors”, defined as any person, firm, partnership, corporation, association, or other organization that is engaged in the business of *designing*, developing, or constructing a residence, modification or repair of a new or existing residence, or construction, alteration, addition, or repair of an appurtenance to a new or existing residence. However, the law does not apply to a contractor’s right to seek contribution, indemnity, or recovery against a subcontractor, supplier, *or design professional* for any claim made against a contractor by a homeowner. **No specific mention of architects.**

18. Nevada. Ne. Stat. §§ 40.600, et seq. One of the three most detailed laws in the nation (as of 2005), with Texas and Washington State. Covers contractors, subcontractors, suppliers *and design professionals*.

19. North Dakota. N.D.. Stat. § 43-07-26. Covers only “contractors” on one-family or two-family dwelling, or an improvement with a value exceeding \$2,000 to a dwelling. **No specific mention of architects.**

20. Ohio. Oh. Stat. §§ 1312.01, et seq. Covers “residential contractors”, defined as a person or entity who, for pay, enters into a contract with an owner for the construction or the substantial rehabilitation of a residential building and who has primary responsibility for the construction or substantial rehabilitation of a residential building. **No specific mention of architects.**

21. Oregon. Ore. Stat. §§ 701.560, et seq. Covers contractors, subcontractors or suppliers. The term “contractor” is defined as a person that performed “services” for the construction, alteration or repair of a residence. **The law specifically excludes application to architects (*those licensed under ORS 671.010 to 671.220*).**

22. South Carolina. S. Car. Stat. §§ 40.59-810, et seq. Covers any action brought against a “contractor or subcontractor”, including defects in *the design*, construction, condition, or sale of the dwelling; and including *failure of the design* of residential improvements to meet the applicable professional standards of care. **No specific mention of architects.**

23. Tennessee. Tenn. Stat. §§ 66-36-101, et seq. Covers contractors *and* “*design professionals*”, which is defined as a person licensed in this state as *an architect*, interior designer, landscape architect, engineer, or surveyor.

24. Texas. Tex. Prop. Code, Chapters 27 & 428. Chapter 27 covers “contractors”, defined as a builder (as defined by Section 401.003), and any person contracting with an owner for the construction or sale of a new residence constructed by that person or of an alteration of or addition to an existing residence, repair of a new or existing residence, or construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence. Chapter 428 covers “the builder”, a term that is not defined. **No specific mention of architects in either law.**

25. Virginia. Va. Stat. § 55-70.1(d). Covers only “vendors” in the sale of a new dwelling. **No specific mention of architects.**

26. Washington. Wa. Stat. §§ 64.50.005, et seq.; H.B. 1848 (2005). Covers “construction professionals”, defined as *an architect*, builder, builder vendor, contractor, subcontractor, engineer, or inspector, including, but not limited to, a dealer and a declarant as defined in state statutes, *performing or furnishing the design*, supervision, inspection, construction, or observation of the construction of any improvement to real property, whether operating as a sole proprietor, partnership, corporation, or other business entity. H.B. 1848 is more than a “right to cure” law, and is an aggressive procedure for reducing claims on condominium projects by creating a statutorily-required process for mediation, arbitration and inspection of the building enclosure. This is unlike any other state’s law as of 2005.

27. West Virginia. W. Va. Stat. §§ 21-11A-1, et seq. Covers “contractors”, defined as a contractor, licensed under state law, who has entered into a contract directly with a claimant. The term *does not include* the contractor's subcontractor, officer, employee, agent or *other person furnishing goods or services* to a claimant. However, while not defined, the statute expressly applies to “*design professionals*” and covers design defects.

C. Contract Notice Requirements. Half of the states with Right-to-Cure laws have a contract “printed notice” provision, which requires that the contractor (and design professional, in some cases) give a written notice to the property owner normally in all capital letters, that the owner must follow certain notice requirements before filing suit². The notice has to be in specific wording. Variations require the notice to be:

² See Alaska Stat. 09.45.893; Fla. Stat. 558.005; Ga. Stat. 8-2-41; Hi. Stat. 672E-11; Ind. Stat. 32-27-3-12; Ks. Stat. 60-4706; Ky. Stat. 411.260; Mo. Stat. 436.353; Oh. Stat. 1312.03; Ore. Stat. 701.590; Tex. Prop. Code 27.007; Wa. Stat. 64.50.050; W.Va. 21-11A-5.

- a. on a separate page attached to the contract (e.g., Alaska, Ohio);
- b. “conspicuous” (e.g., Alaska, Missouri, Ohio, Oregon);
- c. in the sales contract for the dwelling unit (e.g., Arizona, Hawaii);
- d. in at least 10-point bold type (e.g., Arizona, Texas);
- e. deemed delivered to the purchaser of a condo unit if contained in a public offering statement in accordance with state laws (e.g., Missouri, Washington).

All of the states require a Notice of Claim (or Defect) to be sent to the contractor (and design professional) as a condition to file suit, which puts into play a statutory process for inspection, repair or settlement of a construction defect claim. Some states have special requirements on where the notice is mailed, e.g. sent to the last known address of the contractor (and design professional); sent by certified mail, return receipt requested; sent to the address listed with the state licensing Board.

D. Best of Right-To-Cure Laws. The following are the best ideas, or most common, among the 27 states with current laws in effect. For purposes of this summary, the term “owner” shall also include a Home Owner’s Association (“HOA”), as well as any individual residential owner or condo unit owner.

1. Definitions. That clearly includes condominiums, condo owners and condo associations in the definitions of dwellings and home owners. The statutes specifically address HOA’s for condominiums and claims by either an individual homeowner or a HOA. Property covered includes condominium or cooperative system, and includes common areas and common elements.

2. Types of Claims and Claimants. The statutes cover construction defects, including: (a) defective material, products, or components; (b) violation of the applicable codes and ordinances; (c) failure to construct improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction; (d) failure to construct improvements in accordance with the construction contract. Claimant homeowners include the original purchaser as well as a subsequent purchaser of a unit.

3. Pre-claim Notice. Prior to the filing of any lawsuit, the owner gives written notice to the contractor (and design professional), identifying the defect. If the contractor (or design professional) fails to give notice, then all of the pre-claim procedures are void and the owner can sue right away. Notice is not required if there is an imminent threat to health or safety of residents, in which case the owner shall take reasonable steps to cure

the defect as soon as practicable. If a new defect is discovered, then the owner has to go through all of the procedures again.

4. Secondary Notice. A contractor (and design professional) served with a notice of claim shall serve any appropriate subcontractor (and design professional) with a copy of the notice within a specified time after receipt.

5. Response. The contractor (and design professional) has three (3) options in responding to a claim:

- a. offer to inspect the dwelling within a specific time;
- b. offer to settle the claim (without inspection);
- c. dispute the claim.

6. Right to sue. The owner can file suit, without further notice if:

- a. the contractor (or design professional) does not respond to the claim; or,
- b. the contractor (or design professional) disputes the claim.

The owner can also file a counterclaim without going through this process if the contractor (or design professional) sues first.

7. Second Notice, prior to suit. In the following situations, the owner must send a second written notice to the contractor (and design professional) prior to filing suit if the owner rejects:

- a. the inspection offer; or,
- b. the settlement offer.

The notice must state the basis for the rejection.

8. Inspection. If the owner accepts the inspection offer, the owner must provide reasonable access to the dwelling during normal working hours for inspection. Within a fixed time after the inspection, the contractor (and design professional) serves written notice on the owner with:

- a. an offer to repair without charge, with a schedule;
- b. an offer to settle;
- c. an offer to repair only part, and settle the rest (with explanation);
- d. a statement that no repair will be made.

Settlement may include an offer to repurchase the dwelling, plus the value of any improvements made by owner, attorney's and expert's fees, moving costs, points and fees for loans. If the dwelling is less than 2 years old, the market value is the original purchase price. (This provision is in Nevada only, Nev. Stat. 40.665).

9. Acceptance of Offer. If acceptable, the owner will send a written notice of acceptance within a fixed time period. The owner must give reasonable access to the dwelling during normal working hours to perform the repairs as offered.

10. Suit After Inspection. The owner may file suit if:

- a. the contractor (or design professional) does not repair within the time agreed to do so;
- b. the contractor (or design professional) does not repair satisfactorily;
- c. the owner rejects the settlement offer (which requires a written explanation of the basis of rejection first).

11. Limitations on Recovery.

A. The owner can only recover:

1. the reasonable cost of repairs; and,
2. actual damages resulting from the defect (including reasonable and necessary engineering or consulting fees to evaluate and cure the defect); and,
3. reasonable expenses of temporary housing if necessary during the repairs;
4. the reduction in market value, if any, due to the defect; and,
5. reasonable and necessary attorney's fees and costs.
6. loss of use of all, or any part, of the dwelling (Nevada only).
7. any interest provided by statute (Nevada only).

Less compensation awarded under a homeowner's warranty or homeowner's insurance for the defect.

B. Personal injury damages may also be recovered.

C. If the owner unreasonably rejects a settlement offer, or denies a request to repair, the owner cannot recover an amount that exceeds:

- a. the reasonable cost to repair those portions that are the responsibility of the contractor (and design professional); or,
- b. the amount of a reasonable settlement offer.

The court may also deny the owner recover of attorney's fees and costs, if the owner unreasonably rejects an offer, or does not give a reasonable opportunity to repair under an accepted offer. The court may also award attorney's fees and costs to the contractor (and design professional). Also, if the owner fails to permit a reasonable inspection, or fails to provide a good faith response to an offer, there is a rebuttable presumption that the owner failed to mitigate its damages.

12. Defenses. Compliance with the applicable codes in effect at the commencement of construction is a defense and “shall conclusively establish construction in accordance with accepted trade standards for good and workmanlike construction”. A contractor (and design professional) is excused, in whole or in part, from liability upon proof of the following additional defenses: 1) comparative negligence; 2) unforeseen act of nature; 3) owner’s failure to mitigate or prevent damages, or to give timely notice after discovery of the defect; 4) owner’s failure to follow contractor’s (or design professional’s) or manufacturer’s recommendations or commonly accepted maintenance (contractor or design professional must show owner had written notice and that the same were reasonable at the time issued); 5) damaged caused by owner’s alteration, ordinary wear and tear, misuse, abuse, neglect, or use of structure other than as intended; 6) statute of limitations expired; 7) a prior valid release; 8) successful repair by contractor (and design professional) of the defect; 9) normal shrinkage, swelling, expansion or settlement; 10) the defect was disclosed to the owner before purchase (disclosure in writing in language that was understandable); 11) damage caused by materials or work supplied by others (not the contractor and design professional).

Other less common defenses provided by statute in some states (Louisiana and Mississippi to be specific) are: 12) change in the grade around the building (other than by contractor and design professional); 13) dampness, condensation or other damage due to owner’s failure to maintain adequate ventilation or drainage; 14) soil movement covered by other insurance; 15) insect damage; 16) consequential damages; 17) soil movement if built on land owned by the initial owner, if contractor (or design professional) obtained a waiver from that owner; 18) mold and mold damage; 19) rot of any kind; 20) Act of God, other third party acts (riot, war, vandalism, etc.)

13. Mandatory Mediation. If the parties are not able to resolve the claim through this process, then all parties shall attempt to resolve the dispute through non-binding mediation, even if not otherwise required by contract or law. The mediation is independently administered by a qualified independent and neutral mediator agreed upon and each side shall equally share the cost of the mediator. The parties may also provide for arbitration in their contract, which is binding only to the extent provided by law. Mediation may include any person or entity reasonably required to resolve the claims asserted. Any mediation must take place in the county where the claimant-owner resides or in a mutually agreed to location. Mediation must take place within a reasonable time period, but in no event later than 45-days after service of a request for mediation. The parties can also agree to arbitrate instead of litigation. No person who acts as mediator may serve also as an arbitrator (if the parties agree, or have agreed, to arbitrate). [Nevada and Texas have the most detailed provisions on mediation, Nev. Stat. 40.680 – 681; Tex. Prop. Code 27.0041]. Also in 2005, Washington state adopted special provisions for arbitration of condo claims [H.B. 1848 (2005)].

14. Dismissal of Suits. If an owner files suit without going through all the steps, upon motion by the contractor, the suit is to be dismissed by the court (without prejudice), and cannot be re-filed until the claimant has complied with the law. The court or arbitrator shall dismiss, without prejudice, any action failing to comply with the statute unless due to:

- a. The wrongful conduct of another party;
- b. Circumstances beyond control of the party bring suit;
- c. A statute of limitations about to expire, in which case the statute is tolled for 6 months after filing suit pending compliance with the statute.

The action cannot be re-filed until the owner has complied with the statute.

15. Not Admissible in Court. The following are not admissible in court or arbitration if the matter is not resolved.

- a. Offers to cure or to settle;
- b. Responses to offers;
- c. Counteroffers;
- d. Anything that occurs during the inspection or testing (to support a claim of spoliation of evidence);
- e. Expert reports exchanged during this process unless the expert testifies as a witness or the report is used or relied on by other experts.

However, evidence of both parties' conduct during the process (except for in mediation) is admissible. Repair efforts are not considered settlement communications.

16. Notice to Subsequent Purchasers. If the claimant attempts to sell the dwelling that is, or has been, subject to a claim under these statutes, the seller must disclose in writing to any prospective purchaser all notices given to the contractor (and design professional), all expert opinions, the terms of any settlement or judgment, a detailed report of all repairs made.

17. Notice to Insurers. After contractor (and design professional) receives a notice of defect, it may present the notice to its insurer(s), which shall constitute the making of a claim under the policy and requires the insurer to perform its duties required under the policy upon the making of a claim.

18. Exclusions. These provisions do not apply to:

- a. claims for personal injury or death; or,
- b. an emergency that threatens the life or safety of persons, or alleged construction defects that if not addressed will result in significant and material additional

damage to the residence. In such situation, the homeowner can undertake reasonable repairs necessary to mitigate the emergency situation without notice.

19. No New Cause of Action. Nothing in these statutes creates any new civil cause of action, or theory on which liability may be based; nor do these statutes extend the applicable statutes of limitations or repose, other than as specifically provided.

20. Frivolous Suits. An owner (including a HOA) who files suit under these statutes that is groundless and brought in bad faith, or for purposes of harassment is liable to the defendant for reasonable and necessary attorney's fees, expert fees and costs.

21. Condo Claims:

a. A person may not provide anything of value, directly or indirectly, to a property manager, officer, director or member of a HOA to induce, encourage or discourage them from filing a claim for a defect. Property managers retained by an HOA, nor officers, directors or members of an HOA shall not accept anything of value from anyone to induce, encourage or discourage them from filing a claim for a defect; violation is a misdemeanor criminal offense (Ga. and Ks.).

b. A HOA can only bring an action for defects in the common elements after:

1) obtaining written approval of each unit owner whose interest will be subject to the action (Ga.);

2) a majority vote of the members of the HOA (Ga.; Ks.);

3) the "full Board" of the HOA has met in person with the contractor (and design professional) and conferred in good faith to resolve the HOA's claims, unless the contractor (and design professional) declines or ignores the request to meet (Ga.);

4) the HOA satisfies all other requirements of the right-to-cure statutes (Ga.);

5) at least 3 business days before the vote of the HOA, written notice must be sent to each unit owner by the HOA's attorney with details of the defects and damages, the cause (if known), location, estimate of cost of legal action.

c. The HOA cannot hire someone to do destructive tests unless:

1) the person is licensed;

2) the HOA has obtained prior approval of unit owners whose interest will be affected by the testing;

3) the testing entity gives a schedule;

4) all permits are obtained;

5) reasonable and prior notice and opportunity to observe the tests is given to the contractor (and design professional) (Ga.; Ks.).

d. The HOA Board can proceed without notice in case of an emergency repair that is needed (Ga.; Ks.).

e. The owner must provide access for an inspection within 30 days after contractor (or design professional) requests an inspection; but if claim by an HOA, they have 45 days to allow an inspection (Hawaii).

f. The HOA's Board cannot reject a settlement offer from a contractor (and design professional) until (if requested in writing by contractor or design professional) the HOA holds a meeting of its members, no less than 15 days before suit is filed. At least 15 days before the meeting, the Board must send a written notice to the HOA members with date, time and place, the options available to address the problems, options to pay for the same, whether dues increase or assessment likely, plus the complete text of any final written settlement offer from the contractor (and design professional), with a concise explanation of its terms. The discussion at the HOA meeting is "privileged" and not admissible in court unless the HOA consents. No more than one request to meet may be made by the contractor (and design professional). (Mo.).

g. If the claimant is a HOA, then the contractor's (and design professional's) response to the claim notice must be sent by the HOA to each member within 30 days of receipt.

h. HOA Board must send notice to the unit owners prior to suite outlining the action, the relief sought, the expenses and fees the directors anticipate will be incurred (Wa.).

22. Other Ideas From the Various 27 State Laws:

a. All time limits can be extended by agreement;

b. If owner has a lawyer, the lawyer must attend the inspection (unless unavailable during the inspection);

c. Contractor (and design professional) to provide proof of insurance to cover damages during inspection and testing;

d. Contractor (and design professional) must restore the property to pre-testing condition within 48 hours of the test;

e. Contractor (and design professional) must permit inspection to be observed, videotaped or photographed by owner or his or her lawyer;

- f. If the contractor (or design professional) feels a second inspection or testing is needed, this must be permitted;
- g. If the contractor (or design professional) intends to hold others liable (e.g. subcontractor, design professionals), they must be given notice in advance of the inspection to allow them to attend the inspection(s);
- h. The offer to repair must be accompanied with an offer to mediate the dispute (if the owner chooses); mediation limited to one 4-hour session, with the mediator selected and paid for by the contractor (and design professional), but the owner may agree to split the cost and can jointly choose the mediator in that case;
 - i. The repair itself may be photographed or videotaped by either party;
 - j. Contractor (or design professional) cannot obtain a release or waiver in exchange for agreeing to repair the work (i.e. if done poorly, owner can still sue for damages);
 - k. If statute of limitations is about to run, the time period is extended to 100 days after the repair is completed (Calif.); or 60 days from completion of the process (Colo.);
 - l. The statute does not negate any express warranty;
 - m. Contractor (and design professional) shall reasonably coordinate the timing and manner of all inspections to minimize the number of inspections;
 - n. The inspection may include destructive testing by mutual agreement if: 1) the contractor (or design professional) feels such testing is needed; 2) notice is given to the owner, describing the testing and identifying who will perform it, an estimate of the damage and the time needed, and the financial responsibility of the party doing the testing. If the owner objects to the person doing the testing, the contractor (and design professional) shall provide a list of 3 qualified persons for owner to choose;
 - o. Test reports are provided only to the contractor (and design professional);
 - p. If the owner refuses to permit destructive testing, then the owner shall have no claim for damages that could have been avoided or mitigated if such testing had been allowed;
 - q. The statute overrides any conflicting contract requirements;
 - r. Upon request, the contractor (and design professional) and owner shall mutually exchange all available discoverable evidence of the defect; if a party withhold such information, then in any subsequent litigation, the court may award sanctions;
 - s. The owner must provide any expert reports, photographs and videotapes related to the defect with the initial notice to the contractor (and design professional);
 - t. An offer not accepted within 10 days is deemed rejected;

- u. If the claim is resolved through this process, in whole or in part, the owner is barred from bringing an action for the resolved claim;
- v. The statute does not preclude a contractor (and design professional) from seeking indemnity, contribution or recovery from a subcontractor (and design professional), supplier or design professional for any claim made by the owner;
- w. Within 30 days after close of sale, the contractor (and design professional) must provide the purchaser with a list of the name, address, phone and license number of all subcontractor (and design professionals) who performed work, with a brief description of their scope of work;
- x. Statutorily mandated warranties from contractors on new dwellings (1-year overall; 2-years on plumbing, electrical, HVAC; 5-years on major structural defects)(La.). Other variations: 1-year overall; 6-years on major structural (Ms.). These warranties transfer automatically to a subsequent purchaser for their duration;
- y. These statutes contain the “exclusive remedy” to homeowners;
- z. The licensing board shall not initiate an action against a licensee until after this statutory process has been concluded;
- aa. A copy of the expert report (if any) shall be included with the initial notice of defect sent to the contractor (and design professional);
- bb. Repairs must be made by properly licensed, bonded and insured subcontractors;
- cc. The State can appoint a Third-Party Inspector on request of a party (Texas only);
- dd. A party may make an “offer of judgment” (as allowed in most states and Federal Court Rules), coupled with the ability to pay. If the amount of a later court or arbitrator’s award is less than the offer, the defendant making the offer is entitled to its attorney’s fees and costs from the date of the offer.

IV. Indemnity. The most common way to shift or allocate risk in construction is the use of indemnity clauses under which one party agrees to pay the cost incurred by another. Sometimes these clauses also require a party to defend another. Several factors play into the use of indemnity clauses on condo projects. First, architects are insured under standard professional liability insurance policies for only the architects’ own negligent acts, errors or omissions. Overly broad indemnity clauses that require the architect to defend or indemnify an owner or developer for mere “claims” or “alleged” negligence of the architect may not be insurable. Second, it is becoming increasingly common for one party to require another to indemnify the first party for its own negligence; in effect, turning the contract into one of insurance. Many states currently prohibit the enforcement of overly broad indemnity clauses under laws known as “anti-indemnity” statutes. Third, keep in mind that if the project developer is a single-purpose

LLC, to be dissolved after all the units are sold, the indemnity will not provide much assistance in any event to the architect if the developer is dissolved or has no assets or insurance.

V. Joint and Several Liability. Currently only 8 states have retained the legal concept of “joint and several liability” among co-defendants, while 9 others have abolished the concept. Still 33 other states permit joint and several liability with some restrictions. A matrix of all 50 states is attached to this White Paper as **Appendix F**. Under the legal concept of joint and several liability all of the defendants in a negligence case can be held “jointly” liable to a plaintiff, such as a condo unit owner or HOA. This means that if the developer no longer exists or has dissolved its single-purpose LLC, and the contractor has no insurance, the architect might be held liable for the negligence of the developer and/or the contractor. In states which have retained joint and several liability there is limited protection other than choosing solvent, reliable and insured developers to work with. There is a horror story in British Columbia in which a leaky condo resulted in over \$3 million in repair costs. Liability was allocated this way: Developer 30%, Designer 25%, Contractor 25%, Municipality 20%. The developer had settled and the designer and contractor had insufficient funds, so the municipality was responsible for most of the \$3 million judgment. See *The Owners, Strata Plan NW 3341, et al. v. Canlan Ice Sports Corp, et al.*, 2000 B.C.S.C. 1214, known as the *Riverwest* decision.

VII. Uniform Condominium Acts. Architects doing condominium projects need a basic understanding of condo law. To promote uniformity among the laws of the 50 various states, there is a committee of lawyers who draft “model” laws known as the National Conference of Commissioners on Uniform State Laws (the “ULC”). The ULC has written three “uniform” laws that have been adopted in one form or the other by most of the states dealing with common interest ownership or condominiums. Those three primary Acts are: The Uniform Condominium Act (“UCA”); The Uniform Planned Community Act (“UPCA”); and The Uniform Common Interest Ownership Act (“UCIOA”). In order of popularity, the UCA is the most popular, being adopted in 15 states. The UCIOA has become the law in at least two states³, as has The Uniform Planned Community Act.⁴ The Uniform Common Interest Ownership Act (“UCIOA”) was adopted by the National Conference of Commissioners on Uniform State Laws in 1982 and it combined, in a single comprehensive law, prior uniform laws in this area (the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act). In 1994, the ULC adopted significant amendments to UCIOA.

³ Connecticut. C.G.S.A. §§ 47-200 to 47-295; and Vermont. 27A V.S.A. §§ 1-101 to 4-120.

⁴ North Carolina. N.C. G.S. §§ 47F-1-101, et seq.; and Pennsylvania. 68 Pa.C.S.A. §§ 5101, et seq.

The Uniform Planned Community Act (“UPCA”) was approved by the National Conference of Commissioners on Uniform State Laws in 1980 to address the explosive rise in land costs during the 1970's and the growing acceptance of planned unit development (PUD) zoning techniques by local governments. Multi-unit residential “planned communities” served by common area facilities owned and operated by a HOA are covered by this law. Although similar to condominiums, PUD’s were not technically covered by the UCA. The UPCA closely parallels the UCA with similar consumer protections, regulatory structure, and administrative benefits to unit owners in most multi-owner developments.

The Uniform Condominium Act (1980) has been adopted in these states:

1. Alabama. Ala. Code 1975, §§ 35-8A-101 to 35-8A-417.
2. Arizona. A.R.S. §§ 33-1201 to 33-1270.
3. Louisiana. L.S.A.-R.S. 9:1121.101 to 9:1124.117.
4. Maine. 33 M.R.S.A. §§ 1601-101 to 1604-118.
5. Minnesota. Minn. Stat. Ann. §§ 515A.1-101 to 515A.4-117.
6. Missouri. R.S.Mo. §§ 448.1-101 to 448.4-120.
7. Nebraska. Neb. Rev. Stat. §§ 76-825 to 76-894.
8. New Hampshire. N.H. Rev. Stat. Ann. §§ 356-B:1 to 356-B:69.
9. New Mexico. N.M.S.A. 1978 §§ 47-7A-1 to 47-7D-20.
10. North Carolina. N.C.G.S. §§ 47C-1-101 to 47C-4-120.
11. Pennsylvania. 68 Pa. C.S.A. §§ 3101 to 3414.
12. Rhode Island. R.I. Gen.Laws 1956, §§ 34-36.1-1.01 to 34-36.1-4.20.
13. Texas. Tex. Property Code §§ 82.001 to 82.164.
14. Virginia. Va. Code 1950, §§ 55-79.39 to 55-79.103.
15. Washington. R.C.W.A. 64.34.010 to 64.34.950.

One of the most powerful legal documents on a condominium project is called the “declaration”. This document is drafted by the developer and sets up the legal description of the condominium project. It can also be used to regulate such things as voting rights of the HOA members. Normally a 2/3 vote of the unit owners can amend the declaration unless the declaration itself requires a larger “super majority” vote. Many risk management ideas can be incorporated into the declaration so as to become binding on the HOA and the unit owners themselves. The important provisions for an architect to understand when dealing with a condominium project are the following:

A. No Variation by agreement. Under Section 1-104, except when expressly provided in the Act, no provision of the Act can be varied by agreement, and no rights conferred under the Act can be waived by agreement.

B. Contract Defenses Remain. Under Section 1-108 general principles of contract law and equity remain, such as estoppel, fraud, misrepresentation, duress, coercion, mistake, or other validating or invalidating cause recognized under the law.

C. Unconscionable agreement or term of contract. Section 1-112 says that a court may find that a contract or contract clause was unconscionable at the time the contract was made, and may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result. Factors considered include: 1) The commercial setting of the negotiations; 2) Whether a party has knowingly taken advantage of the inability of the other party to reasonably protect his interests by reason of physical or mental infirmity, illiteracy, or inability to understand the language of the agreement or similar factors; 3) The effect and purpose of the contract or clause.

D. Obligation of good faith. Section 1-113 says that every contract or duty governed by the Act imposes an obligation of good faith in its performance or enforcement.

E. No Consequential or Punitive Damages. Section 1-114 says that “consequential, special, or punitive damages may not be awarded except as specifically provided in [the Act]”. Punitive damages are only allowed under section 4-117, below.

F. The Declaration. Under Section 2-101 a condominium is created only by recording a declaration in the county in which the condominium is located. The declaration must include a legal description; the maximum number of units; description of any limited common elements; among other items. Plats and plans are a part of the declaration. The declaration cannot be filed until “all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by a registered and licensed engineer or architect.” This does not mean the building is finished, but that these systems are in place.

G. Validity of and Amending the Declaration. Under Section 2-103 in the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails. This makes the declaration a very important document. Under Section 2-117, with some exceptions, it takes a super-majority of 2/3 of the votes in the association, “or any larger majority the declaration specifies” to amend the declaration. Again, this makes the declaration a very powerful document.

H. Voting Rights. Section 2-107 says that the declaration may provide: (1) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (2) for cumulative voting only for the purpose of electing members of the

executive board; and (3) for class voting on specified issues affecting the class if necessary to protect valid interests of the class.

I. Alterations of units. Under Section 2-111, “Subject to the provisions of the declaration” a unit owner may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium. The unit owner cannot change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the association.

J. Forming the HOA. Section 3-101 requires that a unit owners association be organized no later than the date the first unit in the condominium is conveyed. The association shall be organized as a profit or not for profit corporation or as an unincorporated association. The HOA has the power under Section 3-102 “subject to the provisions of the declaration” to amend bylaws and rules and regulations; institute, defend, or intervene in litigation in its own name on behalf of itself or two or more unit owners on matters affecting the condominium; make contracts and incur liabilities; and other powers.

K. HOA Executive board members and officers. Section 3-103 allows for an executive board but the HOA board may not act on behalf of the association to amend the declaration.

L. Bylaws. Section 3-106 sets out the requirements for the HOA bylaws. As long as the Developer owns 10% or more of the units, the bylaws may only be amended by a 2/3 vote of the unit owners. After the Developer’s interest drops below 10%, the bylaws can be amended by a simple majority of the unit owners. Again, however, the declaration can trump this by requiring a larger percentage vote.

M. HOA’s Duty for Upkeep. Section 3-107 makes the HOA responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the HOA and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes.

N. HOA Meetings. Section 3-108 says that special meetings of the HOA may be called by the president or by 20%, “or any lower percentage specified in the bylaws”, of either the executive board or the unit owners. There must be at least 60-sixty days advance notice of any meeting.

O. Quorums. Section 3-109 says that “unless the bylaws provide otherwise, a quorum is deemed present throughout any meeting of the association if persons entitled

to cast twenty percent of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.” For the HOA Board, a quorum is present if persons entitled to cast fifty percent of the votes on that board are present at the beginning of the meeting. Again, the declaration can require a larger percentage for certain matters.

P. Insurance. Section 3-113 requires the HOA to carry property insurance on the common elements, not less than 80% of the actual cash value of the insured property at the time the insurance is purchased plus liability insurance “not less than any amount specified in the declaration, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.” The declaration may require the HOA to carry any other insurance. By statute, the insurer waives its rights to subrogation under the policy against any unit owner or members of his household.

Q. Express warranties of quality. Perhaps the most important provision is Section 4-113 which states that “express warranties” are made by any seller of a unit, if relied upon by the purchaser, and are created by: 1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto; 2) any model or description of the physical characteristics of the condominium, including plans and specifications of or for improvements; 3) any description of the quantity or extent of the real estate comprising the condominium. By statute, neither formal words, such as “warranty” or “guarantee”, nor a specific intention to make a warranty, are necessary to create an express warranty of quality. However a statement purporting to be “merely an opinion or commendation of the real estate or its value” does not create a warranty.

R. Implied warranties of quality. Second in importance is Section 4-114 that the declarant and any person in the business of selling real estate for his own account warrants that: 1) a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear excepted; and 2) a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type; and 3) that any improvements made or contracted for by him, or made by any person before the creation of the condominium, shall be: (a) Free from defective materials; and (b) Constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner. In addition, a declarant warrants to a purchaser of a unit which may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

S. Disclaimer of Warranties. Section 4-114 says that, “Warranties imposed by this section may be excluded or modified as specified in Section 4-115.” That section

states that implied warranties of quality: 1) May be excluded or modified by agreement of the parties; and 2) Are excluded by expression of disclaimer, such as "as is", "with all faults", or other language which in common understanding calls the buyer's attention to the exclusion of warranties. However, with respect to a purchaser of a **residential unit**, no general disclaimer of implied warranties of quality is effective. Instead the declarant may disclaim liability only in an instrument: 1) signed by the purchaser; 2) for a specified defect or specified failure to comply with applicable law. So there must be a separate instrument which notes the defect in writing.

T. Punitive Damages and Attorney's fees. Section 4-117 states that if the declarant "or any other person subject to [the Act]" fails to comply the Act or any provision of the declaration or bylaws, any person or class of persons adversely affected by such failure to comply has a claim for appropriate relief and that "punitive damages may be awarded in the case of a willful, wanton and malicious failure to comply with any provision". Architects should be aware that punitive damages may not be insurable. Also, the court, in an appropriate case, may award reasonable attorney's fees.

VIII. Statutes of Limitations and Statutes of Repose. Many states have special statutes that put a time limit on claims against contractors, usually from the date of completion or "substantial completion" of the project. Most often suit must be filed within 6-years to 10-years after completion of a project. Also, the Uniform Condominium Act, Section 4-116, provides that an action for breach of an express or implied warranty on a condo project must be commenced within 6-years after the cause of action accrues, but the parties may agree to reduce the period of limitation to not less than 2-years. Under that Act, a cause of action for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues: 1) As to a unit, at the time the purchaser to whom the warranty is first made *enters into possession*; and 2) As to each common element, at the time the common element is completed. However, if a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier. Therefore, longer warranties will extend the statute of limitations.

IX. Project Evaluation Form. Due to the high risk and increased insurance premiums associated with condominium projects, some firms require that all condo projects go through a "secondary sign-off" by principals of the firm after an intensive project evaluation. To assist firms with this process, attached as **Appendix D** is a Project Evaluation Form, which can be adapted to suit a firm's business needs. Having a principal not associated with the project review, evaluate and approve the undertaking of

the project is advisable so that no unreasonable risks are undertaken without the knowledge and input of firm principals, risk managers or partners.

X. Risk Management Ideas. Attached are over 50 aggressive risk management ideas for reducing claims on condo projects. Contract clauses that address these ideas are included in **Appendix B**. These are not listed in any order of importance and some of them may push the envelope too far for some developers. However, given the high risk of condo claims today, it is appropriate to approach this with new risk management concepts.

XI. Conclusion and Recommendation. The condominium market is a large segment of the construction industry, too tempting for most firms to pass up. However, due to the disproportionate risks involved, architects need to be more aggressive in managing risks using special contract clauses that allocate or limit liability, working with developers on special language in HOA By-Laws and condominium declarations, working for passage of legislation that gives architects the right to cure defects in design before suit and legislation which deters frivolous lawsuits, and better quality control programs to reduce the likelihood of claims.

Attachments:

Appendix A. Risk Management Ideas

Appendix B. Sample Condominium Contract Clauses

Appendix C. Form Letter Requesting Financial Information

Appendix D. Project Evaluation Form

Appendix E. Uniform Condominium Act

Appendix F. 50-State Survey on Joint and Several Liability

Appendix G. "Right To Cure" Laws