

Condominiums are surely the most liability-prone projects that A/E firms design. Past industry studies have found that about a third of all condominium projects report some form of construction defect, and about 40 percent of those had serious flaws. More than 25 percent of the owners had either filed lawsuits against their developers or threatened to do so.

Condominium design and construction continue to present a more difficult exposure for which the probability and severity of loss are significantly higher than other construction exposures. **Residential condominiums present a higher exposure than commercial condominium units because they are occupied 24/7, and owners have more emotional attachment to their homes and personal affects.**

There are numerous reasons why these projects have a severe claims history. Condominium developers are frequently over-leveraged and thereby allow quality to suffer. In an effort to save costs, the **design team often isn't given the opportunity to provide construction phase services** and construction observation may altogether be eliminated. Developers have also been known to come into an area for one or two projects, with no ties to the community, and build cheaply-constructed structures. Some developers disappear quickly after finishing a project, and when problems begin to surface, the design professional is the only one left to foot the bill.

In addition, occupants are often first-time buyers, older people with limited income or less sophisticated consumers. They tend to believe the advertising and promotional materials that promise much more than their dollars can realistically buy.

Condominiums are clearly high risk projects. When something goes wrong in the design or construction of condominiums, **the flaw is likely replicated** throughout all of the units. As a result, there are multiple claimants involved, with damages aggregated across the condominium complex. A minor issue that may not have been pursued for one owner can be addressed in a class action suit, with the legal bill shared among all claimants. The ability to share the effort and expense of filing a claim or suit, along with the aggregate nature of the claim across all units lead to a higher frequency and severity of claims.

Then there are the condominium homeowners' associations, whose directors are in charge of setting the budget for maintenance of the common areas and building exteriors. **Many associations fail to establish dues sufficient enough to cover the required upkeep**, thereby resulting in poor maintenance, deferred maintenance or no maintenance at all. **Condominium homeowner associations are often solicited by very aggressive law firms.** These firms will promise recovery from developers, contractors and designers for everything from leaky windows, to cracked sidewalks, to inadequate HVAC systems.

The claims frequency in connection with condominium design is so high that, for a time, almost no professional liability insurer would cover architects or engineers who were involved with condominiums. Insurance is again available on a limited basis, although many markets continue to refuse to underwrite a condominium exposure or will price the insurance so that it is too cost prohibitive to consider.

Knowing that condominium projects are potential liability minefields, it is best to develop a strategy to minimize your exposure through loss prevention measures and contractual safeguards in order to minimize your exposure to claims. Try to anticipate and minimize problems early on by employing every loss prevention technique you can. The following is a list of specific loss prevention recommendations:

- If you are not comfortable with the project, client, or project owner, you will want to pass on the project. You should be familiar with your client, the builder, and the project owner. They need to have experience with this type of project. The project cannot be thinly financed, without room for cost fluctuations. The contractor should be a reputable one that does good work. The structure(s) should be built with quality materials and workmanship.
- Your client should understand that there is a high probability that your professional liability rates will increase over the next several years if you work on their condominium project and experience any form of claims frequency, and it is appropriate that the owner assume some of those costs. **Factor this in your fees.**
- Make sure there is **an adequate contingency fund** for the project that will be available to remedy construction defects.
- Carefully document all meetings and conversations pertaining to the project. In particular, note of any recommendations you make that are not followed by the owner.
- Watch for any substitutions requested by the developer or contractor. Document your objections.
- Develop a maintenance manual, have it incorporated into the homeowners' association by-laws and require that homeowners be educated about their responsibilities for upkeep and following the stated recommendations. Make the provisions of the manual binding upon the homeowners' association.
- Require that the developer have each purchaser inspect the unit and common areas for defects and have the purchaser sign some type of certification of satisfaction.

We recommend two contractual provisions that separately may be helpful and, taken together, may give the firm substantial protection.

First, you should have a strong indemnity in your contract that requires the client to protect you from third party claims. Consider the following language:

The Client acknowledges the risks to the Design Professional inherent in condominium projects and the disparity between the Design Professional's fee and the Design Professional's potential liability for problems or alleged problems with such condominium projects. Therefore, the Client agrees, to the fullest extent permitted by law, to indemnify and hold the Design Professional and the Design Professional's officers, partners, employees and subconsultants harmless from any and all claims, liabilities, losses and costs, including reasonable attorney's fees and costs of defense,

arising or allegedly arising from the services performed under this Agreement, except for the Design Professional's sole negligence or willful misconduct.

Another contractual provision is the requirement that a maintenance manual is developed as part of the scope of basic services. All design consultants on the project would develop written recommendations for the required minimum maintenance of their particular component of the project, such as the decking, plumbing, lighting, HVAC, roofing, sidewalks, etc. These recommendations are then compiled into a maintenance manual for the project. Your client would agree to write into the by-laws of the condominium homeowners' association a requirement that the recommended maintenance be the responsibility of the association. The by-laws will require periodic inspection of each component by a qualified outside inspection service, which would report its findings and maintenance recommendations to the homeowners' association. Each purchaser would receive a copy of the maintenance manual at the time of purchase and would acknowledge understanding of the responsibility of the homeowners' association to have the necessary maintenance performed. A clause to accomplish this reads as follows:

The Client agrees that the by-laws of the Homeowners' Association established for this project will contain a requirement that the Association will have performed the inspections recommended in the Maintenance Manual. The Client further warrants the by-laws will contain provisions requiring the Homeowners' Association to have performed all necessary maintenance when recommended as a result of these inspections. The by-laws shall also contain an appropriate waiver and indemnity in favor of the Client, the Design Professional, their subconsultants and the Contractor if the maintenance recommendations are not performed.

*This information is presented for professional liability risk management guidance. It is not legal advice nor should it be construed to be a determination on issues of coverage for specific claims. Contract language establishes legal duties and rights and should be reviewed by competent local legal counsel.

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