

## If You Build It, They Will Sue

Synopsis: If You Build It, They Will Sue: A White Paper on Condominium Projects

Architects are increasingly exposed to potential future claims and lawsuits brought by homeowners and the homeowners' associations *years* after a condominium project has been completed. This can occur even when the project developer has overruled the architect's design decisions or has a limited role in the construction phase of the project.

The AIA Trust white paper entitled *If You Build It, They Will Sue: A White Paper on Condominium Projects*, aims to clarify architects' potential liability to client and third parties on condominium projects and provides some guidance to address the concerns raised by lawsuits in which architects have been sued by third parties. By understanding potential risks and assessing them upfront, the architect will be better able to address them.

By way of example, the paper provides an overview of the 2014 *Beacon* decision from the California Supreme Court which declared that an architect owes a duty of care to future homeowners where the architect is a "principal architect" on the project even if the architect does not actually build the project or exercise ultimate control over construction decisions. It was noted that a property owner typically employs an architect in order to rely on the architect's specialized training, technical expertise, and professional judgment.

Many courts recognize that even in the absence of a contractual relationship, architects *may* owe a duty to a non-client such as a homeowners' association, based on how close is the connection between the architects' conduct and the Association's injury; how defined the group of people is that the architects' conduct was intended to affect; and the absence of a third party professional to provide an independent assessment to protect homeowners from design defects and resulting injury.

The meaning of this and other court cases is that for an architect, client evaluation and selection could not be more important for a condominium project since the client will quickly transfer ownership to a HOA and individual unit owners. A lack of proper maintenance of common areas, drainage, roofs, etc. are behind the most common condominium lawsuits so the architect and developer should craft maintenance obligations and requirements binding upon the HOA and unit owners. These provisions will help to mitigate damages and serve as affirmative defenses if the HOA or unit owners do not abide by them. Whether the client developer is willing to address maintenance obligations through various documents is critical in owner evaluation and selection and the paper offers recommended provisions.

Important contract provisions can address critical risks and the paper lists a number of examples. Indemnity is noted as the most important contract provision, an agreement to assume a specific liability in the event of a loss and not infrequently, the client saddles the design professional with an onerous indemnity provision. It is also important to avoid an express duty to defend but tie any indemnity obligation to a determination of negligence. A mutual waiver of consequential damages, for missed market opportunities and other factors, is an appropriate way to address them. A limitation of liability provision, of the design professional from the client developer is essential and can be tied to the amount of available insurance, the architect's total fee, or another negotiated amount.

Protecting yourself from third-party claims requires professional liability insurance and trends indicate that owners are requesting higher limits for insurance coverage. The client developer should be required to insure against general liability claims of the contractor and subcontractors for occurrences from commencement of construction through completion and in addition to contractual requirements, one should ascertain that the appropriate policies are in fact obtained.

Condominium projects remain high risk and there is no absolute protection that a design professional can avoid the very real possibility of HOA or individual unit owner claims and lawsuits. The paper provides a good outline to guide the architect in fielding the best defense – which remains a good set of plans and specifications, well thought-out contract and appropriate insurance, competent general contractors and subcontractors, and proper third party observation and inspection.

For more detailed definitions and explanations, please refer to the entire white paper: [If You Build It, They Will Sue: A White Paper on Condominium Projects](#).