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The Saga Continues: The Further Development of Claims and Insurance Coverage in Construction Defect Cases

The implied warranty of habitability is the principal theory of relief upon which residential construction defect cases are prosecuted in Illinois, particularly in cases involving condominium construction. The development of this common law doctrine continues apace and Illinois courts have resolved several questions since Anthony Longo and Michael Pisano authored a comprehensive discussion of the essentials of the issues related to the implied warranty of habitability entitled "The Implied Warranty in Construction Defect Cases" in *IDC Quarterly*, Volume 24, Number 4. We will build on that Monograph as several questions that were open at the time of its publication have been answered and will discuss and set forth new questions that have been raised. Many of these new questions have been principally raised by the recent decisions related to coverage for claims of the implied warranty of habitability. In addition, we will look at the likely advent of additional claims that arise in this context involving breach of fiduciary duty and counterclaims among defendants.

Can a Design Professional Be Sued for Breach of the Implied Warranty of Habitability?

One of the open questions the last time the implied warranty of habitability graced these pages was whether a design professional could be liable under that theory. In *Board of Managers of Park Point at Wheeling Condo Association v. Park Point at Wheeling, LLC*, the court answered that question in the negative.[1]

In *Park Point*, the condominium association sought to impose liability for breach of the implied warranty of habitability under *Minton v. The Richards Group of Chicago*[2] to design professionals.[3] The plaintiff claimed latent defects caused by improper design, material, and construction led to water and air infiltration that was damaging interior flooring and finishes of the common elements and individual units.[4] The plaintiff claimed that it had no recourse against the developer-seller or general contractor.[5] The trial court dismissed the claims against the architect and an interlocutory appeal was allowed.[6]

The appellate court looked first to the basics of the implied warranty of habitability and found that it arises because a disappointed home buyer under the principles of *caveat emptor* has little or no recourse against the builder.[7] The court found that "regardless of the exact role played in each of these projects, the implied warranty of habitability claim centered on the quality of the construction work."[8] Based upon this, the court held that "only builders or builder-sellers warrant the habitability of their construction work."[9] In contrast, design professionals do not warrant the accuracy of their plans and specifications.[10]

The court pointed to the decision in *Paulkovitz v. Imperial Homes, Inc.*[11] and opinions from courts in other jurisdictions to support the proposition that design professionals do not owe a duty with respect to the implied warranty of habitability.[12] From that analysis, the court determined that the implied warranty of habitability has been applied to construction entities and that design professionals do not engage in such activity.[13]

In opposition, the plaintiff argued that the work of an architect is sufficiently similar to a construction defendant to subject it to liability under the implied warranty of habitability because the work of either a construction entity or a design professional could create latent defects and the purpose of the warranty is to protect an innocent homebuyer, irrespective of who created the defects.[14] In addition, the plaintiff contended that *Paulkovitz* was no longer good law.[15]

The court rejected these contentions and held that the law is limited to construction entities that assist in the physical construction of the property.[16] Further, the court found that *Paulkovitz* is still good law because every case cited by the plaintiff to claim otherwise held to the principle that to state a cause of action under the implied warranty of habitability, the party charged must "contribute to the actual construction of [the] home."[17] The appellate court concluded that a design professional does not contribute in that fashion and therefore could not be held liable.[18]

A New Claim Against Developers?

The nature of claims advanced against developers and the fact that they are most commonly advanced by condominium associations means that there is often significant delay following the completion of the construction before the claims arise. Complicating the filing of the claim is that the developer creates and appoints those who sit on the original condominium board prior to turnover of the board to the unit owners. As a result, the statute of limitations is an early and frequent defense advanced by defendants in these cases. In *Henderson Square Condominium Association v. Lab Townhomes, LLC*,[19] the Illinois Supreme Court found that the statute of limitations defense was overcome because of alleged misrepresentations and fraudulent concealment, as well as breach of fiduciary duty by the developer board for failing to properly reserve funds prior to turnover.[20] This decision could lead to these types of claims arising in other cases and could be used by plaintiffs to extend the time to file claims for breach of the implied warranty of habitability.

The plaintiff in *Henderson* filed a five-count complaint: breach of implied warranty of habitability (Count I), fraud (Count II), negligence (Count III), breach of the Chicago Municipal Code (Count IV), and breach of fiduciary duty (Count V).[21] The trial court dismissed the Chicago Municipal Code and breach of fiduciary duty claims, but that judgment was reversed on appeal.[22] The Illinois Supreme Court accepted the petition for leave to appeal, but sustained the judgment of the appellate court.[23]

The townhome project at issue was built by defendants, which included the development companies, general contractors, and the individuals controlling both, Ronald Shipka, Sr., Ronald Shipka, Jr., and John Shipka.[24] The condominium association was created in June 1996 and the Shipkas comprised the first board of managers prior to turnover of the board to the unit owners in late 1996.[25] The plaintiffs alleged that the developer began to sell units in 1996 and upon moving in the unit owners noticed water seepage.[26] In 2009, an exterior restoration consultant and engineer submitted a report that water was infiltrating the units at several locations because the overall workmanship was "very poor."[27] The condominium association hired a contractor to begin to mitigate the defects and found numerous problems that required rebuilding of several of the units.[28] The plaintiffs alleged that they could not find these defects without performing extensive testing and that therefore the defects were concealed.[29]

The plaintiffs filed their complaint in October 2011 and the defendants moved to dismiss.[30] The defendants argued that the plaintiffs' claims were all time barred and the trial court dismissed Counts I, II, and III with prejudice, but gave the plaintiffs leave to file an amended complaint with respect to Counts IV and V.[31] The amended complaint added allegations that the developer and the general contractor violated Section 13-72-030 of the Chicago Municipal Code by marketing the units using false information and omitting other information.[32] In addition, the plaintiffs' amended

complaint alleged that the Shipkas breached their fiduciary duty to the condominium association by failing to share in the common expenses and to fund sufficient reserves.[33] The plaintiffs also alleged that while in control of the developer board the Shipkas knew or should have known of the defects and failed to either repair them or leave sufficient reserves to repair the defects.[34]

The defendants again filed a motion to dismiss arguing that the plaintiffs' claims were time barred because the units were occupied more than 14 years prior to the filing of the original lawsuit.[35] The defendants relied on the four year statute of limitations for construction-related claims in 735 ILCS 5/13-214(a) and the ten year statute of repose in 735 ILCS 5/13-214(b).[36] The defendants also asserted that the claims were time barred by 735 ILCS 5/13-205 which provides a five year statute of limitations to "recover damages for injury done to property, real or personal."[37]

In response to the second motion to dismiss, citing 735 ILCS 5/13-214(e), the plaintiffs argued that sections 13-214(a) and (b) do not apply to causes of action arising out of fraudulent misrepresentations or fraudulent concealment.[38] The plaintiffs asserted that given that section 13-205 does not have a period of repose that applies and that a claim under that theory can be advanced within five years after the plaintiff discovers the claim.[39] The trial court was not persuaded by the plaintiffs' arguments because the amended complaint did not plead the claims of fraudulent concealment and fraudulent misrepresentation with sufficient specificity and the remainder of the complaint was dismissed.[40]

The plaintiffs appealed and the appellate court reversed, finding that section 13-214 applied, the fraud exception of 13-214(e) applied, and there was a question of fact as to whether there were misrepresentations or actions that could support fraudulent concealment.[41] The defendants petitioned for leave to appeal, which was granted.[42]

The Illinois Supreme Court began by analyzing the plaintiffs' fraudulent concealment allegations and rejected the defendants' contention that the allegations of concealment must occur after the alleged conduct to be concealed.[43] The court, citing to *Keithley v. Mutual Life Insurance Co. of New York*,[44] stated that it has long been held that the alleged acts of concealment "ordinarily must be subsequent to the accruing of the cause of action, . . . they may be concurrent or coincident with it, or even precede it, provided they are of such a nature . . . as to operate after the time when the cause of action arose and thereby prevent its discovery, and were so designed and intended."[45] In this case, the amended complaint alleged that the Shipkas, who owned and controlled the developer and the general contractor, knew and intended the materials in the marketing packages, wherein it was stated that the construction would be in conformity with the specifications, to be false.[46]

With respect to the fiduciary duty claim, the court held that silence as to the alleged defects was not permitted as it related to that kind of relationship.[47] The plaintiffs alleged that in their role on the developer board, the Shipkas had a duty pursuant to the Illinois Condominium Property Act, to properly prepare budgets for the association and the court found there existed a question of fact on whether they fulfilled that duty.[48]

The court then turned its attention to the statute of limitations provided under Section 13-205 and held that the discovery rule applied to toll the start of the statute until the plaintiffs knew or should have known of both injury and wrongful cause.[49] The court found the pleading unclear on when the leakage began (the plaintiffs suggest it was not until 2007 or 2008), but held that simply showing leakage was insufficient to start the statute of limitations running because the plaintiff must also know of the wrongful cause of the leaks.[50] In particular, the plaintiffs did not know how insufficient the association's reserve account was until 2009.[51]

In concluding that there were questions of fact as to when the plaintiffs knew or reasonably should have known that their injury was wrongfully caused, the court stated "[i]t is apparent . . . that after plaintiffs began experiencing water problems from the wood decks, they 'hired a contractor to perform minor suggested repairs and undertake certain

maintenance work to abate the problems.'"[52] The plaintiffs then commissioned a more robust investigation of the water infiltration problems and conducted testing that showed that there were significant problems with the construction.[53] The plaintiffs also alleged that the defects could not have been discovered sooner.[54]

The court found that the plaintiffs had sufficiently alleged a breach of the Chicago Municipal Code related to making a material misstatement in the sale of a condominium.[55] Section 13-72-030 of the Code states: "[n]o person shall with the intent that a prospective purchaser rely on such act or omission, advertise, sell or offer for sale any condominium unit by (a) employing any statement or pictorial representation which is false or (b) omitting any material statement or pictorial representation."[56] The trial court had found that a claim under the ordinance was similar to fraud claim and does not apply to future conduct; in this case, the construction of the condominium units in conformity with the plans and specifications.[57] The appellate court found that the ordinance was in addition to common law and because it dealt with the sale of units that may not yet be completed, it could apply to prospective statements.[58]

The Illinois Supreme Court agreed with the appellate court and focused on the language of the ordinance that forbids "any" false statement.[59] This could include statements about construction that was not yet complete.[60] The court also noted the exception to promissory fraud actions where the false statements are part of a scheme to accomplish the fraud, as alleged by the plaintiffs in this case.[61] The court found that the false statements could be actionable by both the original purchasers as well as subsequent purchasers through the association as their representative.[62]

Finally, the court turned to the breach of fiduciary duty claim.[63] The defendants argued that the facts alleged by the plaintiffs did not overcome the business judgment rule with respect to the budgeting and reserve setting.[64] The court rejected this argument out of hand, finding that the plaintiffs had sufficiently alleged that the defendants acted fraudulently and in bad faith when they knew of "the shoddy construction yet failed to account for those repairs."[65]

The decision by the court to uphold the reversal of the dismissal of Counts IV and V of the complaint drew a dissent from Justice Burke joined by Justices Freeman and Karmeier.[66] The dissenting Justices began by pointing out that the complaint was filed 15 years after the construction was completed.[67] The statements that the majority claimed were fraudulent and supported application of fraudulent concealment were statements related to the "quality" of the construction, which the dissent found could not be fraudulent, but merely a statement of subjective opinion.[68] The dissent also asserted that the plaintiffs had failed to allege that they detrimentally relied on the statements in order to invoke fraudulent concealment and thus the complaint was bereft of any allegations of causation.[69] The dissent argued that this defect in pleading no only infects the fraudulent concealment claim with respect to the quality of the construction, but also with respect to the claim of inadequate reserving and the violation of Chicago Municipal Code.[70]

The *Henderson* decision, though not directly related to claims of implied warranty of habitability, is likely to be used to extend the already expansive statute of limitations for that cause of action if it can be coupled with claims of inadequate reserve funding and fraudulent concealment. As almost every case involving the construction of condominiums involves marketing materials from the developer that claim some form of quality construction and the developer having control of the original board that budgets and sets initial reserves, it can be expected that these claims will be asserted in almost every case. This will likely lead to claims of breach of implied warranty of habitability being asserted well more than a decade after construction is completed and on buildings that were built before waivers of those claims were common.

Can a Purchaser Who Takes Subsequent to the Execution of a Waiver of the Warranty of Habitability Sue For a Breach?

The running issue of whether a claim for breach of implied warranty of habitability has been or can be released by a waiver of the warranty continues to vex courts and parties alike. Turning again to *Park Point*, after concluding that there is no liability against design professionals, the court was asked to decide whether a waiver of the implied warranty of habitability operated to exculpate the original and subsequent general contractor, the masonry contractor, and the carpentry subcontractor.[71] Illinois courts have long held that a purchaser can waive the warranty but that the waiver will be strictly construed against the party benefitted by the waiver.[72]

After finding that the waiver executed with the purchase documents applied to the developer, the *Park Point* court turned to whether it applied to the other parties.[73] The language of the disclaimer at issue stated: "THE SELLER HEREBY DISCLAIMS AND THE PURCHASER HEREBY WAIVES THE IMPLIED WARRANTY OF HABITABILITY."[74] The definition of "seller" in the document was "seller (and its owners, officers, agents, and the other representatives)."[75] The court held that the definition did not include the general contractor or subcontractors as they were not specifically identified in the waiver.[76]

More important in a wave of cases that are unfavorable to defendants, in *Fattah v. Bim*, the Illinois Supreme Court held that a waiver of the implied warranty of habitability once waived is not resurrected simply because the property is sold to another purchaser who was unaware of the waiver.[77]

In *Fattah*, the court was faced with a situation in which a general contractor, Mirek Bim, through his company built a single family home for Beth Lubeck.[78] This sale occurred in 2007.[79] The real estate sales contract included a waiver of the implied warranty of habitability given in exchange for a one year express warranty, which was honored by Bim.[80] Subsequently, in 2010, the home was sold to John Fattah in an "as is" condition.[81] Less than a year after the sale to Fattah, the retaining wall around the property collapsed.[82] Fattah timely filed a lawsuit against Bim claiming latent defects.[83]

After a bench trial, the trial court found that even though the damage was a result of a latent defect, the implied warranty of habitability was waived in the contract between Bim and Lubeck.[84] The trial court held that no "builder or developer can predict who will buy" a newly constructed house after its first purchaser.[85] The trial court based its ruling on a finding that holding otherwise would "frustrate the policy favoring the enforcement of knowing waivers" of the implied warranty of habitability.[86] The appellate court reversed the judgment in favor of the defendant and held that the original waiver did not preclude the imposition of the breach of the implied warranty of habitability against a builder by a subsequent purchaser.[87]

The Illinois Supreme Court granted the petition for leave to appeal and considered several issues, including whether the waiver was effective against the subsequent purchaser.[88] The court first noted that the appellate court relied on *Redarowicz v. Ohlendorf* when it concluded that the implied warranty of habitability extends to a subsequent purchaser.[89] Next, and building on that point, the appellate court concluded that the subsequent purchaser never waived the warranty.[90]

In rejecting that reasoning, the court first noted that *Redarowicz* did not involve a situation in which the original purchaser had waived the warranty.[91] Applying that distinction, the court then determined, based upon application of *Peterson v. Hubschman Construction Co.*,[92] that the implied warranty had been waived by Lubeck and that if the court extended the implied warranty of habitability to cover Fattah that it would "significantly alter the burdens and expectations of the defendants and would be inequitable."[93] In addition, the court observed that the builder-vendor would have no ability to know when the house would be sold and if liability for latent defects may reappear based upon the sale.[94] As a result, and in order to prevent confusion, inequity, and potential for malfeasance (such as a sale of a home to a husband by a builder including a lower price based upon the inclusion of a waiver and the next day a sale of the home

to the wife to void the waiver), the court concluded that the implied warranty of habitability once waived, is waived for all future purchasers.[95]

933 Van Buren Condominium Association

In nearly every situation in which claims are advanced against the developer, they are also advanced against the general contractor and subcontractors. As the ability to plead claims of breach of implied warranty of habitability against general contractor and subcontractors has expanded, so too has the filing of counterclaims by developers against those defendants. In *933 Van Buren Condominium Association v. Van Buren*, the court addressed the nature of those counterclaims and how they might be advanced.[96]

The developer hired two roofing contractors to assist in building a condominium.[97] After the condominium association discovered leaking in the common area roof and sued the developer, the developer asserted counterclaims against the roofing contractors asserting that they had failed to defend and indemnify the developer pursuant to their contracts.[98] The developer settled with the condominium association and the only remaining claims were those between the developer and the roofing subcontractors.[99] The trial court granted summary judgment to the roofing subcontractors on the indemnification counterclaims, finding that they had no duty to defend or indemnify the developer.[100] The appellate court reversed the grant of summary judgment in favor of the roofing subcontractors on the claims for indemnity as to the breach of the implied warranty of habitability claim advanced against the developer, but affirmed with respect to the fraud claims that had been advanced by the condominium association against the developer.[101]

The court reached this conclusion by first finding that the indemnity provisions were valid under the Construction Contract Indemnification Negligence Act, which states:

> With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.[102]

This provision prohibits indemnity in the construction context for the negligence of the party to be indemnified. The court then compared the language of the statute to the indemnity provisions in the two roofing subcontractors' contracts with the developer.[103] Citing to *Braye v. Archer-Daniels-Midland Co.*[104] and *Buenz v. Frontline Transportation Co.*,[105] the court held that because the indemnity clauses did expressly require that the developer be indemnified for its own negligence, the provisions were enforceable.[106]

The court next turned to whether the subcontractors breached their duty to defend the developer.[107] As an initial matter, the court rejected the argument that the indemnification clauses were subject to the four year statute of limitations in 735 ILCS 5/13-214(a).[108] Instead, the court held that those claims are subject to the 10 year statute of limitations applicable to breach of contract claims.[109] In analyzing the merits, the court divided the claims for indemnity into the fraud claims and the claims related to the breach of the implied warranty of habitability.

With respect to the fraud claims, the court concluded that those claims were not covered by the indemnity clauses.[110] The fraud claims asserted by the plaintiffs arose out of the failure of the developer to disclose the defects in the

construction of the roof and did relate to the conduct of the subcontractors.[111] Both indemnity clauses only provided for indemnity for conduct related to alleged wrongdoing of the subcontractors (the basis for the court to find the indemnity clauses were enforceable).[112]

With regards to the claim of breach of the implied warranty of habitability, the court determined that those claims triggered the subcontractors' duty to defend under the indemnity clauses.[113] Specifically, the court analyzed the plaintiff's allegations which arose out of the faulty work on the roof which fell into the scope of work for both subcontractors.[114] One of the subcontractors asserted that the two year statute of limitations in 735 ILCS 5/13-204(c) (the limitation of time in which a counterclaim must be filed) but this argument was rejected by the court, again finding that the 10 year statute of limitations for breach of contracts applied.[115]

Most importantly, the court also rejected the argument that a claim for breach of implied warranty of habitability is a claim sounding in tort.[116] This conclusion, which is consistent with prior opinions of the Illinois Supreme Court, has important implications for whether there is insurance coverage for claims of breach of the implied warranty of habitability.[117]

Can a Condominium Association Seek Recovery for Property Damage to Individual Units?

In the prior Monograph on this issue, it was taken for granted that the condominium associations could advance claims for property damage to individual units without the individual unit owners filing a lawsuit. However, several courts, both state and federal, have disagreed and have held that a condominium association lacks standing to advance such claims. Surprisingly, this holding has so far been provided in the insurance coverage cases that have arisen out of disputes related to underlying claims of breach of the implied warranty of habitability.

Under a commercial general liability insurance policy (CGL), an insurer owes a duty to defend its insured if a complaint alleges facts within or potentially within coverage.[118] Generally, CGL policies cover bodily injury or property damage caused by an occurrence.[119] An occurrence is generally defined as an accident.[120] CGL policies do not cover the cost of repairs or replacement of defective work.[121] Rather, CGL policies provide coverage for the negligent damage to other property outside of the scope of the project.[122]

In a multi-unit condominium association, a CGL policy may provide coverage to a claim involving allegations of negligence that cause property damage to other property outside the scope of the project.[123] That is, absent allegations of possible property damage to some property outside the scope of the project the contractor or subcontractor was hired for, a CGL policy will not be triggered and the insurer will generally not owe a duty to defend.[124]

Some Illinois and federal courts have considered whether an insurer owes a duty to defend a contractor when a condominium association sues. As discussed in greater detail below, courts have considered whether an association has alleged negligent conduct that led to property damage to other property than that within the scope of the project the contractor was hired to perform. These courts have generally held that allegations of property damage to personal property of the individual condominium owner are insufficient to trigger coverage. The principal basis for this conclusion that condominium associations do not have standing to assert the claims regarding personal property damage of individual unit owners. Absent standing, courts have held that allegations of property damage to personal property of the individual condominium owners are not recoverable in the underlying lawsuit, and thus, there is no possible or potential liability to the contractor or subcontractor. That is, absent allegations of covered or potentially covered claims, there is no duty to defend.

The Illinois Supreme Court has yet to determine whether a condominium association has standing under the Illinois Condominium Property Act (Act) to recover for damage to condominium unit owners' personal property. In *Henderson Square Condo Association v. Lab Townhomes, LLC*, the Illinois Supreme Court considered whether the governing body of a property of townhomes had standing to bring a claim of fraudulent concealment.[125] In *dicta*, the court stated that "it is clear that a condominium association generally has standing to pursue claims that affect the unit owners or the common elements."[126] However, as the issues before the court did not relate to allegations of individual condominium unit owners' personal property, whether the Act provides standing to associations to bring such claims has yet to be definitely determined.

The Act provides that a condominium association "shall have standing and capacity to act in a representative capacity in relation to matters involving the common elements or more than one unit, on behalf of the unit owners, as their interests may appear."[127] Thus, there are essentially two issues: (1) can (or should) a court considering insurance coverage determine whether a condominium association has standing to assert such claims in the underlying litigation; and (2) do such claims relate to matters involving the common elements or relate to matters involving more than one unit?

Westfield Insurance Co. v. West Van Buren, LLC

In *Westfield Insurance Co. v. West Van Buren, LLC*, the developer subcontracted installation of a roof.[128] The sub-contractor obtained a CGL policy through Westfield Insurance Company for occurrence-based coverage.[129] A year after construction, the condominium association took control of the building.[130] The association claimed construction defects in the roof caused water to infiltrate the building and individual condominium units and demanded the developer reconstruct the roof.[131] The association sought reimbursement for the cost of the repair work after the developer refused.[132] The developer claimed to be an additional insured under Westfield's policy.[133]

The underlying complaint alleged breach of warranty, violation of the Consumer Fraud and Deceptive Business Practices Act, fraud, and breach of the implied warranty of habitability.[134] The complaint alleged water infiltrated the common elements and individual units.[135]

The court's majority first considered whether there were allegations of an occurrence or property damage as defined within the policy.[136] The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and "property damage" as "a. Physical loss to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."[137]

The majority, citing *Stoneridge Development Co. v. Essex Insurance Co.*,[138] first held the underlying complaint failed to allege an occurrence.[139] The court next held that the allegations did not constitute property damage, finding the allegations "sought only to hold the developer responsible for the shoddy workmanship of its roofing subcontractor," and the court held the complaint only sought purely economic losses not covered by the policy.[140]

The developer argued that the underlying complaint alleged actual physical harm to personal property as well.[141] The majority noted that while "construction defects that damage something other than the project itself *can* constitute an occurrence and property damage, they do not in this case," holding that the allegations were meant to "simply bolster the contention that water infiltration generally occurred and caused damages."[142] The majority noted that "the complaint did not seek damages for any personal property damage."[143] Instead, the complaint merely referenced a free-standing fact

but did not attach the personal property damage to any theory of recovery, which was insufficient to trigger coverage.[144] The majority also noted that the "allegations of personal property damage were not offered for the purpose of recovery," but rather were purely tangential to the association's claim for damages for repair and remediation of the roof.[145]

The developer also argued that Westfield should have raised the issue of standing as an affirmative defense in the underlying lawsuit.[146] However, the majority did not answer whether the association had the capacity to represent the individual unit owners, instead holding, as there was no duty to defend, that the issue did not necessarily involve standing.[147]

The dissenting Justice disagreed with the majority and would have held there was a claim for property damage caused by an occurrence.[148] The dissent also criticized the majority's analysis on standing, noting that standing is an affirmative defense which is the defendant's burden to plead and prove.[149] The dissent would have held an affirmative defense is not an exclusion or a basis to decline a tender of defense.[150] Rather, the dissent would have required the insurer to have defended and raised the affirmative defense itself in the underlying matter.[151]

Acuity v. Lenny Szarek, Inc.

In *Acuity v. Lenny Szarek, Inc*., the defendant-insureds argued that the Act gave the condominium association the right to sue for property damage suffered by individual unit owners.[152] Szarek, a carpentry contractor, agreed to perform work at two separate condominium projects.[153] The condominium unit owners investigated apparent water infiltration issues and ultimately took action against the condominium developers and builders.[154] One of the condominium associations brought suit against the developer and its two members, and later amended the complaint to add claims against various contractors, including Szarek.[155] The "complaint included allegations that Szarek's improper construction and installation of building materials resulted in water infiltration that 'caused substantial damages to common elements *** drywall, garage walls and ceilings, and interior finishings of the units, as well as wood floors, carpeting, window coverings and personal property, all located inside the affected unit.'"[156] The other association, after unsuccessfully attempting mediation and arbitration, filed a complaint against Szarek and other contractors for "breach of contract, indemnification and declaratory relief, contending that Szarek failed to provide work 'free from defects in workmanship, materials and design,' ***."[157]

Acuity had issued a CGL policy to Szarek which covered damages to bodily injury or property damage to which the insurance applied, caused by an occurrence.[158] The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, and "property damage" as "[a] a physical injury to tangible property, including all resulting loss of use of that property ***; or [b]. loss of use of tangible property that is not physically injured."[159]

Acuity sought a declaration that it owed no duty to defend or indemnify Szarek in the underlying complaint.[160] The defendants argued that the Act allowed the condominium association the right to sue for property damage suffered by individual unit owners.[161] The court noted that "the statute by its plain language alone certainly does not establish any such right."[162] Both parties cited *Poulet v. H.F.O, LLC*,[163] in support of their argument. The court found that *Poulet* suggested "it remains for an individual unit owner to bring any claim he may have for damage to his own personal property."[164] The court ultimately held that there was "no need to determine precisely what right a condominium association may have to act on behalf of the individual unit owners."[165] The court noted that the condominium association

merely mentioned damage to the personal property of the individual unit owners, but did not seek to recover for those damages.[166]

Allied Property & Casualty Ins. Co v. Metro North Condo Association

In *Allied Property & Casualty Insurance Co v. Metro North Condo Association*, a condominium building sustained extensive water damage caused by a subcontractor's defective window installation.[167] The condominium association brought suit against the developer, who turned out to be insolvent, and then filed a fourth amended complaint adding a claim against the subcontractors for breach of the implied warranty of habitability.[168] The association and the subcontractors reached a settlement, and the association dismissed its pending lawsuit in exchange for the assignment of the subcontractors' rights against its insurer.[169]

At the time of the settlement, the only pending claim was for breach of the implied warranty of habitability.[170] The settlement also specified that it was not intended to compensate the association for the cost of repairing or replacing the defectively installed windows, but for the resultant damage to the remaining parts of the building and to the unit owners' personal property.[171]

The subcontractors were insured under a standard CGL policy.[172] The policy required the insurer to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[173] The policy also contained a number of exclusions to limit coverage.[174]

The court considered whether the policy required the insurer to indemnify the subcontractors.[175] The court first held that the cost of repairing the defective completed work was not covered under the policy.[176] The court next held that the implied warranty of habitability did not allow for recovery of damages covered by the policy.[177] The court then noted that the cost of remedying the subcontractors' defectively installed windows was not covered and was the only cost for which the subcontractors were liable.[178] Finally, the court held that the association lacked standing to sue on behalf of the individual unit owners for damage to the owners' personal property.[179] The court noted that in the settlement, the association claimed it was "entitled to recover (in part) for the unit owners' loss of personal property resulting from water damage caused by [the subcontractors]. But individual damage to the unit owners' privately-owned belongings is an individual loss that affects each owner separately; it is not a collective loss affecting multiple units or the 'common elements' of the building."[180]

Westfield Insurance Co. v. National Decorating Service

Most recently, in *Westfield Insurance Co. v. National Decorating Service*, the Court of Appeals for the Seventh Circuit once against considered the issue.[181] In a third amended complaint, the condominium association identified the following damages: "(1) significant cracking of the exterior concrete walls, interior walls, and ceilings; (2) significant leakage through the exterior concrete walls, balconies, and windows; (3) defects to the common elements of the building; and (4) damage to the interior ceilings, floors, interior painting, drywall, and furniture in the units."[182] The court noted that the furniture allegation was only added after the filing of the third amended complaint.[183]

The court first held that while a condominium association may act in a representative capacity on behalf of its unit owners, the Act limits "the scope of such representation to matters involving the common elements or more than one unit, on behalf of the unit owners, as their interests may appear."[184] The court held the Act "precludes the Association

from being able to pursue a legal remedy for the damage that it alleges [the contractor's] action caused to the individual unit owners' furniture."[185] The court found the allegations insufficient to invoke the duty to defend as the association could not legally recover for the alleged damage to the furniture.[186] The court ultimately held there were other allegations of negligence that caused property damage and ultimately held there was a duty to defend.[187]

Unless and until the Illinois Supreme Court definitively decides whether the Act extends a condominium association's standing to allege property damage of unit owner's personal property or the legislature clarifies the statute, courts will likely rely on the recent opinions that preclude condominium associations from asserting claims for property damage to individual units. That is, in a coverage dispute involving the implied warranty of habitability in the underlying cause of action against a contractor or subcontractor, the court will likely first look to the allegations in the underlying complaint to see if there was an occurrence caused by property damage.

If there are allegations of property damage involving the personal property of the individual unit owners, the court will have to determine whether to follow the above opinions to determine if the condominium association has standing to assert such claims. If the court determines there is no standing, the court will have to consider whether there are any other allegations of property damage sufficient to bring the claim within, or potentially within, coverage under the policy. As a reminder, even if a court determines that a condominium association lacks standing to assert such claims, litigators must be aware to look for allegations of property damage to other property, which may trigger coverage.

Conclusion

The judge-made doctrine of the implied warranty of habitability continues to evolve and in ways that could not have been anticipated by the courts that first invoked the doctrine nearly four decades ago. Claims for breach of the implied warranty of habitability have become the favored theory of recovery in residential construction cases and developers, general contractors, subcontractors, and their insurers will have to adapt to these continued developments.

The Illinois Supreme Court will likely issue a very important decision later in its current term when it decides the appeal in *Sienna Court Condominium Association v. Champion Aluminum Corp.*[188] This case concerns several important issues, including whether a claim for breach implied warranty of habitability can be asserted against material suppliers and design professionals who did not perform construction work and whether an otherwise insolvent builder who had recoverable insurance would preclude claims of breach of the implied warranty of habitability against subcontractors.

Endnotes

1 *Bd. of Managers of Park Point at Wheeling Condo Ass'n v. Park Point at Wheeling, LLC*, 2015 IL App (1st) 123452, ¶ 31.

2 *Minton v. The Richards Grp. of Chicago*, 116 Ill. App. 3d 852 (1st Dist. 1983).

3 *Park Point*, 2015 IL App (1st) 123452, ¶ 4.

4 *Id.*

5 *Id.*

6 *Id.* ¶ 5.

7 *Id.* ¶ 6.

8 *Id.* ¶ 14.

[9] *Park Point*, 2015 IL App (1st) 123452, ¶ 15.

[10] *Id.*

[11] *Paulkovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037 (3d Dist. 1995).

[12] *Park Point*, 2015 IL App (1st) 123452, ¶¶ 16-22.

[13] *Id.* ¶ 22.

[14] *Id.* ¶ 24.

[15] *Id.*

[16] *Id.* ¶ 27.

[17] *Id.*

[18] *Park Point*, 2015 IL App (1st) 123452, ¶¶ 28-31.

[19] *Henderson Square Condo. Ass'n v. Lab Townhomes, LLC*, 2015 IL 118139.

[20] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 38-42.

[21] *Id.* ¶ 1.

[22] *Id.*

[23] *Id.*

[24] *Id.* ¶¶ 4-5.

[25] *Id.* ¶ 6.

[26] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 7.

[27] *Id.* ¶ 8.

[28] *Id.* ¶ 9.

[29] *Id.* ¶ 10.

[30] *Id.* ¶¶ 3, 11.

[31] *Id.* ¶¶ 11-12.

[32] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 13.

[33] *Id.* ¶ 16.

[34] *Id.*

[35] *Id.* ¶¶ 17-18.

[36] *Id.* ¶ 18.

[37] *Id.* ¶ 21.

[38] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 23.

[39] *Id.* ¶ 24.

[40] *Id.* ¶¶ 25-26.

[41] *Id.* ¶ 28.

[42] *Id.* ¶ 30.

[43] *Id.* ¶¶ 36-38.

[44] *Keithley v. Mut. Life Ins. Co. of New York*, 271 Ill. 584, 588 (1916).

[45] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 39 (*quoting Keithley v. Mut. Life Ins. Co. of New York*, 271 Ill. at 598).

[46] *Id.*

[47] *Id.* ¶ 40.

[48] *Id.* ¶ 41.

[49] *Id.* ¶¶ 50-52.

[50] *Id.* ¶ 55.

[51] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 54.

[52] *Id.* ¶ 56.

[53] *Id.*

[54] *Id.*

[55] *Id.* ¶ 75.

[56] *Id.* ¶ 63.; Municipal Code of Chicago 13 §-72-030.

[57] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 64.

[58] *Id.* ¶ 65.

[59] *Id.* ¶ 68.

[60] *Id.*

[61] *Id.* ¶ 69.

[62] *Id.* ¶ 75.

[63] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶ 77.

[64] *Id.*

[65] *Id.* ¶ 79.

[66] *Id.* ¶¶ 84-120.

[67] *Id.* ¶ 87.

[68] *Id.* ¶¶ 90-93.

[69] *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶¶ 97-98.

[70] *Id.* ¶¶ 106-107, 118.

[71] *Park Point*, 2015 IL App (1st) 123452, ¶ 32.

[72] *Id.* ¶ 34.

[73] *Id.* ¶¶ 45-46.

[74] *Id.* ¶ 47. (emphasis in original).

[75] *Id.* ¶ 48.

[76] *Id.* ¶¶ 49-50.

[77] *Fattah v. Bim*, 2016 IL 119365, ¶ 35.

[78] *Fattah*, 2016 IL 119365, ¶¶ 4-5.

[79] *Id.* ¶ 5.

[80] *Id.*

[81] *Id.* ¶ 6.

[82] *Id.*

[83] *Id.* ¶ 7.

[84] *Fattah*, 2016 IL 119365, ¶ 9.

[85] *Id.*

[86] *Id.*

[87] *Id.* ¶ 11.

[88] *Id.* ¶ 14.

[89] *Id.* ¶ 15 (*citing Redarowicz v. Ohlendorf*, 92 Ill. 2d 171 (1982)).

[90] *Fattah*, 2016 IL 119365, ¶ 16.

[91] *Id.* ¶ 17.

[92] *Peterson v. Hubschman Constr. Co*, 76 Ill. 2d 31 (1979).

[93] *Fattah*, 2016 IL 119365, ¶¶ 19-21, 27-28.

[94] *Id.* ¶ 30.

[95] *Id.* ¶¶ 32, 35.

[96] *933 Van Buren Condo. Ass'n v. Van Buren*, 2016 IL App (1st) 143490.

[97] *933 Van Buren Condo. Ass'n*, 2016 IL App (1st) 143490, ¶ 1

[98] *Id.* ¶ 1

[99] *Id.* ¶ 2.

[100] *933 Van Buren Condo. Ass'n v. Van Buren*, 2016 IL App (1st) 143490, ¶ 2.

[101] *Id.*

[102] 740 ILCS 35/1.

[103] *933 Van Buren Condo. Ass'n v*, 2016 IL App (1st) 143490, ¶¶ 35-41.

[104] *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201 (1997).

[105] *Buenz v. Frontline Transp. Co*., 227 Ill. 2d 302 (2008).

[106] *933 Van Buren Condo. Ass'n*, 2016 IL App (1st) 143490, ¶ 38.

[107] *Id.* ¶ 43.

[108] *Id.* ¶ 44.

[109] *Id.*

[110] *Id.* ¶¶ 47-49.

[111] *Id.* ¶ 47.

[112] *933 Van Buren Condo. Ass'n*, 2016 IL App (1st) 143490, ¶¶ 48-49.

[113] *Id.* ¶¶ 51-59.

[114] *Id.* ¶ 52.

[115] *Id.* ¶ 55.

[116] *Id.* ¶ 58.

[117] *Id.*

[118] *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010).

[119] *See generally Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 489 (1997).

[120] *Am. Family Mut. Ins. v. Enright*, 334 Ill. App. 3d 1026, 1031 (1st Dist. 2002).

[121] *Westfield Ins. Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 19, 59; *Viking Constr. Mgmt. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 55 (1st Dist. 2005); *State Farm Fire & Cas. Co. v. Tillerson*, 334 Ill. App. 3d 404, 412 (5th Dist. 2002).

[122] *West Van Buren*, 2016 IL App (1st) 140862, ¶ 20; *CMK Dev. Corp. v. West Bend Mutual Ins. Co.*, 395 Ill. App. 3d 830, 840 (1st Dist. 2009).

[123] *West Van Buren*, 2016 IL App (1st) 140862, ¶¶ 18-20.

[124] *Id.*

[125] *Henderson Square Condo Ass'n v. Lab Townhomes, LLC*, 2015 IL 118139, ¶ 75.

[126] *Henderson Square*, 2015 IL 118139, ¶ 75.

[127] 765 ILCS 506/9.1(b).

[128] *West Van Buren,* 2016 IL App (1st) 140862, ¶ 3.

[129] *Id.*

[130] *Id.* ¶ 4.

[131] *Id.*

[132] *Id.* ¶¶ 4-5.

[133] *Id.* ¶ 5.

[134] *West Van Buren*, 2016 IL App (1st) 140862, ¶ 6.

[135] *Id.*

[136] *Id.* ¶¶ 18-19.

[137] *Id.* ¶ 16.

[138] *Stoneridge Dev. Co. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 747 (2d Dist. 2008) (holding the implied warranty of habitability is contractual in nature and not an occurrence).

[139] *West Van Buren*, 2016 IL App (1st) 140862, ¶¶ 17-18.

[140] *Id.* ¶ 19.

[141] *Id.* ¶ 20.

[142] *Id.* (emphasis added) (internal citation omitted).

[143] *Id.*

[144] *Id.*

[145] *West Van Buren*, 2016 IL App (1st) 140862, ¶ 22.

[146] *Id.* ¶ 23.

[147] *Id.*

[148] *Id.* ¶ 34.

[149] *Id.* ¶ 39 (*quoting Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 252 (2010)).

[150] *West Van Buren*, 2016 IL App (1st) 140862, ¶ 39.

[151] *Id.* ¶ 41.

[152] *Acuity v. Lenny Szarek, Inc.*, 128 F. Supp. 3d 1053, 1062 (N.D. Ill. 2015).

[153] *Acuity*, 128 F. Supp. 3d at 1056.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 1057.

[158] *Id.*

[159] *Acuity,* 128 F. Supp. 3d at 1057.

[160] *Id.*

[161] *Id.* at 1062.

[162] *Id.*

[163] *Poulet v. H.F.O, L.L.C.*, 353 Ill. App. 3d 82 (1st Dist. 2004).

[164] *Acuity*, 128 F. Supp. 3d at 1062.

[165] *Id.* at 1062.

[166] *Id.* at 1062.

[167] *Allied Prop. & Cas. Ins. Co. v. Metro North Condo. Ass'n*, 850 F.3d 844, 845 (7th Cir. 2017).

[168] *Metro North*, 850 F.3d at 846.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Metro North*, 850 F.3d at 846.

[175] *Id.* at 847.

[176] *Id.* at 846.

[177] *Id.* at 848.

[178] *Id.*

[179] *Id.*

[180] *Metro North*, 850 F.3d at 849.

[181] *Westfield Ins. Co. v. Nat'l Decorating Serv.*, 863 F.3d 690 (7th Cir. 2017).

[182] *Nat'l Decorating*, 863 F.3d at 693.

[183] *Id.*

[184] *Id.* at 696 (citations omitted).

[185] *Id.*

[186] *Id.*

[187] *Id.* at 697-98.

[188] *Sienna Court Condo. Ass'n v. Champion Aluminum Corp.*, 2017 IL App (1st) 143364.

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