

Design Professional Newsletter



AN OVERVIEW OF CONDO CONVERSIONS FOR THE DESIGN PROFESSIONAL

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A condominium conversion project involves transforming an existing rental building, usually residential, into individual condominium units. While condo conversions can be attractive projects for many design professionals, they also present several legal and professional risks similar to those in new condo construction. This article provides an overview of liability concerns that architects and engineers may face in condo conversions and offers insights into mitigating those risks.ⁱ

Many states have enacted statutes governing the condo conversion process, outlining the legal requirements for the owner of a multi-family apartment building to subdivide and convert the property into condos. As part of this process, the converting developer may be required to make disclosures regarding the condo conversion project. Specifically, these statutes can require a condo conversion report prepared by a design professional, containing disclosures about the age of the structure and other components of the building, the building's existing condition and structural soundness, and the remaining useful life of the building and its components.ⁱⁱ By statute or common law, or both, prospective unit owners and associations may be treated as third-party beneficiaries of these reports. A report that does not fully disclose all material conditions in a building can lead to claims brought by the developer, a contractor, other design professionals, the association, and individual unit owners.

Even if a design professional is not the author of a disclosure report, they could be argued to be liable for damages resulting from defects in the building that they knew of, or should have known of, as part of their scope of work. Whether or not the applicable law requires disclosure reports, the design professional should be aware of potential problems the building and its components may present within their scope of work. Many older rental buildings may have underlying structural problems that are not immediately apparent, such as foundation issues, framing problems, and aging materials. Additionally, older buildings

Design Professional Newsletter



may have outdated plumbing and electrical systems that are nearing the end of their useful life or no longer meet applicable code requirements. These problems should be addressed in the conversion process, and if they are not, they may become elements of any claims brought by the new association and unit owners after conversion and sale.

A design professional may be able to avoid or minimize liability through carefully negotiated contractual provisions. For instance, the law in many states will enforce limitation of liability clauses, which limit the professional's liability for any breach of the contract—including claims of negligence for design defects—to the monetary value of the contract or a specific monetary amount. While such a provision may not be enforceable as to a third party not in privity, such as an association, it should be enforceable as to those in privity with the design professional, such as the developer or the prime design professional. Additionally, the design professional may seek other beneficial contract provisions: providing a detailed and comprehensive scope of work; requiring warranties that last until the end of the applicable repose period; restricting assignment of rights to pursue any claimed breach; providing for indemnity and related rights as to claims by contractors or others; providing for project insurance; ensuring that the design professional is an additional insured under the developer or prime's insurance; shortening the applicable limitations periods; and providing for recovery of attorney's fees to the prevailing party (a two-edged sword).

Finally, the design professional should consult with qualified insurance and risk management professionals to consider obtaining the best and broadest available professional liability insurance that will provide coverage for probable claims arising from the project, with limits approximating the potential exposure for such claims. Not all policies are the same, and not all insurers provide the same policies. Many insurers may exclude coverage for condo projects or limit coverage to projects of a certain size. Alternatively, the policy may limit coverage to certain types of conversion projects. A design professional should have qualified insurance professionals to provide necessary guidance.

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Design Professional Newsletter



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ⁱ This article is not comprehensive, or specific to any state or jurisdiction. It is also not meant to specifically address the problems that may arise where the design professional becomes involved in the construction or renovation of a rental project which is later converted into a condo. If a design professional is considering becoming involved in a condo conversion project, the professional should become familiar with the laws directly governing condo conversions in the state and municipality where the project is located, and consult with qualified legal and insurance professionals to understand and mitigate their legal and financial exposure, negotiate the best contractual protections possible, and obtain the appropriate and greatest extent of professional liability insurance coverage reasonably available.

ⁱⁱ Developer's reports may also be required to disclose prior pest infestations, such as termites or mold, and their treatment. Also, these statutes may include statutory warranties, or implied warranties may be applied by operation of common law.