Construction Law Section Newsletter

Vol. 19, No. 1 — November 2017

The *Grandview at Port Imperial* Case: Employing the Consumer Fraud Act in Construction Defect Cases

by John Cottle and Matthew Meyers

On June 1, 2017, after a seven-week trial, a Hudson County jury returned a verdict against a Hovnanian Enterprises, Inc., affiliate that had been created to act as developer for The Grandview at Port Imperial Condominium, a riverfront condominium in West New York. The jury found the Hovnanian developer entity had breached an express warranty, and awarded damages under the New Jersey Consumer Fraud Act (CFA)[1] in the amount of $3 million, trebled to $9 million pursuant to N.J.S.A. 56:8-19. The jury further found that Hovnanian Enterprises, the parent company, had used the developer affiliate to perpetrate a fraud or injustice upon the plaintiff condominium association and its members, and that the corporate veil of the developer should be pierced. The trial court has denied the defendants' motions for judgment notwithstanding the verdict (JNOV) and for new trial, and the matter is expected to be appealed.

The *Grandview* case demonstrates how the CFA can be successfully employed in the context of a construction defect and breach of warranty case. In *Grandview*, the plaintiff association was able to demonstrate the developer suppressed material information from prospective purchasers of condominium units that related to building defects covered by the warranty. The plaintiff presented facts showing the condominium building, though approved as Type 2 construction, did not comply with the Type 2 requirements of the applicable building code because, in part, it had combustible subflooring. This noncompliant condition was discovered when the building was approximately half completed. The developer was notified of the situation by the architect, but chose not to interrupt construction, opting instead to attempt to have the building approved as Type 3 construction. That approval was never granted, but the developer nevertheless sold units without disclosing the problem.[2]

The public offering statement (POS), required by N.J.S.A. 45:22A-26 and used by the developer to sell units to the public, warranted that the building was fit for the purposes for which it was intended. The developer amended the POS four times after the code compliance issue surfaced, but never mentioned the problem in any of the amendments. Unit purchasers bought without knowledge that the building was not code complaint.

The CFA was designed to combat "sharp practices and dealings in the marketing of merchandise and real estate, whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kinds of selling or advertising practices."[3] The act "is not aimed solely at the shifty, fast-talking and deceptive merchant but reaches nonsoliciting artisans as well," and is "designed to protect the public even when a merchant acts in good faith."[4] However, when a CFA claim is founded upon statements contained in a warranty, it is not enough to simply show that a warranty was breached. As the court noted in *D'Ercole*, "a breach of warranty, or any breach of contract, is not per se unfair or unconscionable…and a breach of warranty alone does not violate a consumer protection statute."[5] Unconscionability implies a lack of "good faith, honesty in fact and observance of fair dealing."[6] Thus, in order to trigger liability under the CFA in a breach of warranty context, the plaintiff must show that "substantial aggravating circumstances [accompanied] the breach."[7]

When evaluating whether substantial aggravating circumstances are present, counsel should thoroughly explore when and how the developer first became aware of any defect that could be the basis of a warranty claim. If scienter can be established, counsel should then examine the POS and any developer amendments, as well as other marketing materials used by the developer, paying particular attention to the dates of publication and whether they suppressed crucial information the developer was in possession of at the time. Such an inquiry could yield a treasure trove of compelling evidence establishing the aggravating circumstances necessary to trigger liability under the CFA.

While suppression of information that should be disclosed to prospective purchasers is one of the first trails counsel should hike down in searching for aggravating circumstances, it is by no means the only fruitful path of inquiry. The failure of a defendant to obtain all applicable regulatory permits required for a project has also been held to be sufficient to impose CFA liability.

In *Cox v. Sears Roebuck & Co.*,[8] the court determined that a contractor's failure to secure several permits required by the home improvement practices regulations constituted a "clear violation" of the CFA. Thus, while the contractor's sloppy workmanship, standing alone, might not have risen to the level of an aggravating circumstance, a conscious disregard of regulations designed to "prevent precisely the poor-quality work that characterized Sears' performance in this case and to protect consumers such as Cox" did provide a predicate for CFA liability.[9]

In developing a CFA liability theory, counsel should not overlook the distinction between a warranty and an affirmative representation made outside of the warranty language. The difference could be critical. The typical warranty that accompanies the sale of a condominium unit is a promise to repair a covered defective condition if and when the defective condition arises. Generally, the warranty does not represent that the building is free from defects—only that the developer will repair any covered defects that later develop. If the language of a POS goes further and represents that the building is defect free, such language may well rise to the level of an affirmative representation, not requiring a showing of aggravating circumstances. The *Belmont Condominium Association*[10] case is instructive here. In *Belmont*, the developer represented in its POS that "there are no known defects in the building (a part of which) you are purchasing." The court distinguished these representations from "homeowner warranties," and declined to require a showing of aggravating circumstances before imposing CFA liability.[11]

Establishing a basis for CFA liability in the context of a construction warranty claim can be of enormous benefit to a plaintiff seeking redress for a defective building condition. While not every breach of warranty can be pled as a CFA claim, there are many cases where such claims can and should be made. If the initial facts suggest a CFA claim may be viable, it is important for counsel to develop a cogent legal strategy at an early stage, and tailor the discovery accordingly. Adding the CFA arrow to the plaintiff's quiver can be a powerful means of achieving justice for the purchasers of units in a defectively constructed condominium building. It is a tool that warrants serious consideration, and not something counsel should dismiss without studied analysis. ■

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tice on litigation involving complex real estate and business disputes, representing condominiums and community associations, and director and officer liability. He was lead trial counsel for the plaintiff in the Grandview *case. Matthew Meyers is a shareholder in Becker & Poliakoff's community association and construction law practice groups and represents cooperatives, condominiums, and homeowners associations in New Jersey. He concentrates his practice on commercial litigation, with an emphasis on complex construction defects and real estate disputes.*

Endnotes

1. N.J.S.A. 56:8-1, *et, seq.*
2. To meet Type 3 construction requirements, the building would have had to have exterior walls possessing the properties of masonry. The building, as constructed, did not meet this requirement.
3. *D'Ercole Sales, Inc. v. Fruehauf Corp.,* 206 N.J. Super. 11, 23, 501 A.2d 990 (App. Div. 1985).
4. *Id.*
5. *Id.* 25.
6. *Kugler v. Romain*, 58 N.J. 522, 544, 279 A.2d 640 (1971).
7. *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 18, 647 A.2d 454 (1994).
8. 138 N.J. 2, 647 A.2d 454 (1994).
9. *Id.* 19.
10. *Belmont Condominium Ass'n, Inc. v. Geibel,* 432 N.J. Super. 52, 74 A.3d 10 (App. Div. 2013).
11. *Id.* 81-82.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the Construction Law Section Newsletter or the New Jersey State Bar Association.

The Statute of Repose in Construction Defect Cases: How Early Can It Begin to Run for a General Contractor or Builder?

by Sam Maybruch and Matthew Goode

The New Jersey statute of repose states that no action may be "brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction."[1] To that end, "[t]he basic feature of a statute of repose is the fixed beginning and end to the time period a party has to file a complaint."[2] Moreover, "[u]nlike a conventional statute of limitations, the statute of repose does not bar a remedy but rather prevents the cause of action from ever arising."[3]

Calculation of the 10-year limitations period for the statute of repose generally commences one day after substantial completion of the home.[4] In most cases, the date a certificate of occupancy is issued is an appropriate starting point for determining substantial completion. However, the Supreme Court has stated that the issuance of a certificate of occupancy is not necessarily required in order for the statute of repose to begin running.[5] But what happens when there is a delay between when a contractor/developer substantially completes the home and the certificate of occupancy is issued?

There are no published opinions in the state that answer this question. Other jurisdictions are divided. On one hand, courts in a number of jurisdictions, such as Wyoming, hold that substantial completion is the degree of completion at which the owner can utilize the improvement for the purpose for which it was intended. Since buyers are typically unable to utilize a house until a certificate of occupancy is issued, substantial completion commences at the certificate's issuance.[6]

On the other hand, courts in other jurisdictions, such as Minnesota, have held that substantial completion contemplates a structure's physical condition. While a "certificate of occupancy may serve as prima facie evidence of substantial completion because a certificate of occupancy would never be issued before a structure's construction were completed, it is not a *necessary* condition that has to occur before *substantial* completion of a home is achieved…."[7]

The authors' opinion is that the principles adopted by the Minnesota courts and jurisdictions that follow that rule are sounder. While a certificate of occupancy is commonly used as an "indication of when an improvement is ready for use,"[8] it alone should not be the determinative factor for deciding the issue as to the start of the running of the statute.

> A certificate of occupancy is issued when a project "meets the conditions of the construction permit, and all prior approvals and has been done substantially in accordance with the code and with those portions of the plans and specifications controlled by the code," when "all required fees have been paid in full," when "all necessary inspections have been completed," when "all violations have been corrected and... any assessed penalties have been paid," and when "all protective devices and equipment" are installed and operational. *N.J.A.C.* 5:23-2.24. A certificate of occupancy is not an official determination that the structure is substantially ready for its intended use. The certificate of occupancy is, in effect, a declaration that the building is safe for occupancy and is in compliance with the building code and local ordinances.[9]

In New Jersey, when the home is "substantially completed" may be a date different than when the certificate of occupancy is issued. A recent unpublished decision in Burlington County agrees with this position.

In *Proctor v. D.R. Horton, Inc. – New Jersey*, Docket No. BUR-L-890-16, filed in the New Jersey Superior Court,

Law Division, Burlington County, five homeowners sued their general contractor alleging construction deficiencies in a number of homes. The plaintiffs' complaint was filed on April 19, 2016. One of the plaintiff's certificate of occupancy was issued on April 19, 2006. At first blush, it appeared that she filed the complaint on the last possible day prior to the statute precluding her claim.

However, in support of its summary judgment motion, the general contractor submitted the certification of the township construction code official, who indicated that all of the township's subcode inspections were completed as of April 17, 2006, and that in between the date the final subcode inspection occurred and the issuance of the certificate of occupancy, only paperwork was processed. Furthermore, he attested that construction of a home is considered complete as of the date of the final subcode inspection. Reviewing the construction file for this plaintiff's property, he stated that no actual construction occurred after the final subcode inspection of April 17, 2006.

The general contractor argued that the additional day to "process paperwork" before issuing the certificate of occupancy for the property did not preclude a finding that the property was "substantially complete" prior thereto. Its contention was that a party's exposure to liability for defective work should not be dependent on the whims of others to process paperwork. Therefore, the general contractor should have been able to look back "and know that there was repose from liability"[10] as of April 18, 2016. The trial court agreed and dismissed the plaintiff's complaint.[11]

It must be understood that the statute of repose is a policy statement of the New Jersey Legislature. It is a substantive grant of immunity that limits lawsuits unrelated to the "accrual" of a cause of action and is designed to terminate the possibility of liability after 10 years, regardless of a potential plaintiff's lack of knowledge. It is a powerful tool for the defense bar and, as such, considering the developed case law, an attorney faced with defending claims of construction deficiencies should not limit his or her inquiry into simply when the certificate of occupancy is issued but rather explore when the actual construction concluded.

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Endnotes

1. N.J.S.A. 2A:14-1.1.
2. *R.A.C. v. P.J.S., Jr.*, 192 N.J. 81, 96 (2007) (*citing Lieberman v. Cambridge Partners, L.L.C.*, 432 F.3d 482, 490 (3d Cir. 2005)).
3. *Port Imperial Condo. Ass'n v. K. Hovnanian Port Imperial Urban Renewal, Inc.*, 419 N.J. Super. 459, 469, 17 A.3d 283 (App. Div. 2011) (citation omitted). *See also Daidone v. Buterick Bulkheading*, 191 N.J. 557, 565 (2007) (same).
4. *See Welch v. Eng'rs, Inc.*, 202 N.J. Super. 387, 396 (App. Div. 1985) ("On review of the history of these statutes and the reason behind them, we think the Legislature most likely meant that when a person rendered any construction-related services on a particular job, finished them and walked away from the job-site with the work accepted, that person could look back ten years and one day 'after the performance or furnishing of such services and construction,' N.J.S.A. 2A:14-1.1, and know there was repose from liability.").
5. *Diadone*, 191 N.J. at 567 ("Plaintiffs suggest that that uniform date should be the issuance of a certificate of occupancy by the relevant governmental official. We disagree.").
6. *Horning v. Penrose Plumbing & Heating, Inc.*, 336 P.3d 151 (Wyo. 2014).
7. *Rosso v. Hallmark Homes of Minneapolis, Inc.*, 843 N.W.2d 798, 802 (Minn. Ct. App. 2014) (emphasis in original).
8. *Snyder v. Borough of South Plainfield*, 1 N.J. Tax 3, 7-8 (Tax 1980).
9. *Lowe's Home Ctr., Inc. v. City of Millville*, 25 N.J. Tax 591, 600 (2010).
10. *Welch v. Eng'rs, Inc.*, 202 N.J. Super. at 396.
11. Plaintiff filed a motion for leave to appeal this decision. It was recently denied by the Appellate Division.

What Went Wrong with the RREM Program

by Colin Schmitt

The problems with the Reconstruction, Rehabilitation, Elevation, and Mitigation (RREM) Program are not really news at this point. The Department of Community Affairs (DCA) created the RREM Program as its primary apparatus to administer the $1.34 billion in allocated federal funds to assist eligible homeowners to elevate and rebuild their homes after Superstorm Sandy.[1] Almost from its inception, the RREM Program was criticized. From delays in reimbursement payments to homeowners who had rebuilt their own homes,[2] to flawed initial estimates of damage,[3] to "people rejected from the state programs for dubious reasons,"[4] the unfavorable news coverage began less than a year after New Jersey's largest natural disaster.

Approaching Sandy's five-year anniversary, the statistics do not indicate much improvement. Of the estimated 50,000 homeowners and renters who were forced from their primary homes by Sandy, only 7,595 participated in the RREM Program, and nearly 30 percent of RREM participants remain without certificates of occupancy for their homes.[5]

The ineffective program delayed 'reimbursement' payments to participating homeowners, which then denied their contractors the ability to be compensated. The state of New Jersey has publicized its prosecution of at least eight different contractors for Sandy-related fraud[6] (not to mention 96 individuals for false claims[7]), yet established native New Jersey contractors who build RREM projects have also been publicly critical of the state program.[8] What went wrong?

The RREM Program began by conducting a survey of each applicant's property in order to establish an inclusive list of necessary work to elevate and/or rebuild the house. The DCA then generated an estimated cost of repair (ECR) for each project using dollar values for work items as assigned by a software estimating program widely used in the insurance industry. Depending on how they preferred to have their projects completed, homeowners selected among three pathways.

Pathway A was reserved for the limited individuals who could afford to elevate the homes prior to applying to RREM.[9] Pathway B was established for homeowners who wanted to choose their own contractor and assume a more active role in project oversight. Approved homeowners in Pathway B received 50 percent of their award upon providing a signed contract for an elevation project, with the ability for two more subsequent draws against the award based on project completion. But the final 10 percent retainage portion of the award was not available until months later, when the state closed the project out long after final inspection.[10] Pathway C was the approach recommended for homeowners who preferred their project be built by a DCA pre-qualified contractor who had been assigned by the state, was capable of securing a bond for the project, and whose progress was monitored and validated by the state's program manager prior to that contractor being paid.

When the DCA made the surprise decision in July 2014 to discontinue the Pathway C option and require all homeowners to take Pathway B, the justification was the state's desire to speed up the recovery effort by opening the work to a wider group of contractors. The single biggest issue with this approach is that it shifted control of the funding to the individual homeowner who did not necessarily understand the costs of the projects, or that paying the funds to the contractor who had performed the work was not intended to be discretionary. Moreover, when the shift was initiated, the DCA instructed homeowners that they should refrain from sharing their ECRs with their potential builders, lest they undercut their competitive bid advantage. This created a situation where the contractor bid and performed a scope of work that he believed to be necessary to elevate a home, but the owner of the home was obligated to perform a different set of improvements in order to receive federal funds. The mandatory shift to Pathway B also prompted many of the 47 pre-qualified contractors who had come to the state to participate in the Sandy recovery effort to simply go home, thereby enabling predatory 'contractors' to exploit increasingly desperate homeowners.

From a construction attorney's point of view, the engrained flaws of a government-funded recovery

program are difficult to redeem through litigation. The RREM program provided awards of up to $150,000 in project funding at no cost to eligible homeowners, so no viable cause of action for a homeowner would exist absent fraud by the builder or significant damage to the home. The contractors' perspective is even less sympathetic, because they authored (or at least knew the contents of) the contract before they agreed to build the project. Even on bonded projects, the surety's exposure would be limited to the unpaid contract balance—rarely enough to complete the project, let alone cover added legal costs.

Perhaps New Jersey should consider a more pragmatic approach. What processes and tools could the state use to elevate thousands of private residences in the shortest period of time with the least amount of waste?

A more practical approach would have been for the state to require an escrow fund be established for each project, where the contractors would have been entitled to payment based on their proportionate performance. The ECRs might have only been estimates, but they still constituted a worthy tool for apportioning the value of the installed components. Using the values of the ECR to measure a contractor's progress would have been a more equitable way for the state to have guided Pathway B projects. Alternatively, requiring Pathway B contractors to provide bonds for their projects would have also guaranteed completion. Although on Pathway C projects that required both the homeowner and the DCA to be named as dual obligees on the mandatory bonds, there has been no indication that the state has even attempted to make claims against the performance bonds, despite the conspicuous failure of several contractors who the DCA had deemed to be pre-qualified.[11]

Another variable in implementing a uniform elevation and rebuilding program throughout New Jersey arose from the home rule provision of the state constitution, which provides each municipality with the authority to issue zoning and building permits. Each of the state's 565 municipalities has the right to dictate to builders whether permits will be issued for a particular project and what elements must be included for an elevation project. Yet, New Jersey was the first state to adopt a comprehensive Uniform Construction Code,[12] and the Legislature has previously created regional entities to address shared environmental concerns, such as the Highlands Council, Pinelands Commission and Coastal Area Facility Review Act (CAFRA). Because straight elevation projects do not include the habitable square footage of a residence, absolving those projects from local oversight would streamline the process without undercutting local interests.

In 2014, *Time Magazine* analyzed more than 3,000 counties nationwide for their risk of natural disaster.[13] Ocean County was cited as the most dangerous county in the entire U.S., with Cape May, Monmouth, Burlington, Atlantic and Camden counties also being included among the top 15 most dangerous counties.[14] Based on this report, it is extremely likely that the state will experience another catastrophic storm in the near future. As a result, the author believes a better recovery policy should be developed now, to responsibly prepare for that future disaster.

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Endnotes

1. http://www.renewjerseystronger.org/homeowners/rrem/.
2. https://www.usatoday.com/story/news/nation/2013/07/11/sandy-victims-say-talk-of-reimbursement-proves-empty/2511013/.
3. http://www.njspotlight.com/stories/14/02/05/botched-process-denied-thousands-in-nj-of-millions-in-sandy-relief/.
4. https://www.usatoday.com/story/news/nation/2013/07/24/nj-sandy-aid-red-tape/2584611/.
5. http://www.nj.com/news/index.ssf/2017/09/5_years_after_sandy_jersey_victims_see_the_future.html.
6. http://www.nj.com/ocean/index.ssf/2017/04/contractor_defrauded_sandy_victims_by_skipping_out.html.
7. http://www.app.com/story/news/crime/2017/07/31/who-latest-people-charged-sandy-fraud/526931001/.
8. http://www.pressofatlanticcity.com/news/house-raising-booming-since-sandy-a-dangerous-and-expensive-industry/article_12945828-c959-58ef-bdcc-34efea0c3bf0.html; https://oceancountyltrg.org/1000-days-since-sandy/.

9. http://www.renewjerseystronger.org/wp-content/uploads/2014/12/Current-RREM-Policies-and-Procedures.pdf.
10. http://www.renewjerseystronger.org/homeowners/rrem/construction/; http://www.app.com/story/news/local/ocean-county/sandy-recovery/2015/07/27/sandy-rrem-sell-home/30744043.
11. https://www.bizjournals.com/philadelphia/news/2017/09/11/sandy-homeowner-scam-tmb-services-cra-construction.html; http://newjersey.news12.com/story/35881723/kiyc-sandy-victim-left-homeless-after-home-project-delay; http://www.app.com/story/news/local/monmouth-county/sandy-recovery/2015/04/17/long-branch-rrem-sandy-home-left-rot/25961359/; http://www.pressofatlanticcity.com/news/press/ocean/manahawkin-contractor-sued-by-state-after-shoddy-hurricane-sandy-repairs/article_35a3be9c-4f67-11e6-b0f0-ef778386dc9e.html.
12. http://www.nj.gov/dca/divisions/codes/publications/pdf_licensing/co_comment.pdf.
13. http://www.philly.com/philly/news/new_jersey/Analysis_6_New_Jersey_counties_among_most-disaster_prone_in_nation.html.
14. http://time.com/safest-counties/.