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Owners, Take Heart – Amendment to Texas Condominium Law Gives Unit Owners a Voice in Construction Litigation

By Lucas M. Blackadar, Esq.

IN JUNE 2015, TEXAS ADOPTED A MAJOR amendment to its Uniform Condominium Act.[1] The amendment, which took effect in September, requires condominium associations with eight or more units to have completed specific procedural steps before they may bring defect claims against construction or design professionals. Not only does the new law make bringing a claim slightly more challenging, it also places significantly more power in the hands of unit owners.

The amendment, H.B. 1455, which passed in the Texas Senate on May 26, 2015 and was signed into law on June 17, 2015, now requires any condominium association seeking to bring a claim regarding the design or construction of common elements to have completed four major tasks. First, the association must:

> obtain an inspection and a written independent third-party report from a licensed professional engineer that . . . identifies the specific units or common elements subject to the claim; describes the present physical condition of the units or common elements subject to the claim; and describes any modifications, maintenance, or repairs to the units or common elements performed by the unit owners or the association . . .[2]

Second, the association must allow time for the parties subject to the claim to conduct their own inspections and repairs. Specifically, the association must "allow each party subject to a claim at least 90 days after the date of completion of the report to inspect and correct any condition identified in the report."[3]

Third, the association must provide detailed disclosures to the owners regarding the potential claim. These disclosures must include:

> (1) a description of the nature of the claim, the relief sought, the anticipated duration of prosecuting the claim, and the likelihood of success;
> (2) a copy of the [independent inspection] report . . . ;
> (3) a copy of the contract or proposed contract between the association and the attorney selected by the board to assert or provide assistance with the claim;
> (4) a description of the attorneys' fees, consultant fees, expert witness fees, and court costs, whether incurred by the association directly or for which the association may be liable as a result of prosecuting the claim;

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Risk Associated With Differing Site Conditions Can Be Expressly Assumed

By Amanda E. Mathieu, Esq.

DONOVAN HATEM LLP RECENTLY PREVAILED on a Motion for Summary Judgment in the Massachusetts Superior Court ("Court") arising out of a contract dispute between a Contractor, Owner ("City") and Civil Engineer in which the Contractor alleged differing site conditions ("DSC"). The Court concluded that the Contractor failed to overcome the City's showing that no reasonable juror could find that the Contractor encountered DSCs for two reasons: (1) the Contractor did not set forth any credible evidence that it *had* encountered such conditions; and, more importantly (2) the Contractor expressly assumed the risk of DSCs when it executed the Contract Documents.

Background

In November 2010, the City commenced significant work on the drainage and sewer systems below a high school football field ("Project"). The City hired a Civil Engineer to provide engineering and consulting services for the Project, including preparation of specifications for prospective bidders' use in developing their bids ("Bid Specifications"). To that end, the Civil Engineer collected data from geotechnical borings to identify subsurface materials to be included in the Bid Specification appendix. The Bid Specifications forewarned prospective bidders that the boring logs were offered "solely for the purpose of placing the Contractor in receipt of all information available" and, further, that the bidders were required to:

> … interpret such data according to his or her own judgment and acknowledge...that he or she is not relying upon the same as accurately describing the subsurface conditions which may be found to exist. The Contractor further acknowledges that he or she assumes all risk contingent upon the nature of the subsurface conditions, to be actually encountered in performing the work covered by the Contract, even though such actual conditions may result in the Contractor performing more or less work than originally anticipated.

The Contractor's ability to rely on the boring logs was similarly limited by additional Contract Documents. Further, the Bid Specifications provided key guidelines as to installation of helical piles to support the Project's underground sewer pipes. Specifically, the guidelines required the Contractor to furnish "all necessary engineering and design services…to perform all work necessary to provide [a] helical pile foundation system to support [the underground sewer pipe] per the specifications described herein." Pursuant to the Bid Specifications, the Civil Engineer's boring logs "shall be used as the basis for Helical Pile design," and "shall be considered to be representative of the in-situ subsurface conditions *likely* to be encountered on the project site." (Emphasis added). To provide the sewer pipes with the proper support, the helical piles were to reach a particular torque during installation.

In February 2011, after the City accepted the Contractor's bid, the Contractor's subcontractor hired a helical pile consultant ("Consultant") to determine the size and number of helix plates required to comply with the Bid Specifications. The Consultant testified that he designed the helical piles for the Project based solely on the Civil Engineer's boring logs, adding that during the design process he was concerned that the Civil Engineer's boring logs "didn't go deep enough." As such, he believed he had designed the helical piles "based on insufficient information."

In March 2011, when the Contractor could not meet the required torque, it sent a notice letter to the City attributing such failures to DSCs, an argument that the City immediately rejected, noting that the Contractor had provided no supporting documentation. To provide such documentation, the Contractor directed its subcontractor to perform its own soil borings. However, it was ultimately determined that the subcontractor was neither qualified to perform such borings, nor to classify soils and, more importantly, the subcontractor's boring logs failed to evidence DCSs. Ultimately, a third-party review of the subcontractor's helical pile installation methods and torque readings concluded that the subcontractor's torque monitoring device "was not properly calibrated and or functioning to accurately record the installation torque values."

Summary Judgment Decision

Pursuant to Mass. R. Civ. P. 56(c), summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In granting summary judgment here, the Court concluded that the Contractor did not encounter DSCs. In reaching that conclusion, the Court found that the Contractor had failed to provide expert testimony that the subsurface conditions encountered varied from those anticipated by the

Civil Engineer's boring logs. An expert's opinion was essential here as the interpretation of boring data "is beyond the common knowledge or understanding of the lay juror." *See Commonwealth v. Sands,* 424 Mass. 184, 186 (1997).

The Civil Engineer, on the other hand, retained two geotechnical engineers who testified that the conditions identified in the helical pile subcontractor's boring logs were actually similar to and consistent with the conditions contemplated in the Contract Documents and the Civil Engineer's boring logs. Further, an independent third-party review of the helical pile installation protocol revealed that, rather than the presence of DSCs, the issues resulted from an apparent inability to achieve the required torque due to improperly calibrated monitoring equipment.

The Court determined further that, even if the Contractor had set forth evidence of DSCs, the Contractor had expressly assumed the risk of DSCs by executing the Contract Documents which explicitly disclaimed subsurface conditions and required the Contractor to assume:

> … all risk contingent upon the nature of the subsurface conditions, to be actually encountered in performing the work covered by the Contract, even though such actual conditions may result in the Contractor performing more or less work than he originally anticipated.

The Court found that the foregoing language "forewarn[ed] that conditions that differed from the contract specifications could be contemplated and should be considered by the [Contractor] when it computed its bid." As such, the Contractor "must bear the consequences of its choice, after disclosure by the City, to elect the riskier path of not doing its own investigation before bidding on the Project."

While the Contractor argued that the foregoing disclaimers conflicted with paragraph 4.02 of the General Conditions providing that the Contractor may rely on the "general accuracy" of the "technical data" provided in the Civil Engineer's boring logs, the Court disagreed, noting that Massachusetts law has distinguished between a provision permitting contractors to rely on the *accuracy* of data, and a provision permitting contactors to rely on the *sufficiency* of data. The Court found that paragraph 4.02 expressly disclaimed the completeness of the Civil Engineer's boring logs, as well as any opinions or conclusions that the Contractor may have drawn from them.

Moreover, the Project Agreement expressly required the Contractor to acknowledge that it did not believe "any additional examinations, investigations, explorations, tests, studies, or data [were] necessary for the performance and furnishing of the Work at the Contract Price..." In essence, it left it to the Contractor to determine whether the Civil Engineer's boring logs provided sufficient data by which to prepare an accurate bid and complete the Project, or whether further investigation was required.

This decision underscores the importance of ensuring that design professionals negotiate clear, concise contractual provisions that allocate project risks including, but not limited to, those associated with DSCs.

Nullum Tempus Occurrit Regi? No, But the King Still Has a Long Time

By Lucas M. Blackadar, Esq. & Jonathan A. Barnes, Esq.

IN 1996, CONSTRUCTION OF THE LAW SCHOOL AT THE UNIVERSITY OF CONNECTICUT ("University") was completed. In 2008, the State of Connecticut ("State") and the University sued the design professionals and contractors that worked on the University Law School project due to leaks that surfaced after construction was completed. Such lawsuits are common in the construction industry, but what makes this instance noteworthy is that the State waited approximately *twelve years* before it filed suit. Nonetheless, the State ultimately prevailed due to the Supreme Court of Connecticut's ruling that no statute of limitation or repose was enforceable against the State.

The outcome of that matter was highly troubling to the construction industry, and design professionals and contractors alike decried the court's decision. With an unlimited period of time for the State to file claims related to a construction project, any entity that routinely worked with the State on projects would now have to think twice about doing so. Moreover, obtaining professional liability insurance for such projects would become incredibly difficult. Some insurance carriers would likely decide it wasn't worth the risk, and those that would be willing to take the risk would hedge against that risk by drastically increasing premiums. Additionally, design professionals and construction companies would have

to retain their records in perpetuity to safeguard against the looming threat of litigation on any State-owned project that they ever touched. The cost of document storage would grow exponentially because no project documentation could be destroyed given the unlimited liability.

Fortunately, the State Legislature drafted Public Act No. 15-28 ("Act"), which the governor signed into law in June 2015, despite the State failing to enact such legislation in the past. The Act pertains to State-owned projects substantially completed on or after October 1, 2017. With respect to those projects, the State will have 10 years to file claims concerning their design and construction. For projects completed prior to October 1, 2017, the State will be required to file suit by October 1, 2027.

While this appears to be a victory for designers and contractors, the Act still falls short. Ten years is still an excessive amount of time when one considers that non-State entities have seven years to file professional negligence claims and six years to file breach of contract claims. Given this added timeframe, the cost of obtaining insurance and storing records for State-owned projects will still exceed the costs for privately-owned projects. This cost of doing business will likely be passed to the State, and then on to the taxpayers.

While the State Legislature's action is a step in the right direction, it is not ideal. Time will tell how great of an impact the Act will have on the Connecticut construction industry.

The Importance of Carefully Reviewing Contract Terms Including Those Incorporated by Reference

By James L. Soucy, Esq.

IN SEPTEMBER 2015, THE NEW MEXICO SUPREME COURT ("Court") heard an appeal in which it determined whether a clause in a Contract, between a Project Owner ("Owner") and a Design-Build Contractor ("Contractor"), that was incorporated by reference into a Contract between a Contractor and an Architect Subcontractor ("Architect") would provide that Architect with the limited liability of the Contract, or if a provision in the Contract between the Contractor and its Architect would impose an increased level of liability upon the Architect.

The dispute arose when a Mechanically Stabilized Earth Wall ("MSE Wall"), designed by an Architect failed shortly after being constructed and began to damage the Owner's property. The Contractor successfully had the MSE Wall redesigned and reconstructed by others. Thereafter, the Contractor initiated a lawsuit against the Architect, based upon their Contract, seeking to recover the costs of the redesign and reconstruction of the Architect's failed MSE Wall.

The Prime Contract contained a clause through which the Owner agreed that the Contractor's liability to the Owner for errors and omission of any design professional subcontractor was limited to the insurance coverage specified by the Prime Contract. The Subcontract between the Contractor and Architect contained a clause that the liability of the Architect included costs of redesigning the MSE Wall, as well as the Contractor's additional construction costs that were required to correct the Architect's design, should it fail.

The Subcontract also contained "incorporation-by-reference" and "flow-down" clauses. Through the incorporation-by-reference clause, the Prime Contract was made a part of the agreement between the Contractor and Architect, and the Architect was required to perform its design work in strict conformity with the terms set forth in the Prime Contract. Through the flow-down clause in the Subcontract, the Architect, "except as otherwise provided [in the Subcontract]," received all of the rights and benefits that the Contractor received in the Prime Contract, and the Architect, "except as provided [in the Subcontract]," assumed all the obligations, risks, and responsibilities that the Contractor had assumed in the Prime Contract. That is to say, the Architect, in its agreement with the Contractor, received both the benefits and detriments of the agreement with the Owner — unless the Subcontract provided otherwise.

The Contractor filed suit against the Architect, alleging the Architect was negligent in designing the MSE Wall, made negligent misrepresentations to the Contractor and breached the contract with the Contractor. The Contractor requested that it be awarded $6,766,155.56 in damages, plus costs, expenses, and attorney's fees. The Architect responded by claiming that the limitation of liability afforded to the Contractor in the Prime Contract flowed down to the Architect. As such, when the Architect paid its three million dollar insurance policy to the Contractor, it had no more liability under the Subcontract. The Architect responded further that the Contractor breached the Subcontract by not adhering to the limited liability that flowed

to the Architect from the Prime Contract, and the Contractor should have indemnified the Architect.

Thereafter, the Architect filed a motion for summary judgment in the trial court, seeking a judgment in its favor on the grounds that the limited liability clause in the Prime Contract was incorporated into the contract between the Contractor and the Architect, and that the Architect's liability, for its failed MSE Wall design, was limited to the value of the Architect's three million dollar errors and omissions insurance policy. After a hearing on the motion for summary judgment, the trial court granted the Architect's motion for summary judgment and dismissed the case. The Contractor then appealed to the Court.

In reviewing the contract documents, the New Mexico Supreme Court found that the terms of the Prime Contract and the Subcontract were clear and unambiguous. Having found no such ambiguity in the contracts, New Mexico law required the Court to render its opinion based upon its review of language in those contracts and enforce their terms. In this manner, New Mexico's interpretation and enforcement of contracts is very similar, to the treatment of agreements in many other jurisdictions.

The Court stated further that, where parties negotiate and voluntarily enter into a contract, "…the duty of the court is[,] ordinarily[,] to enforce the terms of the contract which the parties have made for themselves." With that, the Court found that the Subcontract, not the Prime Contract, was the document that determined the parties' relationship, rights and obligations as to each other. The Subcontract provided that its terms and conditions were primary, that the Prime Contract was incorporated by reference into the Subcontract, and that the Prime Contract terms were complementary to those in the Subcontract unless terms in the Prime Contract imposed "a higher standard or greater requirement on [the Contractor or Architect]." Therefore, if any clause in the Prime Contract required the Architect to do more than the Subcontract, the Architect would have to adhere to the Prime Contract.

The Court ruled that the Prime Contract's limitation of liability was so different from the more expansive clause in the Subcontract that, given the flow-down clause in the Subcontract, the Architect was held to the stricter limitation clause in the Subcontract that did not limit its liability to its insurance policy. Having made that finding, the Court reversed the trial court's ruling, granting the Architect's motion for summary judgment, and sending the Contractor's lawsuit back to the trial court for further adjudication via trial, mediation, and/or arbitration.

The ruling of the New Mexico Supreme Court, whose interpretation and application of the disputed contract language is likely to be consistent with many other jurisdictions, highlights the importance of performing a thorough review of design-build agreements and consultant-architect agreements prior to executing the contract to determine, not only the scope of the design-build services to be performed, but the extent of liability that is being accepted in connection with the performance of those services. It also bears noting that such a review should also include a review of the construction documents that are "incorporated by reference" into a design-build contract.

A Resident Engineer Providing Inspection Services Owes No Duty to a Subcontractor

By James M. Boyce, Esq.

THE STATE OF NEW YORK NASSAU COUNTY SUPREME COURT dismissed third-party claims against a resident engineer brought by a subcontractor, in part, on the grounds that an engineer providing inspection services owes no duty to a subcontractor.

The action arose out of a project involving the rehabilitation of certain ramp structures located in Staten Island, New York ("Project"). The prime contractor was retained by the owner to perform certain construction work for the Project. The third-party plaintiff entered into two subcontracts with the prime contractor in which the third-party plaintiff agreed to clean and then paint existing steel. The engineer was retained to provide certain residential engineering inspection services of the third-party Plaintiff's work on behalf of the Owner. Third-Party Plaintiff alleged that the prime contractor failed to make payments due under both of the subcontracts. Ultimately, the third-party plaintiff was terminated from the Project.

As a result, the third-party plaintiff commenced an action to recover fees and other costs associated with alleged delays and additional work. Despite the fact that there was no contract or contractual relationship of any kind between the third-party plaintiff and the engineer, the third-party plaintiff named the engineer as a third-party defendant in the action. The third-party complaint contained a single cause of action against the engineer, which was unartfully drafted and failed to provide the specificity required to allow the engineer to determine the exact nature of the claim or claims that were being asserted against it.

Notwithstanding the inadequacies of the third-party complaint, it appeared that the third-party plaintiff was seeking to assert one or all of the following claims against the engineer: negligence, fraud, tortious interference with a contract and/or prima facie tort. The engineer filed a pre-answer motion to dismiss seeking dismissal of the third-party due to its failure to state any viable cause of action against the engineer for which relief could be granted. In the first instance, the engineer argued that the third-party plaintiff was seeking recovery of economic loss from the engineer and that such claims were barred by the economic loss doctrine. In New York, the economic loss doctrine bars a party from recovering economic losses from a defendant if it lacks privity or its functional equivalent. Here, there was no contract between the third-party plaintiff and the engineer, and the functional equivalency of privity did not exist between these two parties.

Second, the engineer argued that, to the extent the third-party complaint asserted a claim for fraud against the engineer, it too, must also be dismissed. To prove a fraud claim, a plaintiff must allege and show a defendant made a misrepresentation of a material fact with knowledge of falsity, intent to induce reliance thereon, and with justifiable reliance upon the misrepresentation resulting in pecuniary loss or damage to the plaintiff. Moreover, CPLR 3016 requires that a cause of action for fraud be pled with specificity. The engineer argued that, not only was the third-party complaint void of any specificity, but the third-party plaintiff was unable to establish that it, or anyone else, justifiably relied upon any statements rendered by engineer.

Third, the engineer argued that the third-party complaint, as supported by the documentary evidence, failed to set forth a viable cause of action for tortious interference with a contract. Tortious interference with a contract consists of the following four elements: (1) the existence of a contract between a plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement, without justification, of a third party to breach or otherwise render performance impossible; and (4) damages. Moreover, to recover on a claim for tortious interference with a contract, the plaintiff must show that the engineer did not act in good faith and committed independent torts or predatory acts directed at the contractor for personal pecuniary gain.

Lastly, the engineer argued that any potential claim for prima facie tort must be dismissed as it cannot be used as a "catchall alternative" to otherwise non-existent claims.

Based upon the facts and arguments presented in the engineer's motion, the Court dismissed the third-party complaint against the engineer. In doing so, the Court reaffirmed the position that an engineer responsible for monitoring a project does not owe a duty to a subcontractor and, as such, the engineer could not be liable in negligence. The Court dismissed the fraud claim on the grounds that the cause of action was not pled with specificity as required by CPLR 3016(b). The tortious interference with contract claim was dismissed on the

grounds that the third-party Plaintiff failed to establish that the engineer acted in bad faith or committed an independent tort or predatory act directed toward the subcontractor for the engineer's pecuniary gain. The Court stated that an assertion that the inspection standards applied by the engineer were excessive and unreasonable did not rise to the level of bad faith. Finally, since the third-party Plaintiff pled the traditional tort of tortious interference, the prima facie tort claim was no longer viable.

For design professionals, the Court's ruling that an inspecting engineer does not owe a duty to a subcontractor is of great import. Indeed, the Court's ruling supports well-established case law and legal principles that an engineer will not be liable, in tort, to a subcontractor for the performance of its contractual obligations, unless the design professional breaches a duty independent of its contract. In essence, the design professional should always be familiar with its scope of services and never assume a duty outside of its contractual obligations. If the design professional can perform its services within these guidelines, the design professional will have strong viable defenses to potential claims of economic loss from a subcontractor.

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(5) a summary of the steps previously taken by the association to resolve the claim;
(6) a statement that initiating a lawsuit or arbitration proceeding to resolve a claim may affect the market value, marketability, or refinancing of a unit while the claim is prosecuted; and
(7) a description of the manner in which the association proposes to fund the cost of prosecuting the claim.[4]

Fourth, and perhaps most significantly, the association must obtain approval from unit owners holding more than 50 percent of the total votes allowed under the declaration. This must take place during "a regular, annual, or special meeting called in accordance with the declaration or bylaws, as applicable."[5] The mandatory disclosures identified above are intended to facilitate obtaining this approval.

The emphasis the new law places on fully informing and securing approval from the unit owners clearly reflects its purpose — to protect unit owners. The purpose of the bill is to save money for unit owners by preventing condominium associations from engaging in costly litigation without the owners' input. This is demonstrated in the disclosures themselves — nearly half of which relate to the costs or financial consequences of pursuing the claim, while only one or two pertain to the actual condition giving rise to the claim.

This development in Texas is an interesting contrast to a recent decision in Massachusetts, in which the Supreme Judicial Court appears to have made it *easier* for condominium associations to pursue construction-related claims. In the summer of 2014, the Supreme Judicial Court decided *Wyman v. Ayer Properties, LLC,* in which it held that the economic loss rule does not apply to damage caused by negligent design and construction of the common areas of a condominium building, regardless of whether damage was caused to other property.[6]

In *Wyman,* defendant Ayer Properties bought a vacant mill building in Lowell to convert it into condominiums.[7] Renovation began in January 2003, with Ayer establishing a condominium trust later that year.[8] In August 2004, Ayer transferred control of the property to the trust, and shortly thereafter, the new trustees expressed concerns about the building's condition, particularly the windows, exterior masonry, and the roof.[9] The trustees hired a professional engineer to conduct a condition survey, and the survey revealed damage to the window frames, exterior masonry and roof.[10] The trustees sued Ayer, claiming negligent design and construction of the common areas of the building.

The Superior Court found that Ayer's negligent design and construction was responsible for weather-related damage to twenty-two common area window frames and the common area roof, as well as the deterioration of the exterior masonry.[12] Although the court found that window and roof defects caused further damage to other parts of the common area, the exterior masonry defects resulted in damage only to the masonry *itself*.[13] As such, the court held that the trustees could not recover for the negligently constructed masonry under the economic loss rule.[14]

The Appeals Court affirmed the judgment with respect to the window frames and roof, but reversed the order with respect to the masonry, holding that "the closest dicta" of the Supreme Judicial Court "lean against the unqualified application of the rule to defectively designed or constructed condominium common areas."[15]

On further appellate review, the Supreme Judicial Court restated the traditional application of the rule: "It ensures that, '[i]n the absence of personal injury or physical damage to property [beyond the defective product itself], the negligent supplier of a defective product is not ordinarily liable in tort for simple economic loss.'"[16] In short, there is no liability when the defective design or construction leads to damage of only the product itself.[17] The purpose of the economic loss rule is

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to prevent litigants from seeking recovery under tort law for damage caused to a product, an injury that should rightfully be resolved under contract law.[18]

However, condominium ownership is different. By its very nature, unit owners relinquish ownership and control of common areas to a condominium association.[19] In *Wyman,* the trustee plaintiffs were not the parties who originally entered into the contract with the builder.[20] Consequently, they would have been left without *any* recourse for damage to the masonry. Additionally, the damages the trustees sought were foreseeable because it had already been determined at trial.[21] Ultimately, the Supreme Judicial Court affirmed the Appeals Court decision, rejecting application of the economic loss doctrine, and allowing the trustees to recover damages for the masonry.

Though both cases apply different methods, the two legal developments are both intended to protect the financial interests of condominium unit owners. In Texas, the law protects unit owners by encouraging their participation in the litigation process. In Massachusetts, the law protects unit owners by allowing condominium associations to recover damages under a theory of law usually foreclosed to them. As this body of law develops, it will be interesting to see whether these developments ultimately protect unit owners in practice.

1 Tex. Prop. Code § 82.001 et seq.
2 Tex. Prop. Code § 82.119(b)(1).
3 *Id.* § 82.119(e)(2).
4 *Id.* § 82.119(f).
5 *Id.* § 82.119(b)(2).
6 *Wyman v. Ayer Properties, LLC,* 11 N.E.3d 1074 (Mass. 2014).
7 *Id.* at 1078.
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at 1079.
13 *Id.*
14 *Id.*
15 *Id.* at 1077 (quoting *Wyman v. Ayer Properties, LLC,* 979 N.E.2d 782 (Mass. App. Ct. 2012)).
16 *Id.* at 1079 (quoting *Berish v. Bornstein,* 770 N.E.2d 961 (Mass. 2002)).
17 *Id.* at 1080.
18 *Id.*
19 *Id.*
20 *Id.* at 1081.
21 *Id.*

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