

# **BRICKLEMYER SMOLKER & BOLVES, P.A.**

ATTORNEYS & COUNSELORS AT LAW

## MEMORANDUM

To: Harbor Bay Community Development District Board of Supervisors  
From: Bricklemyer, Smolker & Bolves P.A.  
Date: 25 August 2010  
Subject: Seawall Litigation Update  
BSB No. 22717

As this is a public document, specific details of studies, tests, and legal strategies are not contained in this update. Public discussion of the progress of the litigation must be limited to that information contained in documents provided to the court and obtainable to the defendants. Rather than rely on oral reports at Board meetings, it has been determined that written monthly updates of information to be placed in the public record would be appropriate, subject to the same confidentiality limitations discussed herein.

Harbor Bay initially filed this action (Case No. 07CA-015263) against Woodruff & Sons, Inc ("Woodruff"), Custom Docks By Seamaster ("Seamaster"), Dansco Engineering, P.A. ("Dansco"), Sam Greenberg, P.A. ("Greenberg"), Reuben Clarson Consulting, Inc. ("Clarson Consulting"), and Reuben Clarson, P.E. ("Clarson") on November 9, 2007. Shortly thereafter, we amended the complaint to include St. Paul Fire and Marine Insurance Company, ("St. Paul") as surety for Woodruff. After review of initial discovery, Harbor Bay again amended its complaint to include a products liability claim against the seawall sheet manufacturer, Materials International, Inc. ("Materials") on September 19, 2008.

As of the end of September, our discovery requests have netted in a review and indexing of over 50,000 documents. On behalf of the District, we have retained four expert witnesses who have closely reviewed all the available relevant documents and are prepared to testify. The first expert, Mr. James Hirst, P.E. is a professional engineer specializing in marine structures. The second expert, Mr. Matthew Michalak, is an experienced seawall contractor/ manager. The third expert, HSA Engineers & Scientists, is a geotechnical firm. The fourth expert, Dr. James Rancourt with the firm of Polymer Solutions Incorporated, is a plastics expert. Under direction from our experts we have conducted limited soils testing and reached an initial determination that the wall was both inadequately engineered, improperly constructed, and the materials may have been manufactured below advertised standards. These results were then provided to the opposing parties, together with an estimate of remedial damages for curing the problems. We continue to formulate a possible scope of work to provide further investigations deemed important to the preparation and review of engineering solutions.

We have prevented all attempts to dismiss the complaint. We have also forced the defendants to make claims with their insurance carriers. Unfortunately several defendants, Reuben Clarson being the most significant, have alleged that they do not have insurance and are operating under

very limited budgets. However, Woodruff, Materials and Seamaster all have insurance carriers as co-counsel. Similarly, St. Paul, as a surety already is an underwriter for work and has the largest policy of approximately \$13 million. Furthermore, Woodruff, our main defendant has admitted to us that they have had several meetings with their carrier's decision-makers at their headquarters and assure us that they are taking this matter with utmost seriousness.

On April 28 and 29, 2009, we began mediation conferences in an effort to find an agreed remedial action and settle the case. As many of you know, discussions and statements made at mediation are confidential and cannot be used at trial. The mediation period is still open and the case has been extended in an effort to have the parties continue to explore settlement. Since our last update, the Judge has granted the Defendants' motion to extend the continued mediation period another 90 days, pushing all dates back at least three months. One of the defendants has proposed a follow-up mediation prior to the release of the final expert cost analysis report to discuss potential settlement, but we are awaiting confirmation from the remaining opposing counsel prior to agreeing to the same.

We continue to push away from having to discuss whether there is a problem with the seawall but are focusing discussions on what to do about the problem. Once we determine an appropriate approach to fixing the problem, then we can focus on who is ultimately responsible. More immediately, we have been able to shift the thinking and open the door for all the parties to start focusing on both immediate fixes for areas deemed critical as well as other permanent modifications. Our experts have had an opportunity to lay out their findings to all the parties and hear from the defendant's lead expert. As such, all the parties have agreed and continue to provide ample time for all the parties' experts to compile additional information, determine what testing would be needed to provide a fix, and propose a unified plan for testing.

Concurrently, the parties continue to take the depositions of key parties, including that of Woodruff and Sons, Inc. (general contractor), Mortensen Engineers, Inc. (geotechnical engineer before and during the construction of the community), Reuben Clarson Consulting, Inc. (seawall designer), Custom Docks by Seamaster, Inc. (subcontractor of Woodruff & Sons, Inc. and seawall installation contractor), Scarola Associates, and Terrabrook. Depositions are set to continue for one week each month until all key witnesses and parties have been deposed.

Our goal in resolving the litigation remains the same as it was when we were directed to file the litigation – secure for the community a seawall that will meet the original requirement to have an effective lifespan of 50 years, recover for the district the costs of dealing with the seawall problem and the attorney's fees spent to compel the defendants to correct the problem.