

THE FLORIDA BAR
CONSTRUCTION LAW COMMITTEE

CLE Presentation
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Mass Defaults by a Homebuilder - Possible Avenues for Recovery

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Case Study: High-end, master-planned, mixed-use community. Master developer is highly-selective in vetting participating builders for its neighborhood communities. Master developer touts the quality and integrity of the selected builders on its website, marketing materials and sales presentations.

In 2009, remodeling company with no custom home original construction experience forms a division to build custom homes (d/b/a Nirvana Homes). Nirvana applies to master developer for acceptance as an approved builder for a new neighborhood and is accepted. Information on Nirvana is included in the master developer's marketing materials with other approved builders. Nirvana undercuts the market price offered by the other builders by 10% to 15% and secures 30 contracts.

Nirvana during this period leases commercial space for a showroom from the master developer. By mid-2011, Nirvana is six months behind in its rent and suppliers are cutting off credit to Nirvana. Yet, master developer continues to tout Nirvana as a quality builder with integrity.

Nirvana through 2011 into the first half of 2012 is behind in construction but continues to take deposits on new contracts. Nirvana files for Chapter 7 bankruptcy in September, 2012. Homes are in various stages of completion. All have contractor and supplier liens. Deposits on contracts for which no work has begun are unaccounted for. It turns out that the qualifier for Nirvana has been out of the country for the entire construction period and his name has been forged on all permit applications. Fraudulent contractor affidavits led to the release of draws.

Homeowner losses are between four million and five million dollars.

Liabilities of Nirvana greatly exceed assets.

Possible Avenues for Recovery

I. Master Developer - Negligence in Vetting Process

- a. Is there a duty?
- b. Significance of published standards and vetting procedures
- c. Justifiable reliance
- d. Duty to update upon knowledge of deteriorating circumstances

II. Restitution in Criminal Proceedings

- a. Possible violations of federal law
- b. Possible violations of state law
- c. Opportunities for restitution

III. Licensing Complaint Against Qualifier

IV. Lender Liability for Releasing Draws

V. State Homeowners' Recovery Fund

- a. Qualifying for Recovery Fund
 - i. out of bankruptcy
 - ii. out of licensing action
- b. Limitation on Fund exposure for a builder
- c. First come-first serve
- d. Funding backlog