Joe Abernathy

LAW OFFICES
HERNDON, COLEMAN, BRADING & McKEE
JOHNSON CITY, TENNESSEE 37605-1160

104 EAST MAIN STREET
P. O. BOX 1160

CHAS T. HERNDON III
J. PAUL COLEMAN
JAMES E. BRADING
THOMAS C. McKEE
CHAS T. HERNDON IV
RONALD W. JENKINS
H. WAYNE GRAVES
J. EDDIE LAUDERBACK
BILLIE J. FARTHING
JAMES R. WHEELER

AREA CODE 615
434-4700

FAX
615-434-4738

August 15, 1994

Mr. Samuel B. Miller, II
Weller, Miller, Carrier,
Miller & Hickie
Attorneys at Law
P. O. Box 3217 CRS
Johnson City, TN 37602

Re: Limited Edition Condominium Owners' Association, Inc., et al v. Tittle Construction Company
Johnson City Law Court
Action No. 15010

Dear Sam:

This letter is written in follow-up to our conversation of June 21st, at which time we discussed the settlement factor. You will recall that at that time I mentioned to you that the three involved carriers were serious as relates to the policy defenses asserted and that Bill Wray had mentioned to me that the Tittles had limited personal finances available or that would be subject to execution to satisfy a judgment that might be rendered against them. He advised that any significant judgment against his clients would force them into bankruptcy. Accordingly, there would appear to be a probability that even if you secured a substantial judgment against the Tittles, your clients' net recovery may be relatively small.

Needless to say, pursuing this litigation has been extremely expensive for both your clients and the involved carriers, and it has concerned me that we have been using up resources that could be used to apply toward the claims of your clients. Of course, your response was that you and your clients were aware of the realities involved, that the Plaintiffs had submitted a settlement proposal to which a response has not been given, and that you would be receptive to a counter-offer. I advised you that I was willing to make a recommendation to my carrier that they participate in the development of a settlement fund, and that I would approach both Howard Vogel and Johanna McGlothlin along the

same lines. I have done so, and I am pleased to advise you that their carriers have agreed to join Aetna in contributing to the development of a settlement fund. However, I would emphasize to you that the contribution of each is expressly conditioned upon a release of all claims being provided by the homeowners' association and the present, past and future owners of all units, including all named Plaintiffs, as relates to all claims or potential claims against their insureds. By making settlement offers, the insurance companies are not waiving any defense or policy provision and the offers should not be construed as an admission of fault, liability or responsibility because these are strictly denied. In conjunction with the settlement, an instrument would have to be recorded in the Register of Deeds' office in Jonesborough, Tennessee evidencing the same and binding future property owners to the terms of same as a covenant running with the land. The three involved carriers have each agreed to contribute $50,000.00 to the settlement fund, contingent on the resolution of a dispute which exists among the insurance companies concerning the payment by Bituminous of a pro-rata share of the costs of defense of the Tittles in the state court action. I have been in contact with Bill Wray, and he advises me that the Tittles are willing to contribute an additional $50,000.00 to the settlement fund, making a total cash offer of settlement of $200,000.00. He advises that this is the most that the Tittles can raise on a cash basis.

In the alternative to the cash payment mentioned above by the Tittles, the Tittles are willing to purchase Units 34, 36 and 38 for $100,000.00 each, subject to their being able to secure appropriate financing. Mr. Wray recognizes that the involved unit owners would not be willing to sell the units in question for that amount, and it would be up to your clients and all other unit owners to determine how much of the settlement fund contributed by the involved carriers would have to be paid to them to effectuate the sales in question. Of course, the balance of the fund would be divided by you and your clients in whatever way you saw fit. It would seem to me that the counter-proposal is reasonable under existing circumstances. It places on the Tittles the risk of loss as relates to the three units that are at greatest risk, while providing to the association and the other unit owners a fund to at least partially compensate them for their alleged losses.

I recognize that your clients in all probability will not be impressed with the offer as submitted. Again, it takes into consideration the realities involved. It is the

position of the three involved carriers that each has valid policy defenses, which they intend to assert at a later stage of this proceeding through Motions for Summary Judgment. Any Motion that will be sustained by the Court will result in an immediate $50,000.00 loss in contribution to the settlement fund. Thus, the rejection of this proposal as submitted herewith has the potential of costing your clients $150,000.00 that is now being tendered in a good faith effort to settle this case.

Perhaps at this point it would be appropriate for me to explain to you the reason for the carriers' optimism as relates to their coverage defenses. Keep in mind that all involved policies are occurrence policies. Responsibility for any one loss attaches as of the time there is a manifestation of the damage claimed. Of course, a majority of claims asserted attribute improper fill technique as the cause of the damage suffered. Apparently, this work was performed in the winter of 1988, prior to March 21st. If the excavation work in question was negligently performed as you allege, the negligent acts themselves would have taken place during the insureds' first term of coverage with Bituminous. However, no damage was suffered prior to the expiration of said coverage on March 21, 1988.

As of March 21, 1988, Aetna picked up the Tittles' CGL coverage and continued to provide the same until March 21, 1990. During this period, a number of the units in question were built and purchased and there is some testimony to the effect that there was some manifestation of damage to several of the units in question during this period. You will recall that on August 31, 1990, Attorney Victor Vaughn wrote a letter to Tittle Construction Company asserting a claim as relates to structural damages suffered by Units 34, 36 and 38. This letter was written during Commercial Union's coverage. Yet, it is my understanding that the Tittles did not advise any of the three involved carriers of this claim at that time. In fact, my client, Aetna, was not advised of any of the claims until July, 1993, nearly three years after the receipt of Mr. Vaughn's letter by its insureds and one year after the filing of the lawsuit in question. It is my understanding that Bituminous received notice of these claims at about the same time. Johanna McGlothlin advises that even though Commercial Union received earlier notice of the claims associated with Units 16 and 18, the receipt of suit papers was the first notice they received as relates to the claims involving Units 34, 36 and 38. As you know, all three carriers have asserted notice defenses, and under the existing circumstances, we

all consider the same to be enforceable. In view of the time delay involved, it would certainly appear that this defense is particularly strong from Aetna's standpoint.

As I commented to you on the 21st, I question that the Tittles have any responsibility as relates to the sinkhole problem involving Units 16 and 18. All three of your expert witnesses have testified that the Tittles were not negligent in not discovering the existence of this potential sinkhole in the area of the cut in question. Where it is possible that their treatment of surface drainage in this area perhaps aggravated the problem, it would seem logical to assume that a collapse at some point in time was eminent.

One of the other defenses upon which these carriers rely is the "occurrence" defense. In order for there to be coverage under any of the three policies in question, the damage in question must be unexpected and unintended. The courts in this state have taken the position for quite some time that damage resulting from faulty workmanship cannot be unexpected. They refer to the coverage in question not being intended as a performance bond for the involved contractor. The following excerpt is taken from the reported decision of Vernon Williams and Son v. Continental Insurance Company, 591 S. W. 2d 760 (1979) at Page 763:

> "Also relevant to basic insuring agreements in the standard comprehensive general liability policy is the definition of property damage: 'injury to or destruction of tangible property.' In St. Paul Fire and Marine Insurance Company v. Coss, 80 Cal. App. 3d 888, 145 Cal. Rptr. 836 (1978), the Court reached the conclusion that a claim limited to remedying faulty workmanship or materials does not constitute 'injury to or destruction of tangible property.' We agree." (Emphasis supplied.)

I am also attaching a copy of a recent memorandum opinion in the case of Westfield Insurance Company v. H & R Mechanical Specialties, Inc. et al, which was recently decided in the Chancery Court for Davidson County. You will note that in that case Chancellor Robert Brandt dealt specifically with this faulty workmanship claim under the exact same policy language that we have here. As you know, each of your expert witnesses have attested to faulty workmanship as relates to both the excavation process and the construction of foundations.

Lastly, each of the involved carriers is strongly asserting the "your work" exclusion as relates to most of the damages suffered. Where these policies are designed to provide coverage for damage to third parties arising from negligence on the part of their insureds, they do not provide recovery for damage to the work of their insureds by the negligent acts of their insureds. This is exactly the nature of the claim that your clients are asserting here. Again, these policies do not act as performance bonds.

I mention these defenses to you only so that you will understand why each of the three involved carriers is optimistic that their positions as relate to coverage will be sustained. While they are willing to make a contribution towards settlement at this time in order to avoid additional expenses, the incentive for doing so will pass in time. The offer submitted herein is not intended as a negotiable offer. It reflects the most that the involved carriers are willing to pay prior to disposing of the coverage issue. We sincerely hope that your clients will give serious consideration to the same. I shall await your response to the offer as submitted. This offer remains open for thirty (30) days.

I remain,

Very truly yours,

HERNDON, COLEMAN, BRADING
& McKEE

Thomas C. McKee tj

Thomas C. McKee

TCM/tj

cc: Mr. William T. Wray, Jr.
Ms. Johanna J. McGlothlin
Mr. Howard H. Vogel
Mr. Walter Lee Davis