

EFFECTIVE PRACTICES FOR DEALING WITH CONSTRUCTION PROBLEMS

I. AVOID CLAIM IMPAIRMENT FROM PASSAGE OF TIME

- A. If a claim is lost through the passage of time the consequences can be devastating. Moreover, there is at least the possibility that those responsible for the loss of a claim could be held personally liable
- B. Claims can be barred by applicable Statutes of Limitations, Statutes of Repose, contracts and/or equitable doctrines. Even though claims may not be totally barred, the ability to recover for a particular claim may be compromised in terms of settlement negotiations.
- C. A full discussion of applicable claim limitation periods is beyond the scope of this discussion. However, some applicable time periods are:
 - 1. **Insurance Claims** - One year to six years.
 - 2. **Implied Warranty Claims**, condominiums built after July 1, 1990 - probably four years after first sale, whether discovered or not.
 - 3. **Implied Warranty Claims**, for Condominiums built before July 1, 1990 - from three years to nine years after substantial completion depending upon facts.
 - 4. **Consumer Protection Act Claims** - Four years after discovery of claim.
- D. If a particular claim becomes impaired, explore with counsel alternate grounds for pursuit of claim as was done in Pfeifer v. Bellingham, 112 Wn.2d 562, 772 P.2d 1018 (1989).
- E. How do you avoid losing a claim? Consult with an attorney immediately upon discovering information that a claim may possibly exist.

II. CLAIM RECOGNITION

- A. Buildings and the components of buildings should be assumed to have a reasonable life cycle – probably not less than twenty years for most all components. Structural, drainage and plumbing components may realistically be expected to last substantially longer than thirty years. If there are signs that buildings components will not last for a reasonably expected life. There should be prospects for recovery. Possible responsible persons and/or entities:
1. Declarant (also known as developer);
 2. Subcontractor;
 3. Component Part Supplier;
 4. Insurance Company;
 5. Board;
 6. You;
- B. Avoid personal liability and loss to your neighbors by acting in a responsible manner so that claims are pursued and not lost through inaction.

III. POSSIBLE SOURCES FOR RECOVERY

- A. Under Washington law, declarants give an implied warranty that construction is free from defective materials, constructed according to sound engineering and construction standards and in compliance with all codes.
- B. Association insurance policies protect against fire, and frequently against structural impairment resulting from decay. Insurance policies are very complex and may provide benefits understood only by attorneys experienced in insurance matters. In a recent case Allstate v. Forest Lynn Homeowners Association, the court held that collapse means: “Any substantial impairment of structural integrity of building.”
- C. Individual condominium owner insurance policies may provide substantial benefits associated with construction problems such as additional living expense, special assessment coverage and others.

IV. CONSIDERATIONS IN CHOOSING COUNSEL

A. COSTS - GENERALLY

1. **INITIAL INTERVIEW:** Does the attorney charge for an initial consultation? The Seattle, King County, Lawyer Referral Program promises a free half-hour consultation. Many, if not most attorneys will follow this practice if requested, even if the case is not a Lawyer Referral matter.
2. **HOURLY FEE:** Hourly rates probably range from \$125.00 per hour to \$225.00 per hour.
3. **CONTINGENT FEE:** A contingent fee is a fee that is paid solely from the recovery proceeds. Contingent fees are typically 33 1/3% but may range from 20% to 50% depending upon many factors including but not limited to risk and anticipated recovery. You can expect to pay higher fees where counsel assumes risk and burden of deferred fees.
4. **OTHER COSTS:** Depending on case, there will be costs other than for legal fees: plans, building department file, copies, depositions, experts, etc.

B. WHAT FEE ARRANGEMENT SHOULD YOU USE?

The fee arrangement which best suits your needs may well be dependent on answers to the following:

1. How fully has your problem been investigated?
2. How much more do you need to learn about currently identified problems?
3. What efforts have been made to identify other possible problems?
4. What are your objectives?
5. How much can your association afford to spend?
6. What are projected costs for experts, depositions, etc.?
7. Will retaining counsel on an hourly basis create division within the association and compromise ability to pursue the claim?
8. What are the projected costs of taking claim to trial?
9. What is counsel's advice on the type of fee agreement?
10. Will counsel agree to contingent fee representation and if so on what terms?
11. What are the prospects of success?

Be realistic about fees, costs, prospects of recovery. Do not engage in "wishful or selective hearing."

C. SELECTION OF COUNSEL

1. Interview at least two attorneys who have had experience in representing condominium associations.
 - a) Does the attorney instill confidence in you?
 - b) Will the attorney instill confidence in other members of your association?
 - c) Do you believe that counsel has the ability to persuade prospective opponents to pay your association's claim?
2. Request written information from attorney:
 - a) Request list of attorney's cases concerning condominiums and all results.
 - (1) Construction cases and results.
 - (2) Insurance cases and results.
 - b) What fee arrangement would counsel agree to.
 - c) What fee arrangement does counsel advise.
 - d) What does counsel estimate to be total for
 - (1) costs
 - (2) legal fees
 - e) How many cases involving condominiums has counsel taken to trial?
 - f) Who will be doing the actual work on your case and what is the rate to be charged by each person doing work?
 - g) What are the terms of any proposed contingent fee agreement?
 - h) What is counsel's proposed course of action and in what other cases has this course of action produced successful results/unsuccessful results?
 - i) What does the attorney need from your association in terms of documents and assistance?

V. **OUTLINE OF CLAIM PROCESS**

- A. **CONDUCT PRELIMINARY INVESTIGATION** - After an attorney is hired, the attorney should direct full investigation of claim and recommend course of action.
- B. **KEEP HOMEOWNERS INFORMED** - Association support is critical.
- C. **LITIGATION PROCEDURE** - Upon the filing of a lawsuit, the King County Courts will issue an **ORDER SETTING CIVIL CASE SCHEDULE**. This order will assign the case to a particular judge and assign a trial date which will be seventeen months after the filing date. Seventeen months to prepare a case for trial is really a short time. Between the filing date and the trial date, the parties will have to identify witnesses, conduct full pre-trial discovery, engage in mediation or other alternative dispute resolution processes, identify exhibits and witnesses and present numerous pre-trial motions.