

CONDOMINIUM WARRANTIES
and
CONDOMINIUM CONSTRUCTION CLAIM DEFECT OPTIONS

CHAPTER TEN

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Bo Barker is a sole practitioner from Bellevue who limits his law practice to representing condominium associations in pursuing claims against developers for faulty construction. He has been representing condominium associations for over 15 years. As a sole practitioner he has found substantial benefit in frequent case associations with co-counsel. With assistance of co-counsel he has resolved over twenty-condominium construction defect cases in the past fifteen years. With the Honorable Philip Talmadge as co-counsel on appeal and the support of seven interested parties who submitted amici curiae briefs supporting the plaintiff's position in Atherton, he represented the Atherton Condominium Owners Association in Atherton v Blume, 115 Wn.2d 506, 799 P.2d 250 (1990) a leading Washington condominium construction defect case.

He obtained his bachelor's degree in business administration from the University of Michigan and his Juris Doctorate from the Ohio State University College of Law.

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1. INTRODUCTION.

As traffic becomes more problematic and the price of real estate increases more people are meeting their housing needs through condominiums. This chapter identifies causes of construction problems associated with condominiums and describes warranty and other rights available to disappointed condominium owners and associations.

2. WHY ARE CONDOMINIUM WARRANTIES IMPORTANT?

- A. A growing number of people are affected by the condominium housing. The number of permits for multi-family housing has increased substantially in recent years.
- B. The increasing number of multi-family housing permits gives rise to an increasing demand for contractors and subcontractors. Increasing demand draws more employees to trade.
- C. There are no state competency requirements for contractors or for subcontractors in most trades. Risk evaluation of subcontractors by insurance underwriters appears to be minimal to non-existent.
- D. Bonding and liability insurance limit requirements for licensed contractors and subcontractors are not high enough to provide meaningful protection against losses in multifamily construction. When compared to risk of loss for faulty construction in multi-family residences, required bond and liability insurance limits are inconsequential.
- E. The permit process does not provide protection against premature building failures.
 - 1) Plan review process does not require or even address adequacy architectural details to resist moisture intrusion. With large unskilled labor pool architectural building details become increasingly important.
 - 2) Building code does not include an inspection which addresses the issue of whether construction will keep moisture from penetrating the building envelope. Uniform Building Code required inspections are: Foundation, Slab or under floor, Lath or gypsum board and Final. There is no building department inspection for building paper, flashing or any other component designed to keep a building dry.
- F. Public Duty Doctrine protects building departments from liability for negligent inspection.

We hold that no duty is owed by local government to a claimant alleging negligent issuance of a building permit or negligent inspection to determine compliance with building codes. The duty to ensure compliance rests with individual permit applicants, builders and developers.” Taylor v. Stevens Co. 111 Wn. 2d 159, 168, 159 P.2d 447 (1988).

3. SOURCES OF PROTECTION FOR CONDOMINIUM PURCHASERS.

A. **Washington Condominium Act (WCA).**

The WCA is codified at RCW 64.34. Portions of the WCA are attached as Appendix 1. There is no case law construing any portion of RCW 64.34.

Express Warranties are authorized under RCW 64.34.443.

Express warranties are created by any written affirmation of fact or promise which relates to the unit, its use of rights appurtenant thereto that the unit or rights appurtenant thereto will confirm to the affirmation or promise. A transfer of a unit transfers to a purchaser all express warranties made by the previous seller.

Implied Warranties provide a substantial benefit to purchasers that:

The common elements in the condominium are **suitable for the ordinary uses of real estate of its type** and that any improvements made or contracted for by such declarant or dealer will be:

- (a) **Free from defective materials;** and
- (b) **Constructed in accordance with sound engineering and construction standards, and in a workmanlike manner in compliance with all laws** then applicable to such improvements

- (6) **Any conveyance . . . transfers to the purchaser all . . . implied warranties of quality. RCW 64.34.445**

Modification or Exclusion of Implied Warranties is restricted.

WCA requires modification and/or exclusion of implied warranties to be by written agreement of the parties in language which in the common understanding calls buyers attention to the exclusion of warranties. If an implied warranty relates to residential housing no general warranty disclaimer is effective, but liability may be disclaimed for specified defects or specified failures to comply with state law. RCW 64.34.450. Attached as APPENDIX 2 is a sample motion to strike an attempted exclusion of all implied warranties.

Duration of Warranty rights is restricted to 4 years. See RCW 64.34.452.

A judicial proceeding for breach of any obligations arising under RCW 64.34.443 and 64.34.445 must be commenced within four years after the cause of action accrues. The minimum period may not be reduced by either oral or written agreement. **A cause of action for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues** for most purposes on the date the first unit in the condominium was conveyed to a

bona fide purchaser. The accrual of the cause of action without a purchaser's knowledge can lead to large losses for a condominium association or owner. If a warranty of quality explicitly extends to future performance the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

Alternate Basis for Relief under RCW 64.34.

Seattle attorney Richard T. Beal cleverly employed WCA 405 and 410 to avoid the four year limitation of RCW 64.34..

WCA 405 provides in part: The **declarant . . . shall be liable for any misrepresentation contained in the public offering statement or for any omission of material fact therefrom . . .**

WCA 410 provides:(1) **A public offering statement shall contain:**

(y) A list of any physical hazards known to the declarant which particularly affect the condominium or the immediate vicinity in which the condominium is located and which are not readily ascertainable by the purchaser;

Variations on Richard Beal's argument might include RCW 64.34 sub-sections:

- (o) The estimated current common expense liability for the units being offered; [and/or]
- (q) The estimated current amount and purpose of any fees not included in the common expenses and charged by the declarant or the association for the use of any of the common elements;

Substantial Non-Warranty Provisions of the WCA:

RCW 64.34.070 may permit pursuit of claims under theories not provided for under RCW 64.34: The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, condemnation, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

RCW 64.34.080 defines and prohibits unconscionable contracts and makes provision for evidentiary hearing on issue unconscionability.

RCW 64.34.090 Obligation of good faith. Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement. [1989 c 43. 1-112.]

RCW 64.34.100 Remedies liberally administered. (1) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

(2) Any right or obligation declared by this chapter is enforceable by judicial proceeding.

RCW 64.34.312 requires delivery of as built plans: [W]ithin sixty days after the first conveyance of a unit in the condominium, the declarant shall deliver to the association

(g) The financial records, including canceled checks, bank statements, and financial statements of the association, and source documents from the time of incorporation of the association through the date of transfer of control to the unit owners;

(j) . . . **A copy of the declarant's plans and specifications. . . with a certificate of the declarant. RCW 64.34.312 requires delivery of as built plans.**

RCW 64.34.455: allows the court to award attorneys fees to the prevailing party for violation of **any right conferred under RCW 64.34.**

B. Claims under the Consumer Protection Act (RCW 19.86).

The Washington State Consumer Protection Act (CPA) allows a party to recover damages for unfair or deceptive acts and/or practices. Several cases have permitted CPA claims in connection with the purchase of a residence. McRae v. Bolstad, 101 Wn.2d 161 676 P.2d 496 (1984) and Griffith v. Centex Real Estate Corp., 93 Wn. App 202, 969 P.2d ____, (1998). To establish a CPA claim a plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) impacting public interest, (4) causing injury to the claimants business or property and (5) which injury was proximately related to the unfair or deceptive act. Hangman Ridge v. Safeco, 105 Wn. 2d 778, 719 P.2d 531 (1986).

CPA claims must be brought within four years of the date of accrual. RCW 19.86.120.

Recovery may include treble damages not to exceed \$10,000,00 under RCW 19.86.090.

C. Common law Rights.

1. Equitable estoppel arising from conduct of Declarant

If a Declarant responds to repair requests in such a manner as to cause an association to believe that the developer will remedy conditions which would otherwise constitute a breach of implied warranties until after the statute of repose would bar the claim, a Declarant could be estopped from asserting the statute of repose as a defense

“The equitable doctrine of estoppel in pais is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations as a defense. [citing cases] One such situation exists where the defendant conceals facts or otherwise induces the plaintiff not to bring suit within the period of the applicable statute of limitations.” Central Heat, Inc. v. Daily Olympian, 74 Wn.2d 126 (1968); see also Duke v. Boyd, 133 Wn.2d 80 (1997).

2. **Common Law Implied Warranty & Fraudulent Concealment Claims**

In Atherton v. Blume, 115 Wn.2d 506 (1990), the court recognized a cause of action for breach of implied warranty of habitability for serious conditions which threatened the safety of the occupants. No cases have addressed the issue of whether the WCA provides the exclusive remedy for condominium claims. If common law claims still exist, the applicable statute of limitations would appear to be three years from the date of discovery of facts giving rise to such a claim. There would seem to be strong policy reasons why common law claims still exist.

4. **PRACTICAL CONSIDERATIONS**

- Consider consequences of non-action.
- Look for danger signs.
 - Caulking/Sealant
 - Cracks in caulking or sealant
 - Mold, mushrooms, mildew
 - Spiders, bugs
 - Cracks in EIFS
 - Exterior staining
 - Soft spots
 - Signs of exterior paint failure: blistering, peeling or flaking
 - Signs of interior water intrusion: corner beads, peeling paint
 - Something that does not seem right to you
- Consider possible liability of Board members as fiduciaries.
- Consider adverse of passing 4-year limit of RCW 64,34,452.
- Seek qualified professional architect/engineer/construction consultant.
- Gather records: Declarations , Public Offering Statement, Plans, Declarations, Budgets