



King County Bar Association Construction Law October 14, 2005

Recent Developments in Condominium Construction Defect Claims Resolution

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Overview

- Statutory framework for condominium construction defect claims
- Recent decisions
 - Insurance coverage
 - Condominium Construction Defect Claims
- HB 1848

Statutory Basis for Claims

- Express Warranties – RCW 64.34.443
 - Must be relied on by purchaser
 - Must be signed by declarant or declarant's agent or contained in Public Offering Statement (POS)
 - Warranties extend to subsequent buyers

Statutory Basis for Claims (cont.)

- Implied Warranties – RCW 64.34.445

Suitable for ordinary uses of real estate of its type

Improvements made or contracted for will be

- Free of defective materials
- Constructed according to sound engineering and construction standards
- In a workmanlike manner
- In compliance with all laws

Implied Warranty Limitations

- RCW 64.34.445 (7) . . . the plaintiff must show that the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach
- RCW 64.34.445 (8) Damages awarded for a breach of an obligation arising under this section are the cost of repairs. However, if it is established that the cost of such repairs is clearly disproportionate to the loss in market value caused by the breach, then damages shall be limited to the loss in market value

Importance of Implied Warranty

- Not implied in other real estate purchase and sale transactions
- Breach of warranty may support award of attorneys fees
- Difficult to disclaim implied warranties
- If implied warranty rights are lost through passage of time or disclaimer value of claim is likely to be seriously compromised (example: Kelsey Lane)

Modification of Warranties

- RCW 64.34.450(2) For units intended for residential use, no disclaimer of implied warranties of quality is effective, except that a declarant or dealer may disclaim liability in writing, in type that is . . . set out from surrounding material so as to be conspicuous, and separately **signed by the purchaser, for a specified defect** or specified failure to comply with applicable law, if: (a) The declarant or dealer knows or has reason to know that the specific defect or failure exists at the time of disclosure; (b) the disclaimer specifically describes the defect or failure; and (c) the disclaimer includes a statement as to the effect of the defect or failure.
- See *Park Ave v Buchan*, 117 Wn. App. 369 (2003)

Limitation of Action on WCA Warranties

- RCW 64.34.452
- Suit must be commenced within 4 years of the accrual
- In general accrual occurs on first sale
- Time for commencement of suit cannot be less than one year after termination of declarant control
- Can toll statute by giving notice under RCW 64.50

Attorneys' fees

- If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party. RCW 64.34.455

Public Offering Statement

- Public Offering Statements are required by RCW 64.34.405 in the case of virtually all condominium developments

Delivery of Public Offering Statement – RCW 64.34.420

- Delivery to buyer required before closing, but if not delivered more than 7 days before closing, buyer may cancel the contract
- On cancellation a buyer is entitled to refund and greater of actual damages or 3 % of price for unintentional or 10% for willful failure to deliver

Contents of Public Offering Statements – RCW 64.34.410

- (1) A public offering statement shall contain the following information:
 - (o) The estimated current common expense liability for the units being offered;
 - (y) A list of any physical hazards known to the declarant which particularly affect the condominium . . .
 - **(aa) Any building code violation citations received by the declarant in connection with the condominium which have not been corrected**
 - (ee) A notice which describes a purchaser's right to cancel the purchase agreement or extend the closing under RCW 64.34.420, including applicable time frames and procedures

Misrepresentation or Omission by Declarant under RCW 64.34.405(3)

- The declarant or dealer shall be liable for any misrepresentation contained in the public offering statement or for any omission of material fact therefrom if the declarant or dealer had actual knowledge of the misrepresentation or omission or, in the exercise of reasonable care, should have known of the misrepresentation or omission.

Declarant Charged with Knowledge of Construction Details

(1) . . . within sixty days after the first conveyance of a unit in the condominium, the declarant shall deliver to the association . . . :

- a copy of the declarant's plans and specifications utilized in the construction . . . with a certificate of the declarant or a licensed architect or engineer that the plans and specifications represent, **to the best of their knowledge and belief**, the actual plans and specifications utilized by the declarant in the construction

WCA remedies not exclusive

RCW 64.34.070. 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.

Who Can Bring an Action?

- RCW 64.34.304 . . . [T]he association may:
 - Institute . . . litigation . . . in its own name on behalf of itself or two or more unit owners on matters affecting the condominium
- Different results in some other states:
 - *Society Hill COA v Society Hill Associates*, 789 A 2d 138 (NJ Super, 2002)

*Red Oakes v. Sundquist v.
Mutual of Enumclaw,
128 Wn. App. 317 (2005)*

- “MOE was not a stranger to this case. It was notified of the claims against Sundquist almost a year in advance of the hearing, defended Sundquist under a reservation of rights, agreed to the tolling of the statute of limitations, paid for an investigation into the claims, and was aware of ongoing settlement negotiations. It should have been no surprise to MOE that the parties settled quickly once a lawsuit was initiated. Further, the trial court permitted MOE to participate in the reasonableness hearing, but it chose not to.”

Mutual of Enumclaw v. Archer,
123 Wn. App. 728 (2004)

- “Archer's contention that it was [the declarant] TRA that ‘manufactured, sold, handled or distributed’ Sjonadal is not persuasive in light of the facts of this case and case authority defining a building as a builder's product. Archer both ‘manufactured’ and ‘handled’ Sjonadal. The fact that TRA sold the units does not change the conclusion that Sjonadal is Archer's product.”

State Farm v. English Cove Assn.,
121 Wn. App. 358 (2004)

- “Here, ECA has indicia of ownership by virtue of its interests in the units and the common elements of the condominium. It has the right to possess its units and the right to sell its units and the associated common elements.”

White v Allstate,
124 Wn. App. 60 (2004)

- The Allstate policy applied “only to losses or occurrences that take place during the policy period.”
- Because the loss in this case occurred before the policy went into effect, we hold that the October 2001 assessment is not covered under the insurance policy as a matter of law.

Kelsey Lane HOA v. Kelsey Lane Co.,
125 Wn. App. 227 (2005)

- Claims not brought within 4 years forced creative approach to case.
- Fraudulent concealment claim failed for lack of proof that the declarant knew of construction defects.
- Claim that disclosures required in POS were not made failed as a matter of law because the statutory interpretations sought by association were strained and tenuous.

Lakemont Ridge HOA v. Lakemont Ridge Ltd.,
125 Wn. App. 71 (2005)

- Chapter 64.50 became effective after the recording of the declarations for the Lakemont condominium.
- RCW 64.50.050(1) requires that a declarant give notice to of its right to offer a cure for a claimed construction defect. No such notice was given.
- Association's suit was dismissed because association did not give a declarant a pre-litigation notice of a construction defect under RCW 64.50 before commencing suit.

Ballard Square v. Dynasty, 126 Wn. App. 285 (2005)

- “We encourage the Legislature to adopt section 14.07, as it would resolve the conundrum the present statute creates. There are competing policy considerations in play here. “An absolute bar to causes of action based upon post-dissolution claims certainly is unreasonable.” [] But at the same time, “permitting post-dissolution claims to be maintained as though there were no survival statute and no bar defeats the policy goal of certainty and definiteness for former shareholders and directors of dissolved corporations.”

EHB 1848, effective 8/1/05

- Applies to multi unit resident buildings
- Permit applicants to submit building enclosure design by qualified designer
- Unaccountable qualified, independent building inspection report for envelope
- One who timely demands arbitration or neutral expert advances costs
- Mediation within 7 months of filing
- Offers of judgment 60 days after completion of mediation

Q&A

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