

# Condominium Construction Defect and Warranty Claims



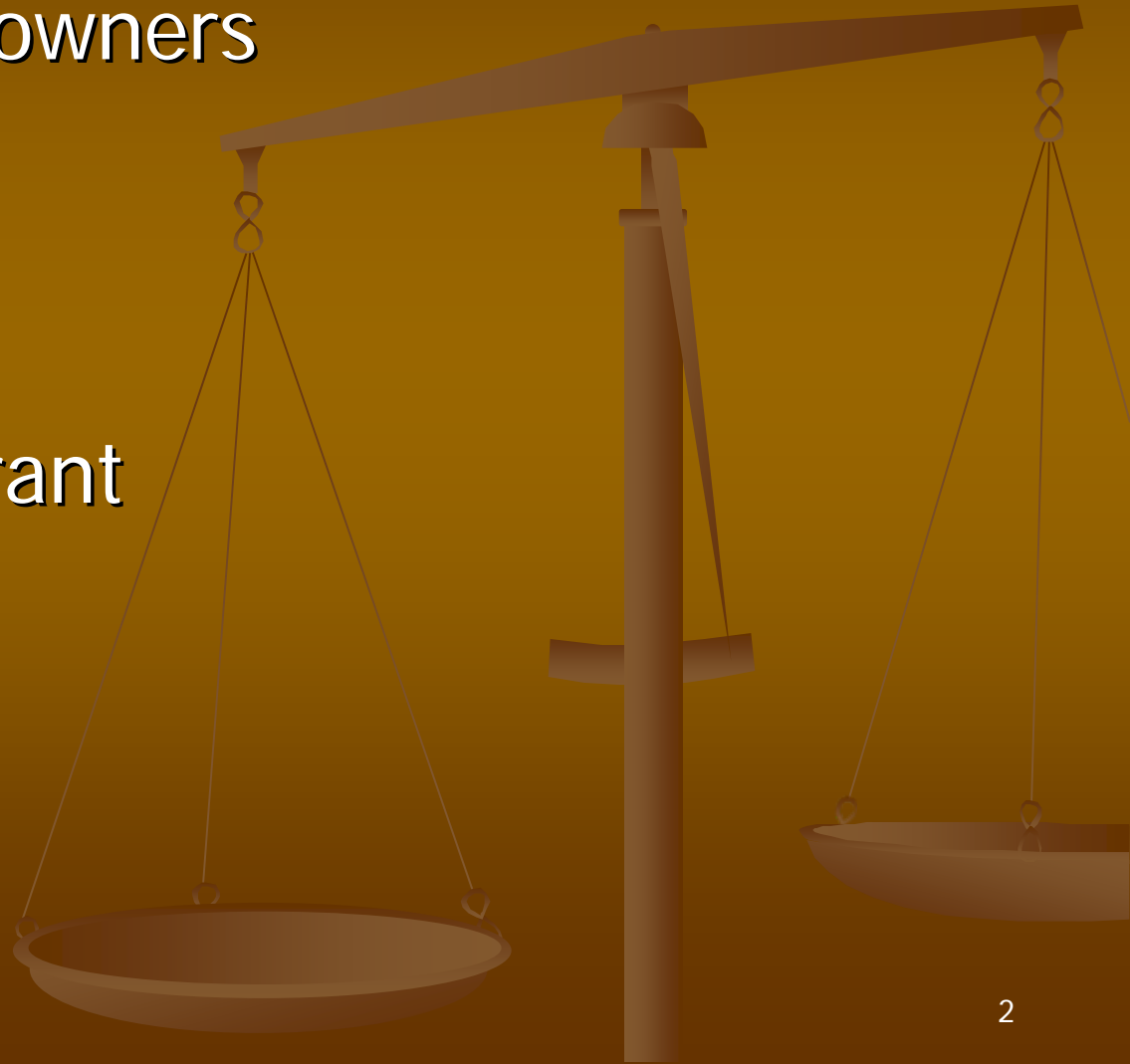
by

Jeremy Stilwell & Dan Zimberoff  
Barker Martin, P.S.

[jeremystilwell@barkermartin.com](mailto:jeremystilwell@barkermartin.com) [danzimberoff@barkermartin.com](mailto:danzimberoff@barkermartin.com)

# Pre-Litigation Notice Requirements

- Notice to Homeowners
  - RCW 64.50.050
  - Declaration
  - Bylaws
- Notice to Declarant
  - RCW 64.50.020
  - Declaration



# Condominium Act

- Old Act Condo: RCW 64.32.
  - Applies to Pre-July 1, 1990 condominiums.
- New Act Condo RCW 64.34.
  - Applies to all condominium created after July 1, 1990. See RCW 64.34.010.

# Defect Claims

- Who can bring the claim?
  - Who is your client?
- RCW 64.34.304(1)(d): The Association may:
  - Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.


# Common Elements vs. Units



- Common Elements:
  - Everything other than units. RCW 64.34.020 (6)
- Unit:
  - Boundaries usually defined by declaration. See RCW 64.34.216 (1)(d) and RCW 64.34.020(31)
- Look to statute and then declaration.

# Ability To Bring Claims

- **RCW 64.34.328: Upkeep of the condominium.**
- The association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the owner's unit and limited common elements reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, shall be liable for the repair thereof.



You know who your client is,  
what do you do next?

Comply with all notice  
requirements.

# RCW 64.50

## A Notice Statute Fraught with Peril

### ■ RCW 64.50.040

- Often referred to as the “Right to Cure Statute” or “Opportunity to Cure”
- Statute does not give construction professional the right or opportunity to cure, only the ability to offer to inspect, cure, or pay damages. RCW 64.50.020.

# Application

## RCW 64.50.050

- ***Lakemont Ridge HOA v. Lakemont Ridge Ltd. Partnership***, 156 Wash.2d 696, 131 P.3d 905 (2006)
  - As a declarant or construction professional, if you want notice before a lawsuit (.020) you must give notice (.050).
- If RCW 64.50 applies and you received the notice required by .050, you cannot file a lawsuit until you comply with the requirements of RCW 64.50.020.
- Declarants: put initial notice language in the Public Offering Statement. RCW 64.50.050(2).

# RCW 64.50

## Required Notice to Declarant

- Notice Must:
  - Describe the claim in reasonable detail sufficient to determine the general nature of the defect.
  
- Service by:
  - Personal Service or “delivery by certified mail to the last known address of the addressee.”
  - Service on registered agent may not be enough.

# Developer's Response

- Developer must serve response within 21 days of service of notice.
  - Practice Tip: Service in this instance is personal service or registered mail. RCW 64.50.020(2)
- Four possible responses (RCW 64.50.020):
  - Reject;
  - Compromise by payment;
  - Remedy the defect; or
  - Inspect and then provide one of the three above responses within 14 days of completion of the inspection.

# Association's Response



- Can reject any offer.
  - Must serve written notice of rejection of offer.
- Can accept any proposal.
  - If the Association accepts proposal to investigate and then respond, the Association should also get written confirmation of extent of tolling provided by RCW 64.34.452(4).

# RCW 64.50

## Pitfalls for the Unwary

- Method of Service:
  - Certified Mail or Personal Service (64.50.010(7))
  - But, Developer's response by registered mail or personal service.
- Date service is effective if you mail:
  - Upon placing in the mail, three days later, or date received?
  - Trial courts have adopted inconsistent results.
- Proper termination
  - To be safe, serve written notice of termination.

# RCW 64.50

## Tolling

- Tolling:
  - Tolloed until 60 days after action is barred by RCW 64.50.020.
  - See RCW 4.16.325 and RCW 64.34.452(4) for specific language.
- Pitfalls:
  - Are the statutes of limitation tolled if you comply with RCW 64.50 even though it is not required?
  - Make sure you properly terminate the RCW 64.50 process before filing.

# RCW 64.50

## Notice to Unit Owners

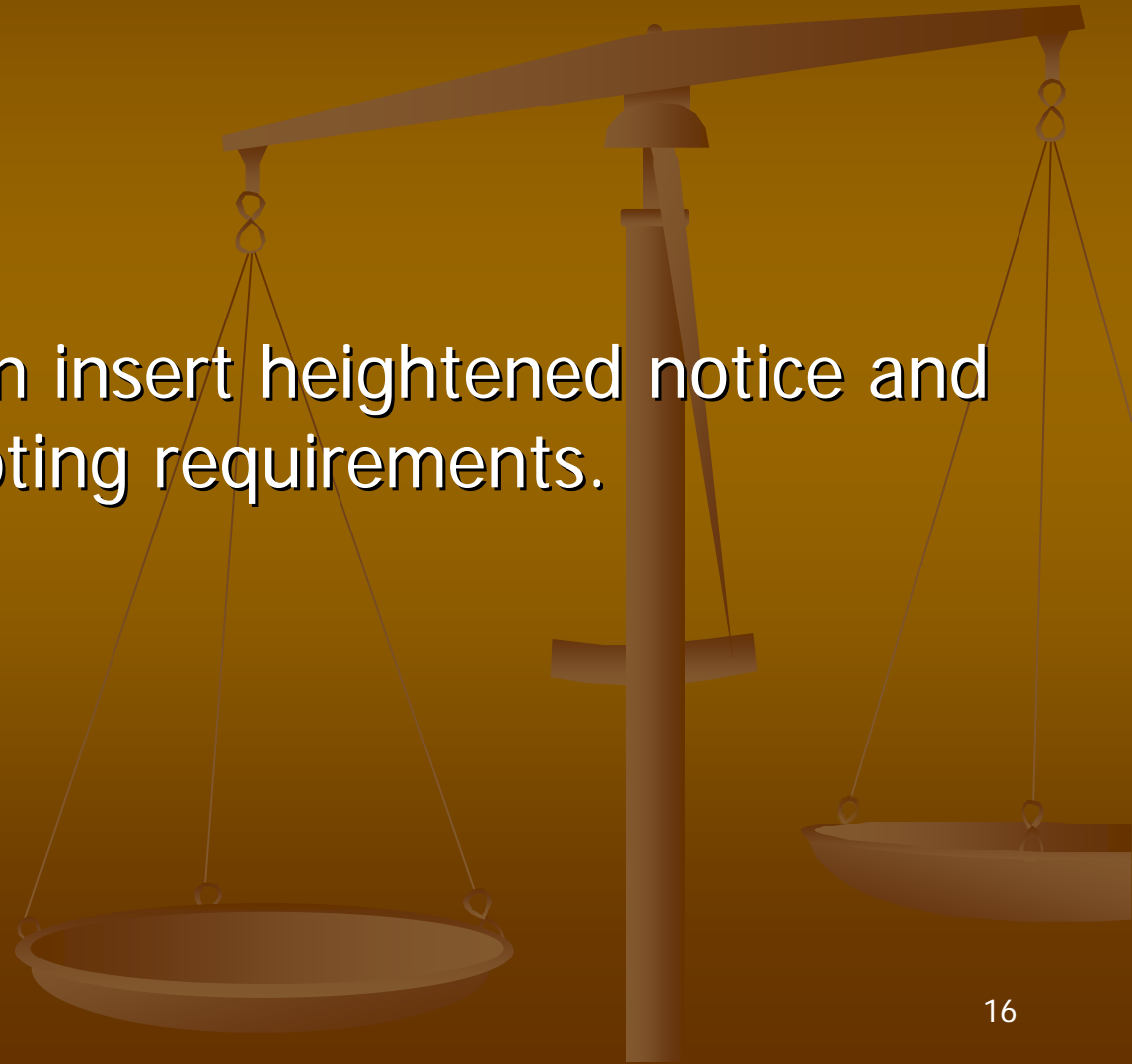
- RCW 64.50.040
  - Prior to service of summons and complaint on any defendant:
    - Mail or deliver,
    - Written notice,
    - To last known address
  - Notice must provide a general description of:
    - Nature of action and relief sought, and
    - Expenses and fees that the board anticipates will be incurred.
  - No requirement to disclose or waive privilege.

# Declaration

## Pre-Litigation Requirements

- The Declaration

- Declarants often insert heightened notice and pre-litigation voting requirements.



# Pre-Filing Requirements: Declaration

- Under the Condo Act, the Association may:
  - Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more Unit Owners on matters affecting the condominium. RCW 64.34.304(1)(d).
- Declarants often add some version of the following language in the Declaration.
  - . . . ; provided, however that the approval of Owners holding at least 67% of the votes in the Association shall be required before the Association may institute, commence or intervene in any litigation or administrative proceeding.

# Other More Onerous Requirements

- Some Declarations require the Association to submit a written report to the unit owners containing:

*" a legal opinion prepared by legal counsel who is independent from the legal counsel whom the Association proposes to hire to pursue the proceedings, and which contains a valuation of the Association's claims on the basis of the actual amounts in dispute, the likelihood of the Association prevailing on those claims, and the merit of the defense to those claims."*

# Treating the Declarant Differently

- RCW 64.34.304(2)
  - The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than limitations imposed on the power of the association to deal with other persons.

# Treating the Declarant Differently

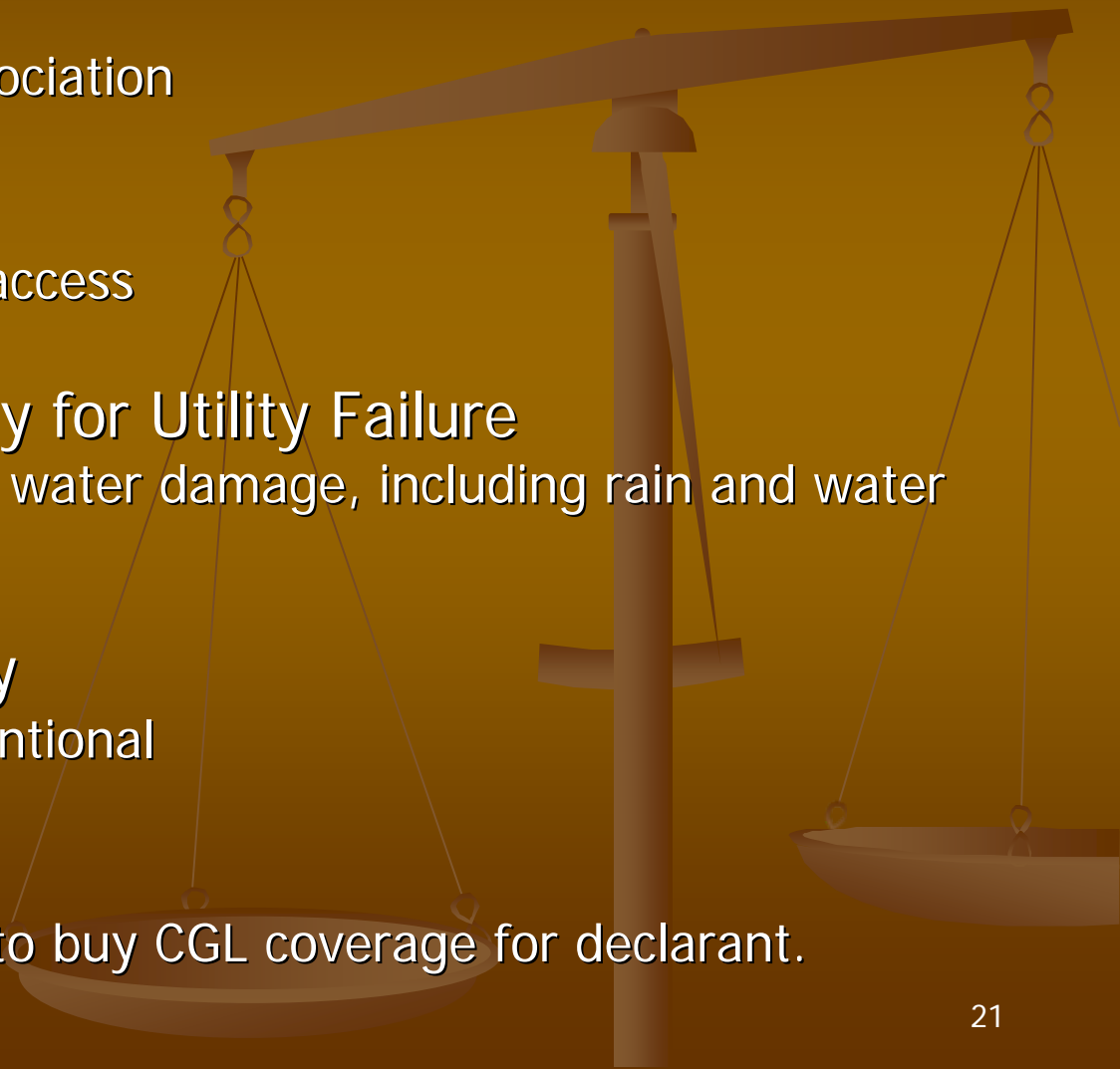
## *Example*

- Sample language that likely violates 64.34.304(2).

“under no circumstances may legal proceedings be commenced against Declarant (or Declarant’s contractor, subcontractors, vendors, suppliers or other professionals) with respect to any alleged construction defect or other condition which Declarant has agreed to in writing to remedy and is proceeding with reasonable due diligence to do so.”

# Declaration Problems: Other Issues

- Indemnification
  - Of Declarant by Association
- Easement Rights
  - Unfettered right of access
- Limitation of Liability for Utility Failure
  - Excludes liability for water damage, including rain and water intrusion
- No Personal Liability
  - unless willful or intentional
- Insurance
  - Imposes obligation to buy CGL coverage for declarant.



# Resolving Declaration Issues



- Many provisions may be unenforceable but, do not rely on RCW 64.34.304(2).
  - Superior court judges have issued inconsistent rulings.
- Comply with notice requirements, if possible.
  - Be wary of statute of limitations.
- Amend Declaration Prior to Lawsuit.

# Now that you can file, what are your potential claims?

- Primary Claims
  - Breach of Statutory Warranties
  - Breach of Duty to Disclose
  - Public Offering Statement
  - Breach of Duty During Declarant Control
- Secondary Claims: used to pierce corporate veil.
  - CPA Violations
  - Unlawful Distributions
  - Fraud

# Condo Act: Implied Warranties of Quality

- The Declarant warrants to the Association and the unit owners that any improvements made or contracted for the Declarant would be:
  1. Free from defective materials;
  2. Constructed in accordance with sound engineering standards;
  3. Constructed in accordance with sound construction standards;
  4. Constructed in a workmanlike manner; and
  5. Constructed in compliance with all applicable laws.

RCW 64.34.445(2)

# Implied Warranties and the Building Code

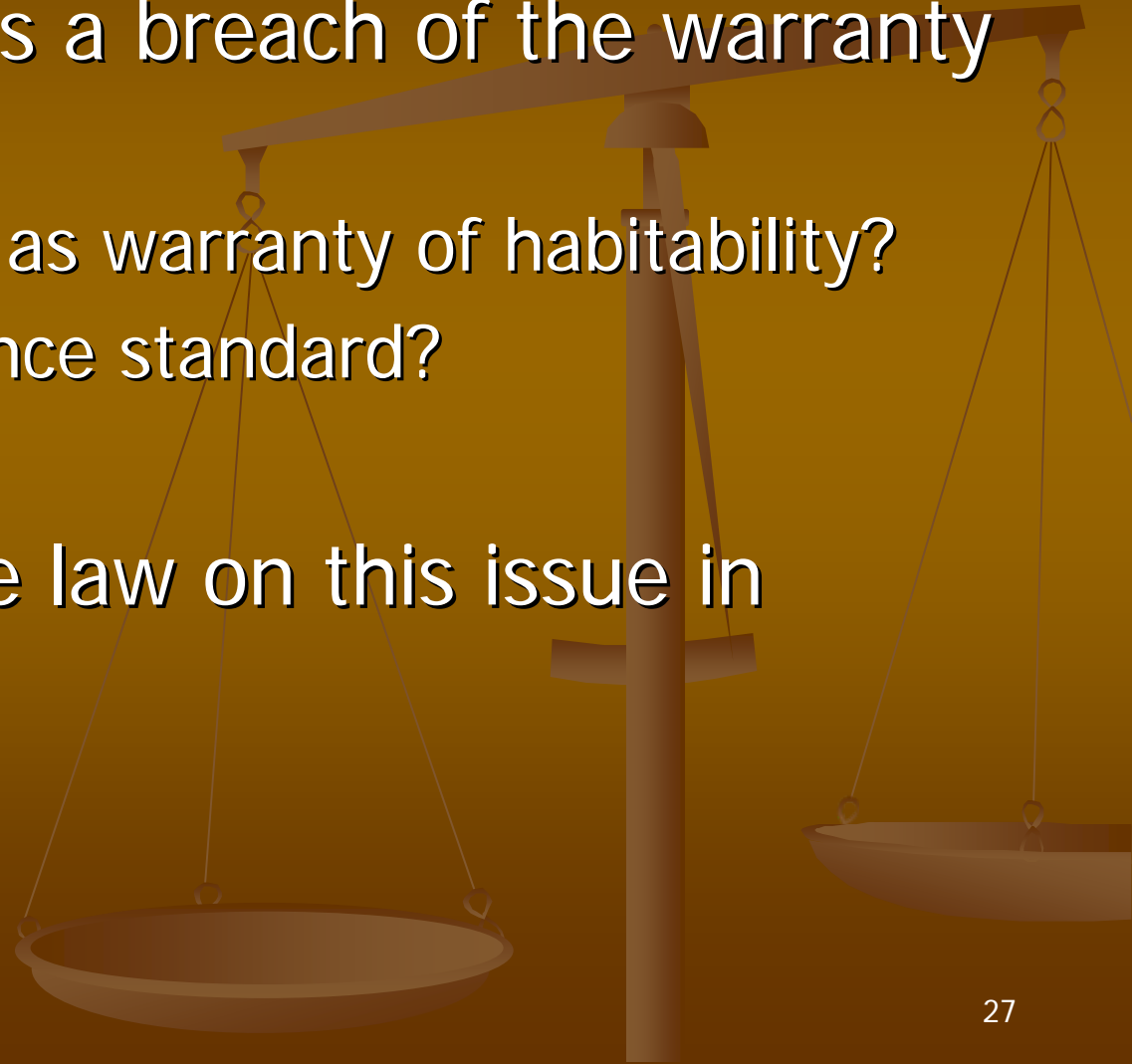
- Warranty
  - Constructed in compliance with all applicable laws.
- Applicable Laws include UBC and IBC
  - Legislature adopts UBC/IBC as part of RCW under RCW 19.27.
  - Both statute and code itself states that the code as a minimum standard. RCW 19.27.020 and 1994 UBC §101.2 .
- Code violations are ripe for summary judgment.

# Condo Act: Implied Warranties of Quality

- **Suitability for Ordinary Use.**
  - The Declarant warrants that “a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type.” RCW 64.34.445

# Warranty of Suitability and Conversion Condominiums

- What constitutes a breach of the warranty of suitability?
  - Same standard as warranty of habitability?
  - Basic performance standard?
- There is no case law on this issue in Washington.



# Express Warranties RCW

## 64.34.443

- Express warranties are limited to those contained in the public offering statement or made in writing signed by the declarant or declarant's agent identified in the public offering statement.
- A declarant may offer an express warranty only if the express warranty does not reduce the protections provided by the implied warranty.  
RCW 64.34.445.

# Condo Act Claims: Statute of Limitations

- Breach of Condo Act Warranty Claims:
  - Four years;
  - Claim accrues at the latest of:
    - Date first unit is conveyed to a bona fide purchaser;
    - The date the common element was completed;
    - The date the common element was added to the building.
  - Can be tolled by RCW 64.50 or by agreement.

# Condo Act Claims: Statutes of Limitations

- Statute of limitations cannot be reduced:
  - “Such periods may not be reduced by either oral or written agreement or through the use of contractual claims or notice procedures that require the filing or service of any claim or notice prior to the expiration of the period specified in this section.”
- Condo Act does not specify the statute of limitations for non-warranty condo act claims.

# Duty to Disclose



- Common law duty separate from the Washington Condominium Act.\*
- Duty to disclose material facts not readily observable to the buyer.

\*See, *Alejandre v. Bull*, 159 Wn. 2<sup>nd</sup> 674, 153 864 (2007) for discussion regarding economic loss rule.

# Public Offering Statement Requirements

- RCW 64.34.410:
  - Applies to all Condominiums.
- RCW 64.34.415:
  - Additional requirements for Conversion Condos.
  - RCW 64.55.090 imposes additional and more stringent inspection requirements for conversion condominiums.

# Public Offering Statement Liability

- **RCW 64.34.405: Public offering statement liability.**
- (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.”

# POS Liability



## ■ Failure to Provide POS

- Damages are the greater of:
  - 10 % of sales price if willful failure, or
  - 3% for any other failure (RCW 64.34.420(3)); or
  - Actual damages.

## ■ Misrepresentation or Omissions in POS

- Liability for misrepresentations or omissions in POS regarding material facts about which the declarant knew or in the exercise of reasonable care should have known. RCW 64.34.405(3).

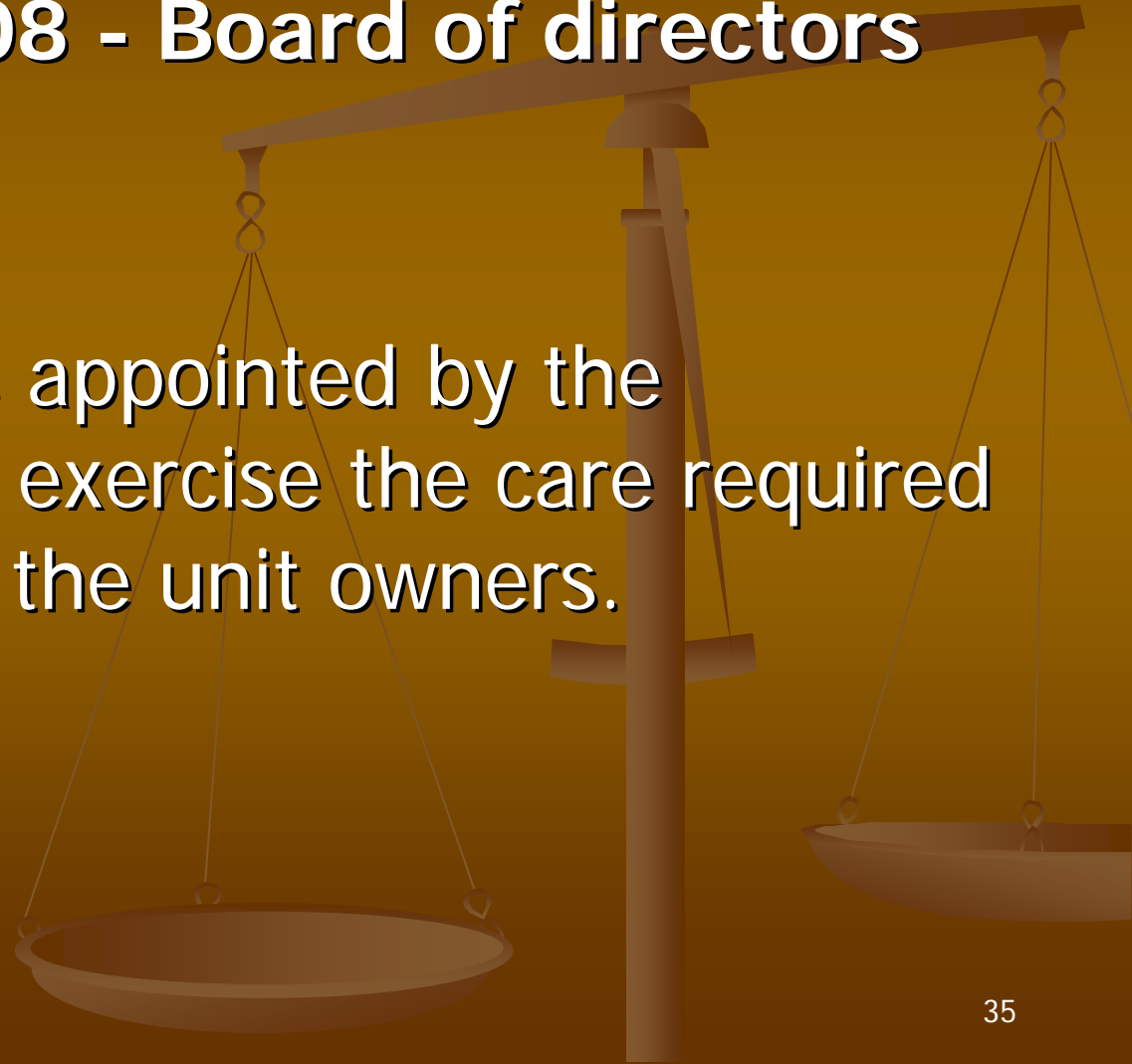
## ■ Longer Statute of Limitation!

- The 4 year limitation period in the WCA only applies to the statutory warranties. Arguably, the three year discovery rule applies to failure to provide the POS or failure to disclose information required in the POS.

# Duties During Declarant Control

- **RCW 64.34.308 - Board of directors and officers.**

Board members appointed by the declarant, must exercise the care required of fiduciaries of the unit owners.



# Fiduciary Duties



- How does declaration appointed board member reconcile their fiduciary duty with the Association's responsibility to:
  - maintenance, repair, and replace of the common elements, including the limited common elements. RCW 64.34.328

# Other Common Claims



- CPA Violations

- *Nordic Construction* – possible liability against officers and directors.

- Unlawful Distributions

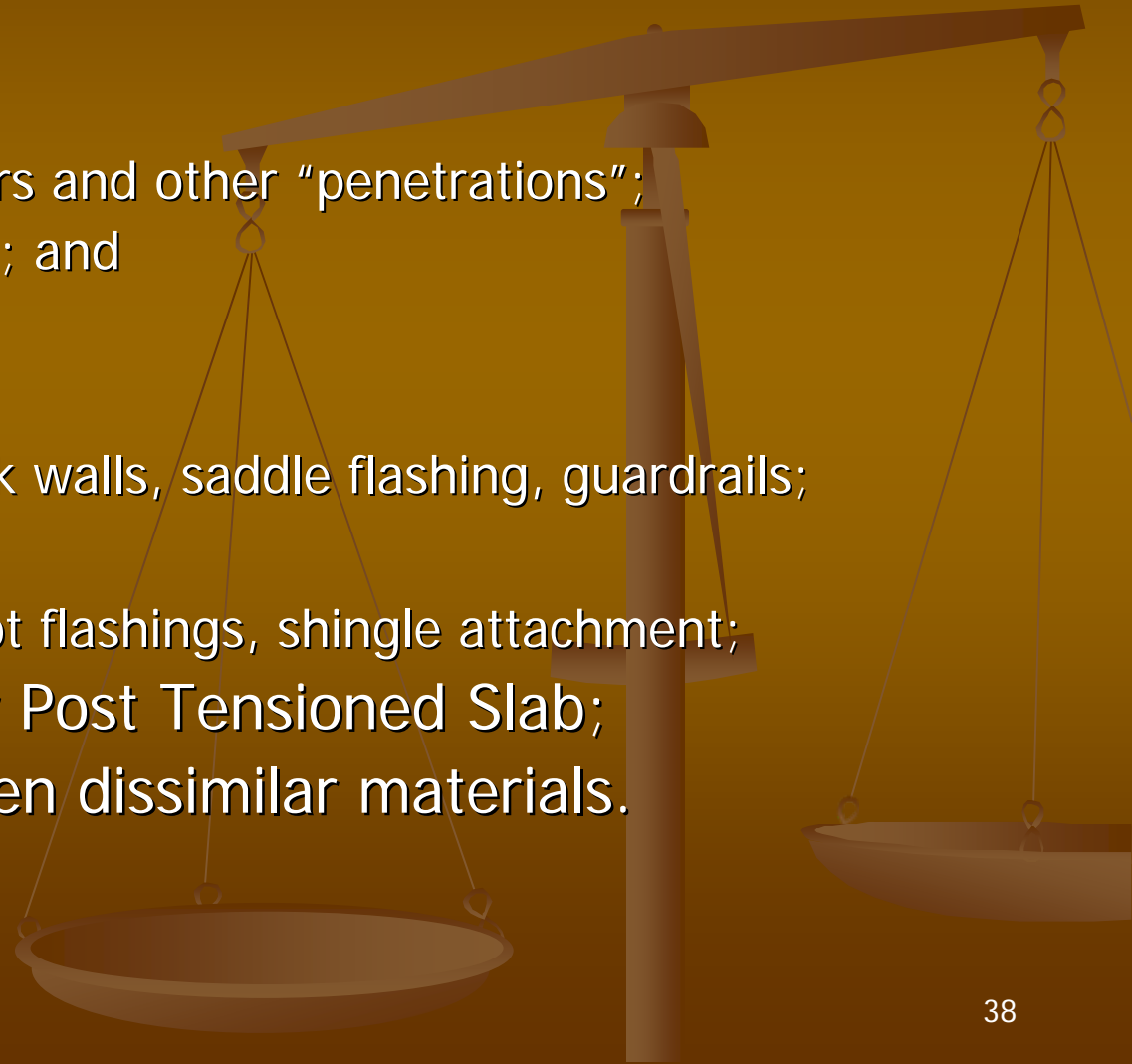
- Potentially forcing shareholders, LLC members or limited partners to disgorge distribution.

- Fraud

- Difficult claim and undermines insurance coverage;
- Fraudulent dissolution.

# Common Defect Issues

- Water Intrusion:
  - Siding:
    - Windows and doors and other “penetrations”;
    - Penetration wraps; and
    - Head Flashing;
  - Decks:
    - Deck surface, deck walls, saddle flashing, guardrails;
  - Roofs:
    - Parapet walls, boot flashings, shingle attachment;
  - Topping Slab over Post Tensioned Slab;
  - Transitions between dissimilar materials.



# More Defect Issues

- Vapor Barrier:
  - Installed on the inside of exterior walls;
  - Prevents humid air from moving through walls and condensing inside the walls;
  - Can be done by installing:
    - Plastic (visqueen) on the studs before interior drywall is installed;
    - Kraft backed insulation installed between the studs with the Kraft backing facing inward;
    - Paint applied vapor barrier.
  - Be wary of paint applied vapor barrier:
    - Tough to confirm application, expensive to test, and tough to meet code required perm rating of 1.0.

# More Defects

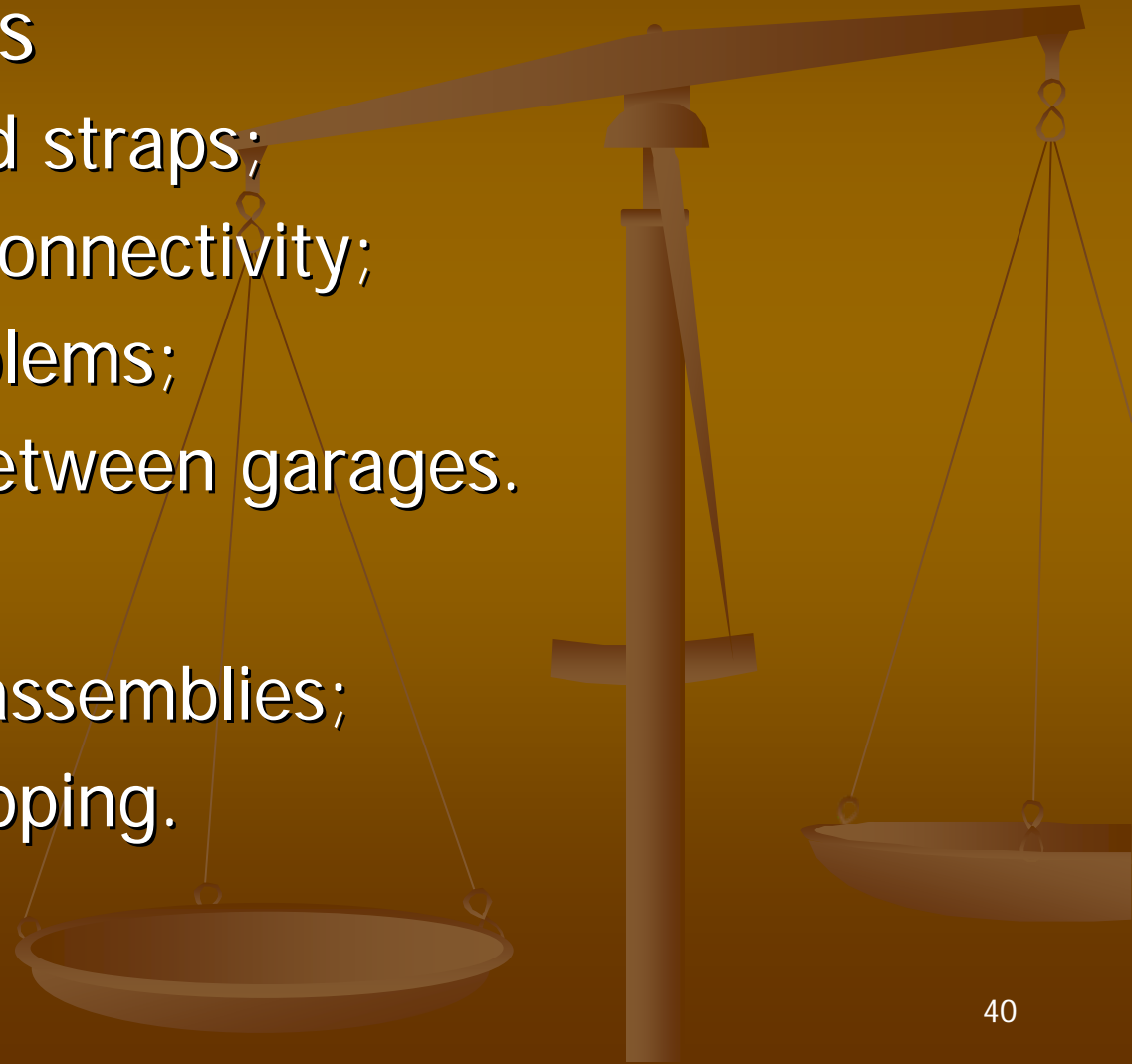
## Warranty of Habitability

### ■ Structural Issues

- Hold downs and straps;
- Through floor connectivity;
- Shear wall problems;
- Narrow walls between garages.

### ■ Fire Resistivity

- Improper wall assemblies;
- Lack of fire stopping.



# Q&A

*Thank you for attending!*

# Declaration Amendments

- 10.4.1 (d) Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two (2) or more Unit Owners on matters specifically involving Common Elements. ~~The Association shall be expressly prohibited from instituting, defending or intervening in litigation, arbitration or administrative proceedings in its own name, or on behalf of two (2) or more Unit Owners on matters either relating to Units or not directly involving the Common Elements;~~

# Declaration Amendments

- 10.4.2 The Board's power hereinabove enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the Association funds a capital addition or improvement (other than for purposes of restoring, repairing or replacing portions of the Common Elements) having a total cost in excess of Five Thousand Dollars (\$5,000), without first obtaining the affirmative vote of a majority of Owners at a meeting called for such purpose...~~In addition, except for causes of action and lawsuits against either (a) any Unit Owner, the Association and/or Declarant arising as the result of their alleged failure to comply with the provisions of this Declaration, the Bylaws or rules and regulations adopted by the Association, or (b) any person or entity, and arising as a result of alleged tortious conduct which resulted in injury to persons or property, no lawsuits shall be commenced by the Association which could result in the Association incurring legal fees and costs in excess of Five Thousand Dollars (\$5,000) without first obtaining the affirmative vote or agreement of the Owners of Units to which at least seventy percent (70%) of the votes in the Association are allocated. If the cause of action or lawsuit is against the Declarant, then Units owned by the Declarant shall not be considered in determining whether the seventy percent (70%) affirmative vote has been received.~~

# Declaration Amendments

- 16.1 Enforcement In the event of a dispute between the Declarant and the Association (or the Board or any Owner), each party shall be solely responsible for payment of all legal fees incurred by that party, regardless of the nature of the dispute or who may be the prevailing party. In any action by a Unit Owner challenging the priority of any decision, action or inaction by the Association or Board, or otherwise asserting that any such decision, action or inaction violates the provisions of the Lease, Act, Declaration, Bylaws or Association rules and regulations, the opinions or votes of Board members shall be accorded no special evidentiary value.

# Declaration Amendments

- 17.1 Liability for Utility Failure, Etc. Except to the extent covered by Insurance obtained by the Board pursuant to Article 13, neither the Association, the Board nor the Manager ~~(or the Declarant or Declarant's managing agent exercising the powers of the Board)~~ shall be liable for any failure of any utility or other service to be obtained and paid for by the Board; or for injury or damage to person or property caused by the elements, or resulting from electricity, noise, smoke, water, rain (or other liquid), dust or sand which may lead or flow from outside or from any parts of Units, or from any of its pipes, drains, conduits, appliances or equipment, or from any other places, or for inconvenience or discomfort resulting from any action taken to comply with any law, ordinance or orders of a governmental authority. No diminution or abatement of Common Expense Assessments shall be claimed or allowed for any such utility or service failure, or for such injury or damage, or for such inconvenience or discomfort.

# Declaration Amendments

- 17.2 No Personal Liability. So long as a Board member, Association Committee member, or Association officer, (other than the Declarant while acting as a Board member or Officer during period of Declarant control) ~~Declarant or Declarant's managing agent exercising the power of the board~~ has acted in good faith, without willful or intentional misconduct, upon the basis of such information as may be possessed by such person, no such person shall be personally liable to any Owner or other party, including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error or negligence (except gross negligence), any discretionary decision or failure to make a discretionary decision by such person in such person's official capacity. However, this Section shall not apply where the consequences of such act, omission, error or negligence are covered by insurance obtained by the Board pursuant to Article 13.

# Declaration Amendments

■ 17.3 Indemnification of Board Members. Each Board member, Association committee member or Association officer except Declarant or Declarant's managing agent exercising the power of the Board shall be indemnified by the Owners against all expenses and liabilities, including attorneys' fees, reasonably incurred by or imposed in connection with any proceeding to which they may be a party, or in which they may become involved, by reason of being or having held such position at the time such expenses or liabilities are incurred, except in such cases wherein such person is adjudged guilty of intentional misconduct, gross negligence or a knowing violation of the law in the performance of their duties, and except in such cases where such person has participated in a transaction from which said person will personally receive a benefit in money, property or services to which said person is not legally entitled. Provided that, in the event of a settlement, the indemnification shall apply only when the Board approves such settlement and reimbursement as being in the best interest of the Association. ~~The Association and each Owner shall defend, indemnify and hold Declarant harmless from any claim, expense or liability based on the failure of the Association or such Owner to comply with applicable duties and obligations under the Declaration, Association Articles or Bylaws, or Association Rules and Regulations, or under any warranty obtained or issued by Declarant, or under applicable law.~~