

# **CLAIMS EVALUATION -NOT THE SAME AS- BUILDING INSPECTION**

Building inspection is only part of claims evaluation. Effective claims evaluation requires a focused building inspection performed under the direction of qualified counsel.

When someone purchases a condominium, a very important part of the purchase is the warranty that comes with the unit. Understanding and enforcing the warranty is not a simple matter. The loss of warranty rights (especially those provided for under the Washington Condominium Act) can be catastrophic. Likewise, the failure to pursue losses which could be covered under an insurance policy can be catastrophic.

My experience tells me that **MOST CONDOMINIUMS HAVE VERY SERIOUS CONSTRUCTION FLAWS** for which recovery can be pursued successfully if claims are not lost through the passage of time or are not unwittingly released.

Reasonable condominium management practices mandate every condominium association to arrange for an evaluation of possible claims in the following instances:

1. For construction and design defects if first sale of a unit in a new complex has occurred within the preceding four years so the association does not lose implied warranties under the Washington Condominium Act (WCA); and
2. Concerning moisture intrusion so that
  - a) ever increasing damage from inevitable rot and/or possible wood destroying insect infestation can be stopped; and/or
  - b) the association's rights under its own insurance policy are not lost through the passage of time.

If an association in which you have an interest as a ***condominium owner, board member or property manager*** falls into any of the above categories it is irresponsible, if not malpractice or a breach of management and/or fiduciary responsibility, to fail to pursue all reasonable courses of action to insure that an adequate claims evaluation is performed. Other instances where claims evaluations are warranted are beyond the scope of this article.

Owners, board members and property managers who fail to meet their obligations can face personal liability. A condominium association whose buildings contain defective construction could find itself facing liability to an owner or a guest who is injured as a result of a building code violation incorporated into the building. Association board members have a responsibility to exercise reasonable care and to fulfill their fiduciary responsibilities in protecting the interests of the association which they represent. Board members are required to exercise the utmost good faith toward the interests of all owners in preserving the association's property. Property managers who fail to exercise reasonable care can be held liable in tort to those who suffer resulting damages irrespective of a contractual disclaimer of liability.

The following are suggested means of avoiding personal liability and serving your own interest, the interests of your neighbors, electorate, and/or clients:

**FOR OWNERS:** Notify your property manager in writing with a copy to at least one board member of any and all conditions in common areas which appear to you to be dangerous, suggest the possibility of faulty construction and/or which are indicative of moisture intrusion. Generally speaking, chipped paint, imperfections in drywall finish and the like do not meet this test. In the written notice politely request that the matter be addressed by a date certain and that you be notified as to what remedial action is taken. Providing a stamped return envelope can be a good idea. If no response is received, follow up politely. Remember that board members are unpaid volunteers.

**FOR PROPERTY MANAGERS:** If you have authority to investigate and remedy any condition needing correction which comes to your attention, do so and document your responsive action appropriately. Unless you are sure that your responsive action has fully resolved the problem notify all board members in writing of your advised additional course of action. If you have reason to believe that there may exist any construction deficiencies or moisture intrusion, advise the association board member(s) in writing that you recommend a focused inspection be done under the direction of counsel as part of a claims evaluation. If you represent an association where the sale of the first unit in that complex occurred less than four years before, advise the association to contact counsel for the purpose of evaluating whether the association has claims worth pursuing and advise the association that their failure to file a suit within four years of the date of the first sale will result in the loss of the right to enforce, against the condominium developer, warranties implied under the WCA. If there are moisture intrusion problems, advise the association that rot **shall** result from moisture intrusion and seek

authority from the board to seek the advise of counsel concerning insurance and investigation of the problem. Be aware that caulking could make matters worse as caulking can have the capacity to retard or mask leaks to such an extent that the consequences of moisture intrusion may not become apparent until after a claim for this condition has become barred by the passage of time. Your level of advice should take into account that you are the paid professional and that the board is made up of volunteers who probably do not have your level of expertise. The board you serve is paying for your expertise and professionalism.

**FOR BOARD MEMBERS:** If yours is an association less than four years old, make immediate arrangements for a claims evaluation which will address the issue of whether or not your complex meets the implied warranties provided for under the WCA. Seek the advice of an attorney who can demonstrate experience in condominium construction defect litigation or if you have a moisture intrusion issue, consult counsel with appropriate experience. Be prepared to provide counsel with a brief written history concerning moisture intrusion, building department records and association insurance policies. If counsel advises a building inspection, authorize it. Direct your property manager in writing to purchase a set of plans approved by the building department for the construction of your complex and the building department's records of inspections performed during the course of construction. Read the records. Make arrangements for the records to be kept in a safe place so that they will become a part of the association's permanent records and always available for reference.

Claims for breach of warranties implied under the WCA (free of defective materials, constructed according to sound construction and engineering standards, in a workmanlike manner and in compliance with all codes) are lost if suit is not commenced within the time allowed by law – in most instances within four years of the date of the sale of the first unit. Other construction related claims (often more difficult and costly to establish) may be brought within three and sometimes four years of the date such claims should have been discovered. The time for bringing a claim under an insurance policy varies but it can be as short as one year from the date when the claim should have been discovered.

In the past year, I have been contacted by at least a dozen associations that could have asserted substantial claims for faulty construction if those responsible for management had acted within the time allowed by law. The owners of units in these associations have suffered very serious losses. In some instances, I have seen claims lost which I would have valued at over 50% of the value of the affected units. I have declined offers of employment in pursuing claims against those who were

responsible for the loss of such claims. I expect that the pursuit of claims against property managers and board members may become more common in the future – and why not? Frequently building inspections had previously been performed by persons who were not qualified to evaluate the existence of claims against condominium developers or under the association’s own insurance policies.

Reliance on course of construction inspections by building departments is misplaced. Building inspections by building departments do not assure compliance with applicable building codes. Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988). In numerous instances, building department employees have testified that they only conduct spot checks and that their work is not intended to assure full compliance with building codes. Building department inspections are not intended to determine compliance with warranties implied under the WCA.

I have observed numerous instances where condominiums are constructed with serious violations of building code requirements relating to fire safety or other deficiencies. The existence of such conditions demonstrates that building department inspections are not assurances of code compliance. In one litigated case the building was approved for occupancy even though the building did not include two exists from the third story, a fire alarm system or one hour fire resistive construction, all of which had been noted in the building department’s own files. In another, the building department approved occupancy even though a required sprinkler system was not installed. In yet another case, a new 15 unit condominium complex was found to be in a state of collapse with over \$2,000,000 of decay damages four years after construction had been completed despite having passed all inspection by the building department during the course of construction.

I advise that the inspections advised in this article be done under the direction of an attorney experienced in construction litigation. Attorneys experienced in the pursuit of claims under the WCA and/or claims under insurance policies will be better qualified to assist in the selection of experts to perform inspections and to provide direction to experts with respect to the performance of inspections. Selection of an expert without assistance of counsel can result in duplication of the substantial expense of a building inspection.

Many attorneys will agree to an initial consultation with a condominium association and/or property manager without charge. You have little to lose by asking an attorney in advance of a proposed meeting to confirm in writing the following:

1. What fees, if any, will the attorney charge for an initial evaluation?
2. What is that attorney’s experience?

3. What information does the attorney request to be supplied before an initial meeting?
4. Who does the attorney suggest as possible experts to do inspections and why?

If your objective is to protect rights under an insurance policy or under the WCA, an attorney is the best choice for assisting you in achieving this objective.

**ACT NOW! Time is of the essence! Do not let your claim become time barred.**