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No. 69500-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1, LP; Continental Pacific Investments Real Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer, Appellants,

v.

Canal Station North Condominium Association, Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Washington State Supreme Court has ruled that the right to arbitration under the Washington Condominium Act (“WCA”) may not be waived, expressly or impliedly. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 805, 225 P.3d 213, 227 (2009) (citing *RCW.34.030*). In fact, this result is obvious given that the WCA states precisely that. That is, the rights conferred under the WCA “may not be varied by agreement, and rights conferred by this chapter **may not be waived.**” RCW 64.34.030 (emphasis added). It cannot be disputed that the right to WCA arbitration (RCW 64.55.100) is a right conferred by “this chapter” – i.e. the WCA.

Based on the foregoing and the fact it is indisputable controlling authority, the Court of Appeal should rule – without more – that there was no waiver of WCA arbitration here. Notwithstanding, even if the right to WCA arbitration could be impliedly waived – which it cannot – there was no such implied waiver by Appellants. The key cases on implied waiver preclude a finding of waiver here. *Townsend v. Quadrant Corp.*, 153 Wash. App. 870, 889, 224 P.3d 818, 829 (2009) (aff'd on other grounds, 173 Wash. 2d 451, 268 P.3d 917 (2012)); *Verbeek Properties v. Greenco Environmental*, 159 Wash.App.82, 246 P.3d 205 (2010). Both of these non-WCA cases held – where, unlike here, there was no absolute right to arbitration – that filing a dispositive motion did not result in a waiver of arbitration. The trial court’s Order (in its entirety) must be reversed and all claims against all parties should proceed to WCA arbitration.

II. ARGUMENT IN REPLY

A. Washington Supreme Court Has Held that Washington Condominium Arbitration Cannot Be Waived

The arbitration proceedings provided by RCW 64.55.100 were enacted after the WCA was put into effect via RCW 64.34, *et seq.* In 2009 the Washington Supreme Court looked at the relationship between RCW 64.55.100 arbitration and the originally enacted WCA. It first quoted “the current enforcement provision” of the WCA, citing RCW 64.34.100:

Except as otherwise provided in RCW 64.55.100 through 64.55.160 or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter.

Satomi Owners Ass'n v. Satomi, LLC, 167 Wash. 2d 781, 805, 225 P.3d 213, 227 (2009). The Court then held that arbitration under RCW 64.55.100 was part of the WCA:

The current enforcement provision [RCW.34.100,] incorporates the arbitration proceedings provided for in RCW 64.55.100 through 64.55.160, which were adopted by the legislature in the same bill that amended the judicial enforcement provision.

Id. Critical to the issues here, the Court held the following:

The terms of the current enforcement provision may not be varied by agreement **and the rights it confers by not be waived.**

*Id.*¹

It cannot be disputed that the RCW 64.55.100 right to arbitration under the WCA – i.e. if declarant demands an arbitration within 90 days after service of the complaint, “the parties **shall** participate in a private arbitration hearing” – is a right that “may not be waived.”² RCW 64.34.030; *Satomi*, 167 Wash. 2d at 805 (2009). Here, the Court should look no further because all arguments regarding implied waiver are irrelevant. Because it is undisputed that Appellants demanded WCA arbitration within the 90-day period required by RCW 64.55.100, the Appellants could not have waived their right to WCA arbitration.

Of course, any fair reading of the relevant statutes and legislative history compels the same conclusion as that in *Satomi*. Chapter 64.55 RCW is incorporated by reference into RCW 64.34 (the WCA). The non-waiver provision of RCW 64.34.030 applies to the arbitration provisions found in RCW 64.55.100 - .160. RCW 64.55.005(2) expressly states that “RCW 64.55.010 and 64.55.100 through 64.55.160 and 64.34.415 apply to any action that alleges breach of an implied or express warranty under chapter 64.34 RCW...” The arbitration provisions of RCW 64.55.100 - .160 are incorporated into the WCA.

¹ Citing RCW 64.34.030, which statute states, “Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived.”

² The HOA agrees and admits that RCW 64.34.030 precludes any finding of waiver as to any provision of the WCA. *Respondent’s Brief*, p. 16-17. The HOA, however, failed to inform the Court that RCW 64.34.030 applies to the right to arbitration under RCW 64.55.100, which, of course, is part of the WCA.

In 2005, the Washington Legislature enacted EHB 1848, creating Chapter 64.55 RCW. In the Bill Analysis from the Washington State House of Representatives regarding enactment of EHB 1848, it states:

The **WCA is amended** to provide for alternative dispute resolution mechanisms including arbitration, mediation, and the use of neutral experts in disputes involving alleged breaches of condominium warranties.³

It is well settled as to the effect of statutory reference:

The precepts and terms to which reference is made are to be considered and treated as if they were incorporated into and made a part of the referring act, just as completely as if they had been explicitly written therein.

Knowles v. Holly, 82 Wash. 2d 694, 700-01, 513 P.2d 18, 22 (1973).

Because RCW 64.34.030 applies to arbitrations under RCW 64.55.100, Appellants did not – and could – waive their right to arbitrate. While the foregoing is dispositive, Appellants address the HOA’s other arguments.

B. The Legislature’s Use of the Word “Shall” Makes the Right to Arbitration Absolute

The HOA argues that the word “shall” in RCW 64.55.100 does not evidence the Legislature’s intent to require WCA arbitration if timely demanded by a party to the action. Rather than rely upon any support in

³ The Bill Analysis further states that: “Once a lawsuit has been filed alleging a breach of a warranty under the WCA, several alternative dispute resolution provisions will apply. The dispute **will be referred to arbitration** if within 90 days after a lawsuit is filed any party demands arbitration.” *See, Appendix (AP) 1 – 4.*

the statute or legislative history, the HOA cites to irrelevant case law regarding waiver of a criminal defendant's right to counsel or jury trial. The HOA's cases are not relevant to an interpretation of RCW 64.55.100.⁴ The basic rules for statutory interpretation are as follows.

The court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *Erection Co. v. Dep't of Labor & Indus. of State of Wash.*, 121 Wash. 2d 513, 518-19, 852 P.2d 288, 291 (1993). The word "shall" in a statute is presumptively imperative and operates to create a duty. *Crown Cascade, Inc. v. O'Neal*, 100 Wash.2d 256, 261, 668 P.2d 585 (1983). The word "shall" in a statute, therefore, imposes a mandatory requirement unless a contrary legislative intent is apparent. *State v. Bryan*, 93 Wash. 2d 177, 183, 606 P.2d 1228, 1231 (1980).

In the foregoing vein, therefore, in *Erection Co. v. Dep't of Labor & Indus. of State of Wash.*, 121 Wash. 2d 513, 518-19, 852 P.2d 288, 291 (1993), the Supreme Court interpreted the Legislature's use of the word "shall" in RCW 49.17.140(3) as requiring a specific time period (30 days) for Department of Labor & Industries' ability to retain jurisdiction over a case.⁵ If the time period is not met, the Department loses jurisdiction and

⁴ RCW 64.55.100(1) provides: "If the declarant, an association, or a party unit owner demands an arbitration by filing such demand with the court not less than thirty and not more than ninety days after filing or service of the complaint, whichever is later, **the parties shall participate in a private arbitration hearing.**" *RCW 64.55.100 (emphasis added).*

⁵ RCW 49.17.140(3) provides: "If the director [of the Department of Labor and Industries] reassumes jurisdiction of all or any portion of the matter upon which notice of appeal has been filed with the director, any redetermination shall be completed and

must forward the case to the Board for determination. There can be no waiver of this 30-day requirement.

Here there is no support for a finding of waiver. This is especially true for a case such as this – where the HOA is arguing that Ballard Leary *implicitly* waived its right to arbitration. It should be noted that the case law relied upon by the HOA required acts of explicit waiver, i.e. a defendant voluntarily, and with consent, relinquishing rights. The HOA juxtaposes those cases with RCW 64.55.100 to argue *implicit* waiver, which is erroneous. Regardless, even if a waiver of the right to arbitration could be read into RCW 64.55.100 (which it cannot), the case law interpreting acts of waiver show that Appellants’ motion on the pleadings did not result in a waiver of the right to arbitrate.

C. A Motion on the Pleadings is Not a Motion on the Merits

1. HOA Misrepresents Appellants’ Motion

The HOA misrepresents Appellant Ballard Leary’s CR 12(b)(6) motion as “a direct challenge to the merits” in order to fit their argument that the sole action of filing this motion constitutes waiver of the right to arbitrate. *Respondent’s Brief, page 23*. The fact that Ballard Leary sought dismissal based on standing (rather than the facts giving rise to the claims) evidences that the motion was not made “on the merits.” In fact, a fair

corrective notices of assessment of penalty, citations, or revised periods of abatement completed within a period of thirty working days, which redetermination shall then become final subject to direct appeal to the board of industrial insurance appeals within fifteen working days of such redetermination with service of notice of appeal upon the director.”

reading of Appellants Ballard Leary's CR 12(b)(6) motion shows that it was a procedural motion made before any actual litigation occurred.

Appellant Ballard Leary's CR 12(b)(6) motion argued as follows:

Under Rule 12(b)(6), prior to answering, defendants may move to dismiss claims in a complaint on the basis that they fail to state claims upon which relief can be granted. This eradicates complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy. *McCurry v. Chevy Chase Bank, FSB*, 169 Wash. 2d 96, 102, 233 P.3d 861, 863 (2010).

In discussing the purpose for Rule 12(b)(6), 3A Teglund, Washington Practice, Rules Practice (2006 Ed.) at page 264 states: "The rule offers a quick and convenient way for the defendant to avoid a claim when it is clear that the plaintiff will never prevail regardless of the facts proven at trial. Typical examples are cases in which the plaintiff's claim is clearly barred by the statute of limitations, or the plaintiff is asserting a cause of action that is not recognized in this state, or the defendant has some other iron-clad defense as a matter of law."...

The HOA lacks representative standing to assert a CPA [and misrepresentation] claim because such a matter is not one that is "affecting the condominium" as that phrase is intended by [RCW 64.34.304(1)(d)].⁶

The above-quoted portions of Ballard Leary's motion demonstrate that Appellants sought to dismiss the CPA and misrepresentations claims on the **sole** basis that the HOA did not have standing to assert those claims. Ballard Leary's motion did not argue the HOA's inability to prove

⁶ CP 443 – 444.

any of the factors of these two causes of action, did the motion argue any factual defenses to the claims.

A motion to dismiss based on a failure to state a claim accepts as true for purposes of the motion all of the factual allegations in the complaint or claim, and the motion may be granted only if it appears that the complaining party can prove no set of facts in support of his claim which would entitle him to relief. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 157 P.3d 831 (2007). Thus, the filing of a CR 12(b)(6) motion is not a motion on the merits because it assumes that all facts in Plaintiff's Complaint are true. This is in accord with the actual legal relief sought, which relied upon the argument that without legal standing, the HOA never could prevail on its CPA and misrepresentation claims.

Appellants' motion also sought to dismiss the HOA's "secondary claims" because they are only actionable if and when the HOA prevails on its liability claim. Plaintiffs file such secondary claims as a means to discover assets and financial records that are otherwise not discoverable. Ballard Leary sought to dismiss these claims as unrelated to the liability issues or, in the alternative, to segregate the claims to first allow arbitration on the liability issues and thereby preclude a discovery fishing expedition and harassment of Appellants.

Appellant Ballard Leary's motion did not argue any factual defenses to the secondary claims, arguing only that the HOA was not entitled to any relief for improper winding up or disgorgement of fraudulent transfers until a finding of liability could be made. Appellant

Ballard Leary's 12(b)(6) motion sought to limit the issues to be presented at arbitration, consistent with the RCW 64.55.100 right to arbitrate.

2. Appellant Was Correct to Ask The Trial Court (Not the Arbitrator) to Dismiss Claims for Lack of Standing

The HOA's argument that the arbitrator – and not the Superior Court – should have decided Ballard Leary's CR 12(b)(6) motion is wrong for the following reasons. *First*, Ballard Leary was correct to file the 12(b)(6) motion with the trial court (and not with the arbitrator) because issues such as standing go to the heart of whether a claim is actionable – and, thereby, arbitrable – in the first place. Only the trial court can make such determinations. This is akin to a trial court deciding whether a dispute is arbitrable under the terms of a contract where a party is challenging the validity of the contract. If no contract exists giving rise to the arbitration, then there are no arbitrable claims. Here, if a party does not have standing to assert a claim, then those claims cannot be submitted to WCA arbitration. When a party specifically challenges the validity of arbitration provisions within a contract, a court, rather than an arbitrator, must decide the threshold question of the enforceability of the arbitration provisions. *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 107 Fair Empl. Prac. Cas. (BNA) 254 (9th Cir. 2009). *See, also, Silver v. Brown*, 678 F. Supp. 2d 1187 (D.N.M. 2009) (As a general rule courts, rather than arbitrators, determine issues of substantive arbitrability). Thus, when a party challenges the ability of its opponent to assert a claim that would be

– if the claim was viable – subject to arbitration, the court (and not the arbitrator) should decide that issue.

Second, the arbitrator would not have jurisdiction to consider the claims for lack of standing. “If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.” *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986); *See, also Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wash. 2d 542, 580, 958 P.2d 962, 981 (1998) (“Absent standing, we are without subject matter jurisdiction to entertain the taking claim.”) If a plaintiff does not have standing to assert certain claims, then the Superior Court – let alone an arbitrator – does not have jurisdiction to oversee that claim. Thus, a determination by the Court as to standing is always proper.

Third, while a trial court decision on standing would be binding on an arbitrator, such a decision by an arbitrator would not be binding on the court. If Appellants filed the CR 12(b)(6) motion with the arbitrator and it was granted and the HOA later demanded trial *de novo*, the arbitrator’s ruling dismissing the claims would not be binding on the trial court. *See, ACF Property Management, Inc. v. Chaussee* 69 Wash.App. 913, 850 P.2d 1387 (1993). Thus, the parties would need to litigate that issue again at the trial court level. Ballard Leary’s 12(b)(6) motion sought to limit the issues to be presented **at arbitration** and any subsequent trial *de novo*.

Fourth, there is nothing contained in RCW 64.55 prohibiting a party from filing a motion on the pleadings prior to demanding arbitration.

There similarly is no requirement in the statute that limits a party's freedom to act before demanding arbitration.

Finally, the Washington Supreme Court has held that the filing of a motion for summary judgment immediately prior to demanding arbitration does not evidence intent to waive arbitration. *Townsend v. Quadrant Corp.*, 153 Wash. App. 870, 889, 224 P.3d 818, 829 (2009) *aff'd* on other grounds, 173 Wash. 2d 451, 268 P.3d 917 (2012).

3. The HOA's Efforts to Distinguish *Townsend* Fail

The HOA argues that *Townsend* is distinguishable because *Townsend* turned on "a factual determination of whether the filing of the motion [for summary judgment] evidenced an intent to waive arbitration." *Respondent's Brief*, page 5. The HOA argues that even though the summary judgment motion at issue in *Townsend* did not result in a waiver of arbitration, Appellants' 12(b)(6) motion is so factually distinguished from the *Townsend* motion that the *Townsend* rule does not apply.⁷ This is false, and a comparison of Ballard Leary's motion to the summary judgment motion filed by Weyerhaeuser and WRECO in *Townsend* proves the HOA is wrong.⁸

⁷ The HOA's Responsive Brief also argues that the use of the word "jury confusion" – which occurred once in Ballard Leary's reply to its CR 12(b)(6) motion evidences an intent to waive. The HOA fails to mention that Ballard Leary's 12(b)(6) motion referred specifically to the "trier of fact" throughout the motion. It is obvious that Ballard Leary was simply referring to "any" trier of fact and use of the phrase "jury confusion" is **not** "inconsistent with any other intent but to forego arbitration." *Civil Service Com'n of City of Kelso v. City of Kelso*, 137 Wash.2d 166, 969 P.2d 474 (1999).

⁸ The HOA's Responsive Brief argues that the summary judgment motion filed by Weyerhaeuser/WRECO is so factually distinguishable from the CR 12(b)(6) motion filed by Appellants that this court must find the Appellants' motion results in waiver of

Weyerhaeuser and WRECO filed a motion for summary judgment before moving to compel arbitration. Weyerhaeuser and WRECO's motion for summary judgment made the following arguments:

- “Should the Court dismiss all claims against Weyerhaeuser and WRECO...when neither of the companies has any connection with this case other than a parent-subsidiary relationship with Quadrant, when plaintiffs have failed to allege any grounds upon which Weyerhaeuser or WRECO can be held liable for Quadrant's actions, **and when there is no evidence of any wrongdoing by Weyerhaeuser or WRECO?**” *App. 2, p. 3; ll. 4-8 (emphasis added)*.
- “[T]here are no grounds to pierce the corporate veil and there is no basis to hold WRECO and Weyerhaeuser liable based on their corporate relationship with Quadrant.” *Id., p. 7, ll. 9-11*.
- “**Because the plaintiffs cannot produce any evidence in support of the elements of any of their claims against WRECO and Weyerhaeuser,** the Court should grant summary judgment and dismiss the plaintiffs' claims...with prejudice.” *Id., p. 7, ll. 19-22 (emphasis added)*.
- “[B]ecause they **cannot point to any representations of WRECO or Weyerhaeuser,** the plaintiffs cannot establish...that any alleged

arbitration. Based on this argument, Appellants obtained the underlying summary judgment motion filed by Weyerhaeuser/WRECO on January 11, 2008 in the trial court matter *Townsend, et ux v. Quadrant, Weyerhaeuser Real Estate Company and Weyerhaeuser Company* (Docket No. 12, King County Superior Court No. 07-2-39341-2 SEA) for this Court to compare the two motions and to disprove the HOA's arguments. The summary judgment motion is attached as App. 48 - 59, and as Exhibit 1 to the Declaration of Jennifer M. Smitrovich, filed herewith. Appellants respectfully request that this court review the *Weyerhaeuser/WRECO* motion (as it directly rebuts the HOA's allegations) and it should be accepted under RAP 10.4(c) or RAP 1.2(c), RAP 18.8(a) and because this Court can take judicial notice that the motion attached as App. 48 - 59 served the basis for the appeal in *Townsend v. Quadrant Corp.*, 153 Wash. App. 870, 889, 224 P.3d 818, 829 (2009) aff'd on other grounds, 173 Wash. 2d 451, 268 P.3d 917 (2012).

representation...was the proximate cause of damages.” *Id.*, p. 9, ll. 6 – 11 (*emphasis added*).

- “The plaintiffs **can point to no ‘unfair or deceptive act’ allegedly performed by either WRECO or Weyerhaeuser...**” *Id.*, p. 10, ll. 27-28; p. 11, ll. 1 (*emphasis added*).

The WRECO/Weyerhaeuser motion argued that the plaintiffs could not prove the specific facts necessary to sustain the causes of action in their Complaint. The summary judgment in *Townsend* obviously went to the merits, yet the Supreme Court found there was no waiver resulting from the motion! By contrast, Appellant Ballard Leary’s motion did not argue about any of the factual deficiencies in the HOA’s Complaint. *CP 439-452*. Appellants’ motion was procedural (i.e. standing and timing). Thus, if the summary judgment motion in *Townsend* did not result in waiver, there could be no waiver here. *Cf.*, *CP 439-452 to App. 48-59*.

D. The HOA Misinterprets the Standard of Review – All Issues Related to Arbitrability Are Reviewed De Novo

The HOA concedes that questions of arbitrability are reviewed *de novo*. *Respondent’s Brief*, p. 13-14. However, the HOA alleges that two of Ballard Leary’s arguments – relating to judicial admissions and equitable estoppel – should be reviewed under an abuse of discretion standard. The HOA claims that these arguments were raised for the first time as part of Ballard Leary’s motion for reconsideration, and relies upon *River House Dev. Inc. v. Integrus Architecture*, P.S., 167 Wash. App. 221, 230-31, 272 P.3d 289, 294 (2012) to argue that such arguments must be reviewed under an abuse of discretion standard. The HOA is incorrect for two reasons.

First, Appellant Ballard Leary raised the subject arguments prior to its motion for reconsideration. Ballard Leary argued, in its Opposition to the HOA's motion to strike the arbitration demand, as follows:

[T]he HOA engages in almost obnoxious hypocrisy when it asserts certain defendants are alter-egos of the declarant, and seeks to hold them liable as declarants, then – in the same breath – asserts they are not declarants and, thus have no WCA right to arbitration. What?! The HOA has brought claims against declarant defendant entities alleging that they are liable to the HOA as alter-egos to the declarant, under the same WCA causes of action as the declarant, based on the same activity of the declarant. So, on the one hand, the HOA desires that the declarant defendants be considered alter egos of the declarant and share in the declarant's liability, including liability under the WCA, but on the other hand, the HOA wants to deny declarant defendants the right to WCA arbitration. The HOA cannot have it both ways.⁹

This challenge directly relates to the judicial admissions and equitable estoppel argument in Ballard Leary's motion for reconsideration. It is disingenuous for the HOA to allege that the arguments giving rise to Ballard Leary's contention that all defendants should be part of the WCA arbitration were made for the first time in the motion for reconsideration.

Second, the issue of who is a proper party to WCA arbitration is so necessarily intertwined with "questions of arbitrability" that it cannot be parsed out under a different standard of review than the other issues raised by Ballard Leary's appeal. All issues related to arbitrability should be

⁹ CP 829.

reviewed under a *de novo* standard. See, e.g. *Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 44, 17 P.3d 1266, 1268 (2001); *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002).

The *River House* case cited by the HOA bears no resemblance to the situation here. River House challenged the trial court's ability to determine whether the court or the arbitrator should decide the issue of waiver of the right to arbitration. However, this challenge was made **for the first time** in the motion for reconsideration. As such, the Court of Appeals (Division 3) decided that the standard of review for the motion for reconsideration should be abuse of discretion. 167 Wash. App. 221, 230-31, 272 P.3d 289, 294 (2012). This is not the situation we have here.

Here, Appellant Ballard Leary challenged – in its initial opposition briefing – the HOA's contention that the “Related Entities” and the individual Board members were not subject to arbitration. It was not raised for the first time on the motion for reconsideration but, instead, it was raised at the outset in direct opposition to the HOA's motion to strike the arbitration demand. All issues should be reviewed *de novo*.

E. Case Law Cited by the HOA is Inapposite

The HOA's reliance upon *Otis Housing Ass'n v. Ha*, 165 Wash.2d 582, 588, 201 P.3d 309 (2009) is wrong.¹⁰ In *Otis*, the Otis Housing

¹⁰ The HOA also alleges that under *Otis*, Appellants were required to inform the trial court and other parties of their intent to arbitrate under the WCA (prior to and/or as part of the CR 12(b)(6) motion). This is false. There is no requirement of “pre-arbitration” notice. All that is required is for Ballard Leary to demand WCA arbitration within 90 days of service of the Complaint, which Ballard Leary unquestionably did.

Authority (OHA) entered into a lease with a purchase option – which purchase option contained an arbitration clause – with Ha to lease a hotel. The issue before the trial court was whether OHA had exercised the purchase option. This was fully litigated, and OHA never sought to exercise the arbitration clause. The trial court found that OHA’s purchase option had expired, and entered final judgment in favor of Ha and restored Ha’s possession of the property. Only then did OHA demand arbitration and move to compel, and the trial court denied the motion holding that OHA had “materially failed to timely exercise and/or close the Option to Purchase” and that the “right to seek arbitration under the Option to Purchase no longer exists and has lapsed.” *Otis Hous. Ass’n, Inc. v. Ha*, 165 Wash. 2d 582, 585-86, 201 P.3d 309, 310-11 (2009).

Clearly, the facts in *Otis* are distinguishable from this case. In *Otis*, OHA fully litigated the merits of the dispute. *Id.* After losing on the merits, only then did OHA seek to invoke the arbitration clause contained in the purchase option – which purchase option the trial court held had expired! In other words, OHA litigated the entire merits of the dispute in the trial court, lost, and then wanted a second bite at the apple with an arbitrator on all the same issues already decided by the trial court. Of course the Court found waiver!

Here, Appellants never argued the merits of any cause of action filed by the HOA. *CP 439-452*. Appellants did not have the entire case decided by the trial court, and then seek a second bite at the apple. Critically, unlike in *Otis*, Appellants’ right to arbitrate – under RCW

64.55.100 – still existed at the time that Ballard Leary filed its arbitration demand (because arbitration was demanded within 90 days of service of the Complaint). The facts in *Otis* bear no resemblance to the facts here.

Finally, the HOA makes no attempt – because it cannot – to distinguish *Verbeek Properties v. Greenco Environmental*, 159 Wash.App.82, 246 P.3d 205 (2010). In *Verbeek*, the Court held that a contractual arbitration clause was not waived by a party who filed a motion to dismiss a lien and then filed an arbitration demand. The *Verbeek* court noted that Washington courts “apply a strong presumption in favor of arbitration.” The *Verbeek* court did not agree that the plaintiffs had waived their right to demand arbitration by (1) failing to initiate arbitration in accordance with RCW 7.04A (Uniform Arbitration Act) or (2) by filing their initial motion to dismiss the lien prior to demanding arbitration.

Like *Verbeek*, Appellant Ballard Leary’s action of filing a motion on the pleadings prior to compelling arbitration is not a waiver of the right to arbitrate. Indeed, Ballard Leary took no other action in the Superior Court prior to filing its CR 12(b)(6) motion. Ballard Leary did not (1) request any discovery of any other party; (2) answer any discovery; (3) request any depositions; (4) conduct any expert site investigations; (5) file any dispositive motions; or (6) even file an Answer.¹¹

¹¹ The HOA argues that this Court cannot consider the inaction taken by Ballard Leary in deciding this issue because those matters are not in the record. This is a circuitous argument. There would be no record of Ballard Leary conducting discovery, taking depositions, or receiving permission for its expert to perform a site inspection because

F. HOA's Arguments Re: Fee Shifting Are Wrong

The HOA argues that RCW 64.34.455 already provides a mechanism for the award of fees in a WCA claim, but fails to note the differences. RCW 64.34.455 does not provide for the payment of attorney's fees if an arbitration result is *de novo*'ed and the party requesting the de novo trial fails to better their position at trial. Further, comparing the fee shifting mechanism in RCW 64.34.455 to the attorney fee clause in RCW 64.55.100(5) shows another marked difference: the trial court has discretion to award fees under RCW 64.34.455, but an award of fees under RCW 64.55.100(5) is mandatory.¹²

This fee shifting mechanism results in substantial risk to the plaintiff of paying monies to the defense – a risk that did not exist prior to

Ballard Leary did not do any of those things. The absence of a record is precisely the point. This is further evidenced by the fact that the HOA cannot (and does not) point to any other action by the Appellants, such as the taking of discovery or conducting depositions, that would support their waiver argument. *See, Declaration of Jennifer M. Smitrovich, ¶ 3. Moreover, the HOA has waived their right to dispute the Appellants' assertion that no other litigation activity or discovery was conducted.* Appellants made these assertions both in Appellants' Motion for Discretionary Review and at oral argument on January 25, 2013 of the motion, and the HOA never objected nor otherwise disputed the assertions (because they could not, because the assertions are 100% true).

¹² Compare RCW 64.34.455, which provides: "The court, in an appropriate case, *may award* reasonable attorney's fees to the prevailing party" to RCW 64.55.100(5), which provides: "If the judgment for damages, not including awards of fees and costs, in the trial de novo is not more favorable to the appealing party than the damages awarded by the arbitrator, not including awards of fees and costs, *the appealing party shall pay the nonappealing adverse party's costs and fees* incurred after the filing of the appeal, including reasonable attorneys' fees so incurred" (emphasis added).

the enactment of RCW 64.55.¹³ The loss of the right to arbitration is prejudicial to Ballard Leary (i.e. loss of right to fees and a resolution tool).

The HOA further argues that there is no support for Ballard Leary's argument regarding the importance of the fee shifting mechanism of RCW 64.55.100(5). This, too, is false. Indeed, appointed members of the Washington Legislative Study Committee on Water Penetration of Condominium authored a law review article regarding the enactment of RCW 64.55 et. seq., which specifically stated:

[The] 2005 amendments [to the WCA] are designed to increase the confidence of homeowners, developers, and insurers by:...

5. Promoting early and cost effective settlement of disputes by providing standards for arbitration and mediation as alternatives to litigation; and

6. Promoting earlier settlement of such suits by creating an attorney fee-shifting mechanism...¹⁴

¹³ Indeed, it is widely recognized that the provision of RCW 64.34.455 granting prevailing party attorney's fees in WCA cases "became a large incentive for...HOA contingent fee lawyers to pursue HOA litigation, and in many cases the contingent fee became a larger factor in settlement discussions...Builders faced litigation in which the HOA experts contended the project was not built in accordance with sound construction engineering standards, whatever those might be, and faced the risk of paying substantial contingent fees to the HOA lawyers." Mark F. O'Donnell & David E. Chawes, Improving the Construction and Litigation Resolution Process: The 2005 Amendments to the Washington Condominium Act Are A Win-Win for Homeowners and Developers, 29 Seattle U. L. Rev. 515, 520-21 (2006). See, App. 24 – 25. Thus, RCW 64.55.100(5) was enacted to help level the playing field for WCA disputes.

¹⁴ *Id.* at p. 516, 517 (emphasis added). See, App. 21 - 22. The article also notes that the Washington Legislative Study Committee on Water Penetration of Condominiums also recommended that a party to a WCA lawsuit "could elect mandatory arbitration as a **matter of right** within ninety days after service of a complaint alleging breach of express or implied warranties..." *Id.* (emphasis added).

Nonetheless, the importance of the fee shifting provision of RCW 64.55.100(5) is axiomatic, as it makes common sense that a plaintiff would not want to risk paying the defense fees if a plaintiff *de novo*'ed a WCA arbitration result. This is precisely why the HOA, here, has fought so hard to keep these claims out of WCA arbitration.

G. The “Related Entities” are Subject to Arbitration

1. RCW 64.55.150 Shows that Other Parties May Be Compelled to Participate in WCA Arbitration

While the HOA is correct that RCW 64.55.100 provides that an HOA or the declarant may initiate WCA arbitration under RCW 64.55.100, that does not mean that the arbitration is limited to only those parties. The HOA’s argument is wrong because RCW 64.55.150 provides that subcontractors and suppliers may be compelled into WCA arbitration if demanded by any party. If subcontractors and suppliers can be brought into WCA arbitration, then it makes no sense that “Related Entities” such as the Declarant’s alleged partners and member corporations, alleged “alter egos,” and alleged agents would be excluded from arbitration.

There can be no question that the HOA has alleged claims against the “Related Entities” under the WCA. The HOA has sought to enforce the WCA against all defendants – alleging breach of the WCA implied and express warranties and misrepresentation in the Public Offering Statement. The fact that the HOA is seeking to assert the WCA against all defendants means that all defendants are entitled to arbitration of these claims.

2. Equitable Estoppel/Judicial Admissions Are Enforceable against the HOA

The HOA attempts to evade the effect of its pleadings by arguing that the three factor test of equitable estoppel does not apply here. Equitable estoppel requires the party asserting estoppel to establish the following elements: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party in reasonable reliance upon such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *See, e.g. Peterson v. Groves*, 111 Wash. App. 306, 44 P.3d 894 (Div. 1 2002).

The HOA argues that the second and third factors of equitable estoppel are not present because (a) Ballard Leary did not “rely upon” the statements in the HOA’s Complaint and (b) there is no injury to Ballard Leary. These arguments are wrong because the HOA asserted WCA claims (and other claims that seek the same relief as provided against the WCA) against all Appellants. In *reliance* upon the HOA’s Complaint, the Appellants filed and served a demand for arbitration under RCW 64.55.100 to move the WCA (and related claims) into arbitration. Had the HOA not asserted WCA claims (and other claims seeking the same damage as under the WCA) against the “Related Entities” and individuals, then they would not have demanded arbitration. The arbitration demand by the Related Entities and individuals was based on the WCA allegations against them made in the HOA’s Complaint.

Of course there is *prejudice* (an injury) to the “Related Entities” and the declarant-appointed Board members based on the HOA’s contrary position of asserting WCA claims against them, yet now denying that they are entitled to the right to arbitration under the WCA. In essence, the HOA is seeking to use the WCA as a “sword” against these defendants but, at the same time, denying them the “shield” of the arbitration right provided in the WCA. As set forth herein, the non-statutory declarant defendants would benefit from the WCA arbitration, as it promotes early resolution and allows them to seek attorney’s fees against the HOA (if the HOA were to *de novo* the arbitration result). Losing the right to arbitration is prejudicial. Thus, all three factors of equitable estoppel are met here, and all the Appellants have the right to assert their right to arbitration under the WCA.

3. It is Well Settled That A Party Cannot Have It Both Ways, And Is Bound By Any Benefits That Flow To A Party By Way of The Opposing Party’s Allegations

The issue presented here is directly analogous to the situation where a party seeks prevailing party attorney fees where no such right exists. The mere assertion of such a right estops that party from denying the right, and allows the opposing party to obtain its attorney fees (even though such a right did not originally exist). In other words, a party cannot have it both ways. *See, e.g. Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wash. App. 188, 196-97, 692 P.2d 867, 872 (1984) (awarding attorney fees to party defending existence of a contract where

plaintiff asserted fee claim based on non-existent contract). As such, where there is a specific allegation against a defendant, that defendant is entitled to any benefits that bilaterally apply to that allegation. Here, all defendants against whom WCA claims (and claims seeking similar damages) are asserted are entitled to WCA arbitration.¹⁵

Finally, the HOA's argument that they are not bound by equitable estoppel or the judicial admissions in their Complaint must be rejected because it is in derogation of the long-standing Washington precedent, which holds a party to the representations made in a pleading. "The pleading on which a party goes to trial is the only one on which he places his defense or cause of action, and he is bound by its admissions." *Smith v. Saulsberry*, 157 Wash. 270, 275-76, 288 P. 927, 930 (1930). "The general rule is that statements of fact in a party's pleadings may be used against him as evidence of those facts." *Id.* These sentiments underscore the fundamental reason why the HOA's claims against the "Related Entities" and individual Board members must be subject to WCA arbitration. The HOA cannot make WCA claims against all Appellants and then deny some of them all the benefits and protections of the WCA.

4. HOA Concedes that Claims Seeking Same Relief as Implied Warranty Are Subject to WCA Arbitration.

¹⁵ The HOA alleges that the defendants denied the relevant allegations in the HOA's Complaint, and this somehow bars them from asserting WCA arbitration rights. Defendants do not need to agree with the HOA's allegations, however, to afford themselves the benefits that arise from the claims asserted. See, *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wash. App. 188, 196-97, 692 P.2d 867, 872 (1984).

The HOA concedes that claims that seek the same relief as the HOA's implied warranty claims "unquestionably" would be subject to arbitration. Thus, by the HOA's admission, the claims against the declarant-appointed Board members (Guincher and Bowzer) for breach of fiduciary duty and violation of the CPA also are subject to WCA arbitration. Further, the HOA alleges that the Board members are "agents" of the Declarant. Just as subcontractors and suppliers – entities that contract with a declarant – are subject to WCA arbitration under RCW 64.55.150, so too should "agents" or "affiliates" or "alter-egos" of the Declarant be subject to arbitration.

Not only does this comport with the Legislature's intent – as evidenced by RCW 64.55.005 and 64.55.150, but it makes practical sense. That is, it makes no sense that the right to WCA arbitration is so limited that it could be erased by the HOA simply adding certain claims and/or certain parties to defeat the right, even though all the damages sought are duplicative of what the WCA provides. The WCA right to arbitration must extend to any party against whom WCA damages are sought. Otherwise, if the claims and parties were split between WCA arbitration and Superior Court litigation, it could lead to multiple duplicative recoveries for the HOA for the same alleged defects.

H. The Manufacturer Defendants – Masco, Dahl Brothers and Uponor – are Subject to Mandatory Arbitration

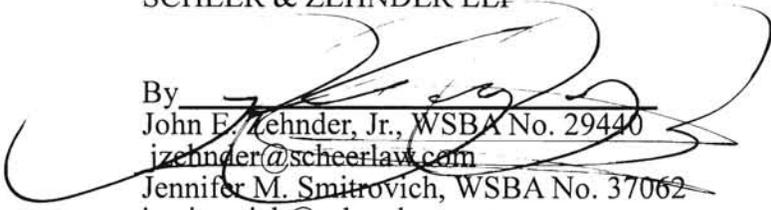
The HOA misinterprets RCW 64.55.150 as allowing only the HOA to compel the manufacturer defendants into WCA arbitration. RCW

64.55.150 does not state that only the party who previously asserted a claim against a supplier has the right to compel that party to WCA arbitration. Rather, RCW 64.55.150 states that “any subcontractor or supplier against whom such party has a legal claim and whose work or performance on the building in question becomes an issue in the arbitration” may be compelled into the arbitration. Here, the HOA has made allegations against the Appellants that implicate the manufacturer defendants’ work. Thus, Appellants have a claim against manufacturers based on the HOA’s allegations. Under RCW 64.55.150, Ballard Leary can – and did – compel the manufacturer defendants into WCA arbitration. The HOA’s argument that Ballard Leary’s second Notice regarding the Demand for Arbitration did not include a demand for the manufacturer defendants to participate in arbitration is false. By the plain terms of the Notice, “all parties” and “all claims” were compelled into arbitration. *CP 719-721*. To date, none of the manufacturer defendants filed an objection at the appellate level to their participation in WCA arbitration.

For the all foregoing reasons, this Court should rule in favor of the Appellants on all issues presented herein.

DATED this 19th day of June 2013.

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APPENDIX

<u>Appendix</u>	<u>Description</u>
App. 1-4	Bill Analysis: Engrossed House Bill 1848, February 15, 2005
App. 5-19	Washington Session Laws, Chapter 456 [Engrossed House Bill 1848]
App. 20-47	Mark F. O'Donnell & David E. Chawes, <u>Improving the Construction and Litigation Resolution Process: The 2005 Amendments to the Washington Condominium Act Are A Win-Win for Homeowners and Developers</u> , 29 Seattle U. L. Rev. 515, 520-21 (2006)
App. 48-59	Summary judgment motion filed by Defendants Weyerhaeuser/WRECO on January 11, 2008 in the trial court matter <u>Townsend, et ux v. Quadrant, Weyerhaeuser Real Estate Company and Weyerhaeuser Company</u> (Docket No. 12, King County Superior Court No. 07-2-39341-2 SEA)

Judiciary Committee

HB 1848

Title: An act relating to managing construction defect disputes involving multiunit residential buildings.

Brief Description: Addressing construction defect disputes involving multiunit residential buildings.

Sponsors: Representatives Springer, Tom, Lantz, Priest, Hunter, Jarrett, Clibborn, Serben, Fromhold, Rodne, Williams, Flannigan, Kessler, O'Brien and Simpson.

Brief Summary of Bill

- Requires course-of-construction inspections of the building enclosure of any multi-unit residential building, including condominium, specifically for water penetration around windows and more generally for compliance with the building's design documents;
- Allows any party in a condominium warranty dispute to demand arbitration after a lawsuit has been filed;
- Requires mediation and allows the use of neutral experts in all condominium warranty disputes, whether in a trial or arbitration;
- Allows any party in such a condominium dispute to make an offer of judgment which may result in the award of reasonable attorney fees to one party or the other depending on the ultimate outcome of the dispute in arbitration or trial; and
- Provides for a trial de novo upon appeal of an arbitration award in any condominium warranty dispute and for the allocation of fees and costs in the arbitration or trial.

Hearing Date: 2/15/05

Staff: Bill Perry (786-7123).

Background:

The Washington Condominium Act (WCA) controls the creation, construction, sale, financing, management, and termination of condominiums.

A condominium consists of real property that has individually owned units and also has commonly held elements in which all the individual unit owners have an undivided common

interest. A condominium may be created for any of a number of purposes, including residential use. A condominium is created by the recording of a "declaration." The person creating a condominium is referred to as the "declarant." A condominium may be created at the time of the construction of a new condominium building, or a condominium may be created by the conversion of an existing building, such as an existing apartment building.

The WCA also creates specific rights and responsibilities. The WCA creates implied warranties and authorizes the use of express warranties regarding the quality of materials and construction in a condominium. The WCA gives certain rights to owners and their associations regarding these warranties.

Express warranties are assertions that are made by the declarant with respect to a condominium and that are relied upon by a buyer.

Implied warranties are statutorily created in the WCA. Implied warranties by the seller of a condominium include warranties of quality that the units and common areas are:

- suitable for the ordinary uses of real estate of that type;
- free from defective materials;
- built in accordance with sound engineering and construction standards;
- built in a workmanlike manner; and
- built in compliance with applicable laws.

The WCA provides that any right or obligation under the WCA is enforceable by judicial proceeding. In a 2001 decision, Marina Cove Condominium Owners Association v. Isabella Estates, the Washington State Court of Appeals held that binding arbitration clauses in condominium agreements are unenforceable under the WCA. The court held that the WCA does not authorize parties to agree to binding arbitration that prevents an appeal to a judicial process.

As part of condominium legislation passed in 2004, a Condominium Study Committee was created to look at two issues related to condominiums: (1) the use of independent third-party inspections during the construction of condominiums in order to reduce water penetration problems; and (2) the use of alternative dispute resolution procedures in condominium cases.

The Condominium Study Committee delivered its report to the Legislature at the beginning of the 2005 legislative session.

Summary of Bill:

Course-of-construction inspections are required for the building enclosures of all multi-unit residential buildings.

The WCA is amended to provide for alternative dispute resolution mechanisms including arbitration, mediation, and the use of neutral experts in disputes involving alleged breaches of condominium warranties.

INSPECTIONS.

The building enclosures of a multi-unit residential building for which a building permit is issued on or after July 1, 2005, must be inspected during initial construction or during rehabilitation work. The inspection must include a check for water penetration problems around the windows of the building and must also include ascertaining whether the construction is being done in



accordance with building enclosure design documents. A building department may not issue a certificate of occupancy until the inspector has filed a letter indicating the required inspections have been performed.

"Multi-unit residential buildings" include condominiums and other residential buildings of more than two units. Hotels, motels, dormitories, care facilities, and floating homes are excluded, as are single ownership residential buildings with covenants preventing conversion to condominium status for at least 10 years.

"Building enclosures" are those portions of a building that separate interior and exterior environments from each other and also include balconies, decks, chimneys, garages, and other structures that interface with the building.

Design documents for the building enclosure must be submitted by an applicant for a building permit before construction starts. These documents must contain sufficient detail to allow construction of the enclosure. The documents must be prepared by or under the direction of an architect or engineer. The building department has no duty to review the documents.

Inspections must be done by a licensed architect or engineer or other person with verifiable training and experience in building enclosure design and construction. The inspector may but need not be the person who prepares the design documents or who is the architect or engineer of record on the building project, but the inspector may not be a person who otherwise has a monetary interest in the project. The inspector has no liability for the inspection to anyone other than the project developer. No evidentiary presumption is created regarding the use of an inspector's report or testimony in any arbitration or trial.

ALTERNATIVE DISPUTE RESOLUTION.

Once a lawsuit has been filed alleging a breach of a warranty under the WCA, several alternative dispute resolution provisions will apply.

The dispute will be referred to arbitration if within 90 days after a lawsuit is filed any party demands arbitration. Whether or not arbitration is demanded, mediation is required, and whether or not arbitration is demanded, either party may request the appointment of a neutral expert. Supreme Court rules will control the procedures for the use of any of these alternative resolution methods, including procedures for joining third parties in an arbitration. If the case is referred to arbitration, any party may appeal the arbitration award and demand a trial de novo, including demanding a jury trial. Whether the dispute is in arbitration or trial, within 60 days after the mandatory mediation, any party may make an offer of judgment.

- **Arbitration.** Any party may demand arbitration within 90 days after a lawsuit is filed. Unless the parties agree otherwise, one arbitrator will hear any claim of \$1,000,000 or less and three will hear larger claims. Unless the parties agree otherwise, the court will appoint all arbitrators. The party demanding arbitration must advance the arbitrator's fees. After an arbitration award, the non-prevailing party must pay the fees in cases involving condos built after July 1, 2005. In cases involving earlier built-condos, the arbitrator's fees continue to be the responsibility of the party demanding arbitration.
- **Mediation.** Mediation is mandatory in all cases. Unless the parties agree otherwise, the court or arbitrator will appoint the mediator. The parties and their experts are required to meet and to attempt to resolve or narrow the scope of their dispute. Mediation ends

whenever one party notifies the other that mediation is terminated. In arbitrations, the party demanding arbitration must advance the fees of the mediator. In trials, the court will decide who advances the fees. After an arbitration award or a court judgment, the non-prevailing party must pay the fees in cases involving condos built after July 1, 2005. In cases involving earlier-built condos, the mediator's fees continue to be the responsibility of the party demanding arbitration, or if arbitration has not been demanded, the court will determine responsibility.

- **Neutral Expert.** Once the mandatory mediation is terminated, any party to the arbitration or trial may request the appointment of a neutral expert. The court or arbitrator decides whether or not an appointment will be made. A neutral expert must be a licensed architect or engineer with suitable experience and training. The court or arbitrator is to determine the scope of the expert's duties which, unless the parties agree otherwise, are not to include finding the amount of damages to be awarded or the cost of repairs. A neutral expert is not liable to the parties for his work as an expert. No presumption is created regarding a neutral expert's findings. The party who requests appointment of an expert is responsible for advancing the expert's fees. After an arbitration award or a court judgment, the non-prevailing party must pay the fees in cases involving condos built after July 1, 2005. In cases involving earlier-built condos, the expert's fees continue to be the responsibility of the party requesting the expert.
- **Trial de Novo.** Within 20 days after an arbitration award, any party may appeal the award and demand a trial de novo. If the judgment of the trial de novo is not more favorable to the appealing party than was the arbitration award, the appealing party must pay the other parties' costs and fees, including reasonable attorney fees, incurred after the filing of the appeal.
- **Offer of Judgment.** Within 60 days after the completion of mediation, any party may make an offer of judgment. The offer must include a demonstration of the ability to pay damages as well as any required costs and fees. If the claimant accepts the defendant's offer, the claimant is deemed the prevailing party and therefore entitled to recover not only damages but also costs and fees, including reasonable attorney fees. If an offer is not accepted and the final judgment is not more favorable to the non-accepting party, then the party making the offer is deemed the prevailing party. If an offer is not accepted and the final judgment is more favorable to the non-accepting party, then the court or arbitrator will determine who the prevailing party is. No costs and fees awarded against condominium owners pursuant to the offer of judgment provisions may exceed five percent of the assessed value of the condominium.
- **Application Dates.** The alternative dispute resolution provisions apply only to lawsuits filed on or after July 1, 2005.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect on July 1, 2005.

(7) All recorded tapes of testimony produced by closed-circuit television equipment shall be subject to any protective order of the court for the purpose of protecting the privacy of the child witness.

(8) Nothing in this section creates a right of the child witness to a closed-circuit television procedure in lieu of testifying in open court.

(9) The state shall bear the costs of the closed-circuit television procedure.

(10) A child witness may or may not be a victim in the proceeding.

(11) Nothing in this section precludes the court, under other circumstances arising under subsection (1)(a) of this section, from allowing a child to testify outside the presence of the defendant and the jury so long as the testimony is presented in accordance with the standards and procedures required in this section.

Passed by the House April 18, 2005.

Passed by the Senate April 6, 2005.

Approved by the Governor May 13, 2005.

Filed in Office of Secretary of State May 13, 2005.

CHAPTER 456

[Engrossed House Bill 1848]

MULTIUNIT RESIDENTIAL BUILDINGS

AN ACT Relating to managing construction defect disputes involving multiunit residential buildings; amending RCW 64.34.415, 64.34.410, and 64.34.100; adding a new section to chapter 64.34 RCW; adding a new chapter to Title 64 RCW; creating a new section; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. APPLICABILITY. (1)(a) Sections 2 through 10 of this act apply to any multiunit residential building for which the permit for construction or rehabilitative construction of such building was issued on or after the effective date of this act.

(b) Sections 2 and 10 of this act apply to conversion condominiums as defined in RCW 64.34.020, provided that section 10 of this act shall not apply to a condominium conversion for which a public offering statement had been delivered pursuant to chapter 64.34 RCW prior to the effective date of this act.

(2) Sections 2 and 11 through 18 of this act apply to any action that alleges breach of an implied or express warranty under chapter 64.34 RCW or that seeks relief that could be awarded for such breach, regardless of the legal theory pled, except that sections 11 through 18 of this act shall not apply to:

(a) Actions filed or served prior to the effective date of this act;

(b) Actions for which a notice of claim was served pursuant to chapter 64.50 RCW prior to the effective date of this act;

(c) Actions asserting any claim regarding a building that is not a multiunit residential building;

(d) Actions asserting any claim regarding a multiunit residential building that was permitted on or after the effective date of this act unless the letter required by section 7 of this act has been submitted to the appropriate building department or the requirements of section 10 of this act have been satisfied.

(3) Other than the requirements imposed by sections 2 through 10 of this act, nothing in this chapter amends or modifies the provisions of RCW 64.34.050.

NEW SECTION. Sec. 2. DEFINITIONS. Unless the context clearly requires otherwise, the definitions in RCW 64.34.020 and in this section apply throughout this chapter.

(1) "Attached dwelling unit" means any dwelling unit that is attached to another dwelling unit by a wall, floor, or ceiling that separates heated living spaces. A garage is not a heated living space.

(2) "Building enclosure" means that part of any building, above or below grade, that physically separates the outside or exterior environment from interior environments and which weatherproofs, waterproofs, or otherwise protects the building or its components from water or moisture intrusion. Interior environments consist of both heated and unheated enclosed spaces. The building enclosure includes, but is not limited to, that portion of roofs, walls, balcony support columns, decks, windows, doors, vents, and other penetrations through exterior walls, which waterproof, weatherproof, or otherwise protect the building or its components from water or moisture intrusion.

(3) "Building enclosure design documents" means plans, details, and specifications for the building enclosure that have been stamped by a licensed engineer or architect. The building enclosure design documents shall include details and specifications that are appropriate for the building in the professional judgment of the architect or engineer which prepared the same to waterproof, weatherproof, and otherwise protect the building or its components from water or moisture intrusion, including details of flashing, intersections at roof, eaves or parapets, means of drainage, water-resistive membrane, and details around openings.

(4) "Developer" means:

(a) With respect to a condominium or a conversion condominium, the declarant; and

(b) With respect to all other buildings, an individual, group of individuals, partnership, corporation, association, municipal corporation, state agency, or other entity or person that obtains a building permit for the construction or rehabilitative reconstruction of a multiunit residential building. If a permit is obtained by service providers such as architects, contractors, and consultants who obtain permits for others as part of services rendered for a fee, the person for whom the permit is obtained shall be the developer, not the service provider.

(5) "Dwelling unit" has the meaning given to that phrase or similar phrases in the ordinances of the jurisdiction issuing the permit for construction of the building enclosure but if such ordinances do not provide a definition, then "dwelling unit" means a residence containing living, cooking, sleeping, and sanitary facilities.

(6) "Multiunit residential building" means:

(a) A building containing more than two attached dwelling units, including a building containing nonresidential units if the building also contains more than two attached dwelling units, but excluding the following classes of buildings:

- (i) Hotels and motels;
- (ii) Dormitories;
- (iii) Care facilities;

(iv) Floating homes;

(v) A building that contains attached dwelling units that are each located on a single platted lot, except as provided in (b) of this subsection.

(vi) A building in which all of the dwelling units are held under one ownership and is subject to a recorded irrevocable sale prohibition covenant.

(b) If the developer submits to the appropriate building department when applying for the building permit described in section 3 of this act a statement that the developer elects to treat the improvement for which a permit is sought as a multiunit residential building for all purposes under this chapter, then "multiunit residential building" also means the following buildings for which such election has been made:

(i) A building containing only two attached dwelling units;

(ii) A building that does not contain attached dwelling units; and

(iii) Any building that contains attached dwelling units each of which is located on a single platted lot.

(7) "Party unit owner" means a unit owner who is a named party to an action subject to this chapter and does not include any unit owners whose involvement with the action stems solely from their membership in the association.

(8) "Qualified building inspector" means a person satisfying the requirements of section 5 of this act.

(9) "Rehabilitative construction" means construction work on the building enclosure of a multiunit residential building if the cost of such construction work is more than five percent of the assessed value of the building.

(10) "Sale prohibition covenant" means a recorded covenant that prohibits the sale or other disposition of individual dwelling units as or as part of a condominium for five years or more from the date of first occupancy except as otherwise provided in section 10 of this act, a certified copy of which the developer shall submit to the appropriate building department; provided such covenant shall not apply to sales or dispositions listed in RCW 64.34.400(2). The covenant must be recorded in the county in which the building is located and must be in substantially the following form:

This covenant has been recorded in the real property records of
County, Washington, in satisfaction of the requirements of sections 2 through 10 of this act. The undersigned is the owner of the property described on Exhibit A (the "Property"). Until termination of this covenant, no dwelling unit in or on the Property may be sold as a condominium unit except for sales listed in RCW 64.34.400(2).

This covenant terminates on the earlier of either: (a) Compliance with the requirements of section 10 of this act, as certified by the owner of the Property in a recorded supplement hereto; or (b) the fifth anniversary of the date of first occupancy of a dwelling unit as certified by the Owner in a recorded supplement hereto.

All title insurance companies and persons acquiring an interest in the Property may rely on the forgoing certifications without further inquiry in issuing any policy of title insurance or in acquiring an interest in the Property.

(11) "Stamped" means bearing the stamp and signature of the responsible licensed architect or engineer on the title page, and on every sheet of the documents, drawings, or specifications, including modifications to the documents, drawings, and specifications that become part of change orders or addenda to alter those documents, drawings, or specifications.

NEW SECTION. Sec. 3. DESIGN DOCUMENTS. (1) Any person applying for a building permit for construction of a multiunit residential building or rehabilitative construction shall submit building enclosure design documents to the appropriate building department prior to the start of construction or rehabilitative construction of the building enclosure. If construction work on a building enclosure is not rehabilitative construction because the cost thereof is not more than five percent of the assessed value of the building, then the person applying for a building permit shall submit to the building department a letter so certifying. Any changes to the building enclosure design documents that alter the manner in which the building or its components is waterproofed, weatherproofed, and otherwise protected from water or moisture intrusion shall be stamped by the architect or engineer and shall be provided to the building department and to the person conducting the course of construction inspection in a timely manner to permit such person to inspect for compliance therewith, and may be provided through individual updates, cumulative updates, or as-built updates.

(2) The building department shall not issue a building permit for construction of the building enclosure of a multiunit residential building or for rehabilitative construction unless the building enclosure design documents contain a stamped statement by the person stamping the building enclosure design documents in substantially the following form: "The undersigned has provided building enclosure documents that in my professional judgment are appropriate to satisfy the requirements of sections 1 through 10 of this act."

(3) The building department is not charged with determining whether the building enclosure design documents are adequate or appropriate to satisfy the requirements of sections 1 through 10 of this act. Nothing in sections 1 through 10 of this act requires a building department to review, approve, or disapprove enclosure design documents.

NEW SECTION. Sec. 4. INSPECTIONS. All multiunit residential buildings shall have the building enclosure inspected by a qualified inspector during the course of initial construction and during rehabilitative construction.

NEW SECTION. Sec. 5. INSPECTORS—QUALIFICATIONS—INDEPENDENCE. (1) A qualified building enclosure inspector:

(a) Must be a person with substantial and verifiable training and experience in building enclosure design and construction;

(b) Shall be free from improper interference or influence relating to the inspections; and

(c) May not be an employee, officer, or director of, nor have any pecuniary interest in, the declarant, developer, association, or any party providing services or materials for the project, or any of their respective affiliates, except that the qualified inspector may be the architect or engineer who approved the building enclosure design documents or the architect or engineer of record. The qualified

inspector may, but is not required to, assist with the preparation of such design documents.

(2) Nothing in this section alters requirements for licensure of any architect, engineer, or other professional, or alters the jurisdiction, authority, or scope of practice of architects, engineers, other professionals, or general contractors.

NEW SECTION. Sec. 6. SCOPE OF INSPECTION. (1) Any inspection required by this chapter shall include, at a minimum, the following:

(a) Water penetration resistance testing of a representative sample of windows and window installations. Such tests shall be conducted according to industry standards. Where appropriate, tests shall be conducted with an induced air pressure difference across the window and window installation. Additional testing is not required if the same assembly has previously been tested in situ within the previous two years in the project under construction by the builder, by another member of the construction team such as an architect or engineer, or by an independent testing laboratory; and

(b) An independent periodic review of the building enclosure during the course of construction or rehabilitative construction to ascertain whether the multiunit residential building has been constructed, or the rehabilitative construction has been performed, in substantial compliance with the building enclosure design documents.

(2) Subsection (1)(a) of this section shall not apply to rehabilitative construction if the windows and adjacent cladding are not altered in the rehabilitative construction.

(3) "Project" means one or more parcels of land in a single ownership, which are under development pursuant to a single land use approval or building permit, where window installation is performed by the owner with its own forces, or by the same general contractor, or, if the owner is contracting directly with trade contractors, is performed by the same trade contractor.

NEW SECTION. Sec. 7. CERTIFICATION—CERTIFICATE OF OCCUPANCY. Upon completion of an inspection required by this chapter, the qualified inspector shall prepare and submit to the appropriate building department a signed letter certifying that the building enclosure has been inspected during the course of construction or rehabilitative construction and that it has been constructed or reconstructed in substantial compliance with the building enclosure design documents, as updated pursuant to section 3 of this act. The building department shall not issue a final certificate of occupancy or other equivalent final acceptance until the letter required by this section has been submitted. The building department is not charged with and has no responsibility for determining whether the building enclosure inspection is adequate or appropriate to satisfy the requirements of this chapter.

NEW SECTION. Sec. 8. INSPECTOR, ARCHITECT, AND ENGINEER LIABILITY. (1) Nothing in this act is intended to, or does:

(a) Create a private right of action against any inspector, architect, or engineer based upon compliance or noncompliance with its provisions; or

(b) Create any independent basis for liability against an inspector, architect, or engineer.

(2) The qualified inspector, architect, or engineer and the developer that retained the inspector, architect, or engineer may contractually agree to the amount of their liability to the developer.

NEW SECTION. Sec. 9. NO EVIDENTIARY PRESUMPTION—ADMISSIBILITY. A qualified inspector's report or testimony regarding an inspection conducted pursuant to this chapter is not entitled to any evidentiary presumption in any arbitration or court proceeding. Nothing in this chapter restricts the admissibility of such a report or testimony, and questions of the admissibility of such a report or testimony shall be determined under the rules of evidence.

NEW SECTION. Sec. 10. NO SALE OF CONDOMINIUM UNIT ABSENT COMPLIANCE. (1) Except for sales or other dispositions listed in RCW 64.34.400(2), no declarant may convey a condominium unit that may be occupied for residential use in a multiunit residential building without first complying with the requirements of sections 1 through 9 of this act unless the building enclosure of the building in which such unit is included is inspected by a qualified building enclosure inspector, and:

(a) The inspection includes such intrusive or other testing, such as the removal of siding or other building enclosure materials, that the inspector believes, in his or her professional judgment, is necessary to ascertain the manner in which the building enclosure was constructed;

(b) The inspection evaluates, to the extent reasonably ascertainable and in the professional judgment of the inspector, the present condition of the building enclosure including whether such condition has adversely affected or will adversely affect the performance of the building enclosure to waterproof, weatherproof, or otherwise protect the building or its components from water or moisture intrusion. "Adversely affect" has the same meaning as provided in RCW 64.34.445(7);

(c) The inspection report includes recommendations for repairs to the building enclosure that, in the professional judgment of the qualified building inspector, are necessary to: (i) Repair a design or construction defect in the building enclosure that results in the failure of the building enclosure to perform its intended function and allows unintended water penetration not caused by flooding; and (ii) repair damage caused by such a defect that has an adverse effect as provided in RCW 64.34.445(7);

(d) With respect to a building that would be a multiunit residential building but for the recording of a sale prohibition covenant and unless more than five years have elapsed since the date such covenant was recorded, all repairs to the building enclosure recommended pursuant to (c) of this subsection have been made; and

(e) The declarant provides as part of the public offering statement, consistent with RCW 64.34.410 (1)(nn) and (2) and 64.34.415(1)(b), an inspection and repair report signed by the qualified building enclosure inspector that identifies:

- (i) The extent of the inspection performed pursuant to this section;
- (ii) The information obtained as a result of that inspection; and

(iii) The manner in which any repairs required by this section were performed, the scope of those repairs, and the names of the persons performing those repairs.

(2) Failure to deliver the inspection and repair report in violation of this section constitutes a failure to deliver a public offering statement for purposes of chapter 64.34 RCW.

NEW SECTION. Sec. 11. ARBITRATION—ELECTION—NUMBER OF ARBITRATORS—QUALIFICATIONS—TRIAL DE NOVO. (1) If the declarant, an association, or a party unit owner demands an arbitration by filing such demand with the court not less than thirty and not more than ninety days after filing or service of the complaint, whichever is later, the parties shall participate in a private arbitration hearing. The declarant, the association, and the party unit owner do not have the right to compel arbitration without giving timely notice in compliance with this subsection. Unless otherwise agreed by the parties, the arbitration hearing shall commence no more than fourteen months from the later of the filing or service of the complaint.

(2) Unless otherwise agreed by the parties, claims that in aggregate are for less than one million dollars shall be heard by a single arbitrator and all other claims shall be heard by three arbitrators. As used in this chapter, arbitrator also means arbitrators where applicable.

(3) Unless otherwise agreed by the parties, the court shall appoint the arbitrator, who shall be a current or former attorney with experience as an attorney, judge, arbitrator, or mediator in construction defect disputes involving the application of Washington law.

(4) Upon conclusion of the arbitration hearing, the arbitrator shall file the decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after the filing of the decision and award, any aggrieved party may file with the clerk a written notice of appeal and demand for a trial de novo in the superior court on all claims between the appealing party and an adverse party. As used in this section, "adverse party" means the party who either directly asserted or defended claims against the appealing party. The demand shall identify the adverse party or parties and all claims between those parties shall be included in the trial de novo. The right to a trial de novo includes the right to a jury, if demanded. The court shall give priority to the trial date for the trial de novo.

(5) If the judgment for damages, not including awards of fees and costs, in the trial de novo is not more favorable to the appealing party than the damages awarded by the arbitrator, not including awards of fees and costs, the appealing party shall pay the nonappealing adverse party's costs and fees incurred after the filing of the appeal, including reasonable attorneys' fees so incurred.

(6) If the judgment for damages, not including awards of fees and costs, in the trial de novo is more favorable to the appealing party than the damages awarded by the arbitrator, not including awards of fees and costs, then the court may award costs and fees, including reasonable attorneys' fees, incurred after the filing of the request for trial de novo in accordance with applicable law; provided if such a judgment is not more favorable to the appealing party than the most recent offer of judgment, if any, made pursuant to section 17 of this act, the court shall not make an award of fees and costs to the appealing party.

(7) If a party is entitled to an award with respect to the same fees and costs pursuant to this section and section 17 of this act, then the party shall only receive an award of fees and costs as provided in and limited by section 17 of this act. Any award of fees and costs pursuant to subsections (5) or (6) of this section is subject to review in the event of any appeal thereof otherwise permitted by applicable law or court rule.

NEW SECTION. Sec. 12. CASE SCHEDULE PLAN. (1) Not less than sixty days after the later of filing or service of the complaint, the parties shall confer to create a proposed case schedule plan for submission to the court that includes the following deadlines:

- (a) Selection of a mediator;
- (b) Commencement of the mandatory mediation and submission of mediation materials required by this chapter;
- (c) Selection of the arbitrator by the parties, where applicable;
- (d) Joinder of additional parties in the action;
- (e) Completion of each party's investigation;
- (f) Disclosure of each party's proposed repair plan;
- (g) Disclosure of each party's estimated costs of repair;
- (h) Meeting of parties and experts to confer in accordance with section 13 of this act; and

(i) Disclosure of each party's settlement demand or response.

(2) If the parties agree upon a proposed case schedule plan, they shall move the court for the entry of the proposed case schedule plan. If the parties cannot agree, either party may move the court for entry of a case schedule plan that includes the above deadlines.

NEW SECTION. Sec. 13. MANDATORY MEDIATION. (1) The parties to an action subject to this act shall engage in mediation. Unless the parties agree otherwise, the mediation required by this section shall commence within seven months of the later of the filing or service of the complaint. If the parties cannot agree upon a mediator, the court shall appoint a mediator.

(2) Prior to the mediation required by this section, the parties and their experts shall meet and confer in good faith to attempt to resolve or narrow the scope of the disputed issues, including issues related to the parties' repair plans.

(3) Prior to the mandatory mediation, the parties or their attorneys shall file and serve a declaration that:

(a) A decision maker with authority to settle will be available for the duration of the mandatory mediation; and

(b) The decision maker has been provided with and has reviewed the mediation materials provided by the party to which the decision maker is affiliated as well as the materials submitted by the opposing parties.

(4) Completion of the mediation required by this section occurs upon written notice of termination by any party. The provisions of section 17 of this act shall not apply to any later mediation conducted following such notice.

NEW SECTION. Sec. 14. NEUTRAL EXPERT. (1) If, after meeting and conferring as required by section 13(2) of this act, disputed issues remain, a party may file a motion with the court, or arbitrator if an arbitrator has been appointed, requesting the appointment of a neutral expert to address any or all of the disputed issues. Unless otherwise agreed to by the parties or upon a showing

of exceptional circumstances, including a material adverse change in a party's litigation risks due to a change in allegations, claims, or defenses by an adverse party following the appointment of the neutral expert, any such motion shall be filed no later than sixty days after the first day of the meeting required by section 13(2) of this act. Upon such a request, the court or arbitrator shall decide whether or not to appoint a neutral expert or experts. A party may only request more than one neutral expert if the particular expertise of the additional neutral expert or experts is necessary to address disputed issues.

(2) The neutral expert shall be a licensed architect or engineer, or any other person, with substantial experience relevant to the issue or issues in dispute. The neutral expert shall not have been employed as an expert by a party to the present action within three years before the commencement of the present action, unless the parties agree otherwise.

(3) All parties shall be given an opportunity to recommend neutral experts to the court or arbitrator and shall have input regarding the appointment of a neutral expert.

(4) Unless the parties agree otherwise on the following matters, the court, or arbitrator if then appointed, shall determine:

- (a) Who shall serve as the neutral expert;
- (b) Subject to the requirements of this section, the scope of the neutral expert's duties;
- (c) The number and timing of inspections of the property;
- (d) Coordination of inspection activities with the parties' experts;
- (e) The neutral expert's access to the work product of the parties' experts;
- (f) The product to be prepared by the neutral expert;
- (g) Whether the neutral expert may participate personally in the mediation required by section 13 of this act; and
- (h) Other matters relevant to the neutral expert's assignment.

(5) Unless the parties agree otherwise, the neutral expert shall not make findings or render opinions regarding the amount of damages to be awarded, or the cost of repairs, or absent exceptional circumstances any matters that are not in dispute as determined in the meeting described in section 13(2) of this act or otherwise.

(6) A party may, by motion to the court, or to the arbitrator if then appointed, object to the individual appointed to serve as the neutral expert and to determinations regarding the neutral expert's assignment.

(7) The neutral expert shall have no liability to the parties for the performance of his or her duties as the neutral expert.

(8) Except as otherwise agreed by the parties, the parties have a right to review and comment on the neutral expert's report before it is made final.

(9) A neutral expert's report or testimony is not entitled to any evidentiary presumption in any arbitration or court proceeding. Nothing in this act restricts the admissibility of such a report or testimony, provided it is within the scope of the neutral expert's assigned duties, and questions of the admissibility of such a report or testimony shall be determined under the rules of evidence.

(10) The court, or arbitrator if then appointed, shall determine the significance of the neutral expert's report and testimony with respect to parties joined after the neutral expert's appointment and shall determine whether

additional neutral experts should be appointed or other measures should be taken to protect such joined parties from undue prejudice.

NEW SECTION. Sec. 15. PAYMENT OF ARBITRATORS, MEDIATORS, AND NEUTRAL EXPERTS. (1) Where the building permit that authorized commencement of construction of a building was issued on or after the effective date of this act:

(a)(i) If the action is referred to arbitration under section 11 of this act, the party who demands arbitration shall advance the fees of any arbitrator and any mediator appointed under section 13 of this act; and

(ii) A party who requests the appointment of a neutral expert pursuant to section 14 of this act shall advance any appointed neutral expert's fees incurred up to the issuance of a final report.

(b) If the action has not been referred to arbitration, the court shall determine liability for the fees of any mediator appointed under section 13 of this act, unless the parties agree otherwise.

(c) Ultimate liability for any fees or costs advanced pursuant to this subsection (1) is subject to the fee- and cost-shifting provisions of section 17 of this act.

(2) Where the building permit that authorized commencement of construction of a building was issued before the effective date of this act:

(a)(i) If the action is referred to arbitration under section 11 of this act, the party who demands arbitration is liable for and shall pay the fees of any appointed arbitrator and any mediator appointed under section 13 of this act; and

(ii) A party who requests the appointment of a neutral expert pursuant to section 14 of this act is liable for and shall pay any appointed neutral expert's fees incurred up to the issuance of a final report.

(b) If the action has not been referred to arbitration, the court shall determine liability for the fees of any mediator appointed under section 13 of this act, unless the parties agree otherwise.

(c) Fees and costs paid under this subsection (2) are not subject to the fee- and cost-shifting provisions of section 17 of this act.

NEW SECTION. Sec. 16. SUBCONTRACTORS. Upon the demand of a party to an arbitration demanded under section 11 of this act, any subcontractor or supplier against whom such party has a legal claim and whose work or performance on the building in question becomes an issue in the arbitration may be joined in and become a party to the arbitration. However, joinder of such parties shall not be allowed if such joinder would require the arbitration hearing date to be continued beyond the date established pursuant to section 11 of this act, unless the existing parties to the arbitration agree otherwise. Nothing in sections 2 through 10 of this act shall be construed to release, modify, or otherwise alleviate the liabilities or responsibilities that any party may have towards any other party, contractor, or subcontractor.

NEW SECTION. Sec. 17. OFFERS OF JUDGMENT—COSTS AND FEES. (1) On or before the sixtieth day following completion of the mediation pursuant to section 13(4) of this act, the declarant, association, or party unit owner may serve on an adverse party an offer to allow judgment to be entered. The offer of judgment shall specify the amount of damages, not including costs or fees, that the declarant, association, or party unit owner is offering to pay or

receive. A declarant's offer shall also include its commitment to pay costs and fees that may be awarded as provided in this section. The declarant, association, or party unit owner may make more than one offer of judgment so long as each offer is timely made. Each subsequent offer supersedes and replaces the previous offer. Any offer not accepted within twenty-one days of the service of that offer is deemed rejected and withdrawn and evidence thereof is not admissible and may not be provided to the court or arbitrator except in a proceeding to determine costs and fees or as part of the motion identified in subsection (2) of this section.

(2) A declarant's offer must include a demonstration of ability to pay damages, costs, and fees, including reasonable attorneys' fees, within thirty days of acceptance of the offer of judgment. The demonstration of ability to pay shall include a sworn statement signed by the declarant, the attorney representing the declarant, and, if any insurance proceeds will be used to fund any portion of the offer, an authorized representative of the insurance company. If the association or party unit owner disputes the adequacy of the declarant's demonstration of ability to pay, the association or party unit owner may file a motion with the court requesting a ruling on the adequacy of the declarant's demonstration of ability to pay. Upon filing of such motion, the deadline for a response to the offer shall be tolled from the date the motion is filed until the court has ruled.

(3) An association or party unit owner that accepts the declarant's offer of judgment shall be deemed the prevailing party and, in addition to recovery of the amount of the offer, shall be entitled to a costs and fees award, including reasonable attorneys' fees, in an amount to be determined by the court in accordance with applicable law.

(4) If the amount of the final nonappealable or nonappealed judgment, exclusive of costs or fees, is not more favorable to the offeree than the offer of judgment, then the offeror is deemed the prevailing party for purposes of this section only and is entitled to an award of costs and fees, including reasonable attorneys' fees, incurred after the date the last offer of judgment was rejected and through the date of entry of a final nonappealable or nonappealed judgment, in an amount to be determined by the court in accordance with applicable law. The nonprevailing party shall not be entitled to receive any award of costs and fees.

(5) If the final nonappealable or nonappealed judgment on damages, not including costs or fees, is more favorable to the offeree than the last offer of judgment, then the court shall determine which party is the prevailing party and shall determine the amount of the costs and fees award, including reasonable attorneys' fees, in accordance with applicable law.

(6) Notwithstanding any other provision in this section, with respect to claims brought by an association or unit owner, the liability for declarant's costs and fees, including reasonable attorneys' fees, shall:

(a) With respect to claims brought by an association, not exceed five percent of the assessed value of the condominium as a whole, which is determined by the aggregate tax-assessed value of all units at the time of the award; and

(b) With respect to claims brought by a party unit owner, not exceed five percent of the assessed value of the unit at the time of the award.

Sec. 18. RCW 64.34.415 and 1992 c 220 s 22 are each amended to read as follows:

(1) The public offering statement of a conversion condominium shall contain, in addition to the information required by RCW 64.34.410:

(a) Either a copy of a report prepared by an independent, licensed architect or engineer, or a statement by the declarant based on such report, which report or statement describes, to the extent reasonably ascertainable, the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium;

(b) A copy of the inspection and repair report prepared by an independent, licensed architect, engineer, or qualified building inspector in accordance with the requirements of section 10 of this act;

(c) A statement by the declarant of the expected useful life of each item reported on in (a) of this subsection or a statement that no representations are made in that regard; and

~~((e))~~ (d) A list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations. Unless the purchaser waives in writing the curing of specific violations, the extent to which the declarant will cure such violations prior to the closing of the sale of a unit in the condominium shall be included.

(2) This section applies only to condominiums containing units that may be occupied for residential use.

Sec. 19. RCW 64.34.410 and 2004 c 201 s 11 are each amended to read as follows:

(1) A public offering statement shall contain the following information:

(a) The name and address of the condominium;

(b) The name and address of the declarant;

(c) The name and address of the management company, if any;

(d) The relationship of the management company to the declarant, if any;

(e) A list of up to the five most recent condominium projects completed by the declarant or an affiliate of the declarant within the past five years, including the names of the condominiums, their addresses, and the number of existing units in each. For the purpose of this section, a condominium is "completed" when any one unit therein has been rented or sold;

(f) The nature of the interest being offered for sale;

(g) A brief description of the permitted uses and use restrictions pertaining to the units and the common elements;

(h) A brief description of the restrictions, if any, on the renting or leasing of units by the declarant or other unit owners, together with the rights, if any, of the declarant to rent or lease at least a majority of units;

(i) The number of existing units in the condominium and the maximum number of units that may be added to the condominium;

(j) A list of the principal common amenities in the condominium which materially affect the value of the condominium and those that will or may be added to the condominium;

(k) A list of the limited common elements assigned to the units being offered for sale;

(l) The identification of any real property not in the condominium, the owner of which has access to any of the common elements, and a description of the terms of such access;

(m) The identification of any real property not in the condominium to which unit owners have access and a description of the terms of such access;

(n) The status of construction of the units and common elements, including estimated dates of completion if not completed;

(o) The estimated current common expense liability for the units being offered;

(p) An estimate of any payment with respect to the common expense liability for the units being offered which will be due at closing;

(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;

(r) Any assessments which have been agreed to or are known to the declarant and which, if not paid, may constitute a lien against any units or common elements in favor of any governmental agency;

(s) The identification of any parts of the condominium, other than the units, which any individual owner will have the responsibility for maintaining;

(t) If the condominium involves a conversion condominium, the information required by RCW 64.34.415;

(u) Whether timesharing is restricted or prohibited, and if restricted, a general description of such restrictions;

(v) A list of all development rights reserved to the declarant and all special declarant rights reserved to the declarant, together with the dates such rights must terminate, and a copy of or reference by recording number to any recorded transfer of a special declarant right;

(w) A description of any material differences in terms of furnishings, fixtures, finishes, and equipment between any model unit available to the purchaser at the time the agreement for sale is executed and the unit being offered;

(x) Any liens on real property to be conveyed to the association required to be disclosed pursuant to RCW 64.34.435(2)(b);

(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;

(z) A brief description of any construction warranties to be provided to the purchaser;

(aa) Any building code violation citations received by the declarant in connection with the condominium which have not been corrected;

(bb) A statement of any unsatisfied judgments or pending suits against the association, a statement of the status of any pending suits material to the condominium of which the declarant has actual knowledge, and a statement of any litigation brought by an owners' association, unit owner, or governmental entity in which the declarant or any affiliate of the declarant has been a defendant, arising out of the construction, sale, or administration of any condominium within the previous five years, together with the results thereof, if known;

(cc) Any rights of first refusal to lease or purchase any unit or any of the common elements;

(dd) The extent to which the insurance provided by the association covers furnishings, fixtures, and equipment located in the unit;

(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;

(ff) Any reports or statements required by RCW 64.34.415 or 64.34.440(6)(a). RCW 64.34.415 shall apply to the public offering statement of a condominium in connection with which a final certificate of occupancy was issued more than sixty calendar months prior to the preparation of the public offering statement whether or not the condominium is a conversion condominium as defined in RCW 64.34.020(10);

(gg) A list of the documents which the prospective purchaser is entitled to receive from the declarant before the rescission period commences;

(hh) A notice which states: A purchaser may not rely on any representation or express warranty unless it is contained in the public offering statement or made in writing signed by the declarant or by any person identified in the public offering statement as the declarant's agent;

(ii) A notice which states: This public offering statement is only a summary of some of the significant aspects of purchasing a unit in this condominium and the condominium documents are complex, contain other important information, and create binding legal obligations. You should consider seeking the assistance of legal counsel;

(jj) Any other information and cross-references which the declarant believes will be helpful in describing the condominium to the recipients of the public offering statement, all of which may be included or not included at the option of the declarant;

(kk) A notice that addresses compliance or noncompliance with the housing for older persons act of 1995, P.L. 104-76, as enacted on December 28, 1995;

(ll) A notice that is substantially in the form required by RCW 64.50.050; ~~((and))~~

(mm) A statement, as required by RCW 64.35.210, as to whether the units or common elements of the condominium are covered by a qualified warranty, and a history of claims under any such warranty; and

(nn) A statement that the building enclosure has been designed and inspected as required by sections 2 through 10 of this act, and, if required, repaired in accordance with the requirements of section 10 of this act.

(2) The public offering statement shall include copies of each of the following documents: The declaration, the survey map and plans, the articles of incorporation of the association, bylaws of the association, rules and regulations, if any, current or proposed budget for the association, ~~((and))~~ the balance sheet of the association current within ninety days if assessments have been collected for ninety days or more, and the inspection and repair report or reports prepared in accordance with the requirements of section 10 of this act.

If any of the foregoing documents listed in this subsection are not available because they have not been executed, adopted, or recorded, drafts of such documents shall be provided with the public offering statement, and, before closing the sale of a unit, the purchaser shall be given copies of any material changes between the draft of the proposed documents and the final documents.

(3) The disclosures required by subsection (1)(g), (k), (s), (u), (v), and (cc) of this section shall also contain a reference to specific sections in the condominium documents which further explain the information disclosed.

(4) The disclosures required by subsection (1)(ee), (hh), (ii), and (ll) of this section shall be located at the top of the first page of the public offering statement and be typed or printed in ten-point bold face type size.

(5) A declarant shall promptly amend the public offering statement to reflect any material change in the information required by this section.

Sec. 20. RCW 64.34.100 and 2004 c 201 s 2 are each amended to read as follows:

(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) Except as otherwise provided in sections 11 through 17 of this act or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in sections 11 through 17 of this act shall be considered judicial proceedings for the purposes of this chapter.

NEW SECTION. **Sec. 21.** A new section is added to Article 1 of chapter 64.34 RCW to read as follows:

Chapter 64.— RCW (sections 1 through 17 of this act) includes requirements for: The inspection of the building enclosures of multiunit residential buildings, as defined in section 2 of this act, which includes condominiums and conversion condominiums; for provision of inspection and repair reports; and for the resolution of implied or express warranty disputes under chapter 64.34 RCW.

NEW SECTION. **Sec. 22.** CAPTIONS. Captions used in this act are not any part of the law.

NEW SECTION. **Sec. 23.** Sections 1 through 17 of this act constitute a new chapter in Title 64 RCW.

NEW SECTION. **Sec. 24.** EFFECTIVE DATE. This act takes effect August 1, 2005.

Passed by the House April 19, 2005.

Passed by the Senate April 8, 2005.

Approved by the Governor May 13, 2005.

Filed in Office of Secretary of State May 13, 2005.

CHAPTER 457

[Engrossed Second Substitute Senate Bill 5454]

COURTS—FUNDING

AN ACT Relating to court operations; amending RCW 3.62.050, 2.56.030, 43.08.250, 3.62.060, 4.12.090, 10.46.190, 12.12.030, 12.40.020, 26.12.240, 27.24.070, 36.18.012, 36.18.016, and 36.18.020; adding a new section to chapter 3.46 RCW; adding a new section to chapter 3.50 RCW; adding a new section to chapter 3.58 RCW; adding a new section to chapter 35.20 RCW; adding a new section to chapter 3.62 RCW; creating a new section; and making appropriations.

Be it enacted by the Legislature of the State of Washington:

ARTICLES

Improving the Construction and Litigation Resolution Process: The 2005 Amendments to the Washington Condominium Act are a Win-Win for Homeowners and Developers

Mark F. O'Donnell[†] & David E. Chawes[‡]

I. INTRODUCTION

On August 1, 2005, significant amendments to the Washington Condominium Act (WCA) became effective.¹ These amendments were intended to substantially reduce water infiltration in multiunit residential buildings and to simplify the condominium construction dispute resolution process. The heart of the amendments is the implementation of alternative dispute resolution (ADR) procedures, as well as fee-shifting

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1. WASH. REV. CODE § 64.34 (2004). The 2005 amendments to the WCA discussed herein are incorporated into WASH. REV. CODE § 64.55, and include requirements for:

The inspection of the building enclosures of multiunit residential buildings, as defined in RCW 64.55.010, which includes condominiums and conversion condominiums; for provision of inspection and repair reports; and for the resolution of implied or express warranty disputes under chapter 64.34 RCW.

Id. § 64.34.073 (Supp. 2005).

provisions which require the non-prevailing party to pay the attorney fees and costs of the prevailing party.

A decade of lawsuits brought under the WCA by condominium owners associations against builders and developers, and in turn by builders against subcontractors, alleging defects in the ability of the building envelopes to resist water from entering into the structures ultimately led to appointment of a Legislative Study Committee on Water Penetration of Condominiums (Committee) in 2004.²

The Committee was charged with presenting recommendations to address and hopefully solve water intrusion problems that resulted in a proliferation of lawsuits.³ The litigation led to a crisis in the construction industry, forcing many developers, builders and contractors out of business because of lack of affordable insurance.⁴ Indeed, many insurers left the Washington construction market.⁵

To address this crisis and attempt to reverse this trend, the 2005 amendments provide a dual-track approach by (1) improving the quality of multiunit residential construction and (2) reducing litigation costs associated with complex, multi-party lawsuits involving condominiums by implementing innovative ADR processes.

Specifically, these amendments are designed to increase the confidence of homeowners, developers, and insurers by:

1. Requiring the submission of detailed building enclosure plans for multiunit residential building enclosures;
2. Requiring course-of-construction building enclosure inspections by qualified independent professionals to verify substantial compliance with the plans;
3. Increasing the role of professionals in the construction and dispute resolution process;
4. Requiring in-place water testing of windows;
5. Promoting early and cost effective settlement of disputes by providing standards for arbitration and mediation as alternatives to litigation; and

2. CONDOMINIUM ACT STUDY COMMITTEE, REPORT TO THE JUDICIARY COMMITTEES OF THE WASHINGTON STATE SENATE AND HOUSE OF REPRESENTATIVES 1 [hereinafter Study Committee Report] (Jan. 2005), available at http://www.oregon.gov/DCBS/CCTF/docs/012805_report.pdf.

3. *Id.* at 2.

4. *Id.* at 1.

5. *Id.*

6. Promoting earlier settlement of such suits by creating an attorney fee-shifting mechanism.⁶

The significance of these amendments can be seen when compared to the previous statute.⁷ Thus, Part II of this Article presents background information on Washington condominium law and earlier attempts to address those problems. Part III presents several of the key issues that faced the Committee, and discusses how the final 2005 amendments addressed those issues. Part IV discusses several practical problems and concerns that have arisen in the course of delivering nearly a dozen presentations about the amendments to various groups such as lawyers, insurers, architects, engineers and forensic experts over the eight months since the amendments became effective. Part V concludes that the amendments are a win-win for homeowners and developers.

II. BACKGROUND ON WASHINGTON CONDOMINIUM LAW AND QUALITY OF CONSTRUCTION ISSUES

A. Brief History of Washington Condominium Law

The earliest statute governing condominiums in Washington State was the Horizontal Property Regimes Act.⁸ This Act is still effective today for those condominiums that were declared before 1990.⁹

The model Uniform Condominium Act was issued in 1980 to further standardize condominium construction and governance law among the states.¹⁰ Washington State adopted most provisions of the Uniform Condominium Act into the Washington Condominium Act of 1989, effective for all condominiums created after July 1, 1990.¹¹ The WCA addresses all aspects of condominium creation, construction, conversion, sale, financing, management, and termination of condominiums.¹² A

6. E.H.B. 1848, 59th Reg. Sess. (Wash. 2005), available at <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/House%20Passed%20Legislature/1848.PL.pdf>, codified at WASH. REV. CODE § 64.55.

7. Washington Condominium Act of 1989, codified at WASH. REV. CODE § 64.34.

8. Alberto Ferrer & Karl Techer, LAW OF CONDOMINIUM § 3, at 2 (1967); Laws of 1963, ch. 156, 1963 Wash. Sess. Laws 732 (codified at WASH. REV. CODE § 64.32 (2004)).

9. See WASH. REV. CODE § 64.32 (2004); see also WASH. REV. CODE § 64.34.010 (2004). "The provisions of chapter 64.32 RCW do not apply to condominiums created after July 1, 1990, and do not invalidate any amendment to the declaration, bylaws, and survey maps and plans of any condominium created before July 1, 1990, if the amendment would be permitted by chapter 64.34 RCW." WASH. REV. CODE § 64.34.010(2) (2004).

10. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CONDOMINIUM ACT (1980) [hereinafter UNIFORM CONDOMINIUM ACT], available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/uca80.htm>.

11. WASH. REV. CODE § 64.34.

12. E.H.B. 1848, 59th Reg. Sess., at 1 (Wash. 2005), available at <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bill%20Reports/House%20Final/1848.FBR.pdf>.

principal purpose of the WCA is to provide protection to condominium purchasers through creation of statutory warranties of quality construction.¹³ Generally speaking, the WCA is a consumer/homeowner friendly statute.

B. Implied Statutory Warranties of Construction Quality for Condominiums

The WCA “implied” statutory warranties were initially adopted from the Uniform Condominium Act, though they have subsequently been altered from their initial version.¹⁴ The WCA protects “consumers from construction defects through its express and implied statutory warranty provisions.”¹⁵ The implied statutory warranties provide that units will be in at least as good condition at the time of conveyance as at the time of contracting; that units and common elements will be suitable for use of real estate of that type (warranty of suitability); and that the project will be free from defective materials and constructed in accordance with sound engineering and construction standards, in a workmanlike manner, and in compliance with applicable laws (warranty of quality).¹⁶

13. *Park Avenue Condo. Owners Ass'n v. Buchan Devs, L.L.C.*, 117 Wash. App. 369, 374, 71 P.3d 692, 693–94 (2003).

14. The initial version of WASH. REV. CODE § 64.34.445, adopted in 1990, was virtually identical to section 4-114 of the Uniform Condominium Act. Compare UNIFORM CONDOMINIUM ACT, *supra* note 10, at § 4-114 with Washington Condominium Act of 1989, ch. 43 § 4-112. The 1992 amendments to section 445 made only minor changes. Condominium Act Amendments, ch. 220 § 26, 1992 Wash. Sess. Laws 1003, 1032–33. The 2004 amendments added subsections (7) and (8) to section 445, quoted *infra* note 16. WASH. REV. CODE § 64.34.445 (2004).

15. *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc.*, 125 Wash. App. 227, 242, 103 P.3d 1256 (2005).

16. WASH. REV. CODE § 64.34.445(1)–(2) (2004). The WCA’s implied warranties are as follows:

- (1) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear and damage by casualty or condemnation excepted.
- (2) A declarant and any dealer impliedly warrants that a unit and 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;
 - (b) Constructed in accordance with sound engineering and construction standards;
 - (c) Constructed in a workmanlike manner; and
 - (d) Constructed in compliance with all laws then applicable to such improvements.
- (3) A declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

Although the implied statutory warranty of quality displaced the common law doctrine of implied warranty of habitability as to condominiums, it is actually broader than the warranty of suitability, in that it imposes liability for defects that might not be so serious as to render the condominium unsuitable for ordinary purposes of similar types of real estate.¹⁷

The statutory warranty of quality has been interpreted by Washington courts to virtually require strict compliance with all portions of applicable building codes.¹⁸ The court's rationale for imposing this strict standard, as announced in *Park Avenue Condominium Owners Association v. Buchan Developments, L.L.C.*, was that while the warranty of suitability addresses whether a structure is reasonably fit for use as a residence, the warranty of quality goes beyond suitability to provide a remedy for defects "which may not be so serious as to render the condominium unsuitable for ordinary purposes."¹⁹

The WCA also provides an attorney fee provision that awards reasonable attorney's fees to the prevailing party in a lawsuit which alleges the condominium declarant (or other party subject to the WCA) failed to comply with the WCA, the condominium declaration, or the condominium association bylaws.²⁰ Typically, the attorney fee provision became a large incentive for homeowner association (HOA) contingent fee lawyers to pursue HOA litigation, and in many cases the contingent fee became a

(4) Warranties imposed by this section may be excluded or modified as specified in RCW § 64.34.450.

(5) For purposes of this section, improvements made or contracted for by an affiliate of a declarant, as defined in 64.34.020(1), are made or contracted for by the declarant.

(6) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

(7) In a judicial proceeding for breach of any of the obligations arising under this section, 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. As used in this subsection, an "adverse effect" must be more than technical and must be significant to a reasonable person. To establish an adverse effect, the person alleging the breach is not required to prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose.

(8) Proof of breach of any obligation arising under this section is not proof of damages. 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.

Id. § 64.34.445.

17. COMMENTS TO THE WASHINGTON CONDOMINIUM ACT, 2 S. J., 51st Leg., Reg. Sess., 1st & 2d Spec. Sess., at 3 (Wash. 1990), available at <http://www.wsbarppt.com/comments/wca.pdf>.

18. See *Park Avenue Condo. Owners Ass'n*, 117 Wash. App. at 384, 71 P.3d at 693-94.

19. *Id.* at 383, 71 P.3d at 694 (quoting 2 S. J., 51st Leg., Reg. Sess., 1st & 2d Spec. Sess., at 2090 (Wash. 1990)).

20. WASH. REV. CODE § 64.34.455 (2004).

larger factor in settlement discussions.²¹ Whether intentionally or not, from the builders' perspective a statute requiring perfection had been created, but without standards defining "perfection." Builders faced litigation in which HOA experts contended the project was not built in accordance with sound construction engineering standards, whatever those might be, and faced the risk of paying substantial contingent fees to the HOA lawyers.

In a two-step process beginning in 1990, the Washington State Legislature passed a land use law, the Growth Management Act, with the express purpose of encouraging growth and reaching desired densities in urban areas by making available affordable housing for all residents of the state and by promoting a variety of housing types.²² In the mid-to-late 1990s, and continuing to the present time, several hundred thousand condominiums have been created, built, and sold in Washington. They range from multi-million dollar units in forty-story towers in downtown Seattle to twenty-unit wood-frame construction in the mid-hundred-thousand-dollar range. Consistent with the Growth Management Act, urban density goals were fostered and, with historically low mortgage interest rates, condominiums became for many an opportunity for home ownership.

Regardless of developer, location, type of construction, or price, these condominiums all had one thing in common: they had to comply with all requirements of the WCA, including the unnecessarily vague standards of the implied statutory warranty provisions. Not surprisingly, given a consumer-oriented statute, vague construction standards in the statutory warranty statutes, and an attorney-fee provision, there was a groundswell of litigation.

In the early 2000s, with construction defect litigation perhaps at an all-time high, the stage was set for a showdown between the building industry and the condominium owners and their allies. The result was essentially a three-year educational process for the Washington Legislature to become fully convinced of the need to address the crisis in the condominium industry.

In 2004, the Washington legislature amended the WCA to ensure availability of a broad range of affordable homeownership opportunities

21. See, e.g. *Eagle Point Condo. Owners v. Coy*, 102 Wash. App. 697, 9 P.3d 898 (2000).

22. 2004 Wash. Sess. Laws ch. 201 § 1; WASH. REV. CODE § 36.70A.020 (1991). "Growth Management Act" is the collective name for two statutes enacted by the Washington Legislature: the Growth Management Act, ch. 17, 1990 Wash. Sess. Laws 1st Spec. Sess. 1972, and the Growth Management Act Revised Provisions Act, ch. 32, 1991 Wash. Sess. Laws, 1st Spec. Sess., 2903. Jared B. Black, *The Land Use Study Commission and the 1997 Amendments to Washington State's Growth Management Act*, 22 HARV. ENVTL. L. REV. 559, 560 n.2 (1998).

and to assist Washington's cities and counties in their efforts to achieve the Growth Management Act's urban density mandates.²³

C. Washington Tackles the Problem

By the late 1990s, Washington's condominium industry had run into serious problems, with condominium owners alleging loss of value and damage from water penetration.²⁴ Resulting litigation led to damage awards or settlements that exceeded the insurers' anticipated exposures. In response, insurers narrowed coverage, substantially increased premiums, or simply fled Washington's condominium market.²⁵ The resulting inability to obtain insurance threatened the legislature's express desire to expand home ownership opportunities for low-income families and to meet the goals of growth management. The legislature tackled this problem with amendments to the WCA and other statutes.

In 2002, the legislature created an obligation of all residential homeowners to give developers notice of, and an opportunity to cure, construction defects before filing a suit for defective construction.²⁶ In 2003, the Washington legislature established additional affirmative defenses that builders could use to mitigate liability.²⁷ The defenses excuse an obligation, damage, loss or liability in several circumstances, namely, to the extent that:

1. It is caused by an unforeseen act of nature that prevented compliance with codes, regulations or ordinances;
2. It is caused by a homeowner's unreasonable failure to minimize damages or follow written maintenance recommendations;
3. It is caused a homeowner's alteration, use, misuse, abuse, or neglect;
4. It is barred by the construction statute of repose or applicable statute of limitations;
5. It is due to a violation for which the builder has obtained a release; or
6. The builder has repaired the violation or defect.²⁸

23. 2004 Wash. Sess. Laws ch. 201 § 1.

24. Study Committee Report at 1.

25. *Id.*

26. Construction Defect Claims Act, ch. 323, 2002 Wash. Sess. Laws 1642 (codified at WASH. REV. CODE § 64.50 (2004)).

27. Construction Liability Act, ch. 80, 2003 Wash. Sess. Laws 595 (codified at WASH. REV. CODE § 4.16.326 (2004)).

28. *Id.* at 596; see WASH. REV. CODE § 4.16.326(1)(a)-(g) (2004).

In 2004, the legislature again amended the WCA to require a heightened standard of proof for construction defect claims and to create a new warranty insurance program.²⁹ The new warranty program was patterned after similar legislation adopted in British Columbia in 1999, and was designed to free developers from the “implied warranty” of the WCA if they would provide insurance to homeowners with legislatively prescribed coverage.³⁰ Developers offering warranty insurance would also be allowed to include binding arbitration clauses in their sales documents, something that Washington courts had concluded was not otherwise permitted under the WCA.³¹ The potential of the warranty program has not been tested because no insurance company has yet offered it since enactment.

The 2004 legislature also considered requiring mandatory course of construction inspection of condominium building envelopes and ADR mechanisms for resolving condominium construction defect cases.³² Unable to reach agreement, the legislature authorized creation of a special study committee of interested parties to examine those issues.³³ The next section describes the recommendations of the Committee and the statutory provisions as enacted into law.

III. COMMITTEE RECOMMENDATIONS LEAD TO FINAL VERSION OF THE LEGISLATION

Legislative amendments to the WCA have generally been classic examples of lobbying on both sides by special interest groups representing builders, homeowner associations, and homeowner association contingent fee lawyers. The 2005 amendments proved no exception, and though the lobbying stymied the legislative efforts, it continued to bring the issues to the legislature’s attention. Accordingly, as an apparent political compromise, the Committee was authorized by the Washington Legislature in 2004 to study the issues relating to water intrusion of condominiums, and to make recommendations on the efficacy of requiring independent third-party inspections of condominium building enclosures.³⁴ The Committee was also asked to recommend ADR procedures

29. Study Committee Report at 1.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. E.S.S.B. 5536, 58th Leg. § 8 (Wash. 2004).

to resolve disputes involving alleged breaches of express or implied warranties under the WCA.³⁵

The Committee members appointed by the Governor included interested parties such as developers, attorneys representing homeowners and developers, and an engineer specializing in building envelope design and inspection.³⁶ Committee meetings were open to the public and regularly attended by interested individuals, including plaintiffs' attorneys; representatives of the Washington Homeowners Coalition; the Master Builders Association; the Community Association Institute, a trade group for condominium property managers; the East King County Chambers of Commerce Legislative Coalition; the Building Industry Association of Washington; and HomeSight, a non-profit entry level builder.³⁷ The Committee heard from builders of low-income housing, insurance representatives, homeowner groups, mediators, contractors, and construction professionals.³⁸ It reviewed recent and pending legislation throughout the country and studied the British Columbia model for dealing with condominium building envelope problems.³⁹

After ten official meetings and numerous non-official meetings and discussions, the Committee issued its final report in January 2005.⁴⁰ At the insistence of the Committee Chair, the group, through at times heated discussions and bartering, finally reached a consensus.⁴¹ The Committee cautioned the legislature that the proposed bill was a fully integrated

35. On March 29, 2004, Washington Governor Gary Locke signed E.S.S.B. 5536 into law. It required a newly formed Study Committee on Water Penetration of Condominiums to study and report back to the legislature on the following issues:

- (a) Examine the problem of water penetration of condominiums and the efficacy of requiring independent third-party inspections of condominiums, including plan inspection and inspection during construction, as a way to reduce the problem of water penetration;
- (b) Examine issues relating to alternative dispute resolution [to resolve disputes involving alleged breaches of implied or express warranties under WASH. REV. CODE § 64.34], including but not limited to:
 - (i) When and how the decision to use alternative dispute resolution is made;
 - (ii) The procedures to be used in an alternative dispute resolution;
 - (iii) The nature of the right of appeal from an alternative dispute resolution decision; and
 - (iv) The allocation of costs and fees associated with an alternative dispute resolution proceeding or appeal.

E.S.S.B. 5536, 58th Leg. § 8 (Wash. 2004).

36. Study Committee Report at 3. Mark F. O'Donnell, lead author of this Article, was appointed to the Committee at the behest of the Master Builders Association, a construction industry trade group which consists primarily of builders.

37. *Id.* at 2.

38. *Id.* at 3

39. *Id.*

40. *Id.* at 2–3.

41. *Id.* at 3.

package not subject to negotiations or picking and choosing between and among its recommendations.⁴² In short, it was an “all or nothing” package for the legislature to consider.⁴³

The Committee’s final report contained eighteen specific recommendations for improving condominium construction and “promoting early and meaningful settlement of disputes.”⁴⁴ The recommendations were also designed to increase the role of design professionals in the construction and dispute resolution process.⁴⁵

The Committee delivered its report to the Legislature at the beginning of the 2005 legislative session.⁴⁶ Although the legislature had specifically requested that the Committee draft legislation to implement its recommendations, its term ran out before a draft bill could be finalized.⁴⁷ To facilitate the legislature’s consideration of the Committee’s work, the legislative staff converted the recommendations into draft bill form.⁴⁸ The final bill, which contained nearly all of the Committee’s substantive recommendations, passed the legislature almost unanimously.⁴⁹ The remainder of this section presents a summary of the Committee’s key recommendations and the final provisions of the 2005 amendments as codified in title 64, chapter 55, of the Revised Code of Washington.

*A. Building Enclosure Design Documents and
Course of Construction Building Enclosure Inspections
Designed to Prevent Water Intrusion Problems*

This section presents the Committee’s recommendations for multi-unit residential building inspections and design documents. The concept of performing inspections of a building during the course of construction is a significant change in the way such buildings are normally constructed, so detailed attention is given to the recommendations and their legislative implementation.

42. *Id.*

43. *Id.*

44. *Id.* at 4.

45. *Id.*

46. E.H.B. 1848, 59th Reg. Sess., at 2 (Wash. 2005), available at <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bill%20Reports/House%20Final/1848.FBR.pdf>.

47. Study Committee Report at 4.

48. *Id.*

49. Multiunit Residential Buildings, ch. 456, 2005 Wash. Sess. Laws 1934. EHB 1848, as amended, passed the Senate 46-1, and the House concurred in the amendments, 98-0. E.H.B. 1848, 59th Reg. Sess., at 5 (Wash. 2005), available at <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bill%20Reports/House%20Final/1848.FBR.pdf>.

1. Scope and Application of the Amendments

Because it is not always apparent whether a building under construction will be used for apartments or condominiums, and because apartments are sometimes converted into condominiums, the Committee recommended that all “multi-unit” residential building enclosures be inspected by a qualified inspector during the course of construction or conversion.⁵⁰

As in the review of any statute, definitions are important. “Multi-unit residential buildings” are defined as those buildings containing more than two attached dwelling units, *excluding* hotels, motels, dormitories, care facilities, floating homes, buildings containing attached dwelling units each located on a single platted lot, and buildings where all dwelling units are owned by one ownership and subject to a recorded irrevocable sale prohibition covenant.⁵¹

The Committee defined another essential term, “building enclosure,” without reference to water resistance.⁵² The amended statute expands the definition by placing more emphasis on the water-resistant characteristics of the components:

“Building enclosure” means that part of any building, above or below grade, that physically separates the outside or exterior environment from interior environments and which weatherproofs, waterproofs, or otherwise protects the building or its components from water or moisture intrusion. Interior environments consist of both heated and unheated enclosed spaces⁵³

Examples of building enclosure elements included in the statute are roofs, walls, balcony support columns, decks, windows, doors, vents, and other penetrations through exterior walls.⁵⁴

The new statute requires building enclosure course of construction inspections for those multiunit residential buildings for which a construction or rehabilitative construction permit was issued on or after August 1, 2005, and those conversion condominiums for which a public offering statement is issued after August 1, 2005.⁵⁵ The statute’s provisions also

50. Study Committee Report at 5, ¶ 1.1.

51. WASH. REV. CODE § 64.55.010(6)(a) (2004). A developer may also elect to treat as a multiunit residential building those buildings containing only two attached dwelling units, those that do not contain attached dwelling units, and those that contain attached dwelling units each of which is located on a single platted lot. WASH. REV. CODE § 64.55.010(6)(b) (Supp. 2005).

52. Study Committee Report at 9, ¶ 1.9.

53. WASH. REV. CODE § 64.55.010(2) (Supp. 2005).

54. *Id.*

55. *Id.* § 64.55.005(1)(a)–(b). “‘Rehabilitative construction’ means construction work on the building enclosure” costing more than five percent of the assessed value of a multiunit residential building. *Id.* § 64.55.010(9).

include conversion of existing residential apartment buildings to condominiums if the conversion involves work on the building enclosure.⁵⁶

2. Building Enclosure Design Documents

As part of the permitting process and prior to the start of construction, the Committee recommended that building enclosure design documents (i.e., plans, details, and specifications) be submitted to the local building department and stamped by a licensed design professional. The Committee also recommended that the documents should contain sufficient information to allow construction of the building enclosure.⁵⁷ If changes are made to the building design during construction, the Committee instructed that the documents be updated.⁵⁸

It bears mentioning here that the Committee specifically discussed the extent to which these provisions, and others, should be prescriptive in nature.⁵⁹ Ultimately, the Committee concluded that certain technical provisions should remain intentionally vague, and be left to the discretion of the building professional.⁶⁰ For example, the level of detail and manner of building enclosure protection may differ between Spokane and Seattle, and may also differ between a wood-frame four-unit building and a hundred-unit high-rise.⁶¹ Thus, the Committee felt it best left to the design profession to determine the appropriate standard of care and the level of detail, number of construction inspections, and types of window testing needed.⁶² The Committee was concerned that too much specificity might hinder creative design innovations and that design professionals should be able to exercise their professional judgment in specifying building

56. *Id.* § 64.55.005(1)(b).

57. Study Committee Report at 5, ¶ 1.2; *id.* at 9, ¶ 1.9.

58. *Id.* at 5, ¶ 1.2.

59. *Id.* at 5, ¶ 1.2 cmt.

60. *Id.*

61. *Id.* For example, Spokane, which is located in the eastern portion of Washington and averaging 16.5 inches of precipitation annually, has a much drier climate than Seattle, which is located in the western portion of the state and averages thirty-eight inches of precipitation annually. Climate ZONE.com entry for Spokane, Washington, <http://www.climate-zone.com/climate/united-states/washington/spokane> (last visited Feb. 12, 2006); Seattle, Washington, Wikipedia, <http://en.wikipedia.org/wiki/Seattle#Climate> (last visited Feb. 12, 2006).

62. Under the WCA, the declarant has ultimate liability to the homeowners for construction defects; thus, any inadequacies in the building enclosure design process or the inspection process remain the responsibility of the declarant. *See* Comments to the WCA, cmt. 2 (“Both of these warranties [suitability for ordinary uses of real estate of similar type and of quality of construction], which arise under subsection [WASH. REV. CODE § 64.34.445](2), are imposed only against declarants and not against unit owners selling their units to others.”).

enclosure details.⁶³ Additionally, the Committee did not want to unduly influence unit pricing by dictating design and inspection information.⁶⁴

Washington's controlling statute requires that building enclosure design documents be submitted to the appropriate building department when applying for a building permit for construction or rehabilitative construction of a multiunit residential building.⁶⁵ The architect or engineer must stamp subsequent design document changes that alter waterproofing, weatherproofing, or water or moisture intrusion protection, and must provide those changes to the building department and the independent building enclosure inspector in a timely manner.⁶⁶ The building department may not issue a building permit unless the design documents contain a stamped statement stating: "The undersigned has provided building enclosure documents that in my professional judgment are appropriate to satisfy the requirements of RCW 64.55.005 through 64.55.090."⁶⁷ Importantly, the building department is not required to review, approve, or determine the adequacy of these design documents.⁶⁸ The local building official's role is simply ministerial: to determine if a building enclosure design document is required and, if so, to assure that it has been submitted.

3. Qualifications of the Inspectors and Scope of Inspections

Because there are currently no generally recognized training programs for building envelope designers and inspectors, and because some specific design issues might not require a licensed professional, the Committee recommended that an inspector be a licensed architect or engineer with verifiable training and experience in building enclosure design and construction, or a person with verifiable training and experience in building enclosure design and construction.⁶⁹

The statute requires that building enclosure inspections be performed during construction or repair construction.⁷⁰ In response to concerns that employees of a condominium declarant conducting such in-

63. Study Committee Report at 5, ¶ 1.2.

64. On a positive note, the lead author has been informed by design professionals that there are efforts underway within the local design professional organizations for consensus on the level of detail for building envelope design, course of construction inspections, and certification for third-party inspectors.

65. WASH. REV. CODE § 64.55.020(1) (Supp. 2005).

66. *Id.*

67. *Id.* § 64.55.020(2).

68. *Id.* § 64.55.020(3).

69. Study Committee Report at 6, ¶ 1.3. As of this writing, the lead author is aware of efforts to form a committee by building design professionals to develop the appropriate standard of care, taking into account all details such as project location, size, and construction type.

70. WASH. REV. CODE § 64.55.030 (Supp. 2005).

spections would appear to lack independence from their employers, the Committee recommended that building enclosure inspectors be “free from any interference or influence relating to the inspections.”⁷¹ Inspections must be conducted by an independent qualified inspector, that is, “a person with substantial and verifiable training and experience in building enclosure design and construction” who is not affiliated with and does not have a pecuniary interest in any party providing services or materials for the project.⁷² The inspector may be the architect or engineer of record or who approved the building enclosure design documents.⁷³

The statute is quite similar to the Committee’s recommendations regarding the scope of inspections. The statute requires that the inspections must include, at a minimum, water penetration resistance testing of a “representative sample” of windows and window installations, conducted to industry standards.⁷⁴ Also required is a review of the building enclosure during the course of construction to determine whether the work has been performed in substantial compliance with the building enclosure design documents.⁷⁵

4. Alternative Inspection Procedure for Conversion Condominiums

For existing buildings being converted into condominiums, the statute contains an alternative inspection and reporting procedure that was not addressed by the Committee. Building enclosure inspections must be performed before the sale of any units, and must include removal of siding or other building enclosure materials, or even more intrusive testing, as necessary for the inspector to determine how the building enclosure was constructed.⁷⁶ The inspector needs to evaluate whether the present condition of the building enclosure would fail to protect the building from water or moisture intrusion.⁷⁷ The resulting inspection report must include recommendations for repairs necessary to fix construction defects that would prevent the building enclosure from keeping out water or moisture not caused by flooding.⁷⁸ All repairs called for in such an inspection report must be made unless the building had a sale prohibition covenant recorded more than five years before the report was issued.⁷⁹ The inspector’s report, identifying the extent and results of the

71. Study Committee Report at 6, ¶ 1.4.

72. WASH. REV. CODE § 64.55.040(1)(a)–(c) (Supp. 2005).

73. *Id.* § 64.55.040(1)(c).

74. *Id.* § 64.55.050(1)(a).

75. *Id.* § 64.55.050(1)(a)–(b).

76. *Id.* § 64.55.090(1)(a).

77. *Id.* § 64.55.090(1)(b).

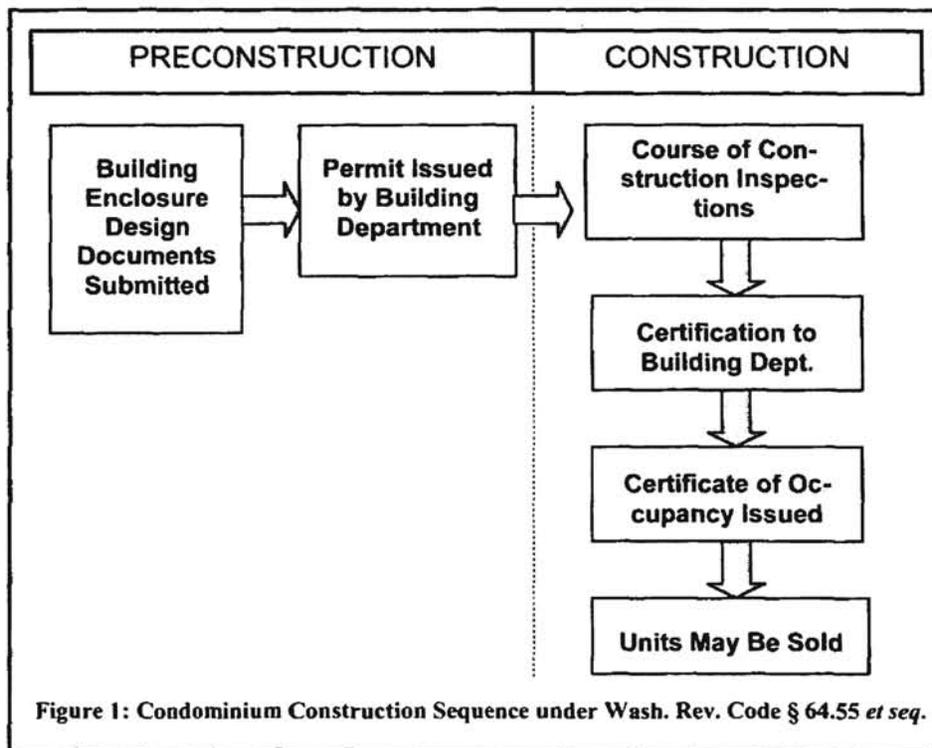
78. *Id.* § 64.55.090(1)(c).

79. *Id.* § 64.55.090(1)(d).

inspection and how required repairs were made, must be provided as part of the condominium public offering statement.⁸⁰

The Committee recommended that, once inspections are completed, the inspector certify that the building enclosures substantially comply with the design documents.⁸¹ However, the Committee recognized that building envelope designs are often modified in the field during construction and that there is a need for flexibility in addressing design issues as they arise. In response, the Committee suggested the inspections be made in accordance with the modified design and the inspectors be involved in the design process.⁸²

The statute requires that after required inspections, the inspector must submit to the building department a letter certifying that the building enclosure substantially complies with the design documents.⁸³ The building department can then issue a final certificate of occupancy.⁸⁴ However, the building department is not responsible for determining whether the required inspections were adequate or appropriate.⁸⁵ Figure 1 presents the sequence of events for new multiunit residential buildings under the amended statute.⁸⁶



80. *Id.* § 64.55.090(1)(e).

81. Study Committee Report at 7–8, ¶ 1.6.

82. *Id.*

83. WASH. REV. CODE § 64.55.060 (Supp. 2005).

84. *Id.*

85. *Id.*

86. *See id.* §§ 64.55.020–090.

5. Limited Liability for Design Professionals and Inspectors

To encourage design professionals and inspectors (and their insurers) to take on projects, the Committee recommended preserving the status quo and limiting liability to the entity with which the professional had formed a contract.⁸⁷ This limitation was not viewed as a potential setback to homeowners because declarants would continue to remain liable to homeowners for construction defects under existing law and homeowners would not be deprived of an opportunity to sue for damages.⁸⁸ If a lawsuit was filed, the Committee recommended that the inspections not be entitled to any evidentiary presumption; instead, the inspector would be allowed to testify at trial under current evidentiary rules governing experts and other matters, and would not be precluded from testifying because of his or her role as inspector.⁸⁹

Notably, the statute does not create a private right of action against the inspector based upon compliance or noncompliance with its provisions, nor does it create any independent basis for inspector liability.⁹⁰ In a significant compromise by the building industry, the inspector's report or testimony regarding his or her building envelope inspection is not entitled to any evidentiary presumption in any proceeding (i.e., a presumption, rebuttable presumption, or clear and convincing evidence), and all questions regarding admissibility of such a report or testimony must be resolved by the rules of evidence.⁹¹ In short, a construction professional assumes no more liability than existed before these amendments. Professionals can only be sued by the parties with whom they contract, and they assume no new liability to a homeowners association.

B. Reducing Transactional Cost: The Use of Arbitration and Mediation Procedures to Facilitate Early and Meaningful Settlement of Disputes

The Committee made several recommendations to facilitate early and less costly resolution of alleged construction defects by use of ADR procedures, including arbitration and mediation.⁹² The final statute adopted most of these recommendations.⁹³ ADR and fee-shifting provisions of the 2005 amendments apply to all actions filed or notices of claim served after August 1, 2005, alleging breach of a WCA express or

87. Study Committee Report at 8, ¶ I.7.

88. *Id.*

89. *Id.*

90. WASH. REV. CODE § 64.55.070 (Supp. 2005).

91. *Id.* § 64.55.080.

92. Study Committee Report at 12-24, ¶ II.1-7.

93. See *infra* notes 95-107.

implied warranty, or seeking relief that could be awarded for such breach for a multiunit residential building, regardless of the legal theory pled.⁹⁴

Table 1 presents the key events and deadlines in bringing claims under the 2005 amendments.

Time Period⁹⁵	Event Description
Day 1.	Serve RCW 64.50 Notice of Claim. ⁹⁶
45 days after service of Notice of Claim.	First possible date to file complaint. ⁹⁷
60 days after later of filing or service of complaint.	Case schedule plan submitted. ⁹⁸
90 days after later of filing or service of complaint.	Last day for any party to file demand for arbitration. ⁹⁹
Prior to mediation.	Parties and experts meet and confer. ¹⁰⁰
After meeting and conferral.	Motion for neutral expert (if necessary). ¹⁰¹
7 months after later of filing or service of complaint.	Last day for mediation to commence. ¹⁰²
60 days after end of mediation.	Last day to serve an offer of judgment. ¹⁰³ Start of first fee-shifting mechanism. ¹⁰⁴
14 months after later of filing or service of complaint.	Last day for arbitration to commence. ¹⁰⁵
20 days after filing arbitration award.	Last day to file request for trial de novo. ¹⁰⁶ Start of second fee-shifting mechanism. ¹⁰⁷

94. WASH. REV. CODE § 64.55.005(2) (Supp. 2005).

95. Several of the listed deadlines may be changed by agreement of the parties. Consult statutes listed *infra* notes 96–107 for language relating to possible alteration of deadlines.

96. WASH. REV. CODE § 64.50.020(1) (2004). The statute provides for service of a Notice of Claim as follows:

In every construction defect action brought against a construction professional, the claimant shall, no later than forty-five days before filing an action, serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect.

Id.

97. *Id.*

98. *Id.* § 64.55.110(1) (Supp. 2005); see *infra* Part III.B.2.

99. WASH. REV. CODE § 64.55.100(1); see *infra* Part III.B.2.

100. WASH. REV. CODE § 64.55.120(2); see *infra* Part III.B.4.

101. WASH. REV. CODE § 64.55.130(1); see *infra* Part III.B.5.

102. WASH. REV. CODE § 64.55.120(1); see *infra* Part III.B.4.

103. WASH. REV. CODE § 64.55.160(1); see *infra* Part III.B.7.

104. WASH. REV. CODE § 64.55.160(4); see *infra* Part III.B.7.

105. WASH. REV. CODE § 64.55.100(1); see *infra* Part III.B.2.

1. Applicability of the ADR Provisions

The Committee originally recommended that its ADR procedures apply “only for disputes in which a complaint is served or filed after [the effective date].”¹⁰⁸ However, the legislature fleshed out criteria for applicability of the various ADR provisions as follows:

RCW 64.55.010 and 64.55.100 through 64.55.170 apply to any action that alleges breach of an implied or express warranty under chapter 64.34 RCW or that seeks relief that could be awarded for such breach, regardless of the legal theory pled, *except that RCW 64.55.100 through 64.55.170 shall not apply to:*

- (a) Actions filed or served prior to August 1, 2005;
- (b) Actions for which a notice of claim was served pursuant to chapter 64.50 RCW prior to August 1, 2005;
- (c) Actions asserting any claim regarding a building that is not a multiunit residential building;
- (d) Actions asserting any claim regarding a multiunit residential building that was permitted on or after August 1, 2005, unless the letter required by RCW 64.55.060 has been submitted to the appropriate building department or the requirements of RCW 64.55.090 have been satisfied.¹⁰⁹

2. Arbitration Will Likely Become the Preferred Method for Resolving Disputes

The Committee recommended that either the homeowner or the declarant could elect mandatory arbitration as a matter of right within ninety days after service of a complaint alleging breach of express or implied warranties.¹¹⁰ Such a request would not affect any notice and would cure rights under title 64, chapter 50, section 050 of the Revised Code of Washington.¹¹¹ Unless otherwise stipulated by the parties, a single arbitrator would hear cases with claimed losses less than \$1 million, while three arbitrators would hear cases with losses above that amount.¹¹² The arbitrators are to be attorneys with experience in construction defect disputes as attorneys, judges, arbitrators, or mediators.¹¹³ Upon demand of a party, any subcontractor or supplier against which that party has a legal claim and whose work or performance is at issue may be joined as a

106. WASH. REV. CODE § 64.55.100(4); *see infra* Part III.B.3.

107. WASH. REV. CODE § 64.55.100(6); *see infra* Part III.B.7.

108. Study Committee Report at 16, ¶ II.7.

109. WASH. REV. CODE § 64.55.005(2) (emphasis added).

110. Study Committee Report at 11, ¶ II.1; *see* WASH. REV. CODE § 64.34..

111. *Id.* ¶ II.1 cmt.

112. *Id.*

113. *Id.*

party to the proceedings.¹¹⁴ The Committee also suggested a lengthy list of new procedural rules for conducting either arbitration or trials de novo for these types of cases.¹¹⁵

The statute requires that within sixty days after the later of filing or service of the complaint, the parties must confer on a proposed case schedule plan that includes deadlines for selection of a mediator (and arbitrator, where applicable); commencement of mediation; joinder of additional parties; completion of investigations; and disclosures of repair plans, estimated costs of repair, and settlement demands and responses.¹¹⁶ If the parties cannot agree on a case schedule, either party may move the court for determination of the applicable dates.¹¹⁷ The intent here was to require the parties to meet and confer to develop a case management order tailored to the needs of the case. It will be important that the attorneys involved in such cases give careful thought to issues such as laydown discovery, who hears dispositive motions, limitations on discovery, and other issues which may unnecessarily escalate the litigation cost.

Any party may demand arbitration not less than thirty nor more than ninety days after the lawsuit has been filed and served.¹¹⁸ Unless the parties agree otherwise, the case is to be heard within fourteen months by a single court-appointed arbitrator if the case involves less than \$1 million or by three court-appointed arbitrators if the case involves more than \$1 million.¹¹⁹ Upon the demand of a party who has a legal claim against a subcontractor, such subcontractor may be joined in the arbitration if the work performed by the subcontractor is an issue in that proceeding.¹²⁰

3. An Arbitration Decision May be Appealed in a Trial de Novo

The Committee recommended that either party have the ability to request a trial de novo in Superior Court after the arbitration decision and as a matter of right.¹²¹ Because of the possibility that the ADR process

114. *Id.* at 15, ¶ II.6.

115. *Id.* at 12, ¶ II.2.

116. WASH. REV. CODE § 64.55.110(1) (Supp. 2005).

117. *Id.* § 64.55.110(2).

118. *Id.* § 64.55.100(1).

119. *Id.* § 64.55.100(2).

120. *Id.* § 64.55.150.

121. Study Committee Report at 11, ¶ II.1. Requests for trial de novo following arbitration include the following procedures:

Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues

and a trial de novo might indeed take longer than under then-current law, the Committee recommended mitigation by requiring courts to set a priority trial date for trials de novo.¹²²

The 2005 statute allows either party to request a trial de novo on appeal within twenty days after the arbitrator's decision is filed.¹²³ If the judgment for damages in the trial de novo is not more favorable to the appealing party than the award previously obtained in arbitration, the appealing party, as the non-prevailing party, must pay the costs and reasonable attorney fees of the adverse party.¹²⁴ If the judgment for damages in the trial de novo is greater than those awarded in the arbitration, the court may award the costs and attorney fees incurred after the request for trial de novo to the appealing party, unless the judgment is not more favorable to the appealing party than the last of any offers of judgment made.¹²⁵

If both the trial de novo provisions and the offer of judgment provisions would result in the award of costs and fees, the offer of judgment provisions of title 64, chapter 55, section 160 of the Revised Code of Washington will control.¹²⁶

4. Mediation of Disputes is Mandatory

Whether in arbitration or court, the Committee recommended that the parties enter mandatory mediation before a mutually agreed upon mediator, or one appointed by the arbitrator or the court, in order to speed the settlement process.¹²⁷ A significant procedural step is the requirement that the parties and their experts meet and confer to attempt resolution or to narrow the scope of the issues in dispute before mediation.¹²⁸

Under the statute, unless the parties agree otherwise, mediation must begin within seven months of the later of filing or service of the complaint.¹²⁹ Prior to mediation, the parties must meet and confer to attempt to narrow or resolve the issues remaining in dispute.¹³⁰ The parties

of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

WASH. REV. CODE § 7.06.050(1) (Supp. 2005).

122. Study Committee Report at 11, ¶ II.1.

123. WASH. REV. CODE § 64.55.100(4) (Supp. 2005).

124. *Id.* § 64.55.100(5).

125. *Id.* § 64.55.100(6). Offers of judgment are those made pursuant to WASH. REV. CODE § 64.55.160 (2004).

126. *Id.* § 64.55.100(7) (Supp. 2005).

127. Study Committee Report at 12, ¶ II.3.

128. *Id.*

129. WASH. REV. CODE § 64.55.120(1) (Supp. 2005).

130. *Id.* § 64.55.120(2).

must provide a decisionmaker who has the authority to settle the dispute and who will be available throughout the mediation.¹³¹ Mediation ends upon settlement or written notice of termination by any party.¹³²

5. Use of a Neutral Expert is Optional

Consistent with its goal of utilizing construction professionals throughout the design and construction process, the Committee took a novel approach and allowed for the appointment of neutral expert.¹³³ If disputed issues remain after meeting and conferring, the Committee recommended that a party be allowed to request that the arbitrator or court appoint a neutral expert.¹³⁴ The qualifications of a neutral expert would be essentially the same as for the course of construction inspector; a licensed architect or engineer with substantial experience in the disputed issue, or an individual with other suitable experience and training would qualify.¹³⁵ To maintain the appearance of the neutral expert's independence, such an individual could not have been employed as an expert by either party within three years before the commencement of the present dispute, unless otherwise agreed by the parties.¹³⁶ The parties would either agree on who the neutral expert would be and the exact scope of his or her services and findings, or the arbitrator would decide those matters.¹³⁷

To encourage participation of experts in such a process with a high potential for liability, the Committee recommended that the neutral expert have no liability to the parties for the performance of his or her duties.¹³⁸ A neutral expert's report and testimony would be admissible at trial, arbitration hearing, or trial de novo subject to the usual evidentiary rules regarding qualification as expert and prejudicial testimony, but the neutral expert's report and testimony would not be entitled to any presumptive effect.¹³⁹

The statute largely follows the Committee's recommendations, allowing any party to request the court (or arbitrator, if that option is elected) to appoint a neutral expert if issues still remain after the parties have met and conferred.¹⁴⁰ Unless the parties agree otherwise, the court

131. *Id.* § 64.55.120(3).

132. *Id.* § 64.55.120(4).

133. Study Committee Report at 12, ¶ II.4.

134. *Id.*

135. *Id.*

136. *Id.* at 12–13.

137. *Id.* at 13.

138. *Id.* at 14.

139. *Id.*

140. WASH. REV. CODE § 64.55.130(1) (Supp. 2005).

or arbitrator will select a neutral expert who has not been employed as an expert by a party within the previous three years, and determine the scope of the expert's duties, timing of his or her inspections, and coordination between the neutral expert and the parties' experts.¹⁴¹ The neutral expert will not decide the amount of damages or the costs of repair, unless the parties agree otherwise.¹⁴² The neutral expert will not be liable to the parties regarding his or her duties, and there is no evidentiary presumption created by a neutral expert's report.¹⁴³

6. Generally, Costs of Arbitration, Mediation and Neutral Experts
are Advanced by the Electing Party, but Costs and Fees
are Awarded to the Prevailing Party

The Committee recommended that the electing party be required to advance the fees of the arbitrator(s), mediator, and neutral expert.¹⁴⁴ The non-prevailing party would be liable for those fees.¹⁴⁵

Under the statute, different rules apply regarding payment of arbitrators, mediators, and neutral experts depending on whether a condominium was built pursuant to a building permit issued before or after August 1, 2005.¹⁴⁶ For buildings started before that date, the party which demands arbitration will pay for both the arbitrator and the mediator, and the party requesting a neutral expert will pay for the expert.¹⁴⁷ If arbitration has not been demanded, the court will decide on payment of the mediator.¹⁴⁸ These payments are not subject to the fee-shifting offer of judgment provisions discussed below.¹⁴⁹ For the later cases, the same parties under the same situations must "advance" payment, but those payments are subject to possible shifting under the offer of judgment provisions.¹⁵⁰

141. *Id.* § 64.55.130(2), (4).

142. *Id.* § 64.55.130(5).

143. *Id.* § 64.55.130(7), (9).

144. Study Committee Report at 15, ¶ II.5.

145. *Id.*

146. WASH. REV. CODE § 64.55.140 (Supp. 2005).

147. *Id.* § 64.55.140(2)(a).

148. *Id.* § 64.55.140(2)(b).

149. *Id.* § 64.55.140(2)(c).

150. *Id.* § 64.55.140(1)(a).

7. Offer of Judgment Provisions Could Result in Shifting of Responsibility for Payment of Attorneys Fees

To promote early settlement of disputes, the Committee recommended that either party could submit one or more offers of judgment.¹⁵¹ The legislature adopted these recommendations without significant alteration. These provisions are perhaps the most powerful in the amendments. They are designed to encourage declarants and their insurers to make their best and most reasonable settlement offers at the earliest possible time, because it not only sets up the opportunity to obtain attorney fees, but also potentially relieves them from the obligation of having to pay the HOA's attorney fees.

In accord with the Committee's recommendations, the new statute provides that ultimate responsibility for attorney fees and arbitration or court costs are affected by the acceptance or rejection of offers of judgment. A declarant, owners association, or individual unit owner who is a party to the dispute in arbitration or trial may make an offer of judgment on an adverse party at any time up to sixty days following termination of mediation.¹⁵² The offer would specify the amount of damages (not including attorneys' fees or costs) the offeror would be willing to pay or receive and also indicate that party's commitment to pay fees and costs that are actually awarded as provided below.¹⁵³ Any such offer not accepted within twenty-one days is considered rejected and withdrawn.¹⁵⁴

151. Study Committee Report at 16, ¶ 11.8. Offers of judgment are generally provided for in Washington by Superior Court Civil Rule (CR) 68, which is nearly identical to Rule 68 of the Federal Rules of Civil Procedure. CR 68 states:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

WASH. SUPER. CT. R. 68 (2004).

152. WASH. REV. CODE § 64.55.160(1) (Supp. 2005).

153. *Id.*

154. *Id.*

In order that the plaintiffs receive assurance that they will actually be paid the defendant's offered amount, any such offer of judgment must include a demonstration of defendant's ability to pay the judgment and any costs and fees, including reasonable attorney fees, within thirty days of acceptance of the offer.¹⁵⁵

If an association or unit owner accepts a declarant's offer of judgment, it would be considered the prevailing party and is entitled to recover the amount of the offer as well as costs and fees, including reasonable attorney fees.¹⁵⁶

However, if the plaintiffs reject an offer of judgment and the final judgment of the arbitrator or court (without consideration of fees and costs) is less favorable to the offeree than was the last offer, then the offeror is considered the prevailing party, and would accordingly recover those fees it accrued following the date of the rejected offer of judgment, as determined by the arbitrator/judge using existing standards.¹⁵⁷ The non-prevailing party would not be entitled to receive any cost or fee award.¹⁵⁸ On the other hand, if the final judgment on damages is more favorable to the offeree than the last offer of judgment, then the arbitrator or court will determine which party is the prevailing party and will decide award of costs and fees in accordance with otherwise applicable law.¹⁵⁹

The Committee was concerned that pleading multiple legal theories could lead to overlapping damage awards, so to retain the fee-shifting provisions of its recommendations, the Committee recommended that the above rules apply to damage awards that could have been obtained under the WCA, even if they were actually alleged under other statutory or common law theories, such as breach of contract, fraud, fiduciary liability, or the Consumer Protection Act.¹⁶⁰ In essence, this was considered a "close the loophole" provision designed to prevent clever pleading from circumventing application of the amendments. This concept was retained by the legislature.¹⁶¹

There are three practical problems created by this provision of the amendments. First, it is often difficult in practice to obtain documented funding commitment, particularly where there are multiple insurance

155. *Id.* § 64.55.160(2). An offer of judgment by the declarant/defendant that depends on insurance proceeds to fund the offer must also include a sworn statement of an insurance company representative demonstrating a commitment to fund the offer. *Id.*

156. *Id.* § 64.55.160(3).

157. *Id.* § 64.55.160(4).

158. *Id.*

159. *Id.* § 64.55.160(5).

160. Study Committee Report at 16–17, ¶ 11.8.

161. WASH. REV. CODE § 64.55.005(2) (Supp. 2005).

carriers insuring the same entity. This is a novel requirement believed to be unique to Washington, and it may be difficult to change the institutional thinking of insurance carriers.

Second, and more importantly, the offer of judgment is to only be made for the amount of damages, not attorney fees.¹⁶² If the offer is accepted, then the HOA will be entitled to attorney fees in an amount determined by the arbitrator or court.¹⁶³ Therefore, from the insurers' perspective, it will be difficult to gauge the dollar exposure without knowing the amount of attorney fees. This will be particularly important in cases where the damages may exceed the available insurance.

Third, the statute allows either party to make an offer of judgment as to damages.¹⁶⁴ It is unclear what happens to attorney fees if the HOA makes an offer of judgment which is accepted by the builder.

8. Limitations on Costs and Fees Prevent Excessive Liability for Homeowner Associations and Individual Unit Owners

If a condominium association has brought a claim, an award of costs and fees against the association may not exceed five percent of the assessed value of the condominium as a whole.¹⁶⁵ If an individual unit owner has brought a claim, such an award against the owner may not exceed five percent of the unit's assessed value.¹⁶⁶

For example, assume a condominium HOA rejects a developer's \$1 million offer of judgment and elects arbitration. If the arbitrator awards \$900,000 to the HOA, the HOA will be deemed the non-prevailing party will receive no award of attorney fees because the \$900,000 award is less favorable than the last offer of judgment. The developer will be deemed the prevailing party and will be entitled to an award of fees and costs incurred after the date the offer of judgment was rejected.

If the assessed value of each condominium unit is \$200,000, and there are fifty such units in the building, then the condominium value is \$10 million. Attorney fees payable by the non-prevailing HOA would be capped at five percent of \$10 million, or \$500,000. If the same claim had been brought by an individual unit owner who was deemed the non-prevailing party, that owner would only be liable only for \$10,000 towards the developer's attorney fees (cap at five percent of the unit's assessed value).

162. *Id.* § 64.55.160(1).

163. *Id.* § 64.55.160(3).

164. *Id.* § 64.55.160(1).

165. *Id.* § 64.55.160(6)(a).

166. *Id.* § 64.55.160(6)(b).

On the other hand, if the HOA had rejected the developer's \$1 million offer of judgment, was subsequently awarded \$1.2 million by the arbitrator, and if the developer had then requested a trial de novo in which the jury awarded the HOA \$1.1 million, the developer would not be automatically entitled to fees and costs because it would have failed to beat its own offer of judgment. In that case, the court would determine which party prevailed, and would set the award for costs and fees.

IV. QUESTIONS, COMMENTS, CRITICISMS, AND MISCONCEPTIONS ABOUT THE AMENDMENTS

Since the enactment of the amendments, presentations have been made to more than a dozen audiences of developers, contractors, insurers, design professionals, and lawyers.¹⁶⁷ Excellent questions have been asked at these presentations, and building developers have shared insightful anecdotal experiences post-effective date. These discussions have revealed that there are a number of misconceptions, misunderstandings, and several unanswered questions about the amendments. Several of these concerns and responses to them follow.

Criticism: The requirements for submission of building envelope plans and third-party independent course of construction inspections do not set forth the minimum level of what is required.

Response: This is correct. First, this issue was debated by the Committee, and it appears that this outcome was the Committee's intention. The amendments apply statewide, but the level of detail and inspections needed in Yakima may differ from those necessary in Yelm. Similarly, the level of detail and number of inspections in a thirty-story concrete condominium structure in downtown Seattle may differ dramatically from those appropriate for a thirty-unit, three-story structure in Redmond.

Second, the Committee felt that improvements in construction quality would necessarily require the involvement of construction expertise sooner, rather than later in the process. The requirement for building enclosure design documents prepared by a qualified expert and course of construction third-party inspections by an independent inspector is a radical departure from pre-amendment law.

Question: What is the local building department's role and responsibility for review of the building enclosure design document and course of construction design document?

167. The lead author, Mark F. O'Donnell, was the presenter. The concerns and response thereto contained in this section are taken from conversations that took place during the course of the presentations.

Response: Its role is ministerial. Based on anecdotes shared at the presentations, it seems that building officials are placing unnecessary limitations and requirements on building enclosure design documents. Essentially, all these officials need do is determine if building enclosure documents are required and, if so, confirm that they have been submitted. If submitted, the building permit should be issued.

The official has no responsibility under the amendments to review the design documents to determine if they are adequate. If a building enclosure plan is required, then course of construction inspections will be required. The building official need not conduct the inspection, nor determine if the independent inspector is qualified. The building official's responsibility is to assure the letter certifying substantial compliance has indeed been submitted.

Questions: Can the person preparing the building design document be the same person conducting the course of construction inspections? If the inspector is hired by the developer, is not the inspector precluded from inspecting because of his/her affiliation with the developer?

Response: Assuming an inspector meets the definition of a "qualified inspector" provided in the statute,¹⁶⁸ the person preparing the building enclosure design documents can be the same person conducting the course of construction inspections. It is likely that this will be the prevailing practice. Title 64, chapter 55, section 040(1)(c) of the Revised Code of Washington specifically allows the architect or engineer to be the inspector. The intent here was that the design professional and inspector be qualified and independent from the developer.

Question: Can an HOA sue the design professional who prepared the building enclosure design documents, the third-party course of construction inspector, or the neutral experts?

Response: No, each are essentially immune from liability to the HOA.

Question: On what portion of the project is the five percent repair construction cost limit applied, and why is it set at that amount?¹⁶⁹

Response: Under title 64, chapter 55, section 020 of the Revised Code of Washington, the five percent limit applied to all buildings in a multiunit building complex. The decision was made so as not to burden routine maintenance, but only to require building enclosure design

168. WASH. REV. CODE § 64.55.040(1) (Supp. 2005).

169. "Rehabilitative construction" is defined as "construction work on the building enclosure of a multiunit residential building if the cost of such construction work is more than five percent of the assessed value of the building." *Id.* § 64.55.010(9). "If construction work on a building enclosure is not rehabilitative construction because the cost thereof is not more than five percent of the assessed value of the building, then the person applying for a building permit shall submit to the building department a letter so certifying." *Id.* § 64.55.020(1).

documents where significant work was to be done on the building envelope.

V. CONCLUSION

By passage of the 2005 amendments to the WCA, Washington has become a national leader by dealing directly with the problems and costs of litigation spawned by water intrusion problems in both new and existing condominiums and other multiunit residential buildings. The new statute has an innovative two-pronged approach: (1) prevention of water intrusion by requiring building enclosure design documents and inspections by independent, qualified inspectors to ensure the design has been followed during construction or rehabilitative construction; and (2) institution of ADR procedures (mandatory mediation and optional arbitration) to reduce the costs and time delays associated with conventional litigation. The key elements in the ADR procedures are its fee-shifting provisions, whereby the prevailing party is awarded its legal fees.

Building envelope design inspections required by the 2005 amendments to the WCA will operate to prevent many condominium water intrusion problems and, it is hoped, lead to a much-needed revitalization of the Washington condominium construction industry. The course of construction inspections should ensure stricter builder conformance with the building envelope design as prepared by the architect.

Costs associated with the litigation surrounding resolution of water intrusion problems in existing condominiums will be reduced as the new ADR procedures are utilized. In retrospect, the compressed timeline for completion of the arbitration process, although laudable, may not be achievable. These cases are sensitive to too many schedules, particularly those of the experts. However, the amendments do allow flexibility in that they encourage parties to agree to a process that is tailored to the needs of the particular case. At the very least, by providing for mandatory mediation and optional arbitration of disputes, attorney fees should be reduced. Also, offer of judgment procedures will provide an incentive for the parties to settle so as not to risk an adverse arbitration or court decision that could shift attorney fees to the non-prevailing parties.

As with nearly any statute presenting such novel approaches to solving such wide-ranging problems, several practical concerns have arisen that could lead to hitches in the process, and might themselves require clarifying amendments in the future.

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THE HONORABLE CHRISTOPHER WASHINGTON
Noted for Hearing with Oral Argument
Friday, February 8, 2008 at 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DONIA TOWNSEND and BOB PEREZ,
individually, on behalf of their marital
community, and as class representatives;
PAUL YSTEBOE and JO ANN YSTEBOE,
individually, on behalf of their marital
community, and as class representatives,

Plaintiffs,

vs.

THE QUADRANT CORPORATION, a
Washington Corporation;
WEYERHAEUSER REAL ESTATE
COMPANY, a Washington Corporation; and
WEYERHAEUSER COMPANY, a
Washington Corporation,

Defendants.

NO. 07-2-39341-2 SEA

**DEFENDANTS WEYERHAEUSER
REAL ESTATE COMPANY'S AND
WEYERHAEUSER COMPANY'S
MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION AND RELIEF REQUESTED

This case is a construction defect case brought by homeowner plaintiffs against
The Quadrant Corporation ("Quadrant") and its parent companies, Weyerhaeuser Company
and Weyerhaeuser Real Estate Company. Defendants Weyerhaeuser Real Estate

*Defendants Weyerhaeuser Real Estate Company's and
Weyerhaeuser Company's Motion for Summary Judgment
(07-2-39341-2 SEA) - Page 1 of 12*

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ORIGINAL

1 Company ("WRECO") and Weyerhaeuser Company ("Weyerhaeuser") request that this Court
2 enter an Order dismissing any and all claims against them.

3 II. STATEMENT OF FACTS

4 The named plaintiffs are homeowners who purchased houses directly and only from
5 Quadrant, a defendant in this matter. EXHIBITS A & B to the Declaration of Dee Jay Phelps
6 in support of Defendant The Quadrant Corporation's Motion to Stay Proceeding and Compel
7 Arbitration ("Phelps Dec.") (purchase and sale agreements).¹ Plaintiffs Donia Townsend and
8 Bob Perez are a married couple who reside in a house designed and built by Quadrant located
9 in the Brookside development in Bonney Lake, Washington. Complaint for Damages at ¶ 2.2.
10 Plaintiffs Paul and Jo Ann Ystebøe are a married couple who reside in a house designed and
11 built by Quadrant located in the Snoqualmie Ridge development in Snoqualmie, Washington.
12 *Id.* at ¶ 2.3.

13 The plaintiffs have commenced this action against Quadrant and its parent companies,
14 asserting a variety of claims arising from or related to alleged defects in their Quadrant
15 homes. In particular, the plaintiffs have brought claims for outrage, fraud, violation of the
16 Unfair Business Practices Act (RCW 19.86), negligence (bodily injury and property damage),
17 negligent misrepresentation, rescission [sic],² breach of warranty, and declaratory relief.

18 The only connection that Weyerhaeuser and WRECO have to this case is their
19 corporate relationship to the homebuilder, Quadrant. Declarations of Dale Sowell and
20 Richard E. Hanson in support of Defendants Weyerhaeuser Real Estate Company's and
21 Weyerhaeuser Company's Motion for Summary Judgment ("Sowell Dec." and "Hanson
22

23
24
25 ¹ In conjunction with this motion, Quadrant has filed a motion to stay the proceedings and compel
26 arbitration pursuant to the arbitration provision contained in the plaintiffs' purchase and sale agreements. For the
27 Court's convenience, a copy of Phelps Dec. is attached hereto.

28 ² Typically, rescission is a type of remedy, not a cause of action or basis for relief. *See Brader v. Minute
Muffler Installation, Ltd.*, 81 Wn. App. 532, 537, 914 P.2d 1220 (1996) (noting that the rescission remedy aims
to restore parties to their original positions), *amended on reconsideration* by 922 P.2d 825 (Wash. Ct. App.
1996).

1 Dec.," respectively). Quadrant is a subsidiary of WRECO, which in turn is a subsidiary of
2 Weyerhaeuser. Hanson Dec. at ¶¶ 3-4; Complaint for Damages at ¶ 3.1.

3 III. STATEMENT OF ISSUES

4 Should the Court dismiss all claims against Weyerhaeuser and WRECO with prejudice
5 when neither of the companies has any connection with this case other than a parent-
6 subsidiary relationship with Quadrant, when the plaintiffs have failed to allege any grounds
7 upon which Weyerhaeuser or WRECO can be held liable for Quadrant's actions, and when
8 there is no evidence of any wrongdoing by Weyerhaeuser or WRECO?

9 IV. EVIDENCE RELIED UPON

10 Defendants Weyerhaeuser and WRECO rely upon the Declarations of Dale Sowell
11 and Richard Hanson in support of Defendants Weyerhaeuser Real Estate Company's and
12 Weyerhaeuser Company's Motion for Summary Judgment, filed herewith; and the
13 Declarations of Mark Gray and Dee Jay Phelps filed in support of Defendant The Quadrant
14 Corporation's Motion to Stay Proceedings and Compel Arbitration, together with any
15 Exhibits thereto; and the records and files herein.

16 V. ARGUMENT

17 A. The Summary Judgment Standard.

18 Rule 56(c) requires the moving party to demonstrate "that there is no *genuine* issue as
19 to any *material* fact and that the moving party is entitled to a judgment as a matter of law."
20 CR 56(c) (emphasis added). Summary judgment is proper if, from all the evidence,
21 reasonable persons could reach but one conclusion. *Precision Moulding & Frame, Inc. v.*
22 *Simpson Door Co.*, 77 Wn. App. 20, 25, 888 P.2d 1239 (1995). The opposing party may not
23 rely on bare allegations in its pleadings to defeat summary judgment, and must set forth
24 specific facts establishing that there is a genuine issue of material fact for trial. *Baldwin v.*
25 *Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989) (citing
26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed.2d 202
27
28

1 (1986)). That is, the nonmoving party cannot rely on bare assertions of fact, conclusory
2 statements, or speculation to raise a genuine issue of material fact and prevent summary
3 judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517
4 (1988). All assertions must be supported by admissible evidence. *Id.* at 359.

5 Here, the plaintiffs' claims with respect to WRECO and Weyerhaeuser are based
6 purely on conclusory allegations, and an improper attempt to muddle the separate corporate
7 identities of Quadrant and its parent companies. In fact, the plaintiffs make no effort to
8 specifically allege any factual basis upon which WRECO and Weyerhaeuser could be held
9 liable in this present action. Accordingly, summary judgment in favor of WRECO and
10 Weyerhaeuser is appropriate.

11 **B. The Court Should Dismiss All Claims Against Weyerhaeuser Company and**
12 **Weyerhaeuser Real Estate Company.**

13 Neither Weyerhaeuser nor WRECO has any connection to the plaintiffs or their
14 purportedly defective houses that justifies retaining them as defendants in this matter. *See*
15 *Sowell Dec.* at ¶¶ 4-6; *Hanson Dec.* at ¶¶ 5-7. As the plaintiffs allege in their complaint,
16 Quadrant—not WRECO or Weyerhaeuser—designed, built, marketed and sold the houses at
17 issue. Complaint for Damages at ¶¶ 5.1-5.15. WRECO and Weyerhaeuser were not parties to
18 the purchase and sale agreements with the plaintiffs, and played no part in the production or
19 sale of the houses at issue. Exs. A & B to Phelps Dec. Indeed, the only association is the
20 mere fact that Quadrant is a fully owned subsidiary of WRECO, which in turn is a fully
21 owned subsidiary of Weyerhaeuser. This corporate relationship is insufficient to hold
22 WRECO and Weyerhaeuser liable for any alleged wrongdoing by Quadrant. Because there
23 are no genuine issues of material fact regarding WRECO's and Weyerhaeuser's liability,
24 summary judgment in their favor is appropriate.

25 **1. The Plaintiffs Make No Specific Allegations Against Weyerhaeuser or**
26 **WRECO.**

27 The plaintiffs improperly rely on allegations against Quadrant to support their claims
28 against Weyerhaeuser and WRECO. In fact, the only time that Weyerhaeuser and WRECO

1 are specifically mentioned in the complaint, aside from the caption, is in the allegation of the
2 corporate relationship between the defendants. Complaint for Damages at ¶ 3.1. Otherwise,
3 the plaintiffs assert a litany of factual allegations about Quadrant's conduct and construction
4 practices, paired with generalized allegations about the "Defendants."

5 For example, the plaintiffs allege "Defendants lied to and defrauded Quadrant home
6 buyers." *Id.* at ¶ 5.11. The plaintiffs then proceed to list a number of allegedly false
7 statements made by Quadrant. *See, e.g., id.* at ¶¶ 5.11-5.13 (stating, in relevant part:
8 "Plaintiffs . . . were repeatedly and falsely told by Quadrant during the purchasing
9 process. . .[;] Quadrant also specifically represented. . .[;] Quadrant even
10 advertised. . .[;] Quadrant also falsely assured . . .[;] Quadrant even misrepresented and falsely
11 assured. . .[;] During the purchasing process, Quadrant withheld . . . any information about . . .
12 indoor air quality problems in Quadrant homes."). The plaintiffs then return to their
13 generalized assertion that "Defendants provided Quadrant home purchasers absolutely no
14 information about" the alleged defects in Quadrant homes. *Id.* at ¶ 5.13.

15 As another example, the plaintiffs seek to support their claims of a "cover up" by all
16 defendants by pointing to alleged actions of Quadrant alone. The plaintiffs allege that
17 "Defendants have . . . engaged . . . in an active and concerted cover up of these serious
18 defects. . . . In fact, at a corporate level, Defendants specifically considered whether or not to
19 inform buyers of the . . . risks associated with Quadrant's reckless production methods." *Id.*
20 at ¶ 5.16. However, the plaintiffs conclude by alleging only that "Quadrant's upper
21 management adopted a direct policy to not inform home purchasers. . . ." *Id.*

22 The plaintiffs repeatedly seek to equivocate "Quadrant" to the term "Defendants," in
23 an effort to draw the parent companies into this action. Not only does this tactic fail to
24 effectively support a claim against Weyerhaeuser or WRECO, but it is also careless and
25 irresponsible pleading practice that should be firmly rejected by this Court.

1 2. ***The Plaintiffs Have Not Alleged, Nor Attempted to Allege, Facts That Would***
2 ***Make Weyerhaeuser or WRECO Liable for the Actions of Quadrant.***

3 Quadrant, Weyerhaeuser, and WRECO are all separate legal entities. As such, none is
4 liable for the acts or omission of the others. “It is a general principle of corporate law deeply
5 ‘ingrained in our economic and legal systems’ that a parent corporation (so-called because of
6 control through ownership of another corporation's stock) is not liable for the acts of its
7 subsidiaries.” *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556 (2002)
8 (quoting *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed.2d 43
9 (1998)).

10 In order to hold Weyerhaeuser or WRECO liable for the acts or omissions of
11 Quadrant, the plaintiffs would have to allege facts that would support piercing of the
12 corporate veil. “Piercing the corporate veil is an equitable remedy imposed to rectify an
13 abuse of the corporate privilege. In general, a corporation is considered a separate entity,
14 even if it is owned by a single shareholder.” *Dickens v. Alliance Analytical Labs., LLC*,
15 127 Wn. App. 433, 440, 111 P.3d 889 (2005) (citations omitted). To pierce the corporate veil,
16 the party seeking to do so must affirmatively establish two essential factors: (1) the corporate
17 form must be intentionally used to violate or evade a duty, and (2) disregard of the corporate
18 veil is necessary and required to prevent an unjustified loss to the injured party. *Id.* at 440-41.
19 The Washington Supreme Court has held that “summary judgment in favor of the [parent]
20 corporation may be appropriate if the plaintiff fails to show evidence of ‘either the requisite
21 manipulation, or the perpetration of fraud on plaintiffs.’” *Minton*, 146 Wn.2d at 398-99
22 (refusing to pierce the corporate veil and granting summary judgment to parent where
23 subsidiary and parent shared common corporate headquarters and subsidiary labeled itself as a
24 subsidiary of parent).

25 Here, the plaintiffs have made no such allegations. They have not alleged that the
26 corporate formations at issue were used to violate or evade a duty, or that unjustified loss will
27 result unless the corporate veils are disregarded. Quadrant is not some sort of “sham” entity.
28 Rather, it is the largest homebuilder in Washington State. Declaration of Mark Gray in

1 support of Defendant Quadrant's Motion to Stay Proceeding and Compel Arbitration ("Gray
2 Dec.") at ¶ 2.³ In fact, the plaintiffs readily acknowledge that Quadrant is a substantial and
3 legitimate corporation:

4 [Quadrant] designs, develops, produces, markets and sells homes in "planned
5 residential communities" in Washington and Oregon. Quadrant has produced
6 thousands of homes in Washington, increasing production rates each year. In
7 2006 alone, Quadrant claims to have produced and sold more than 1,400
8 homes. In 2007[,] Quadrant advertised more than 2,000 available home lots in
16 Quadrant planned communities in Skagit, Snohomish, King, Pierce,
Thurston, and Kitsap counties.

9 Complaint for Damages at ¶ 5.1. In short, there are no grounds to pierce the corporate veil,
10 and there is no basis to hold WRECO and Weyerhaeuser liable based on their corporate
11 relationship with Quadrant.

12 **3. *The Plaintiffs Fail to Allege Facts Showing Direct Wrongdoing By***
13 ***Weyerhaeuser Company or Weyerhaeuser Real Estate Company.***

14 Instead of making a "piercing" claim to hold Weyerhaeuser and WRECO responsible
15 for Quadrant's alleged acts and omissions, the plaintiffs have made vague claims of direct
16 wrongdoing by Weyerhaeuser and WRECO. The plaintiffs are seeking damages from
17 Weyerhaeuser and WRECO based on claims of outrage, fraud, violation of the Unfair
18 Business Practices Act (RCW 19.86), negligence, negligent misrepresentation, and breach of
19 warranty. Accordingly, the plaintiffs must prove each element of each cause of action against
20 each defendant. Because the plaintiffs cannot produce evidence in support of the elements of
21 any of their claims against WRECO and Weyerhaeuser, the Court should grant summary
22 judgment and dismiss the plaintiffs' claims against WRECO and Weyerhaeuser with
23 prejudice.

24 **a. *The Court Should Dismiss Plaintiffs' Breach of Warranty Claims***
25 ***Against WRECO and Weyerhaeuser.***

26 The Court should dismiss the plaintiffs' breach of warranty claims with respect to
27 WRECO and Weyerhaeuser. In support of this claim, the plaintiffs allege: "Defendants

28 ³ For the Court's convenience, a copy of Gray Dec. is attached hereto.

1 impliedly and explicitly warranted to Plaintiffs and other Quadrant homeowners, as intended
2 beneficiaries, that their Quadrant home was built in compliance with applicable building laws
3 and codes in a workmanlike manner and were fit to be inhabited.” Complaint for Damages at
4 ¶ 12.2. The plaintiffs, however, fail to state where, when, and how the warranty obligations
5 of WRECO and Weyerhaeuser arose, whether “impliedly and explicitly.”

6 The plaintiffs’ breach of warranty claim is a claim for breach of contract. *See*
7 *Olmsted v. Mulder*, 72 Wn. App. 169, 863 P.2d 1355 (1993). It is undisputed that plaintiffs
8 have no written contractual relationship of any kind with either WRECO or Weyerhaeuser.
9 Sowell Dec. at ¶ 6; Hanson Dec. at ¶ 7. Indeed, the plaintiffs specifically point out in their
10 Complaint for Damages that neither WRECO nor Weyerhaeuser are parties to the plaintiffs’
11 purchase and sale agreements. Complaint for Damages at ¶¶ 13.1, 13.3. Moreover, neither
12 WRECO nor Weyerhaeuser built the houses at issue in this case, and neither of these entities
13 had any part in the marketing or sale of the houses to the plaintiffs. Gray Dec. at ¶ 4; Sowell
14 Dec. at ¶¶ 4-5; Hanson Dec. at ¶¶ 5-6. Without any contractual relationship, the plaintiffs’
15 breach of warranty claim against Weyerhaeuser and WRECO must fail as a matter of law.
16 *See Lehrer v. DSHS*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000) (“[A] plaintiff in a contract
17 action must prove a valid contract between the parties, breach and resulting damage.”).
18 Accordingly, dismissal of the plaintiffs’ breach of warranty claims against WRECO and
19 Weyerhaeuser is appropriate.

20 *b. The Court Should Dismiss Plaintiffs’ Negligent Misrepresentation and*
21 *Fraud Claims Against WRECO and Weyerhaeuser.*

22 The Court should similarly dismiss the plaintiffs’ claims of negligent
23 misrepresentation⁴ and fraud⁵ with respect to WRECO and Weyerhaeuser. At the outset, the

24
25 ⁴ For a claim for negligent misrepresentation, the plaintiffs must prove the following six elements:
26 “(1) That [the defendant] supplied information for the guidance of others in their business transactions that was
27 false; and (2) That [the defendant] knew or should have known that the information was supplied to guide [the
28 plaintiff] in business transactions; and (3) That [the defendant] was negligent in obtaining or communicating
false information; and (4) That [the plaintiff] relied on the false information supplied by [the defendant]; and
(5) That [the plaintiffs] reliance on the false information supplied by [the defendant] was justified (that is, that
reliance was reasonable under the surrounding circumstances); and (6) That the false information was the

1 plaintiffs were required to plead the circumstances allegedly constituting fraud with
2 particularity. CR 9(b). They did not do so. Moreover, the plaintiffs can point to no
3 representations of any kind made by WRECO or Weyerhaeuser to these plaintiffs. To the
4 contrary, the plaintiffs refer to alleged representations of Quadrant. Such statements are not
5 sufficient to prevent summary judgment in WRECO's and Weyerhaeuser's favor.

6 Furthermore, because they cannot point to *any* representations by WRECO or
7 Weyerhaeuser, the plaintiffs cannot establish the materiality or falsity elements, and, in
8 addition, can offer no evidence that any alleged representation was provided to guide their
9 business transactions, that the plaintiffs relied on the alleged representation, or that the
10 information or representation was the proximate cause of damages. Accordingly, the Court
11 should grant summary judgment, dismissing the misrepresentation and fraud claims.

12 *c. The Court Should Dismiss Plaintiffs' Negligence Claims Against*
13 *WRECO and Weyerhaeuser.*

14 The plaintiffs' negligence claims must also fail as a matter of law with respect to
15 WRECO and Weyerhaeuser. "A cause of action for negligence requires the plaintiff to
16 establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and
17 (4) a proximate cause between the breach and the injury. The threshold determination of
18 whether the defendant owes a duty to the plaintiff is a question of law." *Tincani v. Inland*
19 *Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994) (citation omitted).

20 The plaintiffs allege that "Defendants" owed them the following duties: to design,
21 produce and provide a home in compliance with applicable local laws and building codes, and
22 in a workmanlike manner; to disclose that their home was not built according to local laws
23 and applicable building codes, and that it was not produced in a workmanlike manner; and, to

24 proximate cause of damages to [the plaintiff]." *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d
25 619 (2002) (brackets in original).

26 ⁵ For a claim for fraud, the plaintiffs must prove the following nine elements: "(1) representation of an
27 existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it
28 should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of
the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." *Stiley v. Block*,
130 Wn.2d 486, 505, 925 P.2d 194 (1996) (footnotes omitted).

Defendants Weyerhaeuser Real Estate Company's and
Weyerhaeuser Company's Motion for Summary Judgment
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1 conduct a timely and thorough investigation, remediation, decontamination, and repair of the
2 plaintiffs' homes. Complaint for Damages at ¶¶ 9.1-9.3.

3 There is no legal basis for these alleged duties with respect to WRECO and
4 Weyerhaeuser. It is undisputed that neither WRECO nor Weyerhaeuser built the houses at
5 issue. Neither WRECO nor Weyerhaeuser marketed or sold the houses at issue to the
6 plaintiffs. In fact, neither WRECO nor Weyerhaeuser has ever had a relationship—
7 contractual or otherwise—with the plaintiffs. As a matter of law, the plaintiffs cannot
8 demonstrate the existence of any cognizable duty owed by WRECO or Weyerhaeuser to the
9 plaintiffs, much less the breach of that duty or any resulting injury. The negligence claims
10 cannot lie against WRECO and Weyerhaeuser, and should therefore be dismissed as a matter
11 of law.

12 *d. The Court Should Dismiss Plaintiffs' Consumer Protection Act Claims*
13 *Against WRECO and Weyerhaeuser.*

14 Defendants WRECO and Weyerhaeuser are likewise entitled to summary judgment as
15 to the plaintiffs' Washington Consumer Protection Act, RCW ch. 19.86 ("CPA"), claims. A
16 plaintiff asserting a claim under the CPA must prove five elements: (1) an unfair or deceptive
17 act or practice; (2) in the conduct of trade or commerce; (3) impacting the public interest;
18 (4) injury to the plaintiff's business or property; and (5) a causal relation between the
19 deceptive act and the resulting injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title*
20 *Ins. Co.*, 105 Wn.2d 778, 784-785, 719 P.2d 531 (1986). The causation element of a CPA
21 claim requires that the plaintiff prove reliance on the alleged misrepresentation. *Indoor*
22 *Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 22 (Wash. 2007) (en
23 banc) ("We conclude where a defendant has engaged in an unfair or deceptive act or practice,
24 and there has been an affirmative misrepresentation of fact, our case law establishes that there
25 must be some demonstration of a causal link between the misrepresentation and the plaintiff's
26 injury."); *Nuttall v. Dowell*, 31 Wn. App. 98, 110-11, 639 P.2d 832 (1982).

27 The plaintiffs' CPA claims against WRECO and Weyerhaeuser fail as a matter of law.
28 The plaintiffs can point to no "unfair or deceptive act" allegedly performed by either WRECO

1 or Weyerhaeuser. Although the plaintiffs assert a myriad of allegations, such accusations
2 plainly concern the actions and business practices of Quadrant—not WRECO or
3 Weyerhaeuser. In addition, the plaintiffs do not even try to assert that there is a public interest
4 impact from any such purported act by Weyerhaeuser or WRECO. The plaintiffs simply state
5 that “These acts have a public interest impact because Quadrant has designed, produced, and
6 sold thousands of homes in Washington and will continue to do so in the future.” Complaint
7 for Damages at ¶ 8.5. This allegation is insufficient to support a claim against Weyerhaeuser
8 or WRECO.

9 Finally, even if the plaintiffs could identify an “unfair or deceptive act” by WRECO or
10 Weyerhaeuser (which they cannot), the plaintiffs cannot demonstrate reliance on that act. In
11 short, the plaintiffs’ CPA claim with respect to WRECO and Weyerhaeuser is based entirely
12 on a conclusory allegation that the plaintiffs were harmed due to their purported reliance on
13 an alleged unfair or deceptive act or practice of a subsidiary company. WRECO and
14 Weyerhaeuser are entitled to judgment as a matter of law, and the Court should dismiss the
15 plaintiffs’ CPA claims against WRECO and Weyerhaeuser with prejudice.

16 *e. The Court Should Dismiss Plaintiffs’ Outrage Claims Against WRECO*
17 *and Weyerhaeuser.*

18 Finally, the Court should dismiss the plaintiffs’ claims for outrage with respect to
19 WRECO and Weyerhaeuser. “The elements of the tort of outrage are: (1) extreme and
20 outrageous conduct; (2) that the actor intends to cause, or is reckless in causing, emotional
21 distress; and (3) that actually results in severe emotional distress to the plaintiff.” *King v.*
22 *Hutson*, 97 Wn. App. 590, 597, 987 P.2d 655 (1999). The conduct must be “so outrageous in
23 character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be
24 regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* (quoting
25 *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)).

26 As a matter of law, the conduct of these parent companies cannot be defined as
27 “extreme and outrageous” so as to go beyond “all possible bounds of decency.” It is telling
28 that the plaintiffs cannot point to any particular action by either WRECO or Weyerhaeuser

1 that has allegedly affected them *at all*. Instead, the plaintiffs rely on a series of generalized
2 assertions that cannot even support more traditional tort or contract claims. These assertions
3 are clearly insufficient, as a matter of law, to support a claim of outrage. Because reasonable
4 persons could reach but one conclusion, *see Precision Moulding*, 77 Wn. App. at 25,
5 summary judgment in favor of WRECO and Weyerhaeuser is proper.

6 In sum, the plaintiffs' claims do not—and, frankly, cannot—apply to WRECO and
7 Weyerhaeuser. WRECO and Weyerhaeuser are improperly named defendants and should be
8 dismissed entirely.

9 VI. CONCLUSION

10 The plaintiffs have not stated any supportable claims against Defendants
11 Weyerhaeuser and WRECO. Despite the plaintiffs' efforts to muddle their independent
12 identities, Quadrant, WRECO, and Weyerhaeuser are distinct corporate entities. The
13 plaintiffs' attempt to implicate Weyerhaeuser and WRECO in their claims against Quadrant is
14 unfounded and abusive. This Court should dismiss all claims against WRECO and
15 Weyerhaeuser as a matter of law.

16 A proposed order dismissing all claims against Weyerhaeuser Company and
17 Weyerhaeuser Real Estate Company with prejudice is attached hereto.

18
19 DATED this 10th day of January, 2008.

20
21 HILLIS CLARK MARTIN & PETERSON, P.S.

22
23 By Laurie Lootens Chyz
24 Michael R. Scott, WSBA #12822
25 Laurie Lootens Chyz, WSBA #14297
26 Steven T. Masada, WSBA #35831
27 Attorneys for Defendants
28 Weyerhaeuser Real Estate Company and
Weyerhaeuser Company

ND: 11101.317 4818-2061-6962v3 1/10/2008

*Defendants Weyerhaeuser Real Estate Company's and
Weyerhaeuser Company's Motion for Summary Judgment
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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1, LP; Continental Pacific Investments Real Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer, Appellants,

v.

Canal Station North Condominium Association, Respondent.

**DECLARATION OF JENNIFER M. SMITROVICH IN SUPPORT
OF APPELLANTS' REPLY BRIEF**

Attorneys for Petitioners:

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Jennifer M. Smitrovich, WSBA No. 37062
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Scheer & Zehnder LLP
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206-262-1200

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STATE OF WASHINGTON
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Jennifer M. Smitrovich, on oath, deposes and states:

1. I am one of the attorneys for Appellants Ballard Leary Phase II, LP; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1 LP; CPI Fund 1, LP; Continental Properties LLC; Claudio Guincher, Jane Doe Guincher; Don Bowzer; and Jane Doe Bowzer in this matter. I am over the age of 18, competent to testify, and do so herein of my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the underlying summary judgment motion filed by Weyerhaeuser and WRECO on January 11, 2008 in the trial court matter Townsend, et ux v. Quadrant, Weyerhaeuser Real Estate Company and Weyerhaeuser Company (Docket No. 12, King County Superior Court No. 07-2-39341-2 SEA). This motion for summary judgment was obtained using the King County Electronic Court Records website at <http://www.kingcounty.gov/courts/Clerk/Records/ECROnline.aspx>. This motion for summary judgment also was the subject of the appeal in *Townsend v. Quadrant Corp.*, 153 Wash. App. 870, 889, 224 P.3d 818, 829 (2009) aff'd on other grounds, 173 Wash. 2d 451, 268 P.3d 917 (2012).

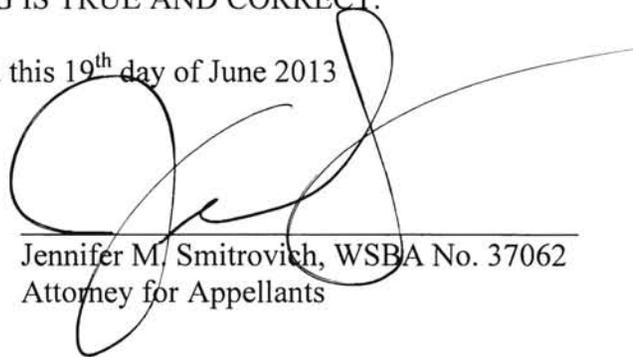
For the Court's convenience, **Exhibit 1** (the Weyerhaeuser/WRECO motion for summary judgment) also is attached to the Appendix to Appellants' Reply Brief. *See, Appendix 48 – 59.*

3. Respondents contend that the Court cannot consider the absence of discovery conducted by Appellants in deciding this appeal

because those matters are not in the record. There is no record to cite to prove the absence of discovery. As one of the attorneys for Appellants, I confirm that the Appellants did not (1) request any discovery of any other party; (2) answer any discovery; (3) request any depositions; (4) conduct any expert site investigations; (5) file any dispositive motions; or (6) file an Answer before demanding RCW 64.55.100 arbitration on August 7, 2012.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 19th day of June 2013

A large, stylized handwritten signature in black ink, appearing to read 'Jennifer M. Smitrovich', is written over a horizontal line. The signature is highly cursive and loops around itself.

Jennifer M. Smitrovich, WSBA No. 37062
Attorney for Appellants

EXHIBIT - 1

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THE HONORABLE CHRISTOPHER WASHINGTON

Noted for Hearing with Oral Argument

Friday, February 8, 2008 at 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DONIA TOWNSEND and BOB PEREZ,
individually, on behalf of their marital
community, and as class representatives;
PAUL YSTEBOE and JO ANN YSTEBOE,
individually, on behalf of their marital
community, and as class representatives,

Plaintiffs,

vs.

THE QUADRANT CORPORATION, a
Washington Corporation;
WEYERHAEUSER REAL ESTATE
COMPANY, a Washington Corporation; and
WEYERHAEUSER COMPANY, a
Washington Corporation,

Defendants.

NO. 07-2-39341-2 SEA

**DEFENDANTS WEYERHAEUSER
REAL ESTATE COMPANY'S AND
WEYERHAEUSER COMPANY'S
MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION AND RELIEF REQUESTED

This case is a construction defect case brought by homeowner plaintiffs against
The Quadrant Corporation ("Quadrant") and its parent companies, Weyerhaeuser Company
and Weyerhaeuser Real Estate Company. Defendants Weyerhaeuser Real Estate

*Defendants Weyerhaeuser Real Estate Company's and
Weyerhaeuser Company's Motion for Summary Judgment
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1 Company ("WRECO") and Weyerhaeuser Company ("Weyerhaeuser") request that this Court
2 enter an Order dismissing any and all claims against them.

3 II. STATEMENT OF FACTS

4 The named plaintiffs are homeowners who purchased houses directly and only from
5 Quadrant, a defendant in this matter. EXHIBITS A & B to the Declaration of Dee Jay Phelps
6 in support of Defendant The Quadrant Corporation's Motion to Stay Proceeding and Compel
7 Arbitration ("Phelps Dec.") (purchase and sale agreements).¹ Plaintiffs Donia Townsend and
8 Bob Perez are a married couple who reside in a house designed and built by Quadrant located
9 in the Brookside development in Bonney Lake, Washington. Complaint for Damages at ¶ 2.2.
10 Plaintiffs Paul and Jo Ann Ysteboe are a married couple who reside in a house designed and
11 built by Quadrant located in the Snoqualmie Ridge development in Snoqualmie, Washington.
12 *Id.* at ¶ 2.3.

13 The plaintiffs have commenced this action against Quadrant and its parent companies,
14 asserting a variety of claims arising from or related to alleged defects in their Quadrant
15 homes. In particular, the plaintiffs have brought claims for outrage, fraud, violation of the
16 Unfair Business Practices Act (RCW 19.86), negligence (bodily injury and property damage),
17 negligent misrepresentation, recession [sic],² breach of warranty, and declaratory relief.

18 The only connection that Weyerhaeuser and WRECO have to this case is their
19 corporate relationship to the homebuilder, Quadrant. Declarations of Dale Sowell and
20 Richard E. Hanson in support of Defendants Weyerhaeuser Real Estate Company's and
21 Weyerhaeuser Company's Motion for Summary Judgment ("Sowell Dec." and "Hanson
22
23

24
25 ¹ In conjunction with this motion, Quadrant has filed a motion to stay the proceedings and compel
26 arbitration pursuant to the arbitration provision contained in the plaintiffs' purchase and sale agreements. For the
27 Court's convenience, a copy of Phelps Dec. is attached hereto.

28 ² Typically, rescission is a type of remedy, not a cause of action or basis for relief. *See Brader v. Minute
Muffler Installation, Ltd.*, 81 Wn. App. 532, 537, 914 P.2d 1220 (1996) (noting that the rescission remedy aims
to restore parties to their original positions), *amended on reconsideration* by 922 P.2d 825 (Wash. Ct. App.
1996).

1 Dec.," respectively). Quadrant is a subsidiary of WRECO, which in turn is a subsidiary of
2 Weyerhaeuser. Hanson Dec. at ¶¶ 3-4; Complaint for Damages at ¶ 3.1.

3 III. STATEMENT OF ISSUES

4 Should the Court dismiss all claims against Weyerhaeuser and WRECO with prejudice
5 when neither of the companies has any connection with this case other than a parent-
6 subsidiary relationship with Quadrant, when the plaintiffs have failed to allege any grounds
7 upon which Weyerhaeuser or WRECO can be held liable for Quadrant's actions, and when
8 there is no evidence of any wrongdoing by Weyerhaeuser or WRECO?

9 IV. EVIDENCE RELIED UPON

10 Defendants Weyerhaeuser and WRECO rely upon the Declarations of Dale Sowell
11 and Richard Hanson in support of Defendants Weyerhaeuser Real Estate Company's and
12 Weyerhaeuser Company's Motion for Summary Judgment, filed herewith; and the
13 Declarations of Mark Gray and Dee Jay Phelps filed in support of Defendant The Quadrant
14 Corporation's Motion to Stay Proceedings and Compel Arbitration, together with any
15 Exhibits thereto; and the records and files herein.

16 V. ARGUMENT

17 A. The Summary Judgment Standard.

18 Rule 56(c) requires the moving party to demonstrate "that there is no *genuine* issue as
19 to any *material* fact and that the moving party is entitled to a judgment as a matter of law."
20 CR 56(c) (emphasis added). Summary judgment is proper if, from all the evidence,
21 reasonable persons could reach but one conclusion. *Precision Moulding & Frame, Inc. v.*
22 *Simpson Door Co.*, 77 Wn. App. 20, 25, 888 P.2d 1239 (1995). The opposing party may not
23 rely on bare allegations in its pleadings to defeat summary judgment, and must set forth
24 specific facts establishing that there is a genuine issue of material fact for trial. *Baldwin v.*
25 *Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989) (citing
26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed.2d 202
27
28

*Defendants Weyerhaeuser Real Estate Company's and
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1 (1986)). That is, the nonmoving party cannot rely on bare assertions of fact, conclusory
2 statements, or speculation to raise a genuine issue of material fact and prevent summary
3 judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517
4 (1988). All assertions must be supported by admissible evidence. *Id.* at 359.

5 Here, the plaintiffs' claims with respect to WRECO and Weyerhaeuser are based
6 purely on conclusory allegations, and an improper attempt to muddle the separate corporate
7 identities of Quadrant and its parent companies. In fact, the plaintiffs make no effort to
8 specifically allege any factual basis upon which WRECO and Weyerhaeuser could be held
9 liable in this present action. Accordingly, summary judgment in favor of WRECO and
10 Weyerhaeuser is appropriate.

11 **B. The Court Should Dismiss All Claims Against Weyerhaeuser Company and**
12 **Weyerhaeuser Real Estate Company.**

13 Neither Weyerhaeuser nor WRECO has any connection to the plaintiffs or their
14 purportedly defective houses that justifies retaining them as defendants in this matter. *See*
15 *Sowell Dec.* at ¶¶ 4-6; *Hanson Dec.* at ¶¶ 5-7. As the plaintiffs allege in their complaint,
16 Quadrant—not WRECO or Weyerhaeuser—designed, built, marketed and sold the houses at
17 issue. Complaint for Damages at ¶¶ 5.1-5.15. WRECO and Weyerhaeuser were not parties to
18 the purchase and sale agreements with the plaintiffs, and played no part in the production or
19 sale of the houses at issue. Exs. A & B to Phelps Dec. Indeed, the only association is the
20 mere fact that Quadrant is a fully owned subsidiary of WRECO, which in turn is a fully
21 owned subsidiary of Weyerhaeuser. This corporate relationship is insufficient to hold
22 WRECO and Weyerhaeuser liable for any alleged wrongdoing by Quadrant. Because there
23 are no genuine issues of material fact regarding WRECO's and Weyerhaeuser's liability,
24 summary judgment in their favor is appropriate.

25 **1. The Plaintiffs Make No Specific Allegations Against Weyerhaeuser or**
26 **WRECO.**

27 The plaintiffs improperly rely on allegations against Quadrant to support their claims
28 against Weyerhaeuser and WRECO. In fact, the only time that Weyerhaeuser and WRECO

1 are specifically mentioned in the complaint, aside from the caption, is in the allegation of the
2 corporate relationship between the defendants. Complaint for Damages at ¶ 3.1. Otherwise,
3 the plaintiffs assert a litany of factual allegations about Quadrant's conduct and construction
4 practices, paired with generalized allegations about the "Defendants."

5 For example, the plaintiffs allege "Defendants lied to and defrauded Quadrant home
6 buyers." *Id.* at ¶ 5.11. The plaintiffs then proceed to list a number of allegedly false
7 statements made by Quadrant. *See, e.g., id.* at ¶¶ 5.11-5.13 (stating, in relevant part:
8 "Plaintiffs . . . were repeatedly and falsely told by Quadrant during the purchasing
9 process. . .[;] Quadrant also specifically represented. . .[;] Quadrant even
10 advertised. . .[;] Quadrant also falsely assured . . .[;] Quadrant even misrepresented and falsely
11 assured. . .[;] During the purchasing process, Quadrant withheld . . . any information about . . .
12 indoor air quality problems in Quadrant homes."). The plaintiffs then return to their
13 generalized assertion that "Defendants provided Quadrant home purchasers absolutely no
14 information about" the alleged defects in Quadrant homes. *Id.* at ¶ 5.13.

15 As another example, the plaintiffs seek to support their claims of a "cover up" by all
16 defendants by pointing to alleged actions of Quadrant alone. The plaintiffs allege that
17 "Defendants have . . . engaged . . . in an active and concerted cover up of these serious
18 defects. . . . In fact, at a corporate level, Defendants specifically considered whether or not to
19 inform buyers of the . . . risks associated with Quadrant's reckless production methods." *Id.*
20 at ¶ 5.16. However, the plaintiffs conclude by alleging only that "Quadrant's upper
21 management adopted a direct policy to not inform home purchasers. . . ." *Id.*

22 The plaintiffs repeatedly seek to equivocate "Quadrant" to the term "Defendants," in
23 an effort to draw the parent companies into this action. Not only does this tactic fail to
24 effectively support a claim against Weyerhaeuser or WRECO, but it is also careless and
25 irresponsible pleading practice that should be firmly rejected by this Court.

2. *The Plaintiffs Have Not Alleged, Nor Attempted to Allege, Facts That Would Make Weyerhaeuser or WRECO Liable for the Actions of Quadrant.*

Quadrant, Weyerhaeuser, and WRECO are all separate legal entities. As such, none is liable for the acts or omission of the others. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556 (2002) (quoting *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed.2d 43 (1998)).

In order to hold Weyerhaeuser or WRECO liable for the acts or omissions of Quadrant, the plaintiffs would have to allege facts that would support piercing of the corporate veil. "Piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege. In general, a corporation is considered a separate entity, even if it is owned by a single shareholder." *Dickens v. Alliance Analytical Labs., LLC*, 127 Wn. App. 433, 440, 111 P.3d 889 (2005) (citations omitted). To pierce the corporate veil, the party seeking to do so must affirmatively establish two essential factors: (1) the corporate form must be intentionally used to violate or evade a duty, and (2) disregard of the corporate veil is necessary and required to prevent an unjustified loss to the injured party. *Id.* at 440-41. The Washington Supreme Court has held that "summary judgment in favor of the [parent] corporation may be appropriate if the plaintiff fails to show evidence of 'either the requisite manipulation, or the perpetration of fraud on plaintiffs.'" *Minton*, 146 Wn.2d at 398-99 (refusing to pierce the corporate veil and granting summary judgment to parent where subsidiary and parent shared common corporate headquarters and subsidiary labeled itself as a subsidiary of parent).

Here, the plaintiffs have made no such allegations. They have not alleged that the corporate formations at issue were used to violate or evade a duty, or that unjustified loss will result unless the corporate veils are disregarded. Quadrant is not some sort of "sham" entity. Rather, it is the largest homebuilder in Washington State. Declaration of Mark Gray in

1 support of Defendant Quadrant's Motion to Stay Proceeding and Compel Arbitration ("Gray
2 Dec.") at ¶ 2.³ In fact, the plaintiffs readily acknowledge that Quadrant is a substantial and
3 legitimate corporation:

4 [Quadrant] designs, develops, produces, markets and sells homes in "planned
5 residential communities" in Washington and Oregon. Quadrant has produced
6 thousands of homes in Washington, increasing production rates each year. In
7 2006 alone, Quadrant claims to have produced and sold more than 1,400
8 homes. In 2007[,] Quadrant advertised more than 2,000 available home lots in
9 16 Quadrant planned communities in Skagit, Snohomish, King, Pierce,
10 Thurston, and Kitsap counties.

11 Complaint for Damages at ¶ 5.1. In short, there are no grounds to pierce the corporate veil,
12 and there is no basis to hold WRECO and Weyerhaeuser liable based on their corporate
13 relationship with Quadrant.

14 **3. *The Plaintiffs Fail to Allege Facts Showing Direct Wrongdoing By***
15 ***Weyerhaeuser Company or Weyerhaeuser Real Estate Company.***

16 Instead of making a "piercing" claim to hold Weyerhaeuser and WRECO responsible
17 for Quadrant's alleged acts and omissions, the plaintiffs have made vague claims of direct
18 wrongdoing by Weyerhaeuser and WRECO. The plaintiffs are seeking damages from
19 Weyerhaeuser and WRECO based on claims of outrage, fraud, violation of the Unfair
20 Business Practices Act (RCW 19.86), negligence, negligent misrepresentation, and breach of
21 warranty. Accordingly, the plaintiffs must prove each element of each cause of action against
22 each defendant. Because the plaintiffs cannot produce evidence in support of the elements of
23 any of their claims against WRECO and Weyerhaeuser, the Court should grant summary
24 judgment and dismiss the plaintiffs' claims against WRECO and Weyerhaeuser with
25 prejudice.

26 **a. *The Court Should Dismiss Plaintiffs' Breach of Warranty Claims***
27 ***Against WRECO and Weyerhaeuser.***

28 The Court should dismiss the plaintiffs' breach of warranty claims with respect to
WRECO and Weyerhaeuser. In support of this claim, the plaintiffs allege: "Defendants

³ For the Court's convenience, a copy of Gray Dec. is attached hereto.

1 impliedly and explicitly warranted to Plaintiffs and other Quadrant homeowners, as intended
2 beneficiaries, that their Quadrant home was built in compliance with applicable building laws
3 and codes in a workmanlike manner and were fit to be inhabited.” Complaint for Damages at
4 ¶ 12.2. The plaintiffs, however, fail to state where, when, and how the warranty obligations
5 of WRECO and Weyerhaeuser arose, whether “impliedly and explicitly.”

6 The plaintiffs’ breach of warranty claim is a claim for breach of contract. *See*
7 *Olmsted v. Mulder*, 72 Wn. App. 169, 863 P.2d 1355 (1993). It is undisputed that plaintiffs
8 have no written contractual relationship of any kind with either WRECO or Weyerhaeuser.
9 Sowell Dec. at ¶ 6; Hanson Dec. at ¶ 7. Indeed, the plaintiffs specifically point out in their
10 Complaint for Damages that neither WRECO nor Weyerhaeuser are parties to the plaintiffs’
11 purchase and sale agreements. Complaint for Damages at ¶¶ 13.1, 13.3. Moreover, neither
12 WRECO nor Weyerhaeuser built the houses at issue in this case, and neither of these entities
13 had any part in the marketing or sale of the houses to the plaintiffs. Gray Dec. at ¶ 4; Sowell
14 Dec. at ¶¶ 4-5; Hanson Dec. at ¶¶ 5-6. Without any contractual relationship, the plaintiffs’
15 breach of warranty claim against Weyerhaeuser and WRECO must fail as a matter of law.
16 *See Lehrer v. DSHS*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000) (“[A] plaintiff in a contract
17 action must prove a valid contract between the parties, breach and resulting damage.”).
18 Accordingly, dismissal of the plaintiffs’ breach of warranty claims against WRECO and
19 Weyerhaeuser is appropriate.

20 *b. The Court Should Dismiss Plaintiffs’ Negligent Misrepresentation and*
21 *Fraud Claims Against WRECO and Weyerhaeuser.*

22 The Court should similarly dismiss the plaintiffs’ claims of negligent
23 misrepresentation⁴ and fraud⁵ with respect to WRECO and Weyerhaeuser. At the outset, the

24
25 ⁴ For a claim for negligent misrepresentation, the plaintiffs must prove the following six elements:
26 “(1) That [the defendant] supplied information for the guidance of others in their business transactions that was
27 false; and (2) That [the defendant] knew or should have known that the information was supplied to guide [the
28 plaintiff] in business transactions; and (3) That [the defendant] was negligent in obtaining or communicating
false information; and (4) That [the plaintiff] relied on the false information supplied by [the defendant]; and
(5) That [the plaintiffs] reliance on the false information supplied by [the defendant] was justified (that is, that
reliance was reasonable under the surrounding circumstances); and (6) That the false information was the

1 plaintiffs were required to plead the circumstances allegedly constituting fraud with
2 particularity. CR 9(b). They did not do so. Moreover, the plaintiffs can point to no
3 representations of any kind made by WRECO or Weyerhaeuser to these plaintiffs. To the
4 contrary, the plaintiffs refer to alleged representations of Quadrant. Such statements are not
5 sufficient to prevent summary judgment in WRECO's and Weyerhaeuser's favor.

6 Furthermore, because they cannot point to *any* representations by WRECO or
7 Weyerhaeuser, the plaintiffs cannot establish the materiality or falsity elements, and, in
8 addition, can offer no evidence that any alleged representation was provided to guide their
9 business transactions, that the plaintiffs relied on the alleged representation, or that the
10 information or representation was the proximate cause of damages. Accordingly, the Court
11 should grant summary judgment, dismissing the misrepresentation and fraud claims.

12 c. *The Court Should Dismiss Plaintiffs' Negligence Claims Against*
13 *WRECO and Weyerhaeuser.*

14 The plaintiffs' negligence claims must also fail as a matter of law with respect to
15 WRECO and Weyerhaeuser. "A cause of action for negligence requires the plaintiff to
16 establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and
17 (4) a proximate cause between the breach and the injury. The threshold determination of
18 whether the defendant owes a duty to the plaintiff is a question of law." *Tincani v. Inland*
19 *Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994) (citation omitted).

20 The plaintiffs allege that "Defendants" owed them the following duties: to design,
21 produce and provide a home in compliance with applicable local laws and building codes, and
22 in a workmanlike manner; to disclose that their home was not built according to local laws
23 and applicable building codes, and that it was not produced in a workmanlike manner; and, to

24 proximate cause of damages to [the plaintiff]." *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d
25 619 (2002) (brackets in original).

26 ⁵ For a claim for fraud, the plaintiffs must prove the following nine elements: "(1) representation of an
27 existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it
28 should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of
the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." *Stiley v. Block*,
130 Wn.2d 486, 505, 925 P.2d 194 (1996) (footnotes omitted).

Defendants Weyerhaeuser Real Estate Company's and
Weyerhaeuser Company's Motion for Summary Judgment
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1 conduct a timely and thorough investigation, remediation, decontamination, and repair of the
2 plaintiffs' homes. Complaint for Damages at ¶¶ 9.1-9.3.

3 There is no legal basis for these alleged duties with respect to WRECO and
4 Weyerhaeuser. It is undisputed that neither WRECO nor Weyerhaeuser built the houses at
5 issue. Neither WRECO nor Weyerhaeuser marketed or sold the houses at issue to the
6 plaintiffs. In fact, neither WRECO nor Weyerhaeuser has ever had a relationship—
7 contractual or otherwise—with the plaintiffs. As a matter of law, the plaintiffs cannot
8 demonstrate the existence of any cognizable duty owed by WRECO or Weyerhaeuser to the
9 plaintiffs, much less the breach of that duty or any resulting injury. The negligence claims
10 cannot lie against WRECO and Weyerhaeuser, and should therefore be dismissed as a matter
11 of law.

12 *d. The Court Should Dismiss Plaintiffs' Consumer Protection Act Claims*
13 *Against WRECO and Weyerhaeuser.*

14 Defendants WRECO and Weyerhaeuser are likewise entitled to summary judgment as
15 to the plaintiffs' Washington Consumer Protection Act, RCW ch. 19.86 ("CPA"), claims. A
16 plaintiff asserting a claim under the CPA must prove five elements: (1) an unfair or deceptive
17 act or practice; (2) in the conduct of trade or commerce; (3) impacting the public interest;
18 (4) injury to the plaintiff's business or property; and (5) a causal relation between the
19 deceptive act and the resulting injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title*
20 *Ins. Co.*, 105 Wn.2d 778, 784-785, 719 P.2d 531 (1986). The causation element of a CPA
21 claim requires that the plaintiff prove reliance on the alleged misrepresentation. *Indoor*
22 *Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 22 (Wash. 2007) (en
23 banc) ("We conclude where a defendant has engaged in an unfair or deceptive act or practice,
24 and there has been an affirmative misrepresentation of fact, our case law establishes that there
25 must be some demonstration of a causal link between the misrepresentation and the plaintiff's
26 injury."); *Nuttall v. Dowell*, 31 Wn. App. 98, 110-11, 639 P.2d 832 (1982).

27 The plaintiffs' CPA claims against WRECO and Weyerhaeuser fail as a matter of law.
28 The plaintiffs can point to no "unfair or deceptive act" allegedly performed by either WRECO

1 or Weyerhaeuser. Although the plaintiffs assert a myriad of allegations, such accusations
2 plainly concern the actions and business practices of Quadrant—not WRECO or
3 Weyerhaeuser. In addition, the plaintiffs do not even try to assert that there is a public interest
4 impact from any such purported act by Weyerhaeuser or WRECO. The plaintiffs simply state
5 that “These acts have a public interest impact because Quadrant has designed, produced, and
6 sold thousands of homes in Washington and will continue to do so in the future.” Complaint
7 for Damages at ¶ 8.5. This allegation is insufficient to support a claim against Weyerhaeuser
8 or WRECO.

9 Finally, even if the plaintiffs could identify an “unfair or deceptive act” by WRECO or
10 Weyerhaeuser (which they cannot), the plaintiffs cannot demonstrate reliance on that act. In
11 short, the plaintiffs’ CPA claim with respect to WRECO and Weyerhaeuser is based entirely
12 on a conclusory allegation that the plaintiffs were harmed due to their purported reliance on
13 an alleged unfair or deceptive act or practice of a subsidiary company. WRECO and
14 Weyerhaeuser are entitled to judgment as a matter of law, and the Court should dismiss the
15 plaintiffs’ CPA claims against WRECO and Weyerhaeuser with prejudice.

16 *e. The Court Should Dismiss Plaintiffs’ Outrage Claims Against WRECO*
17 *and Weyerhaeuser.*

18 Finally, the Court should dismiss the plaintiffs’ claims for outrage with respect to
19 WRECO and Weyerhaeuser. “The elements of the tort of outrage are: (1) extreme and
20 outrageous conduct; (2) that the actor intends to cause, or is reckless in causing, emotional
21 distress; and (3) that actually results in severe emotional distress to the plaintiff.” *King v.*
22 *Hutson*, 97 Wn. App. 590, 597, 987 P.2d 655 (1999). The conduct must be “so outrageous in
23 character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be
24 regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* (quoting
25 *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)).

26 As a matter of law, the conduct of these parent companies cannot be defined as
27 “extreme and outrageous” so as to go beyond “all possible bounds of decency.” It is telling
28 that the plaintiffs cannot point to any particular action by either WRECO or Weyerhaeuser

1 that has allegedly affected them *at all*. Instead, the plaintiffs rely on a series of generalized
2 assertions that cannot even support more traditional tort or contract claims. These assertions
3 are clearly insufficient, as a matter of law, to support a claim of outrage. Because reasonable
4 persons could reach but one conclusion, *see Precision Moulding*, 77 Wn. App. at 25,
5 summary judgment in favor of WRECO and Weyerhaeuser is proper.

6 In sum, the plaintiffs' claims do not—and, frankly, cannot—apply to WRECO and
7 Weyerhaeuser. WRECO and Weyerhaeuser are improperly named defendants and should be
8 dismissed entirely.

9 **VI. CONCLUSION**

10 The plaintiffs have not stated any supportable claims against Defendants
11 Weyerhaeuser and WRECO. Despite the plaintiffs' efforts to muddle their independent
12 identities, Quadrant, WRECO, and Weyerhaeuser are distinct corporate entities. The
13 plaintiffs' attempt to implicate Weyerhaeuser and WRECO in their claims against Quadrant is
14 unfounded and abusive. This Court should dismiss all claims against WRECO and
15 Weyerhaeuser as a matter of law.

16 A proposed order dismissing all claims against Weyerhaeuser Company and
17 Weyerhaeuser Real Estate Company with prejudice is attached hereto.

18
19 DATED this 10th day of January, 2008.

20
21 HILLIS CLARK MARTIN & PETERSON, P.S.

22
23 By Laurie Lootens Chyz
24 Michael R. Scott, WSBA #12822
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ND: 11101.317 4818-2061-6962v3 1/10/2008

*Defendants Weyerhaeuser Real Estate Company's and
Weyerhaeuser Company's Motion for Summary Judgment
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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Ballard Leary Phase II, LP.; BRCP/CPI Phase II, LLC; Continental Pacific Investments Real Estate Fund 1, LP; Continental Pacific Investments Real Estate Fund 1, LP; Continental Properties, Inc.; Claudio Guincher and Jane Doe Guincher; and Don Bowzer and Jane Doe Bowzer, Appellants,

v.

Canal Station North Condominium Association, Respondent.

PROOF/CERTIFICATE OF SERVICE:

APPELLANTS' REPLY BRIEF

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I, Jennifer Griffiths, legal assistant to John E. Zehnder, Jr. and Jennifer M. Smitrovich, counsel for Appellants, hereby certify that on June 19, 2013 copies of the following was served via legal messenger to Respondent's counsel and Division I of the Washington Court of Appeals (original and one (1) working copy) at the addresses identified further below:

1. APPELLANTS' REPLY BRIEF; and
2. DECLARATION OF JENNIFER M. SMITROVICH IN SUPPORT OF APPELLANTS' REPLY BRIEF.

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DATED this 19th day of June, 2013 at Seattle, Washington.


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