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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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SATOMI OWNERS ASSOCIATION, a Washington Non-Profit  
Corporation,

Respondent

v.

SATOMI, LLC, a Washington Limited Liability Company,

Petitioner.

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RESPONDENT'S SUPPLEMENTAL BRIEF RE CONFLICT  
PREEMPTION OF WASHINGTON CONDOMINIUM ACT'S  
ENFORCEMENT PROVISION

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## I. ISSUE

The Federal Arbitration Act (“FAA”) will only preempt state law and enforce an arbitration clause where three conditions are met: 1) the contract or clause is enforceable under state law contract principles;<sup>1</sup> 2) the contract containing the clause implicates interstate commerce;<sup>2</sup> and 3) the FAA conflicts with state law.<sup>3</sup> The Court has requested supplemental briefing on the third preemption issue: whether the FAA conflicts with the 2005 version<sup>4</sup> of Washington Condominium Act’s enforcement provision and the related construction defect arbitration provisions. This brief does not address the enforceability of the arbitration clause under state law contract principles because that is beyond the scope of the Court’s request and would require additional facts not in the present record.<sup>5</sup>

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<sup>1</sup> 9 U.S.C.A. § 2; *McKee v. AT&T Corp.*, --- Wn.2d ---, 191 P.3d 845, 851 (2008); *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 753 (1995); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9<sup>th</sup> Cir. 2008); *Luna v. Household Fin. Corp. III.*, 236 F. Supp. 2d 1166, 1173 (W.D. Wash. 2002). The Washington Supreme Court recently clarified that it is the court’s job, not the arbitrator’s, to determine whether there is a valid agreement to arbitrate, including whether such a clause is unconscionable. *McKee*, 191 P.3d at 856.

<sup>2</sup> See, e.g., *Citizen’s Bank v. Alafabco*, 539 U.S. 52, 123 S. Ct. 2037, 126 L. Ed. 2d 46 (2003); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

<sup>3</sup> See, e.g., *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) and additional citations, *infra*.

<sup>4</sup> RCW 64.34.100 was amended in 2005 commensurate with the adoption of Chapter 64.55 RCW, which provides for mandatory alternate dispute resolution of construction defect claims, to allow for enforcement of Condo Act claims through this arbitration process. Laws 2005, ch. 456, § 20, attached hereto as Appendix A.

<sup>5</sup> Neither the superior court in *Satomi* nor the superior court in *Pier at Leschi* examined the full extent of the enforceability of the Limited Warranties at issue here because they found that there were insufficient indicia of interstate commerce for the FAA to apply in

## II. ARGUMENT

### A. Washington's Construction Defect Arbitration Provisions Are Not Preempted Because There is No Direct and Actual Conflict Between Them and the FAA's Substantive Provisions.

The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>6</sup> State laws are not superseded by federal laws unless that is the “clear and manifest purpose of Congress.”<sup>7</sup> In Washington, there is a strong presumption against preemption, so the party asserting preemption has the burden of proof.<sup>8</sup> Congressional intent to preempt state law is manifest in one of three ways: (1) “express preemption,” where Congress explicitly delineates the extent to which state laws are preempted; (2) “field preemption,” where the federal law is so pervasive that it indicates Congressional intent to occupy that field exclusively; and (3) “conflict preemption,” where it is impossible to comply with both local and federal law.<sup>9</sup>

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any event. If the Court finds that the FAA applies and preempts Washington law, the remedy is to remand for determination of the enforceability of the arbitration clauses and the documents containing them.

<sup>6</sup> U.S. Const., art. VI, cl. 2.

<sup>7</sup> *McKee*, 191 P.3d 845 (citing *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 78, 896 P.2d 682 (1995)); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

<sup>8</sup> *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864, 93 P.2d 108 (2005); *Wilson v. State*, 142 Wn.2d 40, 46, 10 P.3d 1061 (2000) (citing *Goodwin v. Bacon* 127 Wn.2d 50, 57, 896 P.2d 673 (1995)); *Dep't of Labor & Industries of Washington v. Common Carriers, Inc.*, 111 Wn.2d 586, 588, 762 P.2d 348 (1988); *Pioneer First Fed. Sav. Loan Ass'n v. Pioneer Nat'l Bank*, 98 Wn.2d 853, 659 P.2d 481 (1983); *Dep't of Labor & Industries v. Lanier Brugh*, 135 Wn. App. 808, 815-16, 147 P.3d 588 (2006).

<sup>9</sup> *City of Seattle v. Burlington Northern R.R. Co.*, 145 Wn.2d 661, 41 P.3d 1169 (2002); *Lanier Brugh*, 135 Wn. App. at 815.

It is well settled that the FAA contains no provision of express preemption; nor did Congress express an intent to occupy the entire field of arbitration.<sup>10</sup> Thus, to determine whether the FAA preempts state law, the elements of conflict preemption must be met. As the Court most recently explained, a conflict requiring preemption exists where it is either: 1) physically impossible to comply with both state and federal law; or 2) state law “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”<sup>11</sup> The first prong is the more literal of the two and focuses upon whether the language of the state and federal statutes actually conflict. The second prong of the conflict test, referred to as the “obstruction strand” is broader, focusing upon “the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law’s text, application, history and interpretation.”<sup>12</sup> In the present case, an analysis of the two prongs of conflict preemption demonstrates that there is no conflict between the FAA and the Condo Act’s current enforcement provision.

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<sup>10</sup> 9 U.S.C.A. § 1 *et seq.*; *Lanier Brugh*, 135 Wn. App. at 815; *Volt Info. Sciences, Inc.*, 489 U.S. at 477; *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941); *Chicanos Por La Causa, Inc. v. Napolitano*, 2008 WL 4225536, \*4, --- F.3d --- (9<sup>th</sup> Cir. 2008); *Whistler Invs., Inc. v. Depository Trust and Clearing Corp.*, 539 F.3d 1159 (9<sup>th</sup> Cir. 2008); *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9<sup>th</sup> Cir. 2007); *Pac. Legal Foundation v. State Energy Res. Conservation and Dev. Comm.*, 659 F.2d 903, 920 (9<sup>th</sup> Cir. 1982).

<sup>11</sup> *McKee*, 191 P.3d at 853 (citing *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)); *Whistler Invs., Inc.*, 539 F.3d 1159.

<sup>12</sup> *McKee*, 191 P.3d at 853 (citing *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)).

**B. It is Not Physically Impossible to Comply with Both the Condo Act's Enforcement Provision and the FAA.**

Preemption is not appropriate in the present case because it is *not* impossible to comply with the both the Condo Act's enforcement provision or the construction defect arbitration law and the FAA. There are a number of guiding principles provided by the courts in conducting the conflict analysis. First, Washington courts require such a "direct and positive conflict" that the two acts "cannot be reconciled or consistently stand together."<sup>13</sup> In order to find preemption, it must be "physically impossible" to comply with both statutes.<sup>14</sup> Moreover, the conflict must be actual, not merely hypothetical or potential.<sup>15</sup> Courts should not seek out conflict where none exists.<sup>16</sup> In addition, the conflict must appear on the face of the statutes.<sup>17</sup> It is not enough that there is tension between the federal and the state law; if they can be reconciled, no conflict preemption

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<sup>13</sup> *Hisle*, 151 Wn.2d at 864; *Common Carriers, Inc.*, 111 Wn.2d at 588 (citing *Pioneer First Fed. Sav. Loan Ass'n*, 98 Wn.2d at 853).

<sup>14</sup> *Common Carriers, Inc.*, 111 Wn.2d at 589; *Westside Bus. Park, LLC v. Pierce County*, 100 Wn. App. 599, 608-09, 5 P.3d 713 (2000); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1977); *Chicanos Por La Causa, Inc.*, 2008 WL 4225536 at \*4; *Whistler Invs., Inc.*, 539 F.3d at 1159; *Incalza*, 479 F.3d at 1009-10.

<sup>15</sup> *Baker v. Snohomish County Dept. of Planning and Cmty. Dev.*, 68 Wn. App. 581, 591, 841 P.2d 1321 (1992); *Rice v. Norman Williams*, 458 U.S. 654, 659, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982); *Chicanos*, 2008 WL 4225536 at \*4.

<sup>16</sup> *Moen v. Erlandson*, 80 Wn.2d 755, 780, 498 P.2d 849 (1972); *Paul*, 373 U.S. 132; *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446, 80 S. Ct. 813, 817-18, 4 L. Ed. 2d 852 (1960); *Pac. Legal Foundation*, 659 F.2d 903.

<sup>17</sup> See *Harris v. State Dep't of Labor & Industries*, 120 Wn.2d 461, 472, 843 P.2d 1056 (1993) ("An actual conflict occurs where state and federal statutes are contradictory on their face and compliance with both is impossible.")

exists.<sup>18</sup> Conflict preemption is only found where conflicts “will necessarily arise.”<sup>19</sup>

In determining whether a conflict exists, courts across the nation have taken very seriously the mandate that it must be physically impossible to comply with both statutes in order to find preemption, finding no preemption if there is any way to reconcile the statutes. Thus, in *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*,<sup>20</sup> the 9<sup>th</sup> Circuit Court of Appeals held that preemption was not appropriate where the FCC required default minimum payments to payphone service providers by certain entities and Washington state law entitled a payphone service provider to relief in *quantum meruit*. The defendant argued that the FCC preempted the claim because a court *could* assign not only a different rate of compensation, but also ‘payment for calls that are not compensable and assignment of liability to the wrong entity.’<sup>21</sup> The court disagreed, stating that emphasis on the “mere possibility of an inconsistent award” was inappropriate and “[a] hypothetical conflict is not a sufficient basis for preemption.”<sup>22</sup> Similarly, in *Incalza v. Fendi North America, Inc.*,<sup>23</sup> the district court originally held there was no conflict even where compliance with federal

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<sup>18</sup> *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.2d 976 (9<sup>th</sup> Cir. 2007) (citing *Incalza*, 479 F.2d at 1010); *Silkwood*, 464 U.S. at 256.

<sup>19</sup> *Shroyer*, 498 F.2d at 988 (citing *Incalza*, 479 F.2d at 1010).

<sup>20</sup> 423 F.3d 1056 (9<sup>th</sup> Cir. 2005).

<sup>21</sup> *Id.* at 1076-1077.

<sup>22</sup> *Id.*

<sup>23</sup> 479 F.2d at 1010.

law regarding terminating illegal immigrants exposed employer to civil damages under state law.<sup>24</sup> Affirming the lower court, the 9<sup>th</sup> Circuit Court of Appeals held there was no conflict where termination was not the only remedy under federal law, therefore allowing the employer to comply with both federal and state law *even though under facts of present case, employee was actually terminated.*<sup>25</sup> These cases demonstrate the lengths to which a court should go to determine whether state and federal cases can be reconciled.

Finally, while no Washington court has explicitly addressed the present issue, it is important to note that when a case is in state court, the statutory comparison is limited to the substantive provisions of the FAA under sections one and two, not the remaining procedural provisions, which are applicable only in federal court.<sup>26</sup> The relevant portions of the substantive sections of the FAA provide:

“[C]ommerce”, as herein defined, means commerce among the several States or with foreign nations . . . , but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Volt*, 489 U.S. at 477 n. 6 (“While we have held that the FAA’s “substantive” provisions - §§ 1 and 2 - are applicable in state as well as federal court, . . . we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court” apply in state court) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 17 n. 9, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)); *Ovitz v. Schulman*, 133 Cal. App. 4th 830 (Cal. Ct. App. 2005) (language of sections 3, 4, 10 and 12 of FAA strongly suggests they apply only in federal court proceedings); *J.D. Edwards World Solutions Co., J.D. v. Estes, Inc.*, 91 S.W.3d 836, 839 (Tex. Ct. App. 2002) (section 16 of FAA is procedural and does not apply in state court).

9 U.S.C.A. § 1.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2. In short, the substantive provisions of the FAA enforce valid agreements to arbitrate.

The Condo Act's enforcement provision currently provides:

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.

RCW 64.34.100(2).<sup>27</sup> RCW 64.55.100 through 64.55.160 are alternate dispute resolution provisions applicable to construction defect cases in Washington, including *arbitration* (the "construction defect arbitration law"). In other words, the provisions of the Condo Act are expressly enforceable by arbitration, which is consistent with the FAA. RCW 64.55.100(1) provides in relevant part:

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<sup>27</sup> This provision was amended in 2005 commensurate with the enactment of Chapter 64.55 RCW (*see n. 4, supra*) and it is the version to which Appellant Pier at Leschi, LLC is subject. *See* CP 3-11 (Complaint for Damages); CP 22 (Arbitration Demand). The prior version, to which Appellant Satomi, LLC is subject, did not allow for the possibility of arbitration, but provided for judicial review exclusively.

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.

Comparison of the Condo Act's enforceability clause and RCW 64.55.100 (1) to the FAA reveals there is no conflict. Both statutes provide for arbitration of construction defect disputes. The Condo Act's provisions are expressly enforceable by RCW 64.55, which includes arbitration. Parties are entitled to arbitration under the state statutes by merely electing it. Notably, Appellant Pier at Leschi, LLC actually demanded arbitration under the construction defect law, but then chose to pursue enforcement of the arbitration clause contained in its Limited Warranty,<sup>28</sup> perhaps believing that by invoking the arbitration clause, the remaining provisions of the Limited Warranty would somehow become enforceable. There is no actual or direct conflict where the substantive provisions of both statutes provide for arbitration of the claims here. The statutes can easily stand together and be reconciled. It is not physically impossible to comply with both statutes. Therefore, there is no conflict on the face of the statutes and the FAA does not preempt state law.

Appellants will likely argue that a conflict does exist between its *contractual* arbitration procedures and those of state law, but that is not the proper analysis. There is no precedent for comparing the procedural

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<sup>28</sup> CP 22 (Arbitration Demand pursuant to RCW 64.55).

terms of the contract with the procedural terms of state law in order to determine preemption. Such an analysis would contradict the guiding principles that the conflict must appear on the face of the statutes, and that courts should not seek out conflict where none exists, but to reconcile the two statutes if at all possible.

Whether the Condo Act's current enforcement provision conflicts with the FAA is an issue of first impression in Washington. However, a review of cases from other jurisdictions demonstrates that the type of statutes that *are* preempted under the conflict preemption doctrine fall into a few distinct categories: 1) state statutes that provide for exclusive judicial review of certain claims;<sup>29</sup> 2) those that expressly target and invalidate contractual arbitration clauses;<sup>30</sup> and 3) those that require more

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<sup>29</sup> The prior Condo Act enforcement statute is one such statute as it used to provide solely for judicial enforcement of its claims. *See also Keating*, 465 U.S. at 10 (California Franchise Investment Law which provided for unwaivable right to judicial consideration of its claims was preempted by FAA); *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327 (5<sup>th</sup> Cir. 2004) (Texas General Arbitration Act preempted to extent that it required judicial forum for resolution of claims); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3<sup>rd</sup> Cir. 1997) (New Jersey Law Against Discrimination preempted to the extent that it provided for nonwaivable right to judicial forum). *But see Carter v. SSC Odin Operating Co., LLC*, 885 N.E.2d 1204 (Ill. App. Ct. 2008) (holding that Illinois state Nursing Home Care Act's provision disallowing waiver of senior residents' right to sue or to jury trial was not preempted because the statute did not reference arbitration and voiding arbitration clauses was "an incidental, tangential effect of the sections, not their primary purpose, and so the sections can hardly be said to "specifically target arbitration agreements.")

<sup>30</sup> *See, e.g., Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98 (W.D. La. 1985) (statute voiding arbitration clauses in contracts for natural gas preempted); *Knoxville Hotel Properties, Ltd. v. Hardin Constr. Co.*, 546 F. Supp. 34 (E.D. Tenn. 1982) (state law allowing party to revoke agreements to arbitrate preempted); *Austin v. A.G. Edwards & Sons, Inc.*, 349 F. Supp. 615 (M.D. Fla. 1972) (Missouri law making arbitration agreements nonbinding was preempted); *Steele v. Walser*, 880 So. 2d 1123 (Ala. 2003) (preempting statute that agreement to submit controversy to arbitration cannot be specifically enforced); *Cornhusker Int'l Trucks, Inc. v. Thomas Built Buses, Inc.*, 637

of contractual arbitration clauses than others, putting arbitration clauses on unequal footing with other contract terms.<sup>31</sup> In other words, the FAA preempts “anti-arbitration” laws. Neither the current Condo Act enforcement statute nor RCW 64.55 require a judicial forum exclusively; nor do they specifically target or require more of contractual arbitration clauses than of contracts generally. Thus, Washington’s Condo Act enforcement provision and the construction defect arbitration laws do not conflict with the FAA.

In contrast to anti-arbitration statutes, statutes like state arbitration acts, even though they deal only with arbitration, are not preempted because they are consonant with the purposes of the FAA.<sup>32</sup> Because

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N.W.2d 876, 883 (Neb. 2002) (preempted state law that provided that arbitration clauses not valid in motor vehicle franchise contracts).

<sup>31</sup> See, e.g., *Casarotto*, 517 U.S. at 687 (Montana’s arbitration act preempted to extent that it conditioned enforceability of arbitration clauses upon compliance with special notice requirements not applicable to contracts generally); *Taylor v. First North American Bank*, 325 F. Supp. 2d 1304 (M.D. Ala. 2004) (Alabama state law invalidated to extent it required arbitration agreement to be conspicuous or disclosed in a particular way); *Langfitt v. Jackson*, 644 S.E.2d 460, 465 (Ga. Ct. App. 2007) (Georgia law requiring parties to initial arbitration clauses was preempted by FAA); *Park v. Merrill Lynch*, 582 S.E.2d 375, 378 (N.C. Ct. App. 2003) (“FAA only preempts state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements with conditions on their formation and execution which are not generally part of the applicable contract law” (internal citations omitted)); *Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) (Missouri arbitration act preempted because it required that a conspicuous warning that the contract included an arbitration clause directly above the signature blocks); *Blanton v. Stathos*, 570 S.E.2d 565 (S.C. Ct. App. 2002) (South Carolina’s Arbitration Act provision requiring arbitration clauses to be on first page and in all caps was preempted); *General Universal Systems, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2003 WL 1884198 (FAA preempted Texas Arbitration Act’s provision requiring specific notice of reliance upon arbitration clause).

<sup>32</sup> See, e.g., *Jevne v. Superior Court*, 111 P.3d 954, 957 (Cal. Ct. App. 2003) (state arbitration laws not automatically preempted if not anti-arbitration or antagonistic to the process); *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003); *Northwest Const. Co., Inc. v. Oak Partners, L.P.*, 248 S.W.3d 837 (Tex. 2008).

Congress did not intend to wholly preempt the field of arbitration when it enacted the FAA, a state-enacted arbitration scheme is presumptively valid.<sup>33</sup> Congress accepted the fact that individual states may properly provide for arbitration in other ways so long as they do not offend the Congressional intent behind the FAA.

Appellants may argue that procedural provisions of their arbitration clauses conflict with the procedural provisions of RCW 64.55, but that is not the proper analysis because the conflict identified must be on the face of the statute, and must be direct and actual, not hypothetical.<sup>34</sup> It is not enough that under some cases, contractual arbitration terms might conflict with RCW 64.55. The proper question is whether there is any way that the two statutes can be reconciled.<sup>35</sup>

Moreover, the FAA does not allow a party to enforce any and all contractual terms even marginally related to arbitration. It simply enforces the right to arbitration. For example, an analysis of the potential conflicts between the terms of developer's arbitration schemes and the arbitration provisions of RCW 64.55 here would necessarily require analysis of the enforceability of such provisions under state contract law, an issue which has thus far been reserved because the Court does not have the necessary factual record upon which to base such decisions, the lower

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<sup>33</sup> *Skysign Int'l, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1117 (9<sup>th</sup> Cir. 2002). (“[S]tate law cannot by its mere existence stand as such an obstacle when the federal government contemplates coexistence between federal and local regulatory schemes.”)

<sup>34</sup> See notes 11-16, *supra*.

<sup>35</sup> *Id.*

courts having found no evidence of interstate commerce sufficient for the FAA to apply.<sup>36</sup> Such an analysis might reveal that, in fact, enforcing arbitration schemes like those found in the PWC Limited Warranty Booklet does extensive harm to the policies the FAA purports to further.

Because there is no direct and actual conflict between the FAA and the Condo Act's enforcement provisions, including the referenced sections of Chapter 64.55 RCW, the FAA does not preempt these laws.

**C. The Construction Defect Arbitration Statute Does Not Stand as an Obstacle to the Accomplishment of the Objectives of Congress.**

The "obstruction strand" is of the conflict test is whether state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."<sup>37</sup> This second prong focuses upon both the federal law's goals and procedures, "taking into account the law's text, application, history and interpretation."<sup>38</sup> The test takes a broader view of the statutes and reflects the mandate to always consider the purpose of Congress in enacting the relevant federal statute. "The purpose of Congress is the ultimate touch-stone of the preemption analysis."<sup>39</sup> The

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<sup>36</sup> Respondent The Pier at Leschi Condominium Owners Association would argue that any such contractual provisions conflicting with RCW 64.55 are, under the facts of the present case, not binding upon the Association, are unenforceable as impermissible waivers of rights under the Condo Act or are unconscionable. However, a complete analysis of the state contract defenses to the Limited Warranty documents proffered by Appellants is beyond the scope of this brief and this appeal.

<sup>37</sup> See n. 11, *supra*.

<sup>38</sup> *Id.* (citing *Ouellette*, 479 U.S. at 494).

<sup>39</sup> *Lanier Brugh*, 135 Wn. App. at 815; *Cipollone*, 505 U.S. at 516; *Paul*, 373 U.S. at 142-43; *Ting v. AT&T*, 319 F.3d 1126, 1136 (9<sup>th</sup> Cir. 2003).

ultimate purpose, then, is to determine whether the policies of the statutes are harmonious or discordant.<sup>40</sup>

The parties to this appeal have stated the FAA's goals numerous times, always emphasizing the encouragement of arbitration as the primary goal. Indeed, the purpose of the FAA when it was originally enacted in 1924 was to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."<sup>41</sup> The goal was to prevent state courts from singling out arbitration provisions for suspect status,<sup>42</sup> but does not require arbitration clauses to become "special favorites of the law."<sup>43</sup> In short, the FAA establishes a "federal policy favoring arbitration."<sup>44</sup> Another original purpose explicitly stated by Congress was to promote "the efficient and expeditious resolution of claims."<sup>45</sup>

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<sup>40</sup> *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-99, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).

<sup>41</sup> *Scott v. Cingular Wireless*, 160 Wn.2d 843, 858, 161 P.3d 1000 (2007); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288-89, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)); See also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985); *Keating*, 465 U.S. at 13 (citing Hearing on S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67<sup>th</sup> Cong., 4<sup>th</sup> Sess. 6 (1923)); *Volt*, 489 U.S. at 477; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974).

<sup>42</sup> *Casarotto*, 517 U.S. at 687 (1996).

<sup>43</sup> *Scott*, 160 Wn.2d at 858.

<sup>44</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983).

<sup>45</sup> *Shroyer*, 498 F.2d at 989 (citing *Sink v. Aden Enters., Inc.*, 352 F.3d 1197, 1201 (9<sup>th</sup> Cir. 2003) (citing H.R. Rep. No. 96, 68<sup>th</sup> Congress, 1<sup>st</sup> Session, 2 (1924); *Dean Witter*, 470 U.S. at 219-20)).

The Condo Act's current enforcement provision, which provides for arbitration in accordance with RCW 64.55 *et seq.* does not stand as an obstacle to those goals. In fact, it represents state enactment of those exact goals. In 2005, the Washington legislature adopted Chapter 64.55 RCW and amended the Condo Act to require alternative dispute resolution of construction defect claims.<sup>46</sup> The changes were the result of a massive collaborative effort between construction defect attorneys representing both homeowners and developers and other industry personnel above and beyond those appointed to a legislative committee to study the problem of construction defects in Washington and suggest revisions to existing law.<sup>47</sup>

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<sup>46</sup> Laws 2005, ch. 456, § 20, attached hereto as Appendix A.

<sup>47</sup> See Laws 2004, ch. 201, § 8, attached hereto as Appendix B, which established a committee comprised of seven members "with experience and expertise in condominium law or condominium construction" to study, *inter alia*, "[t]he use of arbitration or other forms of alternative dispute resolution to resolve disputes involving alleged breaches of implied or express warranties under chapter 64.34 RCW." The committee's findings were summarized in the "Report to the Judiciary Committees of the Washington State Senate and House of Representatives of the Condominium Act Study Committee Created by Chapter 201, Laws of 2004," dated January 2005 ("Committee Report"), which is attached hereto as Appendix C. The Committee Report noted that it met over ten times between July and December, 2004, that over 1,000 hours were contributed and that the meetings were regularly attended by interested individuals including plaintiff's attorneys, representatives of the Washington Homeowners Coalition, the Master Builders Association, the Community Association Institute, the East King County Chambers of Commerce Legislative Coalition, the Building Industry Association of Washington, and HomeSight and that many members of these groups participated in the discussions. *Id.* at p. 2. The Committee heard from insurance brokers, mediators, design professionals and explored the practices of other states and British Columbia. *Id.* at 3. The Chair of the Committee decided that decisions should be unanimous due to his interpretation of the legislature's request for a compromise that could be supported by "these well-informed individuals with their different points of view, rather than competing recommendations from self-interested alliances." *Id.* at p. 3. The Committee Report also emphasized that its recommendations were the "product of countless hours by and hard-won compromises of the legislature's uncompensated appointees." *Id.* It therefore implored the legislature: "We urge the legislature to consider these recommendations carefully, to honor the

The provisions of Chapter 64.55 RCW, including mandatory discovery deadlines, mediation *and arbitration*, were thus carefully crafted as a total alternative dispute resolution package.<sup>48</sup> The package struck a balance between the interests of condominium purchasers and developers described by counsel for Pier at Leschi, LLC as a “Win-Win for Homeowners and Developers.”<sup>49</sup>

The existence of a state arbitration scheme that has been tailored specifically to construction defect actions in Washington and that strikes a tenuous balance between homeowner and builder interests is consonant with the purposes of the FAA: to encourage arbitration and the expeditious resolution of claims. The purposes of the substantive provisions of the Washington statutes and the FAA are therefore consonant, not dissonant and the state law does not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress.

In fact, the irony is that Congress’s intent in enacting the FAA would be damaged only if the FAA preempts the construction defect arbitration provisions because it would be invalidating a carefully crafted and balanced arbitration scheme for all parties to a construction defect case. Thus, as with California’s class arbitration provisions in *Shroyer*, if preemption is found, “the indisputable result would be to undermine the

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compromises that were reached, and not to cherry-pick the easier recommendations from among those that are more controversial.” *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Mark O’Donnell and David 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. Law Rev., Number 3 (2006).

primary objective of encouraging arbitration.”<sup>50</sup> The Washington statutes in question do not conflict with the FAA and therefore, the FAA does not preempt Washington law.

**D. The Procedural Provisions of the Construction Defect Arbitration Statute Do Not Conflict with the FAA.**

Procedural provisions of a state law are evaluated separately from the substantive provisions, which is grounded in the recognition that because the FAA was not intended to preempt the entire field of arbitration, there would likely be state arbitration statutes with their own sets of procedures. These procedures are presumed valid unless there is a “conflict that causes major damage to a clear federal interest.”<sup>51</sup> As one court put succinctly:

The broad reach of the FAA will not extend so far as to preempt the procedural rules of state proceedings because “there is no federal policy favoring arbitration under a certain set of procedural rules; . . . State rules governing the “conduct of arbitration” will not run afoul of the FAA even when the FAA does not contain a procedural provision that is coextensive with an applicable state procedural rule as long as the state procedural rule does not undermine the goal of the FAA.”<sup>52</sup>

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<sup>50</sup> *Shroyer*, 498 F.2d at 992.

<sup>51</sup> *Wilson*, 142 Wn.2d at 46.

<sup>52</sup> *Joseph v. Advest, Inc.*, 906 A.2d 1205, 1209-10 (Pa. Super. 2006) (citing *Volt*, 489 U.S. at 476).

In other words, state law procedures are not preempted unless they interfere with the purpose of the FAA.<sup>53</sup>

Because the procedural provisions of Washington's construction defect arbitration law does not interfere with the policies of the FAA, they are not preempted. RCW 64.55.100 provides for the timing of an arbitration demand,<sup>54</sup> the number of mediators depending upon the amount in controversy,<sup>55</sup> the qualifications of the arbitrator,<sup>56</sup> and limited appeal of the award through trial de novo, which is specifically discouraged through use of a procedure that requires a party to pay its opponent's fees and costs if the judgment does not exceed the arbitrator's award.<sup>57</sup> None of these procedural requirements does damage to the purpose of the FAA to encourage the resolution of disputes through arbitration. In fact, they promote the secondary purpose of the FAA to provide efficient resolution of claims. In this respect, the procedural provisions of the arbitration statute are similar to those in a number of other states in which the courts

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<sup>53</sup> See, e.g., *Wilson*, 142 Wn.2d at 46 (citing *Goodwin*, 127 Wn.2d at 57) (state statute's procedures reflected policies consistent with Medicaid state and therefore, were not preempted); *Miller v. Cotter*, 863 N.E.2d 537, 544-45 (Mass. 2007) (Massachusetts act procedures applied because they did not stand as an obstacle to the purposes of the federal act: "Only those State acts that seek to limit the enforceability of arbitration contracts are preempted by the Federal Act. 'None of the various preemption standards suggests that Congress intended the federal Act to supersede all state arbitration law . . .'" (citing *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4-5 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077, 109 S. Ct. 1527, 103 L. Ed. 2d 832 (1989)); *Moscatiello v. Hilliard*, 939 A.2d 325, 330 (Pa. Sup. Ct. 2007) (30-day time limit for enforcement of arbitration award not preempted).

<sup>54</sup> RCW 64.55.100(1).

<sup>55</sup> RCW 64.55.100(2).

<sup>56</sup> RCW 64.55.100(3).

<sup>57</sup> RCW 64.55.100(4), (5) and (6).

held that the procedures were not preempted. *See, e.g., Muao v. Grosvenor Properties, Ltd.*, 99 Cal. App. 4th 1085, 1092 (Cal. Ct. App. 2002) (state act governing timing of appeal of award not preempted by FAA); *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868, 873 n. 3 (Mo. Ct. App. 2005) (state statute that order denying arbitration was appealable was not preempted “so long as the procedure does not defeat the substantive rights of the federal act”); *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 104-05 (N.C. Ct. App. 2007) (procedural provisions of Revised Uniform Arbitration Act not preempted because do not “undermine” purpose of FAA and, in fact, “protect the integrity of the arbitration process.”); *Joseph v. Advest, Inc.*, 906 A.2d at 1209-10 (state arbitration statute providing 30 days for challenging arbitration awards not preempted by FAA). Similarly, the procedural sections of the construction defect arbitration provisions do no damage to the purposes of the FAA because they, in no way, express a disdain for arbitration or make it more difficult to obtain arbitration. In fact, Chapter 64.55 RCW requires arbitration of all construction defect disputes, regardless of whether the parties have contracted for it, thus increasing the scope and number of arbitrable claims. Thus, the construction defect provisions of Chapter 64.55 RCW do not defeat the purposes of the FAA and are therefore not preempted.

### III. CONCLUSION

Even if a document containing an arbitration clause is an enforceable contract that implicates interstate commerce, the FAA will not preempt consonant state law unless it is physically impossible to comply with the substantive provisions of both or the state statute as a whole stands as an obstacle to the purposes of the FAA. Here, the Condo Act's enforcement clause and the related construction defect arbitration provisions are entirely consistent with the substantive provisions of the FAA and consonant with its purposes, which are to discourage the wholesale invalidation of arbitration clauses, to put such clauses on even footing with the remainder of contractual terms and to encourage alternate dispute resolution.

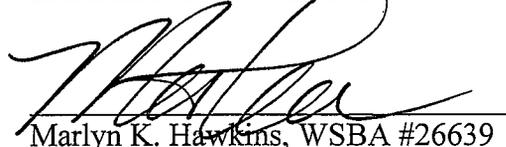
The state statutes at issue here are simply not like those invalidated in whole or in part in other states, which specifically provide for exclusive judicial forums, target contractual arbitration clauses or represent anti-arbitration policies. For all of these reasons, Respondent The Pier at Leschi Condominium Owners Association requests that the Court find that the FAA does not preempt these state statutes because they do not conflict with the FAA.

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Respectfully submitted this 22nd day of October, 2008.

BARKER • MARTIN, P.S.

A handwritten signature in black ink, appearing to read 'Marlyn K. Hawkins', written over a horizontal line.

Marlyn K. Hawkins, WSBA #26639

Dean Martin, WSBA #21970

Attorneys for Respondents

Satomi Owners Association &

The Pier at Leschi Condominium

Owners Association

# Appendix A

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 1848

Chapter 456, Laws of 2005

59th Legislature  
2005 Regular Session

MULTIUNIT RESIDENTIAL BUILDINGS

EFFECTIVE DATE: 8/01/05

Passed by the House April 19, 2005  
Yeas 98 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 8, 2005  
Yeas 46 Nays 1

BRAD OWEN

President of the Senate

Approved May 13, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is ENGROSSED HOUSE BILL 1848 as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

May 13, 2005 - 3:09 p.m.

Secretary of State  
State of Washington

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ENGROSSED HOUSE BILL 1848

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AS AMENDED BY THE SENATE

Passed Legislature - 2005 Regular Session

State of Washington                      59th Legislature                      2005 Regular Session

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

Read first time 02/08/2005. Referred to Committee on Judiciary.

1            AN ACT Relating to managing construction defect disputes involving  
2 multiunit residential buildings; amending RCW 64.34.415, 64.34.410, and  
3 64.34.100; adding a new section to chapter 64.34 RCW; adding a new  
4 chapter to Title 64 RCW; creating a new section; and providing an  
5 effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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

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

16            (2) Sections 2 and 11 through 18 of this act apply to any action  
17 that alleges breach of an implied or express warranty under chapter  
18 64.34 RCW or that seeks relief that could be awarded for such breach,

1 regardless of the legal theory pled, except that sections 11 through 18  
2 of this act shall not apply to:

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

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

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

9 (d) Actions asserting any claim regarding a multiunit residential  
10 building that was permitted on or after the effective date of this act  
11 unless the letter required by section 7 of this act has been submitted  
12 to the appropriate building department or the requirements of section  
13 10 of this act have been satisfied.

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

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

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

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

33 (3) "Building enclosure design documents" means plans, details, and  
34 specifications for the building enclosure that have been stamped by a  
35 licensed engineer or architect. The building enclosure design  
36 documents shall include details and specifications that are appropriate  
37 for the building in the professional judgment of the architect or

1 engineer which prepared the same to waterproof, weatherproof, and  
2 otherwise protect the building or its components from water or moisture  
3 intrusion, including details of flashing, intersections at roof, eaves  
4 or parapets, means of drainage, water-resistive membrane, and details  
5 around openings.

6 (4) "Developer" means:

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

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

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

23 (6) "Multiunit residential building" means:

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

28 (i) Hotels and motels;

29 (ii) Dormitories;

30 (iii) Care facilities;

31 (iv) Floating homes;

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

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

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

- 7 (i) A building containing only two attached dwelling units;
- 8 (ii) A building that does not contain attached dwelling units; and
- 9 (iii) Any building that contains attached dwelling units each of  
10 which is located on a single platted lot.

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

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

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

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

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

37 This covenant terminates on the earlier of either: (a)  
38 Compliance with the requirements of section 10 of this act, as

1 certified by the owner of the Property in a recorded supplement  
2 hereto; or (b) the fifth anniversary of the date of first  
3 occupancy of a dwelling unit as certified by the Owner in a  
4 recorded supplement hereto.

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

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

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

33 (2) The building department shall not issue a building permit for  
34 construction of the building enclosure of a multiunit residential  
35 building or for rehabilitative construction unless the building  
36 enclosure design documents contain a stamped statement by the person  
37 stamping the building enclosure design documents in substantially the

1 following form: "The undersigned has provided building enclosure  
2 documents that in my professional judgment are appropriate to satisfy  
3 the requirements of sections 1 through 10 of this act."

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

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

13 NEW SECTION. Sec. 5. INSPECTORS--QUALIFICATIONS--INDEPENDENCE.

14 (1) A qualified building enclosure inspector:

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

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

19 (c) May not be an employee, officer, or director of, nor have any  
20 pecuniary interest in, the declarant, developer, association, or any  
21 party providing services or materials for the project, or any of their  
22 respective affiliates, except that the qualified inspector may be the  
23 architect or engineer who approved the building enclosure design  
24 documents or the architect or engineer of record. The qualified  
25 inspector may, but is not required to, assist with the preparation of  
26 such design documents.

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

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

33 (a) Water penetration resistance testing of a representative sample  
34 of windows and window installations. Such tests shall be conducted  
35 according to industry standards. Where appropriate, tests shall be

1 conducted with an induced air pressure difference across the window and  
2 window installation. Additional testing is not required if the same  
3 assembly has previously been tested in situ within the previous two  
4 years in the project under construction by the builder, by another  
5 member of the construction team such as an architect or engineer, or by  
6 an independent testing laboratory; and

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

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

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

21 NEW SECTION. Sec. 7. CERTIFICATION--CERTIFICATE OF OCCUPANCY.

22 Upon completion of an inspection required by this chapter, the  
23 qualified inspector shall prepare and submit to the appropriate  
24 building department a signed letter certifying that the building  
25 enclosure has been inspected during the course of construction or  
26 rehabilitative construction and that it has been constructed or  
27 reconstructed in substantial compliance with the building enclosure  
28 design documents, as updated pursuant to section 3 of this act. The  
29 building department shall not issue a final certificate of occupancy or  
30 other equivalent final acceptance until the letter required by this  
31 section has been submitted. The building department is not charged  
32 with and has no responsibility for determining whether the building  
33 enclosure inspection is adequate or appropriate to satisfy the  
34 requirements of this chapter.

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

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

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

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

9 NEW SECTION. Sec. 9. NO EVIDENTIARY PRESUMPTION--ADMISSIBILITY.

10 A qualified inspector's report or testimony regarding an inspection  
11 conducted pursuant to this chapter is not entitled to any evidentiary  
12 presumption in any arbitration or court proceeding. Nothing in this  
13 chapter restricts the admissibility of such a report or testimony, and  
14 questions of the admissibility of such a report or testimony shall be  
15 determined under the rules of evidence.

16 NEW SECTION. Sec. 10. NO SALE OF CONDOMINIUM UNIT ABSENT  
17 COMPLIANCE. (1) Except for sales or other dispositions listed in RCW  
18 64.34.400(2), no declarant may convey a condominium unit that may be  
19 occupied for residential use in a multiunit residential building  
20 without first complying with the requirements of sections 1 through 9  
21 of this act unless the building enclosure of the building in which such  
22 unit is included is inspected by a qualified building enclosure  
23 inspector, and:

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

29 (b) The inspection evaluates, to the extent reasonably  
30 ascertainable and in the professional judgment of the inspector, the  
31 present condition of the building enclosure including whether such  
32 condition has adversely affected or will adversely affect the  
33 performance of the building enclosure to waterproof, weatherproof, or  
34 otherwise protect the building or its components from water or moisture  
35 intrusion. "Adversely affect" has the same meaning as provided in RCW  
36 64.34.445(7);

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

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

14 (e) The declarant provides as part of the public offering  
15 statement, consistent with RCW 64.34.410 (1)(nn) and (2) and  
16 64.34.415(1)(b), an inspection and repair report signed by the  
17 qualified building enclosure inspector that identifies:

18 (i) The extent of the inspection performed pursuant to this  
19 section;

20 (ii) The information obtained as a result of that inspection; and

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

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

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

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

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

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

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

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

1 act, the court shall not make an award of fees and costs to the  
2 appealing party.

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

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

14 (a) Selection of a mediator;

15 (b) Commencement of the mandatory mediation and submission of  
16 mediation materials required by this chapter;

17 (c) Selection of the arbitrator by the parties, where applicable;

18 (d) Joinder of additional parties in the action;

19 (e) Completion of each party's investigation;

20 (f) Disclosure of each party's proposed repair plan;

21 (g) Disclosure of each party's estimated costs of repair;

22 (h) Meeting of parties and experts to confer in accordance with  
23 section 13 of this act; and

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

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

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

35 (2) Prior to the mediation required by this section, the parties

1 and their experts shall meet and confer in good faith to attempt to  
2 resolve or narrow the scope of the disputed issues, including issues  
3 related to the parties' repair plans.

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

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

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

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

16 NEW SECTION. Sec. 14. NEUTRAL EXPERT. (1) If, after meeting and  
17 conferring as required by section 13(2) of this act, disputed issues  
18 remain, a party may file a motion with the court, or arbitrator if an  
19 arbitrator has been appointed, requesting the appointment of a neutral  
20 expert to address any or all of the disputed issues. Unless otherwise  
21 agreed to by the parties or upon a showing of exceptional  
22 circumstances, including a material adverse change in a party's  
23 litigation risks due to a change in allegations, claims, or defenses by  
24 an adverse party following the appointment of the neutral expert, any  
25 such motion shall be filed no later than sixty days after the first day  
26 of the meeting required by section 13(2) of this act. Upon such a  
27 request, the court or arbitrator shall decide whether or not to appoint  
28 a neutral expert or experts. A party may only request more than one  
29 neutral expert if the particular expertise of the additional neutral  
30 expert or experts is necessary to address disputed issues.

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

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

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

6 (a) Who shall serve as the neutral expert;

7 (b) Subject to the requirements of this section, the scope of the  
8 neutral expert's duties;

9 (c) The number and timing of inspections of the property;

10 (d) Coordination of inspection activities with the parties'  
11 experts;

12 (e) The neutral expert's access to the work product of the parties'  
13 experts;

14 (f) The product to be prepared by the neutral expert;

15 (g) Whether the neutral expert may participate personally in the  
16 mediation required by section 13 of this act; and

17 (h) Other matters relevant to the neutral expert's assignment.

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

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

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

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

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

1 (10) The court, or arbitrator if then appointed, shall determine  
2 the significance of the neutral expert's report and testimony with  
3 respect to parties joined after the neutral expert's appointment and  
4 shall determine whether additional neutral experts should be appointed  
5 or other measures should be taken to protect such joined parties from  
6 undue prejudice.

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

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

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

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

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

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

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

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

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

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

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

16 NEW SECTION. Sec. 17. OFFERS OF JUDGMENT--COSTS AND FEES. (1) On  
17 or before the sixtieth day following completion of the mediation  
18 pursuant to section 13(4) of this act, the declarant, association, or  
19 party unit owner may serve on an adverse party an offer to allow  
20 judgment to be entered. The offer of judgment shall specify the amount  
21 of damages, not including costs or fees, that the declarant,  
22 association, or party unit owner is offering to pay or receive. A  
23 declarant's offer shall also include its commitment to pay costs and  
24 fees that may be awarded as provided in this section. The declarant,  
25 association, or party unit owner may make more than one offer of  
26 judgment so long as each offer is timely made. Each subsequent offer  
27 supersedes and replaces the previous offer. Any offer not accepted  
28 within twenty-one days of the service of that offer is deemed rejected  
29 and withdrawn and evidence thereof is not admissible and may not be  
30 provided to the court or arbitrator except in a proceeding to determine  
31 costs and fees or as part of the motion identified in subsection (2) of  
32 this section.

33 (2) A declarant's offer must include a demonstration of ability to  
34 pay damages, costs, and fees, including reasonable attorneys' fees,  
35 within thirty days of acceptance of the offer of judgment. The  
36 demonstration of ability to pay shall include a sworn statement signed

1 by the declarant, the attorney representing the declarant, and, if any  
2 insurance proceeds will be used to fund any portion of the offer, an  
3 authorized representative of the insurance company. If the association  
4 or party unit owner disputes the adequacy of the declarant's  
5 demonstration of ability to pay, the association or party unit owner  
6 may file a motion with the court requesting a ruling on the adequacy of  
7 the declarant's demonstration of ability to pay. Upon filing of such  
8 motion, the deadline for a response to the offer shall be tolled from  
9 the date the motion is filed until the court has ruled.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33 (a) The name and address of the condominium;

34 (b) The name and address of the declarant;

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

- 1 (d) The relationship of the management company to the declarant, if  
2 any;
- 3 (e) A list of up to the five most recent condominium projects  
4 completed by the declarant or an affiliate of the declarant within the  
5 past five years, including the names of the condominiums, their  
6 addresses, and the number of existing units in each. For the purpose  
7 of this section, a condominium is "completed" when any one unit therein  
8 has been rented or sold;
- 9 (f) The nature of the interest being offered for sale;
- 10 (g) A brief description of the permitted uses and use restrictions  
11 pertaining to the units and the common elements;
- 12 (h) A brief description of the restrictions, if any, on the renting  
13 or leasing of units by the declarant or other unit owners, together  
14 with the rights, if any, of the declarant to rent or lease at least a  
15 majority of units;
- 16 (i) The number of existing units in the condominium and the maximum  
17 number of units that may be added to the condominium;
- 18 (j) A list of the principal common amenities in the condominium  
19 which materially affect the value of the condominium and those that  
20 will or may be added to the condominium;
- 21 (k) A list of the limited common elements assigned to the units  
22 being offered for sale;
- 23 (l) The identification of any real property not in the condominium,  
24 the owner of which has access to any of the common elements, and a  
25 description of the terms of such access;
- 26 (m) The identification of any real property not in the condominium  
27 to which unit owners have access and a description of the terms of such  
28 access;
- 29 (n) The status of construction of the units and common elements,  
30 including estimated dates of completion if not completed;
- 31 (o) The estimated current common expense liability for the units  
32 being offered;
- 33 (p) An estimate of any payment with respect to the common expense  
34 liability for the units being offered which will be due at closing;
- 35 (q) The estimated current amount and purpose of any fees not  
36 included in the common expenses and charged by the declarant or the  
37 association for the use of any of the common elements;

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

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

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

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

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

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

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

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

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

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

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

- 1 (cc) Any rights of first refusal to lease or purchase any unit or  
2 any of the common elements;
- 3 (dd) The extent to which the insurance provided by the association  
4 covers furnishings, fixtures, and equipment located in the unit;
- 5 (ee) A notice which describes a purchaser's right to cancel the  
6 purchase agreement or extend the closing under RCW 64.34.420, including  
7 applicable time frames and procedures;
- 8 (ff) Any reports or statements required by RCW 64.34.415 or  
9 64.34.440(6)(a). RCW 64.34.415 shall apply to the public offering  
10 statement of a condominium in connection with which a final certificate  
11 of occupancy was issued more than sixty calendar months prior to the  
12 preparation of the public offering statement whether or not the  
13 condominium is a conversion condominium as defined in RCW  
14 64.34.020(10);
- 15 (gg) A list of the documents which the prospective purchaser is  
16 entitled to receive from the declarant before the rescission period  
17 commences;
- 18 (hh) A notice which states: A purchaser may not rely on any  
19 representation or express warranty unless it is contained in the public  
20 offering statement or made in writing signed by the declarant or by any  
21 person identified in the public offering statement as the declarant's  
22 agent;
- 23 (ii) A notice which states: This public offering statement is only  
24 a summary of some of the significant aspects of purchasing a unit in  
25 this condominium and the condominium documents are complex, contain  
26 other important information, and create binding legal obligations. You  
27 should consider seeking the assistance of legal counsel;
- 28 (jj) Any other information and cross-references which the declarant  
29 believes will be helpful in describing the condominium to the  
30 recipients of the public offering statement, all of which may be  
31 included or not included at the option of the declarant;
- 32 (kk) A notice that addresses compliance or noncompliance with the  
33 housing for older persons act of 1995, P.L. 104-76, as enacted on  
34 December 28, 1995;
- 35 (ll) A notice that is substantially in the form required by RCW  
36 64.50.050; ((and))
- 37 (mm) A statement, as required by RCW 64.35.210, as to whether the

1 units or common elements of the condominium are covered by a qualified  
2 warranty, and a history of claims under any such warranty; and

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

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

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

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

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

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

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

34 (1) The remedies provided by this chapter shall be liberally  
35 administered to the end that the aggrieved party is put in as good a  
36 position as if the other party had fully performed. However,

1 consequential, special, or punitive damages may not be awarded except  
2 as specifically provided in this chapter or by other rule of law.

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

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

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

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

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

20 NEW SECTION. Sec. 24. EFFECTIVE DATE. This act takes effect  
21 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.

# Appendix B

CERTIFICATION OF ENROLLMENT

SECOND ENGROSSED SUBSTITUTE SENATE BILL 5536

Chapter 201, Laws of 2004

58th Legislature  
2004 Regular Session

CONDOMINIUMS

EFFECTIVE DATE: 6/10/04

Passed by the Senate March 11, 2004  
YEAS 41 NAYS 8

BRAD OWEN

\_\_\_\_\_  
President of the Senate

Passed by the House March 10, 2004  
YEAS 97 NAYS 0

FRANK CHOPP

\_\_\_\_\_  
Speaker of the House of Representatives

Approved March 29, 2004.

GARY F. LOCKE

\_\_\_\_\_  
Governor of the State of Washington

CERTIFICATE

I, Milton H. Doumit, Jr.,  
Secretary of the Senate of the  
State of Washington, do hereby  
certify that the attached is  
SECOND ENGROSSED SUBSTITUTE SENATE  
BILL 5536 as passed by the Senate  
and the House of Representatives  
on the dates hereon set forth.

MILTON H. DOUMIT JR.

\_\_\_\_\_  
Secretary

FILED

March 29, 2004 - 3:00 p.m.

Secretary of State  
State of Washington

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SECOND ENGROSSED SUBSTITUTE SENATE BILL 5536

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AS AMENDED BY THE HOUSE

Passed Legislature - 2004 Regular Session

State of Washington                      58th Legislature                      2003 Regular Session

By Senate Committee on Judiciary (originally sponsored by Senators Finkbeiner, Reardon, Roach, Hale, Horn, Benton, Morton, Hewitt, Schmidt, Kastama, Sheahan, Mulliken, Johnson, Parlette, Stevens, West and Esser)

READ FIRST TIME 02/21/03.

1            AN ACT Relating to condominiums; amending RCW 64.34.100, 64.34.324,  
2            64.34.425, 64.34.445, 64.34.450, 64.34.452, 64.34.020, 64.34.312, and  
3            64.34.410; adding a new section to chapter 64.34 RCW; adding a new  
4            chapter to Title 64 RCW; creating new sections; and providing an  
5            effective date.

6            BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7            NEW SECTION.    **Sec. 1.** A new section is added to chapter 64.34 RCW  
8            to read as follows:

9            (1) The legislature finds, declares, and determines that:

10            (a) Washington's cities and counties under the growth management  
11            act are required to encourage urban growth in urban growth areas at  
12            densities that accommodate twenty-year growth projections;

13            (b) The growth management act's planning goals include encouraging  
14            the availability of affordable housing for all residents of the state  
15            and promoting a variety of housing types;

16            (c) Quality condominium construction needs to be encouraged to  
17            achieve growth management act mandated urban densities and to ensure  
18            that residents of the state, particularly in urban growth areas, have  
19            a broad range of ownership choices.

1 (2) It is the intent of the legislature that limited changes be  
2 made to the condominium act to ensure that a broad range of affordable  
3 homeownership opportunities continue to be available to the residents  
4 of the state, and to assist cities' and counties' efforts to achieve  
5 the density mandates of the growth management act.

6 **Sec. 2.** RCW 64.34.100 and 1989 c 43 s 1-113 are each amended to  
7 read as follows:

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

13 (2) Except as otherwise provided in chapter 64.-- RCW (sections 101  
14 through 2002 of this act), any right or obligation declared by this  
15 chapter is enforceable by judicial proceeding.

16 **Sec. 3.** RCW 64.34.324 and 1992 c 220 s 16 are each amended to read  
17 as follows:

18 (1) Unless provided for in the declaration, the bylaws of the  
19 association shall provide for:

20 (a) The number, qualifications, powers and duties, terms of office,  
21 and manner of electing and removing the board of directors and officers  
22 and filling vacancies;

23 (b) Election by the board of directors of such officers of the  
24 association as the bylaws specify;

25 (c) Which, if any, of its powers the board of directors or officers  
26 may delegate to other persons or to a managing agent;

27 (d) Which of its officers may prepare, execute, certify, and record  
28 amendments to the declaration on behalf of the association; ((and))

29 (e) The method of amending the bylaws; and

30 (f) A statement of the standard of care for officers and members of  
31 the board of directors imposed by RCW 64.34.308(1).

32 (2) Subject to the provisions of the declaration, the bylaws may  
33 provide for any other matters the association deems necessary and  
34 appropriate.

35 (3) In determining the qualifications of any officer or director of  
36 the association, notwithstanding the provision of RCW 64.34.020(32) the

1 term "unit owner" in such context shall, unless the declaration or  
2 bylaws otherwise provide, be deemed to include any director, officer,  
3 partner in, or trustee of any person, who is, either alone or in  
4 conjunction with another person or persons, a unit owner. Any officer  
5 or director of the association who would not be eligible to serve as  
6 such if he or she were not a director, officer, partner in, or trustee  
7 of such a person shall be disqualified from continuing in office if he  
8 or she ceases to have any such affiliation with that person, or if that  
9 person would have been disqualified from continuing in such office as  
10 a natural person.

11 **Sec. 4.** RCW 64.34.425 and 1992 c 220 s 23 are each amended to read  
12 as follows:

13 (1) Except in the case of a sale where delivery of a public  
14 offering statement is required, or unless exempt under RCW  
15 64.34.400(2), a unit owner shall furnish to a purchaser before  
16 execution of any contract for sale of a unit, or otherwise before  
17 conveyance, a resale certificate, signed by an officer or authorized  
18 agent of the association and based on the books and records of the  
19 association and the actual knowledge of the person signing the  
20 certificate, containing:

21 (a) A statement disclosing any right of first refusal or other  
22 restraint on the free alienability of the unit contained in the  
23 declaration;

24 (b) A statement setting forth the amount of the monthly common  
25 expense assessment and any unpaid common expense or special assessment  
26 currently due and payable from the selling unit owner and a statement  
27 of any special assessments that have been levied against the unit which  
28 have not been paid even though not yet due;

29 (c) A statement, which shall be current to within forty-five days,  
30 of any common expenses or special assessments against any unit in the  
31 condominium that are past due over thirty days;

32 (d) A statement, which shall be current to within forty-five days,  
33 of any obligation of the association which is past due over thirty  
34 days;

35 (e) A statement of any other fees payable by unit owners;

36 (f) A statement of any anticipated repair or replacement cost in

1 excess of five percent of the annual budget of the association that has  
2 been approved by the board of directors;

3 (g) A statement of the amount of any reserves for repair or  
4 replacement and of any portions of those reserves currently designated  
5 by the association for any specified projects;

6 (h) The annual financial statement of the association, including  
7 the audit report if it has been prepared, for the year immediately  
8 preceding the current year.

9 (i) A balance sheet and a revenue and expense statement of the  
10 association prepared on an accrual basis, which shall be current to  
11 within one hundred twenty days;

12 (j) The current operating budget of the association;

13 (k) A statement of any unsatisfied judgments against the  
14 association and the status of any pending suits or legal proceedings in  
15 which the association is a plaintiff or defendant;

16 (l) A statement describing any insurance coverage provided for the  
17 benefit of unit owners;

18 (m) A statement as to whether there are any alterations or  
19 improvements to the unit or to the limited common elements assigned  
20 thereto that violate any provision of the declaration;

21 (n) A statement of the number of units, if any, still owned by the  
22 declarant, whether the declarant has transferred control of the  
23 association to the unit owners, and the date of such transfer;

24 (o) A statement as to whether there are any violations of the  
25 health or building codes with respect to the unit, the limited common  
26 elements assigned thereto, or any other portion of the condominium;

27 (p) A statement of the remaining term of any leasehold estate  
28 affecting the condominium and the provisions governing any extension or  
29 renewal thereof; (~~and~~)

30 (q) A copy of the declaration, the bylaws, the rules or regulations  
31 of the association, and any other information reasonably requested by  
32 mortgagees of prospective purchasers of units. Information requested  
33 generally by the federal national mortgage association, the federal  
34 home loan bank board, the government national mortgage association, the  
35 veterans administration and the department of housing and urban  
36 development shall be deemed reasonable, provided such information is  
37 reasonably available to the association; and

1       (r) A statement, as required by section 301 of this act, as to  
2 whether the units or common elements of the condominium are covered by  
3 a qualified warranty, and a history of claims under any such warranty.

4       (2) The association, within ten days after a request by a unit  
5 owner, and subject to payment of any fee imposed pursuant to RCW  
6 64.34.304(1)(1), shall furnish a resale certificate signed by an  
7 officer or authorized agent of the association and containing the  
8 information necessary to enable the unit owner to comply with this  
9 section. For the purposes of this chapter, a reasonable charge for the  
10 preparation of a resale certificate may not exceed one hundred fifty  
11 dollars. The association may charge a unit owner a nominal fee for  
12 updating a resale certificate within six months of the unit owner's  
13 request. The unit owner shall also sign the certificate but the unit  
14 owner is not liable to the purchaser for any erroneous information  
15 provided by the association and included in the certificate unless and  
16 to the extent the unit owner had actual knowledge thereof.

17       (3) A purchaser is not liable for any unpaid assessment or fee  
18 against the unit as of the date of the certificate greater than the  
19 amount set forth in the certificate prepared by the association unless  
20 and to the extent such purchaser had actual knowledge thereof. A unit  
21 owner is not liable to a purchaser for the failure or delay of the  
22 association to provide the certificate in a timely manner, but the  
23 purchaser's contract is voidable by the purchaser until the certificate  
24 has been provided and for five days thereafter or until conveyance,  
25 whichever occurs first.

26       **Sec. 5.** RCW 64.34.445 and 1992 c 220 s 26 are each amended to read  
27 as follows:

28       (1) A declarant and any dealer warrants that a unit will be in at  
29 least as good condition at the earlier of the time of the conveyance or  
30 delivery of possession as it was at the time of contracting, reasonable  
31 wear and tear and damage by casualty or condemnation excepted.

32       (2) A declarant and any dealer impliedly warrants that a unit and  
33 the common elements in the condominium are suitable for the ordinary  
34 uses of real estate of its type and that any improvements made or  
35 contracted for by such declarant or dealer will be:

36       (a) Free from defective materials; (~~and~~)

1 (b) Constructed in accordance with sound engineering and  
2 construction standards(~~(7-and)~~);

3 (c) Constructed in a workmanlike manner; and

4 (d) Constructed in compliance with all laws then applicable to such  
5 improvements.

6 (3) A declarant and any dealer warrants to a purchaser of a unit  
7 that may be used for residential use that an existing use, continuation  
8 of which is contemplated by the parties, does not violate applicable  
9 law at the earlier of the time of conveyance or delivery of possession.

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

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

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

17 (7) In a judicial proceeding for breach of any of the obligations  
18 arising under this section, the plaintiff must show that the alleged  
19 breach has adversely affected or will adversely affect the performance  
20 of that portion of the unit or common elements alleged to be in breach.  
21 As used in this subsection, an "adverse effect" must be more than  
22 technical and must be significant to a reasonable person. To establish  
23 an adverse effect, the person alleging the breach is not required to  
24 prove that the breach renders the unit or common element uninhabitable  
25 or unfit for its intended purpose.

26 (8) Proof of breach of any obligation arising under this section is  
27 not proof of damages. Damages awarded for a breach of an obligation  
28 arising under this section are the cost of repairs. However, if it is  
29 established that the cost of such repairs is clearly disproportionate  
30 to the loss in market value caused by the breach, then damages shall be  
31 limited to the loss in market value.

32 **Sec. 6.** RCW 64.34.450 and 1989 c 43 s 4-113 are each amended to  
33 read as follows:

34 (1) (~~Except as limited by subsection (2) of this section~~) For  
35 units intended for nonresidential use, implied warranties of quality:

36 (a) May be excluded or modified by written agreement of the  
37 parties; and

1 (b) Are excluded by written expression of disclaimer, such as "as  
2 is," "with all faults," or other language which in common understanding  
3 calls the buyer's attention to the exclusion of warranties.

4 (2) (~~With respect to a purchaser of a unit that may be occupied~~)  
5 For units intended for residential use, no (~~general~~) disclaimer of  
6 implied warranties of quality is effective, (~~but~~) except that a  
7 declarant (~~and any~~) or dealer may disclaim liability in (~~an~~  
8 instrument) writing, in type that is bold faced, capitalized,  
9 underlined, or otherwise set out from surrounding material so as to be  
10 conspicuous, and separately signed by the purchaser, for a specified  
11 defect or specified failure to comply with applicable law, if: (a) The  
12 declarant or dealer knows or has reason to know that the specific  
13 defect or failure (~~entered into and became a part of the basis of the~~  
14 bargain) exists at the time of disclosure; (b) the disclaimer  
15 specifically describes the defect or failure; and (c) the disclaimer  
16 includes a statement as to the effect of the defect or failure.

17 (3) A declarant or dealer may offer an express written warranty of  
18 quality only if the express written warranty does not reduce  
19 protections provided to the purchaser by the implied warranty set forth  
20 in RCW 64.34.445.

21 **Sec. 7.** RCW 64.34.452 and 2002 c 323 s 11 are each amended to read  
22 as follows:

23 (1) A judicial proceeding for breach of any obligations arising  
24 under RCW 64.34.443 (~~and~~), 64.34.445, and 64.34.450 must be commenced  
25 within four years after the cause of action accrues: PROVIDED, That  
26 the period for commencing an action for a breach accruing pursuant to  
27 subsection (2)(b) of this section shall not expire prior to one year  
28 after termination of the period of declarant control, if any, under RCW  
29 64.34.308(4). Such periods may not be reduced by either oral or  
30 written agreement, or through the use of contractual claims or notice  
31 procedures that require the filing or service of any claim or notice  
32 prior to the expiration of the period specified in this section.

33 (2) Subject to subsection (3) of this section, a cause of action or  
34 breach of warranty of quality, regardless of the purchaser's lack of  
35 knowledge of the breach, accrues:

36 (a) As to a unit, the date the purchaser to whom the warranty is

1 first made enters into possession if a possessory interest was conveyed  
2 or the date of acceptance of the instrument of conveyance if a  
3 nonpossessory interest was conveyed; and

4 (b) As to each common element, at the latest of (i) the date the  
5 first unit in the condominium was conveyed to a bona fide purchaser,  
6 (ii) the date the common element was completed, or (iii) the date the  
7 common element was added to the condominium.

8 (3) If a warranty of quality explicitly extends to future  
9 performance or duration of any improvement or component of the  
10 condominium, the cause of action accrues at the time the breach is  
11 discovered or at the end of the period for which the warranty  
12 explicitly extends, whichever is earlier.

13 (4) If a written notice of claim is served under RCW 64.50.020  
14 within the time prescribed for the filing of an action under this  
15 chapter, the statutes of limitation in this chapter and any applicable  
16 statutes of repose for construction-related claims are tolled until  
17 sixty days after the period of time during which the filing of an  
18 action is barred under RCW 64.50.020.

19 (5) Nothing in this section affects the time for filing a claim  
20 under chapter 64.-- RCW (sections 101 through 2002 of this act).

21 NEW SECTION. Sec. 8. (1) A committee is established to study:

22 (a) The required use of independent third-party inspections of  
23 residential condominiums as a way to reduce the problem of water  
24 penetration in residential condominiums; and

25 (b) The use of arbitration or other forms of alternative dispute  
26 resolution to resolve disputes involving alleged breaches of implied or  
27 express warranties under chapter 64.34 RCW.

28 (2) The committee consists of the following members who shall be  
29 persons with experience and expertise in condominium law or condominium  
30 construction:

31 (a) A member, who shall be the chair of the committee, to be  
32 appointed by the governor;

33 (b) Three members to be appointed by the majority leader of the  
34 senate; and

35 (c) Three members to be appointed by the speaker of the house of  
36 representatives.

37 (3) The committee shall:

1 (a) Examine the problem of water penetration of condominiums and  
2 the efficacy of requiring independent third-party inspections of  
3 condominiums, including plan inspection and inspection during  
4 construction, as a way to reduce the problem of water penetration;

5 (b) Examine issues relating to alternative dispute resolution,  
6 including but not limited to:

7 (i) When and how the decision to use alternative dispute resolution  
8 is made;

9 (ii) The procedures to be used in an alternative dispute  
10 resolution;

11 (iii) The nature of the right of appeal from an alternative dispute  
12 resolution decision; and

13 (iv) The allocation of costs and fees associated with an  
14 alternative dispute resolution proceeding or appeal;

15 (c) Deliver to the judiciary committees of the senate and house of  
16 representatives, not later than December 31, 2004, a report of the  
17 findings and conclusions of the committee, and any proposed legislation  
18 implementing third-party water penetration inspections or providing for  
19 alternative dispute resolution for warranty issues.

20 **Sec. 9.** RCW 64.34.020 and 1992 c 220 s 2 are each amended to read  
21 as follows:

22 In the declaration and bylaws, unless specifically provided  
23 otherwise or the context requires otherwise, and in this chapter:

24 (1) "Affiliate (~~of a declarant~~)" means any person who controls,  
25 is controlled by, or is under common control with (~~a declarant~~) the  
26 referenced person. A person "controls" (~~a declarant~~) another person  
27 if the person: (a) Is a general partner, officer, director, or  
28 employer of the (~~declarant~~) referenced person; (b) directly or  
29 indirectly or acting in concert with one or more other persons, or  
30 through one or more subsidiaries, owns, controls, holds with power to  
31 vote, or holds proxies representing, more than twenty percent of the  
32 voting interest in the (~~declarant~~) referenced person; (c) controls in  
33 any manner the election of a majority of the directors of the  
34 (~~declarant~~) referenced person; or (d) has contributed more than  
35 twenty percent of the capital of the (~~declarant~~) referenced person.  
36 A person "is controlled by" (~~a declarant~~) another person if the  
37 (~~declarant~~) other person: (i) Is a general partner, officer,

1 director, or employer of the person; (ii) directly or indirectly or  
2 acting in concert with one or more other persons, or through one or  
3 more subsidiaries, owns, controls, holds with power to vote, or holds  
4 proxies representing, more than twenty percent of the voting interest  
5 in the person; (iii) controls in any manner the election of a majority  
6 of the directors of the person; or (iv) has contributed more than  
7 twenty percent of the capital of the person. Control does not exist if  
8 the powers described in this subsection are held solely as security for  
9 an obligation and are not exercised.

10 (2) "Allocated interests" means the undivided interest in the  
11 common elements, the common expense liability, and votes in the  
12 association allocated to each unit.

13 (3) "Assessment" means all sums chargeable by the association  
14 against a unit including, without limitation: (a) Regular and special  
15 assessments for common expenses, charges, and fines imposed by the  
16 association; (b) interest and late charges on any delinquent account;  
17 and (c) costs of collection, including reasonable attorneys' fees,  
18 incurred by the association in connection with the collection of a  
19 delinquent owner's account.

20 (4) "Association" or "unit owners' association" means the unit  
21 owners' association organized under RCW 64.34.300.

22 (5) "Board of directors" means the body, regardless of name, with  
23 primary authority to manage the affairs of the association.

24 (6) "Common elements" means all portions of a condominium other  
25 than the units.

26 (7) "Common expenses" means expenditures made by or financial  
27 liabilities of the association, together with any allocations to  
28 reserves.

29 (8) "Common expense liability" means the liability for common  
30 expenses allocated to each unit pursuant to RCW 64.34.224.

31 (9) "Condominium" means real property, portions of which are  
32 designated for separate ownership and the remainder of which is  
33 designated for common ownership solely by the owners of those portions.  
34 Real property is not a condominium unless the undivided interests in  
35 the common elements are vested in the unit owners, and unless a  
36 declaration and a survey map and plans have been recorded pursuant to  
37 this chapter.

1 (10) "Conversion condominium" means a condominium (a) that at any  
2 time before creation of the condominium was lawfully occupied wholly or  
3 partially by a tenant or subtenant for residential purposes pursuant to  
4 a rental agreement, oral or written, express or implied, for which the  
5 tenant or subtenant had not received the notice described in (b) of  
6 this subsection; or (b) that, at any time within twelve months before  
7 the conveyance of, or acceptance of an agreement to convey, any unit  
8 therein other than to a declarant or any affiliate of a declarant, was  
9 lawfully occupied wholly or partially by a residential tenant of a  
10 declarant or an affiliate of a declarant and such tenant was not  
11 notified in writing, prior to lawfully occupying a unit or executing a  
12 rental agreement, whichever event first occurs, that the unit was part  
13 of a condominium and subject to sale. "Conversion condominium" shall  
14 not include a condominium in which, before July 1, 1990, any unit  
15 therein had been conveyed or been made subject to an agreement to  
16 convey to any transferee other than a declarant or an affiliate of a  
17 declarant.

18 (11) "Conveyance" means any transfer of the ownership of a unit,  
19 including a transfer by deed or by real estate contract and, with  
20 respect to a unit in a leasehold condominium, a transfer by lease or  
21 assignment thereof, but shall not include a transfer solely for  
22 security.

23 (12) "Dealer" means a person who, together with such person's  
24 affiliates, owns or has a right to acquire either six or more units in  
25 a condominium or fifty percent or more of the units in a condominium  
26 containing more than two units.

27 (13) "Declarant" means (~~any person or group of persons acting in~~  
28 ~~concert who~~);

29 (a) Any person who executes as declarant a declaration as defined  
30 in subsection (15) of this section(~~(7)~~); or

31 (b) (~~reserves or succeeds to any special declarant right under~~)  
32 Any person who reserves any special declarant right in the declaration;  
33 or

34 (c) Any person who exercises special declarant rights or to whom  
35 special declarant rights are transferred; or

36 (d) Any person who is the owner of a fee interest in the real  
37 property which is subjected to the declaration at the time of the  
38 recording of an instrument pursuant to RCW 64.34.316 and who directly

1 or through one or more affiliates is materially involved in the  
2 construction, marketing, or sale of units in the condominium created by  
3 the recording of the instrument.

4 (14) "Declarant control" means the right of the declarant or  
5 persons designated by the declarant to appoint and remove officers and  
6 members of the board of directors, or to veto or approve a proposed  
7 action of the board or association, pursuant to RCW 64.34.308 (4) or  
8 (5).

9 (15) "Declaration" means the document, however denominated, that  
10 creates a condominium by setting forth the information required by RCW  
11 64.34.216 and any amendments to that document.

12 (16) "Development rights" means any right or combination of rights  
13 reserved by a declarant in the declaration to: (a) Add real property  
14 or improvements to a condominium; (b) create units, common elements, or  
15 limited common elements within real property included or added to a  
16 condominium; (c) subdivide units or convert units into common elements;  
17 (d) withdraw real property from a condominium; or (e) reallocate  
18 limited common elements with respect to units that have not been  
19 conveyed by the declarant.

20 (17) "Dispose" or "disposition" means a voluntary transfer or  
21 conveyance to a purchaser or lessee of any legal or equitable interest  
22 in a unit, but does not include the transfer or release of a security  
23 interest.

24 (18) "Eligible mortgagee" means the holder of a mortgage on a unit  
25 that has filed with the secretary of the association a written request  
26 that it be given copies of notices of any action by the association  
27 that requires the consent of mortgagees.

28 (19) "Foreclosure" means a forfeiture or judicial or nonjudicial  
29 foreclosure of a mortgage or a deed in lieu thereof.

30 (20) "Identifying number" means the designation of each unit in a  
31 condominium.

32 (21) "Leasehold condominium" means a condominium in which all or a  
33 portion of the real property is subject to a lease, the expiration or  
34 termination of which will terminate the condominium or reduce its size.

35 (22) "Limited common element" means a portion of the common  
36 elements allocated by the declaration or by operation of RCW 64.34.204  
37 (2) or (4) for the exclusive use of one or more but fewer than all of  
38 the units.

1 (23) "Master association" means an organization described in RCW  
2 64.34.276, whether or not it is also an association described in RCW  
3 64.34.300.

4 (24) "Mortgage" means a mortgage, deed of trust or real estate  
5 contract.

6 (25) "Person" means a natural person, corporation, partnership,  
7 limited partnership, trust, governmental subdivision or agency, or  
8 other legal entity.

9 (26) "Purchaser" means any person, other than a declarant or a  
10 dealer, who by means of a disposition acquires a legal or equitable  
11 interest in a unit other than (a) a leasehold interest, including  
12 renewal options, of less than twenty years at the time of creation of  
13 the unit, or (b) as security for an obligation.

14 (27) "Real property" means any fee, leasehold or other estate or  
15 interest in, over, or under land, including structures, fixtures, and  
16 other improvements thereon and easements, rights and interests  
17 appurtenant thereto which by custom, usage, or law pass with a  
18 conveyance of land although not described in the contract of sale or  
19 instrument of conveyance. "Real property" includes parcels, with or  
20 without upper or lower boundaries, and spaces that may be filled with  
21 air or water.

22 (28) "Residential purposes" means use for dwelling or recreational  
23 purposes, or both.

24 (29) "Special declarant rights" means rights reserved for the  
25 benefit of a declarant to: (a) Complete improvements indicated on  
26 survey maps and plans filed with the declaration under RCW 64.34.232;  
27 (b) exercise any development right under RCW 64.34.236; (c) maintain  
28 sales offices, management offices, signs advertising the condominium,  
29 and models under RCW 64.34.256; (d) use easements through the common  
30 elements for the purpose of making improvements within the condominium  
31 or within real property which may be added to the condominium under RCW  
32 64.34.260; (e) make the condominium part of a larger condominium or a  
33 development under RCW 64.34.280; (f) make the condominium subject to a  
34 master association under RCW 64.34.276; or (g) appoint or remove any  
35 officer of the association or any master association or any member of  
36 the board of directors, or to veto or approve a proposed action of the  
37 board or association, during any period of declarant control under RCW  
38 64.34.308(4).

1 (30) "Timeshare" shall have the meaning specified in the timeshare  
2 act, RCW 64.36.010(11).

3 (31) "Unit" means a physical portion of the condominium designated  
4 for separate ownership, the boundaries of which are described pursuant  
5 to RCW 64.34.216(1)(d). "Separate ownership" includes leasing a unit  
6 in a leasehold condominium under a lease that expires contemporaneously  
7 with any lease, the expiration or termination of which will remove the  
8 unit from the condominium.

9 (32) "Unit owner" means a declarant or other person who owns a unit  
10 or leases a unit in a leasehold condominium under a lease that expires  
11 simultaneously with any lease, the expiration or termination of which  
12 will remove the unit from the condominium, but does not include a  
13 person who has an interest in a unit solely as security for an  
14 obligation. "Unit owner" means the vendee, not the vendor, of a unit  
15 under a real estate contract.

16 **Sec. 10.** RCW 64.34.312 and 1989 c 43 s 3-104 are each amended to  
17 read as follows:

18 (1) Within sixty days after the termination of the period of  
19 declarant control provided in RCW 64.34.308(4) or, in the absence of  
20 such period, within sixty days after the first conveyance of a unit in  
21 the condominium, the declarant shall deliver to the association all  
22 property of the unit owners and of the association held or controlled  
23 by the declarant including, but not limited to:

24 (a) The original or a photocopy of the recorded declaration and  
25 each amendment to the declaration;

26 (b) The certificate of incorporation and a copy or duplicate  
27 original of the articles of incorporation of the association as filed  
28 with the secretary of state;

29 (c) The bylaws of the association;

30 (d) The minute books, including all minutes, and other books and  
31 records of the association;

32 (e) Any rules and regulations that have been adopted;

33 (f) Resignations of officers and members of the board who are  
34 required to resign because the declarant is required to relinquish  
35 control of the association;

36 (g) The financial records, including canceled checks, bank

1 statements, and financial statements of the association, and source  
2 documents from the time of incorporation of the association through the  
3 date of transfer of control to the unit owners;

4 (h) Association funds or the control of the funds of the  
5 association;

6 (i) All tangible personal property of the association, represented  
7 by the declarant to be the property of the association or ostensibly  
8 the property of the association, and an inventory of the property;

9 (j) Except for alterations to a unit done by a unit owner other  
10 than the declarant, a copy of the declarant's plans and specifications  
11 utilized in the construction or remodeling of the condominium, with a  
12 certificate of the declarant or a licensed architect or engineer that  
13 the plans and specifications represent, to the best of their knowledge  
14 and belief, the actual plans and specifications utilized by the  
15 declarant in the construction or remodeling of the condominium;

16 (k) Insurance policies or copies thereof for the condominium and  
17 association;

18 (l) Copies of any certificates of occupancy that may have been  
19 issued for the condominium;

20 (m) Any other permits issued by governmental bodies applicable to  
21 the condominium in force or issued within one year before the date of  
22 transfer of control to the unit owners;

23 (n) All written warranties that are still in effect for the common  
24 elements, or any other areas or facilities which the association has  
25 the responsibility to maintain and repair, from the contractor,  
26 subcontractors, suppliers, and manufacturers and all owners' manuals or  
27 instructions furnished to the declarant with respect to installed  
28 equipment or building systems;

29 (o) A roster of unit owners and eligible mortgagees and their  
30 addresses and telephone numbers, if known, as shown on the declarant's  
31 records and the date of closing of the first sale of each unit sold by  
32 the declarant;

33 (p) Any leases of the common elements or areas and other leases to  
34 which the association is a party;

35 (q) Any employment contracts or service contracts in which the  
36 association is one of the contracting parties or service contracts in  
37 which the association or the unit owners have an obligation or a

1 responsibility, directly or indirectly, to pay some or all of the fee  
2 or charge of the person performing the service; (~~and~~)

3 (r) A copy of any qualified warranty issued to the association as  
4 provided for in section 1001 of this act; and

5 (s) All other contracts to which the association is a party.

6 (2) Upon the transfer of control to the unit owners, the records of  
7 the association shall be audited as of the date of transfer by an  
8 independent certified public accountant in accordance with generally  
9 accepted auditing standards unless the unit owners, other than the  
10 declarant, by two-thirds vote elect to waive the audit. The cost of  
11 the audit shall be a common expense unless otherwise provided in the  
12 declaration. The accountant performing the audit shall examine  
13 supporting documents and records, including the cash disbursements and  
14 related paid invoices, to determine if expenditures were for  
15 association purposes and the billings, cash receipts, and related  
16 records to determine if the declarant was charged for and paid the  
17 proper amount of assessments.

18 **Sec. 11.** RCW 64.34.410 and 2002 c 323 s 10 are each amended to  
19 read as follows:

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

22 (a) The name and address of the condominium;

23 (b) The name and address of the declarant;

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

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

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

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

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

36 (h) A brief description of the restrictions, if any, on the renting

1 or leasing of units by the declarant or other unit owners, together  
2 with the rights, if any, of the declarant to rent or lease at least a  
3 majority of units;

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

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

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

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

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

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

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

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

23 (q) The estimated current amount and purpose of any fees not  
24 included in the common expenses and charged by the declarant or the  
25 association for the use of any of the common elements;

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

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

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

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

36 (v) A list of all development rights reserved to the declarant and  
37 all special declarant rights reserved to the declarant, together with

1 the dates such rights must terminate, and a copy of or reference by  
2 recording number to any recorded transfer of a special declarant right;

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

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

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

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

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

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

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

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

30 (ee) A notice which describes a purchaser's right to cancel the  
31 purchase agreement or extend the closing under RCW 64.34.420, including  
32 applicable time frames and procedures;

33 (ff) Any reports or statements required by RCW 64.34.415 or  
34 64.34.440(6)(a). RCW 64.34.415 shall apply to the public offering  
35 statement of a condominium in connection with which a final certificate  
36 of occupancy was issued more than sixty calendar months prior to the  
37 preparation of the public offering statement whether or not the

1 condominium is a conversion condominium as defined in RCW  
2 64.34.020(10);

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

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

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

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

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

23 (ll) A notice that is substantially in the form required by RCW  
24 64.50.050; and

25 (mm) A statement, as required by section 301 of this act, as to  
26 whether the units or common elements of the condominium are covered by  
27 a qualified warranty, and a history of claims under any such warranty.

28 (2) The public offering statement shall include copies of each of  
29 the following documents: The declaration, the survey map and plans,  
30 the articles of incorporation of the association, bylaws of the  
31 association, rules and regulations, if any, current or proposed budget  
32 for the association, and the balance sheet of the association current  
33 within ninety days if assessments have been collected for ninety days  
34 or more.

35 If any of the foregoing documents listed in this subsection are not  
36 available because they have not been executed, adopted, or recorded,  
37 drafts of such documents shall be provided with the public offering

1 statement, and, before closing the sale of a unit, the purchaser shall  
2 be given copies of any material changes between the draft of the  
3 proposed documents and the final documents.

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

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

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

15 NEW SECTION. **Sec. 12.** Sections 5 and 6 of this act apply only to  
16 condominiums created by declarations recorded on or after July 1, 2004.

17 NEW SECTION. **Sec. 13.** If any provision of this act or its  
18 application to any person or circumstance is held invalid, the  
19 remainder of the act or the application of the provision to other  
20 persons or circumstances is not affected.

21 NEW SECTION. **Sec. 14.** Sections 1 through 13 of this act take  
22 effect July 1, 2004.

## 23 **ARTICLE 1**

### 24 **GENERAL PROVISIONS**

25 NEW SECTION. **Sec. 101.** DEFINITIONS. The definitions in this  
26 section apply throughout this chapter unless the context clearly  
27 requires otherwise.

28 (1) "Affiliate" has the meaning in RCW 64.34.020.

29 (2) "Association" has the meaning in RCW 64.34.020.

30 (3) "Building envelope" means the assemblies, components, and  
31 materials of a building that are intended to separate and protect the  
32 interior space of the building from the adverse effects of exterior  
33 climatic conditions.

1 (4) "Common element" has the meaning in RCW 64.34.020.  
2 (5) "Condominium" has the meaning in RCW 64.34.020.  
3 (6) "Construction professional" has the meaning in RCW 64.50.010.  
4 (7) "Conversion condominium" has the meaning in RCW 64.34.020.  
5 (8) "Declarant" has the meaning in RCW 64.34.020.  
6 (9) "Declarant control" has the meaning in RCW 64.34.020.  
7 (10) "Defect" means any aspect of a condominium unit or common  
8 element which constitutes a breach of the implied warranties set forth  
9 in RCW 64.34.445.  
10 (11) "Limited common element" has the meaning in RCW 64.34.020.  
11 (12) "Material" means substantive, not simply formal; significant  
12 to a reasonable person; not trivial or insignificant. When used with  
13 respect to a particular construction defect, "material" does not  
14 require that the construction defect render the unit or common element  
15 unfit for its intended purpose or uninhabitable.  
16 (13) "Mediation" means a collaborative process in which two or more  
17 parties meet and attempt, with the assistance of a mediator, to resolve  
18 issues in dispute between them.  
19 (14) "Mediation session" means a meeting between two or more  
20 parties to a dispute during which they are engaged in mediation.  
21 (15) "Mediator" means a neutral and impartial facilitator with no  
22 decision-making power who assists parties in negotiating a mutually  
23 acceptable settlement of issues in dispute between them.  
24 (16) "Person" has the meaning in RCW 64.34.020.  
25 (17) "Public offering statement" has the meaning in RCW 64.34.410.  
26 (18) "Qualified insurer" means an entity that holds a certificate  
27 of authority under RCW 48.05.030, or an eligible insurer under chapter  
28 48.15 RCW.  
29 (19) "Qualified warranty" means an insurance policy issued by a  
30 qualified insurer that complies with the requirements of this chapter.  
31 A qualified warranty includes coverage for repair of physical damage  
32 caused by the defects covered by the qualified warranty, except to the  
33 extent of any exclusions and limitations under this chapter.  
34 (20) "Resale certificate" means the statement to be delivered by  
35 the association under RCW 64.34.425.  
36 (21) "Transition date" means the date on which the declarant is  
37 required to deliver to the association the property of the association  
38 under RCW 64.34.312.

1 (22) "Unit" has the meaning in RCW 64.34.020.

2 (23) "Unit owner" has the meaning in RCW 64.34.020.

3 **ARTICLE 2**

4 **EXCLUSIVE REMEDY AND PROCEDURE**

5 **IN CASES WHERE A QUALIFIED WARRANTY IS PROVIDED**

6 NEW SECTION. **Sec. 201.** No declarant, affiliate of a declarant, or  
7 construction professional is liable to a unit owner or an association  
8 for damages awarded for repair of construction defects and resulting  
9 physical damage, and chapter 64.50 RCW shall not apply if: (1) Every  
10 unit is the subject of a qualified warranty; and (2) the association  
11 has been issued a qualified warranty with respect to the common  
12 elements. If a construction professional agrees on terms satisfactory  
13 to the qualified insurer to partially or fully indemnify the qualified  
14 insurer with respect to a defect caused by the construction  
15 professional, the liability of the construction professional for the  
16 defect and resulting physical damage caused by him or her shall not  
17 exceed damages recoverable under the terms of the qualified warranty  
18 for the defect. Any indemnity claim by the qualified insurer shall be  
19 by separate action or arbitration, and no unit owner or association  
20 shall be joined therein. A qualified warranty may also be provided in  
21 the case of improvements made or contracted for by a declarant as part  
22 of a conversion condominium, and in such case, declarant's liability  
23 with respect to such improvements shall be limited as set forth in this  
24 section.

25 **ARTICLE 3**

26 **DISCLOSURE**

27 NEW SECTION. **Sec. 301.** (1) Every public offering statement and  
28 resale certificate shall affirmatively state whether or not the unit  
29 and/or the common elements are covered by a qualified warranty, and  
30 shall provide to the best knowledge of the person preparing the public  
31 offering statement or resale certificate a history of claims under the  
32 warranty.

33 (2) The history of claims must include, for each claim, not less

1 than the following information for the unit and/or the common elements,  
2 as applicable, to the best knowledge of the person providing the  
3 information:

- 4 (a) The type of claim that was made;
- 5 (b) The resolution of the claim;
- 6 (c) The type of repair performed;
- 7 (d) The date of the repair;
- 8 (e) The cost of the repair; and
- 9 (f) The name of the person or entity who performed the repair.

10 **ARTICLE 4**

11 **MINIMUM COVERAGE STANDARDS FOR QUALIFIED WARRANTIES**

12 NEW SECTION. **Sec. 401. TWO-YEAR MATERIALS AND LABOR WARRANTY.**

13 (1) The minimum coverage for the two-year materials and labor warranty  
14 is:

15 (a) In the first twelve months, for other than the common elements,  
16 (i) coverage for any defect in materials and labor; and (ii) subject to  
17 subsection (2) of this section, coverage for a violation of the  
18 building code;

19 (b) In the first fifteen months, for the common elements, (i)  
20 coverage for any defect in materials and labor; and (ii) subject to  
21 subsection (2) of this section, coverage for a violation of the  
22 building code;

23 (c) In the first twenty-four months, (i) coverage for any defect in  
24 materials and labor supplied for the electrical, plumbing, heating,  
25 ventilation, and air conditioning delivery and distribution systems;  
26 (ii) coverage for any defect in materials and labor supplied for the  
27 exterior cladding, caulking, windows, and doors that may lead to  
28 detachment or material damage to the unit or common elements; (iii)  
29 coverage for any defect in materials and labor which renders the unit  
30 unfit to live in; and (iv) subject to subsection (2) of this section,  
31 coverage for a violation of the building code.

32 (2) Noncompliance with the building code is considered a defect  
33 covered by a qualified warranty if the noncompliance:

34 (a) Constitutes an unreasonable health or safety risk; or

35 (b) Has resulted in, or is likely to result in, material damage to  
36 the unit or common elements.

1        NEW SECTION.    **Sec. 402.**    FIVE-YEAR BUILDING ENVELOPE WARRANTY. The  
2 minimum coverage for the building envelope warranty is five years for  
3 defects in the building envelope of a condominium, including a defect  
4 which permits unintended water penetration so that it causes, or is  
5 likely to cause, material damage to the unit or common elements.

6        NEW SECTION.    **Sec. 403.**    TEN-YEAR STRUCTURAL DEFECTS WARRANTY. The  
7 minimum coverage for the structural defects warranty is ten years for:

8            (1) Any defect in materials and labor that results in the failure  
9 of a load-bearing part of the condominium; and

10           (2) Any defect which causes structural damage that materially and  
11 adversely affects the use of the condominium for residential occupancy.

12        NEW SECTION.    **Sec. 404.**    BEGINNING DATES FOR WARRANTY COVERAGE.

13           (1) For the unit, the beginning date of the qualified warranty coverage  
14 is the earlier of:

15            (a) Actual occupancy of the unit; or

16            (b) Transfer of legal title to the unit.

17           (2) For the common elements, the beginning date of a qualified  
18 warranty is the date a temporary or final certificate of occupancy is  
19 issued for the common elements in each separate multiunit building,  
20 comprised by the condominium.

21        NEW SECTION.    **Sec. 405.**    BEGINNING DATES FOR SPECIAL CASES;  
22 DECLARANT CONTROL. (1) If an unsold unit is occupied as a rental unit,  
23 the qualified warranty beginning date for such unit is the date the  
24 unit is first occupied.

25           (2) If the declarant subsequently offers to sell a unit which is  
26 rented, the declarant must disclose, in writing, to each prospective  
27 purchaser, the date on which the qualified warranty expires.

28           (3) If the declarant retains any declarant control over the  
29 association on the date that is fourteen full calendar months following  
30 the month in which the beginning date for common element warranty  
31 coverage commences, the declarant shall within thirty days thereafter  
32 cause an election to be held in which the declarant may not vote, for  
33 the purpose of electing one or more board members who are empowered to  
34 make warranty claims. If at such time, one or more independent board  
35 members hold office, no additional election need be held, and such

1 independent board members are empowered to make warranty claims. The  
2 declarant shall inform all independent board members of their right to  
3 make warranty claims at no later than sixteen full calendar months  
4 following the beginning date of the common element warranty.

5 NEW SECTION. **Sec. 406.** LIVING EXPENSE ALLOWANCE. (1) If repairs  
6 are required under the qualified warranty and damage to the unit, or  
7 the extent of the repairs renders the unit uninhabitable, the qualified  
8 warranty must cover reasonable living expenses incurred by the owner to  
9 live elsewhere in an amount commensurate with the nature of the unit.

10 (2) If a qualified insurer establishes a maximum amount per day for  
11 claims for living expenses, the limit must be the greater of one  
12 hundred dollars per day or a reasonable amount commensurate with the  
13 nature of the unit for the complete reimbursement of the actual  
14 accommodation expenses incurred by the owner at a hotel, motel, or  
15 other rental accommodation up to the day the unit is ready for  
16 occupancy, subject to the owner receiving twenty-four hours' advance  
17 notice.

18 NEW SECTION. **Sec. 407.** WARRANTY ON REPAIRS AND REPLACEMENTS. (1)  
19 All repairs and replacements made under a qualified warranty must be  
20 warranted by the qualified warranty against defects in materials and  
21 labor until the later of:

22 (a) The first anniversary of the date of completion of the repair  
23 or replacement; or

24 (b) The expiration of the applicable qualified warranty coverage.

25 (2) All repairs and replacements made under a qualified warranty  
26 must be completed in a reasonable manner using materials and labor  
27 conforming to the building code and industry standards.

## 28 **ARTICLE 5**

### 29 **PERMITTED TERMS FOR QUALIFIED WARRANTIES**

30 NEW SECTION. **Sec. 501.** A qualified insurer may include any of the  
31 following provisions in a qualified warranty:

32 (1) If the qualified insurer makes a payment or assumes liability  
33 for any payment or repair under a qualified warranty, the owner and  
34 association must fully support and assist the qualified insurer in

1 pursuing any rights that the qualified insurer may have against the  
2 declarant, and any construction professional that has contractual or  
3 common law obligations to the declarant, whether such rights arose by  
4 contract, subrogation, or otherwise.

5 (2) Warranties or representations made by a declarant which are in  
6 addition to the warranties set forth in this chapter are not binding on  
7 the qualified insurer unless and to the extent specifically provided in  
8 the text of the warranty; and disclaimers of specific defects made by  
9 agreement between the declarant and the unit purchaser under RCW  
10 64.34.450 act as an exclusion of the specified defect from the warranty  
11 coverage.

12 (3) An owner and the association must permit the qualified insurer  
13 or declarant, or both, to enter the unit at reasonable times, after  
14 reasonable notice to the owner and the association:

- 15 (a) To monitor the unit or its components;
- 16 (b) To inspect for required maintenance;
- 17 (c) To investigate complaints or claims; or
- 18 (d) To undertake repairs under the qualified warranty.

19 If any reports are produced as a result of any of the activities  
20 referred to in (a) through (d) of this subsection, the reports must be  
21 provided to the owner and the association.

22 (4) An owner and the association must provide to the qualified  
23 insurer all information and documentation that the owner and the  
24 association have available, as reasonably required by the qualified  
25 insurer to investigate a claim or maintenance requirement, or to  
26 undertake repairs under the qualified warranty.

27 (5) To the extent any damage to a unit is caused or made worse by  
28 the unreasonable refusal of the association, or an owner or occupant to  
29 permit the qualified insurer or declarant access to the unit for the  
30 reasons in subsection (3) of this section, or to provide the  
31 information required by subsection (4) of this section, that damage is  
32 excluded from the qualified warranty.

33 (6) In any claim under a qualified warranty issued to the  
34 association, the association shall have the sole right to prosecute and  
35 settle any claim with respect to the common elements.

36 **ARTICLE 6**

1                   **PERMITTED EXCLUSIONS FROM QUALIFIED WARRANTIES--GENERAL**

2           NEW SECTION.   **Sec. 601.**   (1) A qualified insurer may exclude from  
3 a qualified warranty:

4           (a) Landscaping, both hard and soft, including plants, fencing,  
5 detached patios, planters not forming a part of the building envelope,  
6 gazebos, and similar structures;

7           (b) Any commercial use area and any construction associated with a  
8 commercial use area;

9           (c) Roads, curbs, and lanes;

10          (d) Subject to subsection (2) of this section, site grading and  
11 surface drainage except as required by the building code;

12          (e) Municipal services operation, including sanitary and storm  
13 sewer;

14          (f) Septic tanks or septic fields;

15          (g) The quality or quantity of water, from either a piped municipal  
16 water supply or a well;

17          (h) A water well, but excluding equipment installed for the  
18 operation of a water well used exclusively for a unit, which equipment  
19 is part of the plumbing system for that unit for the purposes of the  
20 qualified warranty.

21          (2) The exclusions permitted by subsection (1) of this section do  
22 not include any of the following:

23           (a) A driveway or walkway;

24           (b) Recreational and amenity facilities situated in, or included as  
25 the common property of, a unit;

26           (c) A parking structure in a multiunit building;

27           (d) A retaining wall that:

28           (i) An authority with jurisdiction requires to be designed by a  
29 professional engineer; or

30           (ii) Is reasonably required for the direct support of, or retaining  
31 soil away from, a unit, driveway, or walkway.

32                                           **ARTICLE 7**

33                                           **PERMITTED EXCLUSIONS--DEFECTS**

34           NEW SECTION.   **Sec. 701.**   A qualified insurer may exclude any or all  
35 of the following items from a qualified warranty:

- 1 (1) Weathering, normal wear and tear, deterioration, or deflection  
2 consistent with normal industry standards;
- 3 (2) Normal shrinkage of materials caused by drying after  
4 construction;
- 5 (3) Any loss or damage which arises while a unit is being used  
6 primarily or substantially for nonresidential purposes;
- 7 (4) Materials, labor, or design supplied by an owner;
- 8 (5) Any damage to the extent caused or made worse by an owner or  
9 third party, including:
- 10 (a) Negligent or improper maintenance or improper operation by  
11 anyone other than the declarant or its employees, agents, or  
12 subcontractors;
- 13 (b) Failure of anyone, other than the declarant or its employees,  
14 agents, or subcontractors, to comply with the warranty requirements of  
15 the manufacturers of appliances, equipment, or fixtures;
- 16 (c) Alterations to the unit, including converting nonliving space  
17 into living space or converting a unit into two or more units, by  
18 anyone other than the declarant or its employees, agents, or  
19 subcontractors while undertaking their obligations under the sales  
20 contract; and
- 21 (d) Changes to the grading of the ground by anyone other than the  
22 declarant or its employees, agents, or subcontractors;
- 23 (6) An owner failing to take timely action to prevent or minimize  
24 loss or damage, including failing to give prompt notice to the  
25 qualified insurer of a defect or discovered loss, or a potential defect  
26 or loss;
- 27 (7) Any damage caused by insects, rodents, or other animals, unless  
28 the damage results from noncompliance with the building code by the  
29 declarant or its employees, agents, or subcontractors;
- 30 (8) Accidental loss or damage from acts of nature including, but  
31 not limited to, fire, explosion, smoke, water escape, glass breakage,  
32 windstorm, hail, lightning, falling trees, aircraft, vehicles, flood,  
33 earthquake, avalanche, landslide, and changes in the level of the  
34 underground water table which are not reasonably foreseeable by the  
35 declarant;
- 36 (9) Bodily injury or damage to personal property or real property  
37 which is not part of a unit;

1 (10) Any defect in, or caused by, materials or work supplied by  
2 anyone other than the declarant, an affiliate of a declarant, or their  
3 respective contractors, employees, agents, or subcontractors;

4 (11) Changes, alterations, or additions made to a unit by anyone  
5 after initial occupancy, except those performed by the declarant or its  
6 employees, agents, or subcontractors as required by the qualified  
7 warranty or under the construction contract or sales agreement;

8 (12) Contaminated soil;

9 (13) Subsidence of the land around a unit or along utility lines,  
10 other than subsidence beneath footings of a unit or under driveways or  
11 walkways;

12 (14) Diminution in the value of the unit.

13 **ARTICLE 8**

14 **MONETARY LIMITS ON QUALIFIED WARRANTY COVERAGE**

15 NEW SECTION. **Sec. 801.** (1) A qualified insurer may establish a  
16 monetary limit on the amount of the warranty. Any limit must not be  
17 less than:

18 (a) For a unit, the lesser of (i) the original purchase price paid  
19 by the owner, or (ii) one hundred thousand dollars;

20 (b) For common elements, the lesser of (i) the total original  
21 purchase price for all components of the multiunit building, or (ii)  
22 one hundred fifty thousand dollars times the number of units of the  
23 condominium.

24 (2) When calculating the cost of warranty claims under the standard  
25 limits under a qualified warranty, a qualified insurer may include:

26 (a) The cost of repairs;

27 (b) The cost of any investigation, engineering, and design required  
28 for the repairs; and

29 (c) The cost of supervision of repairs, including professional  
30 review, but excluding legal costs.

31 (3) The minimum amounts in subsections (1) and (2) of this section  
32 shall be adjusted at the end of each calendar year after the effective  
33 date by an amount equal to the percentage change in the consumer price  
34 index for all urban consumers, all items, as published from time to  
35 time by the United States department of labor. The adjustment does not  
36 affect any qualified warranty issued before the adjustment date.









1 (b) The party is not an individual; or

2 (c) The party is a resident of a jurisdiction other than Washington  
3 and will not be in Washington at the time of the mediation session.

4 (9) A representative who attends a mediation session in the place  
5 of a party as permitted by subsection (8) of this section:

6 (a) Must be familiar with all relevant facts on which the party, on  
7 whose behalf the representative attends, intends to rely; and

8 (b) Must have full authority to settle, or have immediate access to  
9 a person who has full authority to settle, on behalf of the party on  
10 whose behalf the representative attends.

11 (10) A party or a representative who attends the mediation session  
12 may be accompanied by counsel.

13 (11) Any other person may attend a mediation session on consent of  
14 all parties or their representatives.

15 (12) At least seven days before the first mediation session is to  
16 be held, each party must deliver to the mediator a statement briefly  
17 setting out:

18 (a) The facts on which the party intends to rely; and

19 (b) The matters in dispute.

20 (13) The mediator must promptly send each party's statement to each  
21 of the other parties.

22 (14) Before the first mediation session, the parties must enter  
23 into a retainer agreement with the mediator which must:

24 (a) Disclose the cost of the mediation services; and

25 (b) Provide that the cost of the mediation will be paid:

26 (i) Equally by the parties; or

27 (ii) On any other specified basis agreed by the parties.

28 (15) The mediator may conduct the mediation in any manner he or she  
29 considers appropriate to assist the parties to reach a resolution that  
30 is timely, fair, and cost-effective.

31 (16) A person may not disclose, or be compelled to disclose, in any  
32 proceeding, oral or written information acquired or an opinion formed,  
33 including, without limitation, any offer or admission made in  
34 anticipation of or during a mediation session.

35 (17) Nothing in subsection (16) of this section precludes a party  
36 from introducing into evidence in a proceeding any information or  
37 records produced in the course of the mediation that are otherwise  
38 producible or compellable in those proceedings.

1 (18) A mediation session is concluded when:

2 (a) All issues are resolved;

3 (b) The mediator determines that the process will not be productive  
4 and so advises the parties or their representatives; or

5 (c) The mediation session is completed and there is no agreement to  
6 continue.

7 (19) If the mediation resolves some but not all issues, the  
8 mediator may, at the request of all parties, complete a report setting  
9 out any agreements made as a result of the mediation, including,  
10 without limitation, any agreements made by the parties on any of the  
11 following:

12 (a) Facts;

13 (b) Issues; and

14 (c) Future procedural steps.

15 **ARTICLE 16**

16 **ARBITRATION**

17 NEW SECTION. **Sec. 1601.** A qualified warranty may include  
18 mandatory binding arbitration of all disputes arising out of or in  
19 connection with a qualified warranty. The provision may provide that  
20 all claims for a single condominium be heard by the same arbitrator,  
21 but shall not permit the joinder or consolidation of any other person  
22 or entity. The arbitration shall comply with the following minimum  
23 procedural standards:

24 (1) Any demand for arbitration shall be delivered by certified mail  
25 return receipt requested, and by ordinary first class mail. The party  
26 initiating the arbitration shall address the notice to the address last  
27 known to the initiating party in the exercise of reasonable diligence,  
28 and also, for any entity which is required to have a registered agent  
29 in the state of Washington, to the address of the registered agent.  
30 Demand for arbitration is deemed effective three days after the date  
31 deposited in the mail;

32 (2) All disputes shall be heard by one qualified arbitrator, unless  
33 the parties agree to use three arbitrators. If three arbitrators are  
34 used, one shall be appointed by each of the disputing parties and the  
35 first two arbitrators shall appoint the third, who will chair the  
36 panel. The parties shall select the identity and number of the

1 arbitrator or arbitrators after the demand for arbitration is made.  
2 If, within thirty days after the effective date of the demand for  
3 arbitration, the parties fail to agree on an arbitrator or the agreed  
4 number of arbitrators fail to be appointed, then an arbitrator or  
5 arbitrators shall be appointed under RCW 7.04.050 by the presiding  
6 judge of the superior court of the county in which the condominium is  
7 located;

8 (3) In any arbitration, at least one arbitrator must be a lawyer or  
9 retired judge. Any additional arbitrator must be either a lawyer or  
10 retired judge or a person who has experience with construction and  
11 engineering standards and practices, written construction warranties,  
12 or construction dispute resolution. No person may serve as an  
13 arbitrator in any arbitration in which that person has any past or  
14 present financial or personal interest;

15 (4) The arbitration hearing must be conducted in a manner that  
16 permits full, fair, and expeditious presentation of the case by both  
17 parties. The arbitrator is bound by the law of Washington state.  
18 Parties may be, but are not required to be, represented by attorneys.  
19 The arbitrator may permit discovery to ensure a fair hearing, but may  
20 limit the scope or manner of discovery for good cause to avoid  
21 excessive delay and costs to the parties. The parties and the  
22 arbitrator shall use all reasonable efforts to complete the arbitration  
23 within six months of the effective date of the demand for arbitration  
24 or, when applicable, the service of the list of defects in accordance  
25 with RCW 64.50.030;

26 (5) Except as otherwise set forth in this section, arbitration  
27 shall be conducted under chapter 7.04 RCW, unless the parties elect to  
28 use the construction industry arbitration rules of the American  
29 arbitration association, which are permitted to the extent not  
30 inconsistent with this section. The expenses of witnesses including  
31 expert witnesses shall be paid by the party producing the witnesses.  
32 All other expenses of arbitration shall be borne equally by the  
33 parties, unless all parties agree otherwise or unless the arbitrator  
34 awards expenses or any part thereof to any specified party or parties.  
35 The parties shall pay the fees of the arbitrator as and when specified  
36 by the arbitrator;

37 (6) Demand for arbitration given pursuant to subsection (1) of this  
38 section commences a judicial proceeding for purposes of RCW 64.34.452;

1 (7) The arbitration decision shall be in writing and must set forth  
2 findings of fact and conclusions of law that support the decision.

3 **ARTICLE 17**  
4 **ATTORNEYS' FEES**

5 NEW SECTION. **Sec. 1701.** In any judicial proceeding or arbitration  
6 brought to enforce the terms of a qualified warranty, the court or  
7 arbitrator may award reasonable attorneys' fees to the substantially  
8 prevailing party. In no event may such fees exceed the reasonable  
9 hourly value of the attorney's work.

10 **ARTICLE 18**  
11 **TRANSFER**

12 NEW SECTION. **Sec. 1801.** (1) A qualified warranty pertains solely  
13 to the unit and common elements for which it provides coverage and no  
14 notice to the qualified insurer is required on a change of ownership.

15 (2) All of the applicable unused benefits under a qualified  
16 warranty with respect to a unit are automatically transferred to any  
17 subsequent owner on a change of ownership.

18 **ARTICLE 19**  
19 **ACCEPTANCE OF DECLARANT FOR QUALIFIED WARRANTY**

20 NEW SECTION. **Sec. 1901.** (1) No insurer is bound to offer a  
21 qualified warranty to any person. Except as specifically set forth in  
22 this section, the terms of any qualified warranty are set in the sole  
23 discretion of the qualified insurer. Without limiting the generality  
24 of this subsection, a qualified insurer may make inquiries about the  
25 applicant as follows:

26 (a) Does the applicant have the financial resources to undertake  
27 the construction of the number of units being proposed by the  
28 applicant's business plan for the following twelve months;

29 (b) Does the applicant and its directors, officers, employees, and  
30 consultants possess the necessary technical expertise to adequately  
31 perform their individual functions with respect to their proposed role  
32 in the construction and sale of units;

1 (c) Does the applicant and its directors and officers have  
2 sufficient experience in business management to properly manage the  
3 unit construction process;

4 (d) Does the applicant and its directors, officers, and employees  
5 have sufficient practical experience to undertake the proposed unit  
6 construction;

7 (e) Does the past conduct of the applicant and its directors,  
8 officers, employees, and consultants provide a reasonable indication of  
9 good business practices, and reasonable grounds for belief that its  
10 undertakings will be carried on in accordance with all legal  
11 requirements; and

12 (f) Is the applicant reasonably able to provide, or to cause to be  
13 provided, after-sale customer service for the units to be constructed.

14 (2) A qualified insurer may charge a fee to make the inquiries  
15 permitted by subsection (1) of this section.

16 (3) Before approving a qualified warranty for a condominium, a  
17 qualified insurer may make such inquiries and impose such conditions as  
18 it deems appropriate in its sole discretion, including without  
19 limitation the following:

20 (a) To determine if the applicant has the necessary capitalization  
21 or financing in place, including any reasonable contingency reserves,  
22 to undertake construction of the proposed unit;

23 (b) To determine if the applicant or, in the case of a corporation,  
24 its directors, officers, employees, and consultants possess reasonable  
25 technical expertise to construct the proposed unit, including specific  
26 technical knowledge or expertise in any building systems, construction  
27 methods, products, treatments, technologies, and testing and inspection  
28 methods proposed to be employed;

29 (c) To determine if the applicant or, in the case of a corporation,  
30 its directors, officers, employees, and consultants have sufficient  
31 practical experience in the specific types of construction to undertake  
32 construction of the proposed unit;

33 (d) To determine if the applicant has sufficient personnel and  
34 other resources to adequately undertake the construction of the  
35 proposed unit in addition to other units which the applicant may have  
36 under construction or is currently marketing;

37 (e) To determine if:

1 (i) The applicant is proposing to engage a general contractor to  
2 undertake all or a significant portion of the construction of the  
3 proposed unit; and

4 (ii) The general contractor meets the criteria set out in this  
5 section;

6 (f) Requiring that a declarant provide security in a form suitable  
7 to the qualified insurer;

8 (g) Establishing or requiring compliance with specific construction  
9 standards for the unit;

10 (h) Restricting the applicant from constructing some types of units  
11 or using some types of construction or systems;

12 (i) Requiring the use of specific types of systems, consultants, or  
13 personnel for the construction;

14 (j) Requiring an independent review of the unit building plans or  
15 consultants' reports or any part thereof;

16 (k) Requiring third-party verification or certification of the  
17 construction of the unit or any part thereof;

18 (l) Providing for inspection of the unit or any part thereof during  
19 construction;

20 (m) Requiring ongoing monitoring of the unit, or one or more of its  
21 components, following completion of construction;

22 (n) Requiring that the declarant or any of the design  
23 professionals, engineering professionals, consultants, general  
24 contractors, or subcontractors maintain minimum levels of insurance,  
25 bonding, or other security naming the potential owners and qualified  
26 insurer as loss payees or beneficiaries of the insurance, bonding, or  
27 security to the extent possible;

28 (o) Requiring that the declarant provide a list of all design  
29 professionals and other consultants who are involved in the design or  
30 construction inspection, or both, of the unit;

31 (p) Requiring that the declarant provide a list of trades employed  
32 in the construction of the unit, and requiring evidence of their  
33 current trade's certification, if applicable.

34 **ARTICLE 20**  
35 **MISCELLANEOUS**

1        NEW SECTION.    **Sec. 2001.**    All qualified warrantees shall be deemed  
2    to be "insurance" for purposes of RCW 48.01.040, and shall be regulated  
3    as such.

4        NEW SECTION.    **Sec. 2002.**    Captions and part headings used in this  
5    act are not any part of the law.

6        NEW SECTION.    **Sec. 2003.**    Sections 101 through 2002 of this act  
7    constitute a new chapter in Title 64 RCW.

      Passed by the Senate March 11, 2004.

      Passed by the House March 10, 2004.

      Approved by the Governor March 29, 2004.

      Filed in Office of Secretary of State March 29, 2004.

## Appendix C

Report to the Judiciary Committees of the  
Washington State Senate and House of  
Representatives

of the Condominium Act Study Committee  
Created by Chapter 201, Laws of 2004

January 2005

**REPORT OF THE CONDOMINIUM ACT STUDY COMMITTEE  
CREATED BY CHAPTER 201, LAWS OF 2004**

**January 2005**

**Introduction**

The 2004 legislature, along with earlier legislatures, found that Washington's condominium industry had faltered. Condo owners have suffered from water penetration. The resulting litigation led to court decisions that expanded the scope of insurance policies beyond the insurers' expectations and damage awards that exceeded their anticipated exposures. Insurers reacted by fleeing the State's condo market or narrowing coverage and hiking premiums. Partisans in these battles disagreed about the relative contributions of poor construction practices and overzealous litigants to these problems. In addition to the financial hardships these problems caused for both developers and condo owners, the decline of the condo market threatened the legislature's desire to expand home ownership opportunities for low income families and for growth management.

The legislature has tackled this problem with amendments to the State's Condominium Act and new laws. These enactments have included the creation of an obligation of condo owners to give developers notice of and an opportunity to cure construction defects. Partisans debate the utility of that provision, but, whatever its merits, it has not solved the problem. In 2003, the legislature established additional affirmative defenses that builders can use to avoid or reduce liability. In 2004 the legislature again amended the Condo Act to require a higher standard of proof for construction defect claims and to create a new warranty insurance program. It is too soon to tell whether the new proof standard will have a beneficial effect. The new warranty program, patterned after similar legislation adopted in British Columbia in 1999, purported to free developers from the "implied warranty" and liability regime of the Condo Act if they would provide insurance to homeowners with legislatively prescribed coverage. 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 Condo Act. The potential of the warranty program has not been tested to date because no insurance company has yet offered it in the few months since enactment.

The 2004 legislature also considered two other topics: mandatory course-of-construction inspection of condominium building envelopes and alternative dispute resolution mechanisms for condo construction defect cases. Unable to reach agreement on those issues, the legislature created a study committee to examine them. Specifically, section 8 of SB 5536 provided:

- (1) A committee is established to study:
  - (a) The required use of independent third-party inspections of residential condominiums as a way to reduce the problem of water penetration in residential condominiums; and

- (b) The use of arbitration or other forms of alternative dispute resolution to resolve disputes involving alleged breaches of implied or express warranties under chapter 64.34 RCW.
- (2) The committee consists of the following members who shall be persons with experience and expertise in condominium law or condominium construction:
  - (a) A member, who shall be the chair of the committee, to be appointed by the governor;
  - (b) Three members to be appointed by the majority leader of the senate; and
  - (c) Three members to be appointed by the speaker of the house of representatives.
- (3) The committee shall:
  - (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, 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;
  - (c) Deliver to the judiciary committees of the senate and house of representatives, not later than December 31, 2004, a report of the findings and conclusions of the committee, and any proposed legislation implementing third-party water penetration inspections or providing for alternative dispute resolution for warranty issues.

The legislature and the governor appointed the committee members at the end of June 2004, and the committee met for the first time in July. The committee's meetings were open to the public and were regularly attended by interested individuals, including plaintiffs' attorneys and representatives of the Washington Homeowners Coalition, the Master Builders Association, the Community Association Institute, the East King County Chambers of Commerce Legislative Coalition, the Building Industry Association of Washington, and HomeSight. These organizations were provided every opportunity to participate in our proceedings. While we don't speak for them, it is our understanding that they have all accepted our recommendations with varying degrees of enthusiasm.

The committee met a total of 10 times between July and December. The free time contributed to this effort was in the range of 1,000 hours. In the first several meetings, the committee tried to explore the scope and nature of the problems affecting Washington's condo industry, without explicitly formulating solutions. During this phase,

the committee heard from insurance companies and brokers, a mediator/arbitrator who specializes in construction defect cases, design professionals with expertise in building envelope inspections, and a plaintiffs attorney from Vancouver, B.C. familiar with condo defect litigation and practices there.<sup>1</sup> In addition we drew on the experiences of our members and other meeting attendees. To some degree, we also explored the practices of other jurisdictions, including British Columbia, Texas, Alaska, California and Nevada. Of these, British Columbia's experiences were the most useful.

The committee made no thorough effort to confirm the legislature's findings about the extent or severity of the decline in the condo construction industry. The members' anecdotal accounts generally confirmed the legislature's conclusions, though there were disagreements about the magnitude of the decline. Also, Washington's condo markets did not match the post-reform rebound in British Columbia, suggesting that more than the recession was at work. But we had our hands full with the two jobs we were given and did not pursue this issue.

The voting members of the committee (the chair did not vote) were by and large individuals who were professionally interested in the outcome of the committee's work, including developers, attorneys representing homeowners and developers, and an engineer specializing in building envelope design and inspection. Their professional interests gave them substantial background in, if not always completely dispassionate views about, the questions posed by the legislature. Since the committee's membership was neither democratically selected nor demographically representative, the chair decided that all recommendations would have to be unanimous. It was his view that the legislature wanted a compromise that could be supported by these well-informed individuals with their different points of view, rather than competing recommendations from self-interested alliances.

The committee members worked hard to rise above their economic interests, while being informed by them. Their unanimous recommendations are testimony to their success in doing so. Unanimity was not easily achieved. We arrived at many seeming dead-ends. But the committee scheduled several extra meetings and had many out-of-meeting conversations that ultimately allowed us to avoid failure. The resulting compromises were carefully crafted and are interdependent in ways that may not be obvious to those who did not participate in our deliberations. We recognize that the legislature bears the final responsibility for turning our recommendations into law, if it chooses to do so. As the legislature takes up that responsibility, we emphasize that these recommendations are the product of countless hours by and hard-won compromises of the legislature's uncompensated appointees. We urge the legislature to consider these recommendations carefully, to honor the compromises that were reached, and not to cherry-pick the easier recommendations from among those that are more controversial. Because of the hard work that went into forging these recommendations, as well as our shared interest in building a healthy, dynamic and

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<sup>1</sup> Despite our appreciation for their contributions and the fact that our meetings were open to the public, we have chosen to leave these individuals nameless in this report. We encouraged and believe we got complete candor from them. But we have only ourselves to blame for these recommendations.

high-quality condo industry that serves the needs of homeowners, developers and the State, we are all willing to continue our involvement through the legislature's deliberations.

The legislature specifically requested that we draft legislation to implement our recommendations, and we attempted to do that. But time ran out on those efforts. We consumed and exceeded our allotted time period in arriving at our recommendations. Legislative staff, however, helped us with initial efforts to convert these recommendations into bill form. Those efforts progressed further in the case of course-of-construction inspection than with the alternative dispute resolution process. In neither case, however, did the committee finally bless the specific form of those bills. The alternative dispute resolution bill does little more than wrap the committee's bullet point recommendations with a preamble and enacting clause. We would be happy to consult individually with legislative members and staff in drafting implementing legislation and believe the involvement of committee members in that effort is essential to its success.

### **Goals and Objectives Underlying Our Recommendations**

Although we did not develop formal criteria against which to measure our recommendations, our discussions made plain that our common goals were to increase the confidence of homeowners, developers and insurers in the Washington condo industry and liability systems by:

- Improving and demonstrating improvements in construction,
- Promoting early and meaningful settlement of disputes, and
- Increasing the role of design professionals in the construction and dispute resolution process.

## Recommendations

Our recommendations follow. In addition, we have provided commentary, which is not part of our recommendations, but which may be helpful in understanding what we intended or why we did what we did.

- I. *Recommendations regarding "The required use of independent third-party inspections of residential condominiums as a way to reduce the problem of water penetration in residential condominiums"*

Recommendations	Commentary
<p>1. <b>Inspections.</b> All multi-unit residential building enclosures for which building permits are issued after enactment shall be inspected by a qualified inspector during the course of construction, whether initial construction or rehabilitative construction of the building enclosure.</p>	<p>This recommendation reaches beyond condominiums to all multi-unit buildings, since it is not always apparent whether a building under construction will be for apartments or condominiums and also because buildings are often converted from apartments to condos. The recommendation applies to newly constructed buildings and buildings that undergo rehabilitative construction of the building enclosure, but does not otherwise apply to pre-existing buildings.</p>
<p>2. <b>Design Documents.</b> Building enclosure design documents shall be submitted to the appropriate building department prior to the start of construction of the building enclosure. The design documents shall be stamped by a licensed design professional and contain an appropriate level of information to allow construction of the building enclosure. The submission shall be updated (either through individual updates or a cumulative or as-built update) to reflect changes made to the design during construction.</p>	<p>The committee debated at length whether new standards were needed for building envelopes. In the end, we concluded that design complexities precluded the use of prescribed or even presumptively adequate building enclosure details. We also believed that too much specificity might thwart useful design innovations. Our conclusion was that design professionals should be free to specify building enclosure details that were appropriate in their professional judgment. They would, however, be required to prepare plans specifically for the building enclosure at a high level of detail and to submit those plans to the building department. The building department would have no obligation to review or approve those plans. The committee understands that the nature and details of the design documents will vary significantly depending on the project being built and its location. For example,</p>

	<p>we would ordinarily expect a greater level of building enclosure design details for projects built in Western Washington than in Eastern Washington. We discussed the possibility of only requiring design documents and inspections for marine climate zones, but rejected that approach in favor of one that allows for substantial flexibility in its implementation.</p>
<p>3. <b>Qualifications.</b> To be qualified, a building enclosure inspector must either be a licensed architect or engineer with verifiable training and experience in building enclosure design and construction, or any person with verifiable training and experience in building enclosure design and construction. This recommendation shall not be construed to alter the requirements for licensure, or the jurisdiction, authority, or scope of practice of architects, professional engineers, or general contractors.</p>	<p>The committee presumes that most inspectors will be licensed design professionals with substantial training and experience in building enclosure design and construction. We recognized, however, that there are several individuals without those credentials performing building envelope inspections in Washington. We also recognized that specific design issues may not require a licensed professional. For those reasons, we believe the legislation should permit the use of non-design professionals as inspectors where they are able to demonstrate that they have the necessary training and experience. Since there is no generally recognized training program for building envelope design and inspection, the committee's recommendation is necessarily general in that regard.</p>
<p>4. <b>Independence.</b> A qualified building enclosure inspector shall be free from any interference or influence relating to the inspections. The qualified inspector may not be an employee or subsidiary of, nor have any pecuniary interest in, the declarant or developer of the project in question or any party providing services or materials for the project, except that the inspector may be the architect or engineer who approved the building envelope design documents or the architect or engineer of record. The qualified inspector may, but is not required</p>	<p>The committee recognizes that many individuals employed by declarants may have the necessary training and experience to be inspectors. Even so, the committee concluded that inspectors who were employees of a declarant may suffer from the appearance of a lack of independence and compromise the confidence of homeowners. We recognize that this may, in some instances, create an unfair burden on developers with in-house design professionals, though we also believe that impact can be mitigated by contracting with outside professionals for supervision and final approval of inspections performed in substantial part</p>

<p>to, assist with the preparation of such design documents.</p>	<p>by employees. While the committee believed that the best practice is that the inspector be involved in a meaningful way in the preparation of the building design documents, the Committee elected not to require such involvement legislatively. We were concerned that this would hinder the ability of builders to hire and fire consultants, and might forestall evolution of useful design/inspection paradigms.</p>
<p>5. <b>Scope of Inspection.</b> Any course of construction inspection program for a multi-unit residential building shall include at a minimum the following:</p> <ul style="list-style-type: none"> <li>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. Testing would not be required if the same assembly had previously been tested <i>in situ</i> in the project under construction by that builder, other members of the construction team (e.g., the architect or engineer), or by an independent testing laboratory.</li> <li>b. An independent periodic review of building enclosure construction activities during the course of construction to ascertain whether that the multi-unit residential building has been constructed in general compliance with the building enclosure design documents.</li> </ul>	<p>The committee believed that the small additional expense of resistance testing was warranted by the valuable results it would produce. We recognize, however, that the type of testing may vary according to the type of structure and windows and the climate in which the building is constructed. We assume inspectors will visit construction projects between one and three times a week, depending on the stage of construction.</p>
<p>6. <b>Certification.</b> A qualified inspector shall prepare a letter certifying that the building enclosure has been</p>	<p>The committee recognized that the building envelope design might be modified during the course of construction.</p>

<p>inspected during the course of construction and has been constructed in substantial compliance with the building envelope design documents. The letter of inspection shall be provided to the appropriate building department prior to final acceptance by the building department.</p>	<p>The inspector will inspect the construction in accordance with the modified design. This recognizes the need for flexibility in addressing design issues as they arise during the course of construction. It also emphasizes the need for the inspector's involvement in the design process. There is no requirement that the inspector submit his or her notes or inspection records to the building department. The committee assumes that design professionals will develop professional standards for their inspections and certifications, including reports to accompany their certifications. Such reports might prove useful to both declarants and homeowners.</p>
<p>7. <b>Liability.</b> The qualified inspector is only liable to the declarant. The inspector and the developer may contractually agree to limit the inspector's liability to the fee or contract price actually paid.</p>	<p>The committee concluded that it was not practical to make an inspector directly liable to homeowners for his or her errors or omissions. Design professionals and inspectors are not typically liable to homeowners under current law. The committee believed that making them liable under this new regime would scare away inspectors and their insurers, inhibiting successful implementation of these recommendations. Moreover, the committee did not believe that the solution to the problems in the condominium industry would be improved by creating new and greater opportunities for litigation. Declarants would remain liable to homeowners for construction defects to the same extent as they are under existing law, so homeowners would not be deprived of an opportunity to sue if they were damaged.</p>
<p>8. <b>No Presumption.</b> The course of construction inspection will not be entitled to any evidentiary presumption, but the inspector will be permitted to testify at trial under current evidentiary rules.</p>	<p>To testify at trial, the inspector's testimony would have to satisfy the usual evidentiary rules governing experts and other matters, but the inspector would not be precluded from testifying because of his or her role as the inspector.</p>
<p>9. <b>Definitions.</b> Several new definitions are required in connection with the</p>	<p>These were working definitions used by the committee. We recognize that they will</p>

<p>recommendations above:</p> <p>“Building enclosure” means that part of any building, above or below grade that physically separates the outside or exterior environment from the interior environment(s). Interior environments include unheated enclosed spaces (including balconies and decks, guardwalls, balcony support columns, chimneys, garages, etc. that interface with the building).</p> <p>“Building enclosure design documents” means plans, details and specifications for the building enclosure stamped by a licensed engineer or architect.</p> <p>“Dwelling unit” means a suite operated as a housing unit, used or intended to be used as a residence or usually containing cooking, eating, living, sleeping and sanitary facilities.</p> <p>“Multi-unit residential building” means a residential building containing more than two dwelling units, excluding the following classes of buildings: (a) hotels and motels; (b) dormitories; (c) care facilities; (d) floating homes; (e) any multi-unit building in which all of the dwelling units are held under one ownership and constructed for rental purposes, if the building is subject to a covenant restricting the sale or other disposition of any dwelling units for ten years from the date of first occupancy.</p>	<p>have to be harmonized with the Condo Act.</p> <p>The qualified inspector will inspect for water penetration related issues involving decks, guardwalls, balcony support columns, chimneys, garages, etc., but shall not be responsible for inspecting for health and safety or similar issues.</p>
<p>10. <b>Effective Date.</b> The foregoing requirements would be effective for all buildings for which a building permit is issued on or after July 1, 2005.</p>	<p>The committee recognizes that building departments may not be prepared to receive the building enclosure design documents as early as July 1, 2005, but believes that these requirements should be effective notwithstanding that possible</p>

	<p>deficiency. The role of the building department in implementing these recommendations is strictly ministerial and delays in creating a process for the receipt of design documents and inspection letters should not impede implementation of the other requirements suggested in these recommendations.</p>
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II. Recommendations regarding “The use of arbitration or other forms of alternative dispute resolution to resolve disputes involving alleged breaches of implied or express warranties under chapter 64.34 RCW”

Recommendations	Commentary
<p>1. <b>Arbitration.</b></p> <p>a. <b>Election.</b> At the election of either the homeowner or the declarant made within 90 days from service of the complaint regarding a dispute involving alleged breaches of implied or express warranties under RCW Ch. 64.34 (or seeking relief that could be awarded for such breaches pursuant to RCW Ch. 64.34, regardless of the legal theories pled) would be referred, as a matter of right, to mandatory arbitration, regardless of the size of the dispute.</p> <p>b. <b>Number of arbitrators</b></p> <p>i. Unless otherwise agreed, claims for less than \$1 million will be heard by a single arbitrator.</p> <p>ii. Unless otherwise agreed, claims for \$1 million or more will be heard by three arbitrators.</p> <p>c. <b>Qualifications.</b> All arbitrators should be attorneys with experience as attorneys, judges, arbitrators or mediators in construction defect disputes.</p> <p>d. <b>Trial <i>de novo</i>.</b> A party may, as a matter of right, request a trial <i>de novo</i> in Superior Court pursuant to RCW Ch. 7.06, the trial date for which should be given priority. If the judgment in the trial <i>de novo</i> is not more</p>	<p>Either party may elect to arbitrate, but the decision is postponed until a complaint has been filed. At this point, the parties should have better information to make this decision and the insurance companies should be involved in the decision making process.</p> <p>Having multiple arbitrators is especially useful where there is no right of appeal. Here, there is a right to a trial <i>de novo</i>. Nonetheless, we have provided for three arbitrators for larger cases, but have allowed the parties to agree to use a single arbitrator if they wish.</p> <p>The intent of the committee was to design a dispute resolution process that would lead to better, quicker and cheaper results. This is accomplished by requiring or permitting case scheduling, early intervention of a neutral expert and incentives through the offer-of-judgment rules for early and meaningful settlement. But, if the new procedures – mediation, arbitration, and trial <i>de novo</i> – were fully exhausted, the process could be longer than it is now. We believe this possibility should be mitigated by requesting a priority trial date for trials <i>de novo</i>.</p> <p>These procedures do not affect any notice and cure rights under RCW § 64.50.050.</p>

<p>favorable to the appealing party than the arbitration award, that party shall pay the other party(ies)'s fees and costs incurred after the filing of the appeal.</p>	
<p><b>2. Modifications to Procedures.</b> Whether in arbitration or court, new procedural rules along the lines of those suggested in Exhibit A should be adopted.</p>	<p>The committee understands that there may be "separations of powers" issues that affect whether these rules may be adopted by statute.</p>
<p><b>3. Mediation.</b></p> <p>a. Whether in arbitration or court, the parties must participate in mandatory mediation before a mediator agreed to by the parties or, in the absence of an agreement, appointed by the arbitrator(s) or court.</p> <p>b. The parties and their experts shall be required to meet and confer in an attempt to resolve or narrow the scope of the disputed issues. The parties' obligations to mediate and meet and confer should be governed by timelines such as those provided in Exhibit A.</p>	<p>Most cases now settle before trial, many in mediation. We have attempted to design a mediation process that promotes early settlement. The parties would be referred to mandatory mediation whether they are in court or in arbitration. The use of a neutral expert and the offer-of-judgment recommendations should further assist the parties in narrowing the issues in dispute and settling cases.</p> <p>Exhibit A is illustrative only. Mediation should be required as early as possible in the case.</p>
<p><b>4. Neutral Expert.</b></p> <p>a. If, after meeting and conferring, disputed issues remain, at the request of a party, the arbitrator/court may (but shall not be required to) appoint a neutral expert.</p> <p>b. The neutral expert shall be a licensed architect or engineer with substantial experience in the disputed issue or shall have other suitable experience and training. The neutral expert shall not have been employed as an expert by either party within</p>	<p>The use of a neutral expert should help the parties narrow the issues in dispute early in the course of a law suit. We opted for this approach rather than a specialized construction defect "science court" because we believed there would not be enough cases to justify the creation of an entirely new court, but believed it would yield many if not all of the same benefits. We also preferred this approach to Texas' creation of a state agency that employs and assigns inspectors to assist in dispute resolution. The Texas system has been criticized (rightly or wrongly we don't know) for being a captive of the building industry. We believe our neutral expert</p>

<p>three years before the commencement of the present dispute, unless the parties agree otherwise.</p> <p>c. The parties shall be given an opportunity to recommend neutral experts to the arbitrator/court and have input to the arbitrator's or court's appointment.</p> <p>d. The parties shall agree to, or, in the absence of agreement, the arbitrator/court shall determine, matters such as:</p> <ul style="list-style-type: none"> <li>i. Who will serve as the neutral expert.</li> <li>ii. The scope of the neutral expert's duties (provided that the neutral expert shall only make findings regarding costs if that assignment is agreed to by the parties).</li> <li>iii. The number and timing of inspections of the property.</li> <li>iv. Coordination of inspection activities with the parties' experts.</li> <li>v. The neutral expert's access to the work product of the parties' experts.</li> <li>vi. The product to be prepared by the neutral expert.</li> <li>vii. Whether the neutral expert should participate personally in the parties' mediation.</li> <li>viii. Other matters relevant to the neutral expert's assignment.</li> </ul> <p>e. The neutral expert will not make findings regarding the amount of damages or cost of repair unless agreed by the parties.</p>	<p>recommendation does not lend itself to that criticism and avoids the creation of a new state agency.</p> <p>The parties will have a substantial opportunity for input to the selection of the neutral expert, the neutral expert's scope of work, and the neutral expert's report.</p> <p>The qualifications for the neutral expert are the same as for the course-of-construction inspector.</p> <p>The arbitrator/court will determine whether and to what extent the neutral expert's report can be used as evidence against a later-joined party who did not participate in the selection of the neutral expert and also who will pay if additional experts are appointed because of later-joined parties.</p> <p>The committee recognized that it would not be possible to design a "one size fits all" standard for the neutral expert's role. But we assume that the neutral expert will generally prepare a report that specifies the building enclosure problems and suggested corrective measures in sufficient detail to permit the parties to obtain bids for the suggested repairs based on the report. If so, the neutral expert's report, if accepted by the parties, will leave open only the issue of the cost of the recommended repairs. Our experience suggests that repair cost estimates should be within 10% of one another if based on detailed plans.</p> <p>The neutral expert's report will not be entitled to any evidentiary presumption, but the report and the expert's testimony would be admissible at the arbitration hearing or at trial (including the trial de novo) for whatever weight it may have.</p>
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| <ul style="list-style-type: none"><li>f. A party may, by motion to the arbitrator(s) or court, object to the individual appointed to serve as the neutral expert and the determinations regarding the neutral expert's assignment.</li><li>g. The neutral expert shall have no obligation to participate in the repairs recommended by the neutral expert. The homeowners shall have no obligation to accept any low bid submitted as part of the determination of damages. The neutral expert shall have no liability to the parties for the performance of his or her duties.</li><li>h. Except as agreed by the parties, the parties shall have a right to review and comment on the neutral expert's report before it is made final.</li><li>i. The neutral expert's report and testimony shall be admissible at the arbitration hearing, trial <i>de novo</i> or trial subject to the usual evidentiary rules (qualification as expert, prejudicial testimony, etc.). The neutral expert's report and testimony shall not be entitled to any presumptive effect.</li><li>j. The arbitrator(s) or court shall determine the significance of the neutral expert's report and testimony for parties joined after the neutral expert's appointment and whether additional neutral experts should be appointed or other measures taken to protect later-joined parties from undue prejudice.</li></ul> |  |
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<p>5. <b>Costs of Arbitration, Mediation and Neutral Expert.</b> The electing party must advance the fees of the arbitrator(s), mediator and neutral expert.</p> <p>a. If the building permit is issued on or after July 1, 2005, then the non-prevailing party (determined under existing standards) in the ADR process shall be liable for the fees of the arbitrator(s), mediator and neutral expert. If the appropriate building department has not promulgated the necessary filing requirements, a declarant may nonetheless be deemed to have complied with the new course-of-construction inspection procedures if it satisfies all of the related requirements other than ministerial filings with the building department (this still requires permit issuance on or after July 1, 2005). The arbitrator/judge shall determine the declarant's compliance in the event of a dispute.</p> <p>b. If the building permit is issued prior to July 1, 2005, then the party that elected the ADR process shall be liable for the fees of the arbitrator(s), mediator and neutral expert.</p>	<p>The reference to issuance of the "building permit" is to final action by the appropriate building department following payment of all required fees and satisfaction of any "stamping" or similar requirements.</p> <p>In all cases, the party that elects arbitration will advance the costs of the arbitrator and mediator and the party that requests a neutral expert will advance the costs of the neutral expert.</p> <p>As a general rule, the electing party will bear the costs of these ADR activities in disputes involving buildings that were not subject to the course-of-construction inspections, whether or not that party prevails. In disputes involving buildings that were subject to such inspections, the non-prevailing party will be required to bear these costs. While this is the general rule, we opted for a bright-line test based on the date of issuance of the building permit to minimize ambiguities.</p>
<p>6. <b>Subcontractors.</b> Upon the demand of a party to the ADR proceedings, any subcontractor or supplier against which such party has a legal claim and whose work or performance becomes an issue in the ADR proceedings shall join in and become a party to and be bound by the ADR proceedings.</p>	

<p><b>7. Effective date for ADR process.</b> The new ADR process is available at the election of a party only for disputes in which a complaint is served or filed after July 1, 2005.</p>	
<p><b>8. Offers of Judgment and Attorneys' Fees.</b></p> <p>a. Either party may submit an offer of judgment on or prior to the 60<sup>th</sup> day following completion of mediation (as determined by a notice from one party to the other terminating mediation). The offer in judgment will specify the amount of damages (not including attorneys' fees or costs) the party is willing to pay or receive and also indicate the party's willingness to pay fees awarded as provided below. There can be more than one offer so long as the offer is timely made.</p> <p>b. An offer by the defendant must include a demonstration of ability to pay both damages and fees.</p> <p>c. If the plaintiff accepts the defendant's offer of judgment, the plaintiff shall be the prevailing party and, in addition to the amount of the offer, be entitled to recover its fees in an amount to be determined by the arbitrator/judge using existing standards.</p> <p>d. If the final judgment on damages (without consideration of attorneys' fees and costs) is not more favorable to the offeree than the offer of judgment, then the party making the offer shall be the prevailing party for purposes of a fee award. The</p>	<p>These recommendations are intended to promote early settlement. To qualify, an offer-of-judgment can be made at any time up to the 60<sup>th</sup> day following completion of mediation, including prior to or during the mediation. A party may make more than one qualifying offer-of-judgment.</p> <p>Since defendants are not always able to pay the amounts they owe, the offer must be accompanied by a demonstration of ability to pay the amount it offers, so the plaintiffs will have assurance that they will be paid the offered amount if they accept the offer.</p> <p>If the plaintiff accepts the defendant's qualifying offer, it will also be entitled to receive a fee award using existing standards with no new limitations.</p> <p>If an offer of judgment is not accepted, but the judgment is ultimately less favorable to the offeree than the offer, that party will be the non-prevailing party and will be required to pay the other party's attorneys' fees, using existing standards, except that the plaintiff's obligation to pay a defendant's fees will not exceed 5% of assessed value.</p> <p>The obligation of the non-prevailing party to bear the costs of arbitration, mediation and the neutral expert is addressed in Section II, 5, above.</p> <p>The committee was aware that it is possible to plead multiple legal theories which would lead to overlapping damage awards. We did not want the parties to avoid the fee shifting provisions of these recommendations by seeking a damage award under some theory (common law or statutory) other than the Condo Act that</p>

<p>amount of the fee award shall be for the period following the date of the offer of judgment and shall be determined by the arbitrator/judge using existing standards. The non-prevailing party shall not be entitled to receive any award of fees.</p> <p>e. If the final judgment is more favorable to the offeree than the offer of judgment, then the arbitrator/judge shall determine which party is the prevailing party and the amount of the fee award using existing standards.</p> <p>f. Notwithstanding the above, the amount of the defendant's fees payable by the plaintiff shall not exceed 5% of the assessed value of the condo project as a whole, allocated among the owners in proportion to the assessed values of their individual units.</p> <p>g. These attorney fee provisions will apply to any damages that could have been awarded pursuant to RCW 64.34.445, regardless of the legal theories pled.</p>	<p>could have been obtained under the Condo Act. Our recommendations provide that these rules apply to damage awards that could have been obtained under the Condo Act, even if they were obtained under other theories.</p>
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**Conclusion**

Given the makeup of the committee, it may be stating the obvious to say that no member is happy with all of these recommendations. But, collectively, the recommendations are supported by us all. We did not reach this consensus easily. It will break down quickly if these recommendations are split apart or significantly modified. All members made significant concessions in order to make gains elsewhere.

We appreciate this opportunity to be of service to the legislature and especially appreciate the support we received from legislative and gubernatorial staff. We also thank the many other individuals who were not members of the committee, but who contributed their time and talents to the successful conclusion of our efforts.

**Study Committee Members**

Todd Bennett, Bennett Homes

Abbie Birmingham, Murray-Franklyn

Marcus Dell, RDH Building Engineering, Inc.

Vince DePillis, Real Property Law Group

Marion Morgenstern, Strichartz Morgenstern

Mark O'Donnell, Preg O'Donnell and Gillett

Steven Seward, attorney, chair

**Exhibit A**  
**Rules of Procedure**

## The Plan:

The Case Schedule/ADR Plan includes the following deadlines:

1. Deadline to add third and fourth parties or stipulate that third or fourth parties will not be added.
  - a. NOTE: While the third and fourth party defendants are often essential, their addition to the case results in some necessary delays and will force the mediation to take place at a later date. If the developer decides not to add third or fourth parties to the lawsuit, an even earlier mediation would be possible.
  - b. If third parties are not added, it may also be possible to require or allow an accelerated trial date, further reducing the time required to resolve a claim.
2. Deadline to select mediator. Good mediators are very busy and must be booked months in advance.
3. Deadline for completion of plaintiff's investigation.
4. Deadlines for disclosure of investigation plans of the defendants, and third- and fourth-party defendants' ("the Parties Defendant").

This is necessary to coordinate access to the site and comply with CR 34. These deadlines may need to be staggered because the third and fourth parties must respond to the upstream parties' claims and will likely want to wait until the upstream parties have performed their investigation and disclosed their list of defects and proposed repairs.

5. Deadlines for Parties Defendant to complete their investigation. These dates may need to be staggered as well.
6. Deadlines for each party to disclose their list of defects and proposed scope of repair.
7. Deadlines to petition for and utilize neutral expert.
8. Deadline for each party to produce and disclose its estimated cost of repair.
9. Deadline for plaintiff's written settlement demand.
10. Deadline for defendant's response to plaintiff's written settlement demand.
11. Deadline for defendant's and third party defendants' demands on downstream parties and related deadlines for their respective responses.
12. Deadline for submission of mediation materials.

This deadline should be 30 days prior to mediation to ensure that all parties and their insurers have time to receive and review necessary materials.
13. Deadline for each party to submit a declaration that: (1) a decision maker with authority will be available for the duration of the mediation, (2) the decision maker has been provided with and reviewed the requisite mediation materials provided by its own counsel, as well as the materials

submitted by the opposing parties.

These last two deadlines are aimed at ensuring a productive and ultimately successful mediation session. When mediation does not result in agreement, it is generally for one of two reasons: (1) either the parties are unable to reach an agreement, or (2) more commonly, one or more of the parties is not prepared, and thus is unable to fully engage in the process. The foregoing deadlines require advance preparation which will, in turn, maximize the potential for a successful outcome.

Deadline for mediation. Courts, are authorized to, and should perhaps be required to penalize the failure to comply with the deadlines established. Sanctions are particularly important with respect to items 11 and 12, as they are so close to mediation that it will be impossible to correct the problem and still have a meaningful mediation.

Below is a sample case schedule that assumes a lawsuit was filed on January 1, 2004, which assumes there will be third- and fourth-party defendants. For reference, when a lawsuit is filed in King County, the court issues a case schedule that sets a trial date generally 18 months from the date suit is filed. The current mediation deadline is one month prior to trial, by which point the parties will have incurred significant attorneys' fees to comply with other pre-trial deadlines.

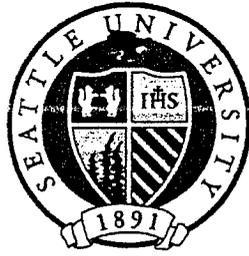
<b>Event or Deadline</b>	<b>Date</b>	<b>Time From Filing</b>	<b>King County's Standard Case Schedule</b>
Lawsuit Filed	January 1, 2004	0	0
Deadline for Plaintiff to submit preliminary list of defects	February 1, 2004	1 month	Not addressed in case schedule, but required by RCW 64.50.030
Deadline to File Motion to Compel Arbitration	No later than 45 days after service of process.		
Deadline to add third-parties	April 1, 2004	3 months	Not addressed
Deadline for Plaintiffs to complete its main investigation	May 1, 2004	4 months	Not addressed
Deadline to select mediator.	May 1, 2004	4 months	Not addressed

Event or Deadline	Date	Time From Filing	King County's Standard Case Schedule
Deadline for Plaintiff to disclose its list of defects and scope of repair.	June 1, 2004	5 months	Not addressed
Deadline to add 4 <sup>th</sup> parties.	June 1, 2004	5 months	Not addressed
Deadline for Defendants' investigation plan.	July 1, 2004	6 months	Not addressed
Deadline to complete Defendants' Investigation.	August 1, 2004	7 months	Not addressed
Deadline for 3 <sup>rd</sup> and 4 <sup>th</sup> party defendants' to disclose their proposed investigations.	August 1, 2004	7 months	Not addressed
Deadline for Plaintiff to disclose its estimated cost of repair.	August 1, 2004	7 months	Not addressed
Deadline for 3 <sup>rd</sup> and 4 <sup>th</sup> party defendants' investigation.	September 1, 2004	8 months	Not addressed
Deadline for Defendants to disclose their list of defects and scope of repair.	September 1, 2004	8 months	Not addressed
Deadline for Plaintiffs and Defendants' expert to meet and determine the repairs, if any, about which they do not agree.	October 1, 2004	9 months	Not addressed
Deadline for Defendants to disclose their estimate.	October 1, 2004	9 months	Not addressed
Deadline for 3 <sup>rd</sup> and 4 <sup>th</sup> Parties to disclose their list of defects, scope of repair, and cost estimate.	October 1, 2004	9 months	Not addressed
Deadline for Motion to appoint neutral expert	October 15, 2004	9.5 months	Not addressed

Event or Deadline	Date	Time From Filing	King County's Standard Case Schedule
Deadline for Plaintiff's written settlement demand	October 15, 2004	9.5 months	45 days before trial
Deadline for Defendants' written response to Plaintiff's settlement demand.	November 15, 2004	10.5 months	35 days before trial
Deadline for neutral experts' opinions regarding those repair items in dispute.	November 22, 2004	10.75 months	Not addressed
Deadline for all parties to exchange mediation materials.	December 1, 2004	11 months	Not currently addressed
Deadline for all parties to submit declaration of preparedness.	December 25, 2004	11.8 months	Not currently addressed
Mediation (settlement/mediation/ADR conference)	December 31, 2004	12 months	30 days before trial, approx. 17 months from filing
Trial Date Note: An accelerated trial date may be possible if third or fourth parties are not added to the lawsuit.	November 1, 2005	18 months	18 months from filing date

There are several methods to shorten this schedule and have an earlier mediation. The schedule can be shortened by several months if third- and fourth- party defendants are not brought into the lawsuit. Time can also be reduced if the parties are able to agree to a joint investigation rather than staggered investigations.

# Appendix D



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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*

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## 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<sup>†</sup> & David E. Chawes<sup>‡</sup>*

#### I. INTRODUCTION

On August 1, 2005, significant amendments to the Washington Condominium Act (WCA) became effective.<sup>1</sup> 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.<sup>2</sup>

The Committee was charged with presenting recommendations to address and hopefully solve water intrusion problems that resulted in a proliferation of lawsuits.<sup>3</sup> 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.<sup>4</sup> Indeed, many insurers left the Washington construction market.<sup>5</sup>

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

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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](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.<sup>6</sup>

The significance of these amendments can be seen when compared to the previous statute.<sup>7</sup> 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.<sup>8</sup> This Act is still effective today for those condominiums that were declared before 1990.<sup>9</sup>

The model Uniform Condominium Act was issued in 1980 to further standardize condominium construction and governance law among the states.<sup>10</sup> 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.<sup>11</sup> The WCA addresses all aspects of condominium creation, construction, conversion, sale, financing, management, and termination of condominiums.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> The WCA protects "consumers from construction defects through its express and implied statutory warranty provisions."<sup>15</sup> 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).<sup>16</sup>

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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.<sup>17</sup>

The statutory warranty of quality has been interpreted by Washington courts to virtually require strict compliance with all portions of applicable building codes.<sup>18</sup> 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."<sup>19</sup>

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.<sup>20</sup> 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.wsbarpnt.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.<sup>21</sup> 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.<sup>22</sup> 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

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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.<sup>23</sup>

### 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> In 2003, the Washington legislature established additional affirmative defenses that builders could use to mitigate liability.<sup>27</sup> 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.<sup>28</sup>

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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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> Unable to reach agreement, the legislature authorized creation of a special study committee of interested parties to examine those issues.<sup>33</sup> 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.<sup>34</sup> The Committee was also asked to recommend ADR procedures

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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.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> The Committee heard from builders of low-income housing, insurance representatives, homeowner groups, mediators, contractors, and construction professionals.<sup>38</sup> It reviewed recent and pending legislation throughout the country and studied the British Columbia model for dealing with condominium building envelope problems.<sup>39</sup>

After ten official meetings and numerous non-official meetings and discussions, the Committee issued its final report in January 2005.<sup>40</sup> At the insistence of the Committee Chair, the group, through at times heated discussions and bartering, finally reached a consensus.<sup>41</sup> The Committee cautioned the legislature that the proposed bill was a fully integrated

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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.<sup>42</sup> In short, it was an “all or nothing” package for the legislature to consider.<sup>43</sup>

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

The Committee delivered its report to the Legislature at the beginning of the 2005 legislative session.<sup>46</sup> 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.<sup>47</sup> To facilitate the legislature’s consideration of the Committee’s work, the legislative staff converted the recommendations into draft bill form.<sup>48</sup> The final bill, which contained nearly all of the Committee’s substantive recommendations, passed the legislature almost unanimously.<sup>49</sup> 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.

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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.<sup>50</sup>

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.<sup>51</sup>

The Committee defined another essential term, “building enclosure,” without reference to water resistance.<sup>52</sup> 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 spaces . . . .<sup>53</sup>

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.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup>

## 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.<sup>57</sup> If changes are made to the building design during construction, the Committee instructed that the documents be updated.<sup>58</sup>

It bears mentioning here that the Committee specifically discussed the extent to which these provisions, and others, should be prescriptive in nature.<sup>59</sup> Ultimately, the Committee concluded that certain technical provisions should remain intentionally vague, and be left to the discretion of the building professional.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> 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

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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.<sup>63</sup> Additionally, the Committee did not want to unduly influence unit pricing by dictating design and inspection information.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> 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."<sup>67</sup> Importantly, the building department is not required to review, approve, or determine the adequacy of these design documents.<sup>68</sup> 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.<sup>69</sup>

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

63. Study Committee Report at 5, ¶ I.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, ¶ I.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."<sup>71</sup> 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.<sup>72</sup> The inspector may be the architect or engineer of record or who approved the building enclosure design documents.<sup>73</sup>

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.<sup>74</sup> 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.<sup>75</sup>

#### 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.<sup>76</sup> The inspector needs to evaluate whether the present condition of the building enclosure would fail to protect the building from water or moisture intrusion.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> The inspector's report, identifying the extent and results of the

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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).

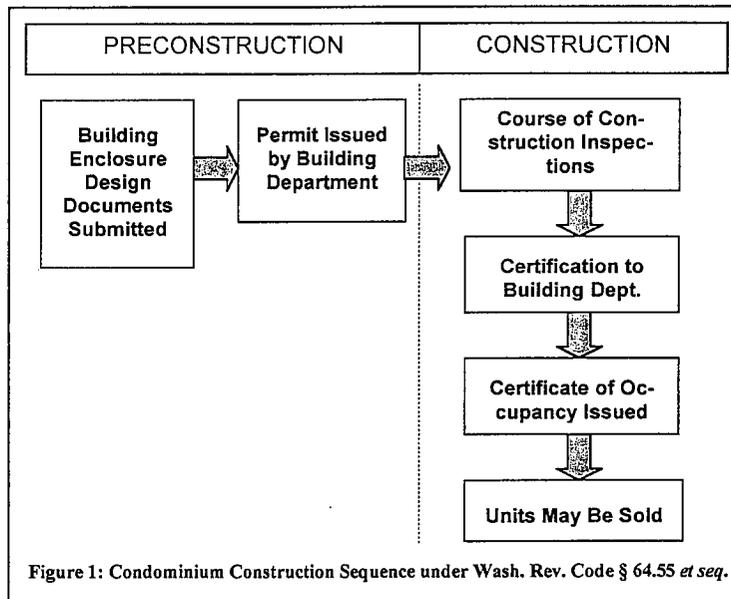
78. *Id.* § 64.55.090(1)(c).

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.<sup>80</sup>

The Committee recommended that, once inspections are completed, the inspector certify that the building enclosures substantially comply with the design documents.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> The building department can then issue a final certificate of occupancy.<sup>84</sup> However, the building department is not responsible for determining whether the required inspections were adequate or appropriate.<sup>85</sup> Figure 1 presents the sequence of events for new multiunit residential buildings under the amended statute.<sup>86</sup>



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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> The final statute adopted most of these recommendations.<sup>93</sup> 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

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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.<sup>94</sup>

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

<b>Time Period<sup>95</sup></b>	<b>Event Description</b>
Day 1.	Serve RCW 64.50 Notice of Claim. <sup>96</sup>
45 days after service of Notice of Claim.	First possible date to file complaint. <sup>97</sup>
60 days after later of filing or service of complaint.	Case schedule plan submitted. <sup>98</sup>
90 days after later of filing or service of complaint.	Last day for any party to file demand for arbitration. <sup>99</sup>
Prior to mediation.	Parties and experts meet and confer. <sup>100</sup>
After meeting and conferral.	Motion for neutral expert (if necessary). <sup>101</sup>
7 months after later of filing or service of complaint.	Last day for mediation to commence. <sup>102</sup>
60 days after end of mediation.	Last day to serve an offer of judgment. <sup>103</sup> Start of first fee-shifting mechanism. <sup>104</sup>
14 months after later of filing or service of complaint.	Last day for arbitration to commence. <sup>105</sup>
20 days after filing arbitration award.	Last day to file request for trial de novo. <sup>106</sup> Start of second fee-shifting mechanism. <sup>107</sup>

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]."<sup>108</sup> 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.<sup>109</sup>

### 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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> The arbitrators are to be attorneys with experience in construction defect disputes as attorneys, judges, arbitrators, or mediators.<sup>113</sup> 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

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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.<sup>114</sup> The Committee also suggested a lengthy list of new procedural rules for conducting either arbitration or trials de novo for these types of cases.<sup>115</sup>

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.<sup>116</sup> If the parties cannot agree on a case schedule, either party may move the court for determination of the applicable dates.<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup>

### 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.<sup>121</sup> 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.<sup>122</sup>

The 2005 statute allows either party to request a trial de novo on appeal within twenty days after the arbitrator's decision is filed.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup>

#### 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.<sup>127</sup> 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.<sup>128</sup>

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

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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.<sup>131</sup> Mediation ends upon settlement or written notice of termination by any party.<sup>132</sup>

#### 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.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup>

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.<sup>138</sup> 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.<sup>139</sup>

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.<sup>140</sup> Unless the parties agree otherwise, the court

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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.<sup>141</sup> The neutral expert will not decide the amount of damages or the costs of repair, unless the parties agree otherwise.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> The non-prevailing party would be liable for those fees.<sup>145</sup>

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.<sup>146</sup> 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.<sup>147</sup> If arbitration has not been demanded, the court will decide on payment of the mediator.<sup>148</sup> These payments are not subject to the fee-shifting offer of judgment provisions discussed below.<sup>149</sup> 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.<sup>150</sup>

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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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> Any such offer not accepted within twenty-one days is considered rejected and withdrawn.<sup>154</sup>

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151. Study Committee Report at 16, ¶ II.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.<sup>155</sup>

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.<sup>156</sup>

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.<sup>157</sup> The non-prevailing party would not be entitled to receive any cost or fee award.<sup>158</sup> 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.<sup>159</sup>

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.<sup>160</sup> 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.<sup>161</sup>

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

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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, ¶ II.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.<sup>162</sup> If the offer is accepted, then the HOA will be entitled to attorney fees in an amount determined by the arbitrator or court.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup>

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).

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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.<sup>167</sup> 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?

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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,<sup>168</sup> 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?<sup>169</sup>

**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.