



SCHOOL OF
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VOLUME 29
SPRING 2006
NUMBER 3

SEATTLE UNIVERSITY LAW REVIEW

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

ARTICLES

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

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

I. INTRODUCTION

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

[†] Mark F. O'Donnell is an Appointed Member of the Washington Legislative Study Committee on Water Penetration of Condominiums. He is the Founding Member of the Construction Defect Practice Group at Preg, O'Donnell & Gillett PLLC, with offices in Washington, Oregon, and Alaska. Mr. O'Donnell is a 1983 graduate of the Seattle University School of Law. He recognizes and thanks the other Legislative Study Committee members, who donated and devoted many hundreds of hours to developing innovative solutions to a very difficult problem area affecting hundreds of thousands of Washington residents, businesses, and insurers. This Article represents only the views and perspectives of the authors, and is not intended to be an official comment or opinion of the Committee.

[‡] David E. Chawes is an Associate at Preg, O'Donnell & Gillett PLLC, Seattle, Washington. He is a 2004 graduate of the Seattle University School of Law, and served as Executive Editor (Note & Comment) of the Seattle University Law Review (2003–2004). Mr. Chawes is also a Certified Industrial Hygienist.

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

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

Id. § 64.34.073 (Supp. 2005).

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

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

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

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

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

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

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

3. *Id.* at 2.

4. *Id.* at 1.

5. *Id.*

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

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

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

A. Brief History of Washington Condominium Law

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

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

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

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

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

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

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

11. WASH. REV. CODE § 64.34.

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

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

*B. Implied Statutory Warranties of Construction Quality
for Condominiums*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. § 64.34.445.

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

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

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

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

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

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

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

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

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

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

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

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

C. Washington Tackles the Problem

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

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

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

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

24. Study Committee Report at 1.

25. *Id.*

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

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

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

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

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

III. COMMITTEE RECOMMENDATIONS LEAD TO FINAL VERSION OF THE LEGISLATION

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

29. Study Committee Report at 1.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

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

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

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

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

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

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

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

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

37. *Id.* at 2.

38. *Id.* at 3

39. *Id.*

40. *Id.* at 2–3.

41. *Id.* at 3.

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

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

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

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

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

42. *Id.*

43. *Id.*

44. *Id.* at 4.

45. *Id.*

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

47. Study Committee Report at 4.

48. *Id.*

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

1. Scope and Application of the Amendments

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

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

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

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

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

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

50. Study Committee Report at 5, ¶ I.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, ¶ I.9.

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

54. *Id.*

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

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

2. Building Enclosure Design Documents

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

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

56. *Id.* § 64.55.005(1)(b).

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

58. *Id.* at 5, ¶ 1.2.

59. *Id.* at 5, ¶ 1.2 cmt.

60. *Id.*

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

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

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

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

3. Qualifications of the Inspectors and Scope of Inspections

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

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

63. Study Committee Report at 5, ¶ 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.”⁷¹ Inspections must be conducted by an independent qualified inspector, that is, “a person with substantial and verifiable training and experience in building enclosure design and construction” who is not affiliated with and does not have a pecuniary interest in any party providing services or materials for the project.⁷² The inspector may be the architect or engineer of record or who approved the building enclosure design documents.⁷³

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

4. Alternative Inspection Procedure for Conversion Condominiums

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

71. Study Committee Report at 6, ¶ I.4.

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

73. *Id.* § 64.55.040(1)(c).

74. *Id.* § 64.55.050(1)(a).

75. *Id.* § 64.55.050(1)(a)–(b).

76. *Id.* § 64.55.090(1)(a).

77. *Id.* § 64.55.090(1)(b).

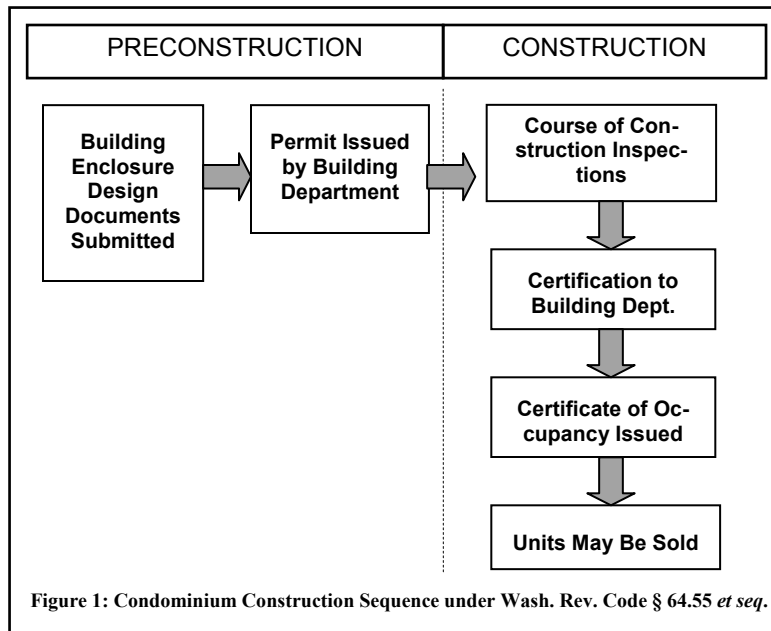
78. *Id.* § 64.55.090(1)(c).

79. *Id.* § 64.55.090(1)(d).

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

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

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



80. *Id.* § 64.55.090(1)(e).

81. Study Committee Report at 7–8, ¶ I.6.

82. *Id.*

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

84. *Id.*

85. *Id.*

86. *See id.* §§ 64.55.020–.090.

5. Limited Liability for Design Professionals and Inspectors

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

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

B. Reducing Transactional Cost:

The Use of Arbitration and Mediation Procedures to Facilitate Early and Meaningful Settlement of Disputes

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

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

88. *Id.*

89. *Id.*

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

91. *Id.* § 64.55.080.

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

93. *See infra* notes 95–107.

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

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

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

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

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

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

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

Id.

97. *Id.*

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

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

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

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

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

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

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

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

1. Applicability of the ADR Provisions

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

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

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

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

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

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

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

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

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

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

111. *Id.* ¶ II.1 cmt.

112. *Id.*

113. *Id.*

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

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

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

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

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

114. *Id.* at 15, ¶ II.6.

115. *Id.* at 12, ¶ II.2.

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

117. *Id.* § 64.55.110(2).

118. *Id.* § 64.55.100(1).

119. *Id.* § 64.55.100(2).

120. *Id.* § 64.55.150.

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

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

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

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

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

4. Mediation of Disputes is Mandatory

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

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

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

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

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

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

124. *Id.* § 64.55.100(5).

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

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

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

128. *Id.*

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

130. *Id.* § 64.55.120(2).

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

5. Use of a Neutral Expert is Optional

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

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

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

131. *Id.* § 64.55.120(3).

132. *Id.* § 64.55.120(4).

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

134. *Id.*

135. *Id.*

136. *Id.* at 12–13.

137. *Id.* at 13.

138. *Id.* at 14.

139. *Id.*

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

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

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

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

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

141. *Id.* § 64.55.130(2), (4).

142. *Id.* § 64.55.130(5).

143. *Id.* § 64.55.130(7), (9).

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

145. *Id.*

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

147. *Id.* § 64.55.140(2)(a).

148. *Id.* § 64.55.140(2)(b).

149. *Id.* § 64.55.140(2)(c).

150. *Id.* § 64.55.140(1)(a).

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

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

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

151. Study Committee Report at 16, ¶ 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 of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

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

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

153. *Id.*

154. *Id.*

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

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

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

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

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

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

156. *Id.* § 64.55.160(3).

157. *Id.* § 64.55.160(4).

158. *Id.*

159. *Id.* § 64.55.160(5).

160. Study Committee Report at 16–17, ¶ 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.¹⁶² If the offer is accepted, then the HOA will be entitled to attorney fees in an amount determined by the arbitrator or court.¹⁶³ Therefore, from the insurers' perspective, it will be difficult to gauge the dollar exposure without knowing the amount of attorney fees. This will be particularly important in cases where the damages may exceed the available insurance.

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

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

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

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

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

162. *Id.* § 64.55.160(1).

163. *Id.* § 64.55.160(3).

164. *Id.* § 64.55.160(1).

165. *Id.* § 64.55.160(6)(a).

166. *Id.* § 64.55.160(6)(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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