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The new Washington Condominium Act

Law balances owner and builder rights

Many insurers have stopped offering coverage for condominium construction in Washington. Those that offer it charge premiums that price many construction professionals out of the market, in part causing multifamily housing construction to decline more than 30 percent over the past few years. The state legislature's goal for the new condominium law is to encourage more multifamily construction in Washington.

As expected, the new Condominium Act attempts to balance owners' rights against imposing too heavy a burden on developers and construction professionals. It makes some dramatic changes that will impact construction professionals and owners, and the lawyers who represent them. It remains to be seen whether these changes will spur insurers to re-enter the Washington condominium construction market and offer products under the qualified warranty insurance program at a cost that encourages multifamily housing construction. The following is a brief summary of the most significant changes that are likely to play a role in the outcome of condominium defect disputes in the near future.

Burden of proof

Section 5 in the Act contains two new provisions. First, subsection (7) provides that in order to prove a breach of any of the obligations arising under the Act, "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." This provision is in response to cases in which defective construction that did not impair the performance or integrity of a condominium was nonetheless found to be a breach, and damages were recoverable by the owner.

Damages

One of the most important aspects of the new Act is a revision to the amount of damages that can be recovered. Damages are based on the cost of repairs but if that amount is clearly disproportionate to the loss in market value, then damages are limited to the loss in market value.

Warranties

Section 6 of the Condominium Act contains new language regarding exclusion or modification of implied warranties. Implied warranties for residential units can only be disclaimed in the narrow circumstances where: (1) the declarant or dealer knows, or has reason to know, that the specific defect or failure exists at the time of disclosure; (2) the disclaimer specifically describes the defect or failure; and (3) the disclaimer includes a statement as to the effect of the defect or failure. Additionally, the waiver must be conspicuous and separately signed by the purchaser.

Statutes of limitations

Section 7 precludes contractual modification of the statute of limitations either orally or in

writing. The statute of limitations for a claim under the Act is four years after the cause of action accrues.

Task force created

A new task force has been established to study various issues affecting condominium defect litigation including: (1) the required use of independent third-party inspections as a way to reduce the problem of water penetration in residential condominiums; and (2) the use of arbitration or other forms of alternative dispute resolution to facilitate early and effective resolution of defective construction disputes. The task force is comprised of developers, building construction consultants, property managers and attorneys. The task force is required to deliver a report of its findings and any proposed legislation to the judiciary committees of the Washington Senate and House no later than Dec. 31.

Insurance program

The legislature has created an innovative statutory warranty insurance plan that is intended to provide relief for developers and construction professionals from the Act's implied warranties. The insurance coverage would assist developers with costs associated with repair of defects in materials and construction. However, this new insurance program is dependent on insurers offering products that satisfy the warranty requirements, and that has not yet occurred. The Act refers to this new insurance plan as a qualified warranty.

Qualified warranty requirements

Article 4 specifies the substantial qualified warranty obligations required under the statutory warranty insurance plan. Article 4 also contains provisions providing for a living expense allowance should an owner need to live elsewhere during repairs. The table below summarizes the qualified warranty requirements.

Qualified warranty exclusions

Article 6 details the specific items that may be excluded from a qualified warranty. Examples include landscaping, commercial use areas, roads and curbs, quantity and quality of water supply, and surface drainage, except as required by the building code. Similarly, Article 7 details specific defects that may be excluded such as wear and tear, negligent and improper maintenance, alterations to the unit, and various other issues.

Qualified warranty caps

The monetary amount of a qualified warranty can be limited. For a unit, the limit cannot be less than the original purchase price or \$1,000. For common elements, the limit cannot be less than the total original price for all components of the building, or \$150,000 times the number of units.

Notice of warranty expiration dates

There is a mandatory notice requirement for expiration of warranties. As soon as reasonably possible after the beginning date for the qualified warranty, it is required that an owner and association be provided with a schedule of the expiration dates for coverage under the qualified warranty as applicable to the unit and the common elements, respectively. The expiration dates schedule for a unit must set out all the required dates on an adhesive label that is a minimum size of four inches by four inches and is suitable for affixing by the owner in a conspicuous location in the unit.

Mediation and arbitration

Article 15 permits a party to demand mediation. A qualified warranty may also include mandatory binding arbitration of all disputes arising out of, or in connection with, a qualified warranty. The provision may provide that all claims for a single condominium be heard by the same arbitrator, but shall not permit the joinder or consolidation of any other person or entity.

Attorney's fees

The final significant change to the Act is an attorney's fee provision. Article 17 gives the court or arbitrator in a judicial proceeding or arbitration the authority to award reasonable attorney's fees to the substantially prevailing party. The award cannot exceed the reasonable hourly value of the attorney's work.

This is a start. Certainly, more work remains to be done to encourage insurers to re-enter the Washington construction market. It is too early to tell whether Washington's Condominium Act will serve as a model for other states facing similar problems in the condominium development industry. Hopefully, the task force studying condominium liability will provide recommendations for additional reforms for the legislature to consider

when it convenes in January 2005.

Qualified warranty requirements

Materials and labor warranty

12 months for other than common elements; 15 months for common elements; and 24 months for materials or labor regarding specific trades such as electrical, plumbing, heating, ventilation, air conditioning, and for various elements such as exterior cladding, windows and doors, or any defect that renders the unit unfit to live in.

Building envelope warranty

Minimum coverage for the building envelope is five years, including a defect that permits unintended water penetration so that it causes material damage

Structural defects warranty

Minimum coverage for structural defects (e.g., load-bearing parts of the condo) is 10 years.

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