

CCTF Staff Summary Washington State – Statutory Framework

**February 2, 2006
Reese Lord**

Recent legislation related to construction claims

- 2001-02** **SB 6409 => RCW 64.50**
<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6409&year=2001>
- 2003-04** **SB 5536 => RCW 64.35** (also amends 64.34)
<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5536&year=2003>
- 2005-06** **EHB 1848 => RCW 64.55**
<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1848&year=2006>

Background: The Washington State Legislature passed three bills over the past five years to address construction defect issues.

- SB 6409 requires notice and an opportunity to cure before a civil lawsuit related to a construction defect may be filed.
- SB 5536 clarifies the implied and express warranties in the Washington Condominium Act, requires a higher standard of proof for defect claims, and establishes a voluntary qualified warranty program.
- EHB 1848 addresses construction defect disputes involving multi-unit residential buildings by mandating the use of (1) independent building enclosure specialists during design and construction and (2) alternative dispute resolution procedures.

Analysis: SB 6409 stipulates the process and timeline for filing a construction claim including providing notice to the contractor. The contractor may choose to remedy the defect, settle the claim by monetary payment, or dispute the claim.

The Washington Condominium Act creates a system of warranties of quality – both implied and expressed. Implied warranties extend to the extent of defective materials, sound engineering and construction, workmanship, and compliance with all laws. Plaintiffs claiming a breach of an implied warranty must show that the alleged breach has had an adverse effect on the use of the property. The voluntary warranty insurance program established by SB 5536 provides a framework where insurers may require compliance with specific design, construction practices, and maintenance. The warranty program obligates the consumer to conduct required maintenance, provide timely notice of a defect, and comply with alternative dispute resolution measures.

EHB 1848 evolved out of the work of a study committee formed by SB 5536. (A summary of the study committee's findings is included on the following pages.) The purpose of the new law is twofold:

1) to reduce condominium construction defects leading to water damage; and 2) to motivate earlier, lower-cost settlement of condominium construction defect claims. The law requires:

- An architect or engineer to submit building-enclosure design documents (required for permit)
- A building envelope specialist to certify compliance with plans including inspections during course of construction and field-testing of window for water penetration (required for occupancy)
- Alternative dispute resolution methods including a conference to identify issues, a case schedule plan, mandatory mediation, inspection by a neutral expert, and attorney fee-shifting mechanism.

NOTE: Liability for design and 3rd-party inspections is determined contractually with developer.

CATEGORY	STUDY COMMITTEE FINDINGS	STATUTORY LANGUAGE
<u>Design/Construction Practices</u>		
Building materials	<ul style="list-style-type: none"> ▪ 	<ul style="list-style-type: none"> ▪
Design	<ul style="list-style-type: none"> ▪ Design complexities preclude the use of prescribed building enclosure details. 	<ul style="list-style-type: none"> ▪ An architect or engineer must submit stamped building-enclosure design documents that contain an appropriate level of information to allow construction of the building enclosure.
Training/education	<ul style="list-style-type: none"> ▪ 	<ul style="list-style-type: none"> ▪
Quality Assurance/ Quality Control	<ul style="list-style-type: none"> ▪ Water penetration is a significant issue, particularly within the condominium market. 	<ul style="list-style-type: none"> ▪ All multi-unit, residential, building enclosures shall be inspected by a qualified inspector during the course of construction. ▪ Inspection to include field-testing of a representative sample of windows for water penetration. ▪ Inspection report must certify that the building enclosure has been constructed in substantial compliance with the design documents. ▪ Qualified inspector shall be a third-party free from any pecuniary interest in the project.
<u>Regulatory Environment</u>		
Building codes	<ul style="list-style-type: none"> ▪ 	<ul style="list-style-type: none"> ▪
Consumer education	<ul style="list-style-type: none"> ▪ Homeowners may be losing confidence in Washington condo industry and liability system. 	<ul style="list-style-type: none"> ▪
Insurance/bonding	<ul style="list-style-type: none"> ▪ Insurance rates and exclusions for condominium projects have increased substantially. Some insurers have left the market. 	<ul style="list-style-type: none"> ▪

CATEGORY	STUDY COMMITTEE FINDINGS	STATUTORY LANGUAGE
Licensing	<ul style="list-style-type: none"> ▪ Most inspectors performing building envelope inspections are licensed design professionals. Nevertheless, some building-envelope-related design issues do not require a licensed design professional. ▪ There is no generally recognized training program for building envelope design and inspection. 	<ul style="list-style-type: none"> ▪ 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. ▪ No formal licensure or registration of building-enclosure specialist specified.
Permits/Inspections	<ul style="list-style-type: none"> ▪ 	<ul style="list-style-type: none"> ▪ Stamped building-enclosure design documents required for initial building permit. ▪ The building-enclosure inspection report required for certificate of occupancy. ▪ Building department does not review or have liability for adequacy of building-enclosure design documents or inspection report.
Regulatory/statutory framework	<ul style="list-style-type: none"> ▪ The decline in new condominium construction may present challenges to growth management policies and efforts to increase home ownership. ▪ Design professionals and inspectors are not typically liable to homeowners under current law. ▪ Developers and contractors are liable to homeowners through implied warranties, which extend to defective materials, sound engineering and construction, workmanship, and compliance with all laws. 	<ul style="list-style-type: none"> ▪ Liability for design and 3rd-party inspections is determined contractually with the developer or contractor.
<u>Dispute Resolution</u>		
Arbitration/mediation	<ul style="list-style-type: none"> ▪ Washington courts have concluded that binding arbitration clauses are not permitted. ▪ The intent of the committee was to design a dispute 	<ul style="list-style-type: none"> ▪ Mandatory mediation of construction defect claims including early meeting to define scope of issues.

CATEGORY	STUDY COMMITTEE FINDINGS	STATUTORY LANGUAGE
	<p>resolution process that would lead to better, quicker, and cheaper results.</p>	<ul style="list-style-type: none"> ▪ Arbitration may be elected by both parties. ▪ Binding arbitration may be used under voluntary warranty program. ▪ An offer-of-judgement may be made up to 60 days following mediation specifying the amount of damages the offeror is willing to pay or receive. ▪ If an offer-of-judgement is not accepted but the final judgment is ultimately less favorable to the offeree than the offer-of-judgement, the offeree will be the “non-prevailing” party and will be required to pay the other party’s attorneys fees. ▪ A party may, as a matter of right, request a <i>trial de novo</i> in Superior Court.
<p>Complaint process</p>	<ul style="list-style-type: none"> ▪ 	<ul style="list-style-type: none"> ▪ Claimant must provide notice-of-repair and opportunity-to-cure to contractor. ▪ Plaintiffs claiming a breach of an implied warranty must show adverse impact. ▪ Provides for the appointment of a neutral expert by court/arbitrator (with input from the parties) to prepare a report that specifies the building enclosure problems and suggested corrective measures but does not identify the amount of damages. (This report is not entitled to evidentiary presumption.) ▪ As a general rule, the “non-prevailing” party in a suit will be required to bear the costs of arbitration, mediation, and neutral expert.
<p><u>Post-Construction</u></p>		
<p>Maintenance</p>	<ul style="list-style-type: none"> ▪ 	<ul style="list-style-type: none"> ▪ Owners are responsible for maintenance as a

CATEGORY	STUDY COMMITTEE FINDINGS	STATUTORY LANGUAGE
		condition of a qualified warranty. <ul style="list-style-type: none"> ▪ Warranty providers must provide maintenance schedule to owners.
Warranties	<ul style="list-style-type: none"> ▪ 	<ul style="list-style-type: none"> ▪ Any written affirmation pertaining to the physical characteristics, use, or rights of a unit creates an express warranty. ▪ A seller implicitly warrants a unit is free from defective materials and is constructed in accordance with sound engineering and construction, workmanship, and compliance with all laws ▪ Voluntary warranty program (1 yr. materials/labor, 2 yrs. mechanical/ plumbing/ electrical systems; 5 yrs. building envelope; 10 yrs. structure)