

Home is Where the Heart Is: Construction Defects

By Mathew King

In this day and age of tract housing and planned urban developments, construction defects are being discovered at an alarming rate. Under RCW 64.50.020, there is a process to go through before suing for construction defects.

Construction Defect Claims Process

At least 45 days before a lawsuit is filed, the claimant serves written notice of claim on the construction professional. The notice must state that the claimant asserts a construction defect claim against the construction professional and describe the claim in reasonable detail sufficient to determine the general nature of the defect. Note that this may mean that many, if not all, of the construction defects must be discovered prior to filing notice of the claim.

The construction professional then has 21 days to serve a written response to the notice of the claim. The response must (1) propose to inspect and/or repair, (2) offer to compromise and settle the claim or (3) dispute the claim. If the construction professional disputes the claim, the claimant may file.

Upon receipt of the construction professional's response, the claimant can either (1) reject the inspection or settlement offer and file the lawsuit, or (2) accept inspection or repair. If the claimant accepts the inspection or proposal, they must provide reasonable access for those inspections or repairs.

If the inspection alternative is accepted, the construction professional has 14 days from the date of inspection to (1) offer to remedy the defect, (2) offer to compromise and settle the

claim, (3) dispute the construction defect claim.

The claimant can then accept the repair, accept the settlement offer or file the lawsuit.

Theories of Recovery

Once that process is completed, there are many theories that can be pursued. Perhaps the most common theory is breach of contract. Most sales contracts contain provisions promising quality construction or detailing construction standards. A common term is that the buildings will be built in substantial compliance with the plans and specifications. The approved plans and specifications incorporate the Uniform Building Code, thereby making any Building Code violation a breach of contract.

A related claim is breach of warranty. A vendor of a new home impliedly warrants that the structure is safe and that the foundations are firm and secure as to be fit for the building's intended purpose as a dwelling.¹ This warranty is limited to habitability defects and does not apply to more general construction defects that do not impact the livability of the unit.² Other warranties may be implied by statute³ or expressly in the contract or sales packets.

A negligence claim may also be available if the construction defect results in personal injury. However, there is no "negligent construction" theory in Washington State.⁴ A negligence claim commonly arises when the construction defect results in mold growth and exposure. Note, however, that compliance with the Building Code creates a presumption that the builder exercised due care.⁵

Depending on the relationship between the builder/vendor and the real estate agents, misrepresentation and/or fraud claims may be viable. However, these claims may only be asserted when the builder/vendor knew, or should have known, of the misrepresentations or the existence of construction defects.

Finally, the Washington Consumer Protection Act⁶ may also apply in the construction defect situation, depending on the size of the project and the nature of the other claims asserted.

Defenses to Construction Defect Claims

While there are many theories to find liability, there are also quite a few defenses against liability.

The first defense is a failure to follow the procedure outlined in RCW 64.50.020. Such a failure warrants immediate dismissal of the plaintiff's suit.⁷ While this is not a complete defense (because the plaintiff can comply with the procedure and re-file), it is a valuable tool to pressure an early settlement.

Another defense is the statute of limitations/statute of repose. All construction defects claims must be filed within six years of substantial completion of the construction.⁸ Note, however, that the statute is tolled during the process set forth in RCW 64.50.020. Also note that the statute only deals with construction defect claims and does not apply to personal injury or other negligence claims.⁹

Comparative fault is another viable defense. This defense is premised on the theory that plaintiffs have breached a duty to themselves, thereby causing

some of the damage. This defense may be particularly attractive where the plaintiff is a "do-it-yourselfer" who attempted repairs and/or construction before calling in a professional.

Waiver is another potential defense where the construction professional has attempted to remedy the construction defect and the plaintiff signed off on the repairs. By accepting the repairs, he may waive any potential claims for that defect.

Finally, the economic loss rule is very important in defending against the construction defect claim. Essentially, the economic loss rule prohibits a person from recovering for certain tort claims when a contract exists between parties to allocate liability.¹⁰ In the construction context, the economic loss rule bars claims for negligence against a contractor, subcontractor, or engineer participating in a project, where only economic damages are alleged.¹¹ ■

¹ *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969).

² *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976).

³ See RCW 64.34.405 as an example applicable to condominiums.

⁴ *Stuart v. Coldwell Banker*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987).

⁵ *Nordstrom v. White Metal Roofing*, 75 Wn.2d 629, 453 P.2d 619 (1969).

⁶ Chapter 19.86 RCW

⁷ RCW 64.50.020(6).

⁸ RCW 4.16.310.

⁹ *Pfeifer v. Bellingham*, 112 Wn.2d 562, 772 P.2d 1018 (1989).

¹⁰ *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 211, 969 P.2d 486 (1998).

¹¹ *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.* 1, 124 Wn.2d 816, 821, 881 P.2d 986 (1994).

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