

Construction Solutions Mold and Moisture Management October 26, 2005

Legal and Insurance Issues

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Overview of Presentation

- Engrossed House Bill (EHB) 1848
- Insurance Issues
- Recovery for Mold Related Claims in Washington State
- Response to Claim Involving Mold

EHB 1848 Summary

- Applies to multi unit resident buildings
- Permit applicants must submit building enclosure design by qualified designer
- Unaccountable qualified, independent building inspection report for envelope
- One who timely demands arbitration or neutral expert advances costs
- Mediation within 7 months of filing
- Provision for offers of judgment may shift attorneys fee and cost responsibility

- Effective date of act: August 1, 2005
- Copy of entire act available at <http://www.leg.wa.gov/pub/billinfo/2005-06/>
- Information provided in this presentation is overview, and is not intended to cover all applications and/or exceptions
- What can this mean for
 - Architects
 - Owner's representatives
 - Building owners

To what does EHB 1848 apply?

- . . . to any multiunit residential building for which the permit for construction . . . was issued on or after the effective date [8/1/05] of this act.
- . . . to conversion condominiums . . . [unless] a public offering statement had been delivered prior to the effective date of this act.
- . . . to any action that alleges breach of an implied . . . warranty under chapter 64.34 RCW

Definitions

- "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.
- "Building enclosure design documents" means plans, details, and specifications for the building enclosure that have been stamped by a licensed engineer or architect.
- "Qualified building inspector" means a person satisfying the requirements of section 5 of this act.

New Design Documents Required

- Any person applying for a building permit for construction of a multiunit residential building or rehabilitative construction shall submit building enclosure design documents to the appropriate building department prior to the start of construction or rehabilitative construction of the building enclosure.
- The building department shall not issue a building permit for construction of the building enclosure of a multiunit residential building or for rehabilitative construction unless the building enclosure design documents contain a stamped statement by the person stamping the building enclosure design documents in substantially the following form: "The undersigned has provided building enclosure documents that in my professional judgment are appropriate to satisfy the requirements of sections 1 through 10 of this act."

Lack of Permitting Agency Design Accountability

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

New Inspections Required

- All multiunit residential buildings shall have the building enclosure inspected by a *qualified* inspector during the course of initial construction and during rehabilitative construction (emphasis added)

Qualifications of Inspectors

- (1) A qualified building enclosure inspector:
 - (a) Must be a person with substantial and verifiable training and experience in building enclosure design and construction;
 - (b) Shall be free from improper interference or influence relating to the inspections; and
 - (c) May not be an employee, officer, or director of, nor have any pecuniary interest in, the declarant, developer, association, or any party providing services or materials for the project, or any of their respective affiliates, except that the qualified inspector may be the architect or engineer who approved the building enclosure design documents or the architect or engineer of record. The qualified inspector may, but is not required to, assist with the preparation of such design documents.

Scope of Inspection

- (1) Any inspection required by this chapter shall include . . .
 - (a) Water penetration resistance testing of a representative sample of windows and window installations . . . conducted according to industry standards. Where appropriate, tests shall be conducted with an induced air pressure difference across the window and window installation. Additional testing is not required if the same assembly has previously been tested in situ within the previous two years in the project under construction by the builder, by another member of the construction team such as an architect or engineer, or by an independent testing laboratory; and
 - (b) An independent periodic review of the building enclosure during the course of construction or rehabilitative construction to ascertain whether the multiunit residential building has been constructed, or the rehabilitative construction has been performed, in substantial compliance with the building enclosure design documents.

Inspection Certification

- Upon completion of an inspection required by this chapter, the qualified inspector shall prepare and submit to the appropriate building department a signed letter certifying that the building enclosure has been inspected during the course of construction or rehabilitative construction and that it has been constructed or reconstructed in substantial compliance with the building enclosure design documents, as updated pursuant to section 3 of this act.

Certificate of Occupancy

- The building department shall not issue a final certificate of occupancy or other equivalent final acceptance until the letter required by this section has been submitted. *The building department is not charged with and has no responsibility for determining whether the building enclosure inspection is adequate or appropriate to satisfy the requirements of this chapter.* (emphasis added)

Who spoiled the stew?

- (1) Nothing in this act is intended to, or does:
 - (a) Create a private right of action against any inspector, architect, or engineer based upon compliance or noncompliance with its provisions; or
 - (b) Create any independent basis for liability against an inspector, architect, or engineer.

But wait, maybe somebody gets it!

- The qualified inspector, architect, or engineer and the developer that retained the inspector, architect, or engineer may contractually agree to the amount of their liability to the developer.
- However - - -
 - Is the consumer protected
 - Is consumer protection important

Compliance with Act Mandatory

■ no declarant may convey a condominium unit that may be occupied for residential use in a multiunit residential building without first complying with the requirements of sections 1 through 9 of this act unless the building enclosure of the building in which such unit is included is inspected by a qualified building enclosure inspector, and:

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

Compliance with Act Mandatory

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

Compliance with Act Mandatory

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

Compliance with Act Mandatory

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

Compliance with Act Mandatory

- (e) The declarant provides as part of the public offering statement, consistent with RCW 64.34.410 (1)(nn) and (2) and 64.34.415(1)(b), an inspection and repair report signed by the qualified building enclosure inspector that identifies:
 - (i) The extent of the inspection performed pursuant to this section;
 - (ii) The information obtained as a result of that inspection; and
 - (iii) The manner in which any repairs required by this section were performed, the scope of those repairs, and the names of the persons performing those repairs.

Compliance with Act Mandatory

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

Mandatory Arbitration

- If the declarant, an association, or a party unit owner demands an arbitration by filing such demand with the court not less than thirty and not more than ninety days after filing or service of the complaint, whichever is later, the parties shall participate in a private arbitration hearing.

Appeal from Arbitration

- (4) Upon conclusion of the arbitration hearing, the arbitrator shall file the decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after the filing of the decision and award, any aggrieved party may file with the clerk a written notice of appeal and demand for a trial de novo in the superior court on all claims between the appealing party and an adverse party.

Consequences of failed appeal

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

Mandatory Mediation

- The parties to an action subject to this act shall engage in mediation. Unless the parties agree otherwise, the mediation required by this section shall commence within seven months of the later of the filing or service of the complaint. If the parties cannot agree upon a mediator, the court shall appoint a mediator.

Neutral Expert

■ . . . a party may file a motion . . . requesting the appointment of a neutral expert to address any or all of the disputed issues. . . . Upon such a request, the court or arbitrator shall decide whether or not to appoint a neutral expert or experts. . . .

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

Work of Neutral Expert

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

Neutral expert has no liability

- The neutral expert shall have no liability to the parties for the performance of his or her duties as the neutral expert.

Who pays the costs of mediation, arbitration and neutral expert

- If permit issued after 8/1/05, arbitration and neutral experts fees *advanced* by requesting party and mediator's fees are paid as court orders
- If permit issued before 8/1/05, arbitration and neutral expert fees shall be paid by requesting party
- Court determines responsibility for mediator's fees
- Fee shifting provisions may apply.

Fee Shifting Provision

- Under RCW 64.34.445 attorneys fees may be awarded to prevailing party.
- Section 17 of HB 1848 contains provision for shifting of liability for fees and costs by setting out provisions for extension of offers of funded judgments.
- Fee shifting may also occur as result of unsuccessful appeal from arbitration.

New Public Offering Statement Requirements

- A public offering statement shall contain. . . : A statement that the building enclosure has been designed and inspected as required by sections 2 through 10 of this act, and, if required, repaired in accordance with the requirements of section 10 of this act. [and] and the inspection and repair report or reports prepared in accordance with the requirements of section 10 of this act.

Insurance Issues

- Typical exclusion in CGL policies
- Typical property insurance exclusion
- Instruct insurance agent in writing to obtain competitive quotes for full coverage
- **REVIEW INSURANCE POLICY**

CGL Fungus Exclusion

- “This insurance does not apply to ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ caused directly or indirectly, in whole or in part, by:
 - Any ‘fungus(es)’ or ‘spores’, or
 - Any ... building ... that contains ... any ‘fungus(es)’ or ‘spores’

Property Damage Exclusion

- We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause of event that contributes concurrently or in any sequence to the loss.

–d. Other Types of Loss

■ 2. Fungus, decay

How do you protect yourself

- Insurance may not be an option.
- Build it right.
- Shift risks by contract.
- Devious methods probably will not be effective.

Mold litigation in Washington

- No reported cases addressing recoveries for personal injury claims caused by mold
- Few recoveries for personal injury caused by mold
- Numerous recoveries at trial and settlement for property damage caused by mold.

Recommended Response to Mold Claims

- Treat the matter seriously
- Initiate immediate remedial action
- Cost of litigation is far greater than cost of remediation

Q&A

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