
SENATE BILL 5428

State of Washington

65th Legislature

2017 Regular Session

By Senators Padden and Rossi

Read first time 01/24/17. Referred to Committee on Law & Justice.

1 AN ACT Relating to the costs of litigation for condominium
2 associations; amending RCW 64.34.308, 64.34.445, and 64.55.100; and
3 reenacting and amending RCW 64.34.020.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 64.34.020 and 2011 c 189 s 1 are each reenacted and
6 amended to read as follows:

7 In the declaration and bylaws, unless specifically provided
8 otherwise or the context requires otherwise, and in this chapter:

9 (1) "Affiliate" means any person who controls, is controlled by,
10 or is under common control with the referenced person. A person
11 "controls" another person if the person: (a) Is a general partner,
12 officer, director, or employer of the referenced person; (b) directly
13 or indirectly or acting in concert with one or more other persons, or
14 through one or more subsidiaries, owns, controls, holds with power to
15 vote, or holds proxies representing, more than twenty percent of the
16 voting interest in the referenced person; (c) controls in any manner
17 the election of a majority of the directors of the referenced person;
18 or (d) has contributed more than twenty percent of the capital of the
19 referenced person. A person "is controlled by" another person if the
20 other person: (i) Is a general partner, officer, director, or
21 employer of the person; (ii) directly or indirectly or acting in

1 concert with one or more other persons, or through one or more
2 subsidiaries, owns, controls, holds with power to vote, or holds
3 proxies representing, more than twenty percent of the voting interest
4 in the person; (iii) controls in any manner the election of a
5 majority of the directors of the person; or (iv) has contributed more
6 than twenty percent of the capital of the person. Control does not
7 exist if the powers described in this subsection are held solely as
8 security for an obligation and are not exercised.

9 (2) "Allocated interests" means the undivided interest in the
10 common elements, the common expense liability, and votes in the
11 association allocated to each unit.

12 (3) "Assessment" means all sums chargeable by the association
13 against a unit including, without limitation: (a) Regular and special
14 assessments for common expenses, charges, and fines imposed by the
15 association; (b) interest and late charges on any delinquent account;
16 and (c) costs of collection, including reasonable attorneys' fees,
17 incurred by the association in connection with the collection of a
18 delinquent owner's account.

19 (4) "Association" or "unit owners' association" means the unit
20 owners' association organized under RCW 64.34.300.

21 (5) "Baseline funding plan" means establishing a reserve funding
22 goal of maintaining a reserve account balance above zero dollars
23 throughout the thirty-year study period described under RCW
24 64.34.380.

25 (6) "Board of directors" means the body, regardless of name, with
26 primary authority to manage the affairs of the association.

27 (7) "Common elements" means all portions of a condominium other
28 than the units.

29 (8) "Common expense liability" means the liability for common
30 expenses allocated to each unit pursuant to RCW 64.34.224.

31 (9) "Common expenses" means expenditures made by or financial
32 liabilities of the association, together with any allocations to
33 reserves.

34 (10) "Condominium" means real property, portions of which are
35 designated for separate ownership and the remainder of which is
36 designated for common ownership solely by the owners of those
37 portions. Real property is not a condominium unless the undivided
38 interests in the common elements are vested in the unit owners, and
39 unless a declaration and a survey map and plans have been recorded
40 pursuant to this chapter.

1 (11) "Contribution rate" means, in a reserve study as described
2 in RCW 64.34.380, the amount contributed to the reserve account so
3 that the association will have cash reserves to pay major
4 maintenance, repair, or replacement costs without the need of a
5 special assessment.

6 (12) "Conversion condominium" means a condominium (a) that at any
7 time before creation of the condominium was lawfully occupied wholly
8 or partially by a tenant or subtenant for residential purposes
9 pursuant to a rental agreement, oral or written, express or implied,
10 for which the tenant or subtenant had not received the notice
11 described in (b) of this subsection; or (b) that, at any time within
12 twelve months before the conveyance of, or acceptance of an agreement
13 to convey, any unit therein other than to a declarant or any
14 affiliate of a declarant, was lawfully occupied wholly or partially
15 by a residential tenant of a declarant or an affiliate of a declarant
16 and such tenant was not notified in writing, prior to lawfully
17 occupying a unit or executing a rental agreement, whichever event
18 first occurs, that the unit was part of a condominium and subject to
19 sale. "Conversion condominium" shall not include a condominium in
20 which, before July 1, 1990, any unit therein had been conveyed or
21 been made subject to an agreement to convey to any transferee other
22 than a declarant or an affiliate of a declarant.

23 (13) "Conveyance" means any transfer of the ownership of a unit,
24 including a transfer by deed or by real estate contract and, with
25 respect to a unit in a leasehold condominium, a transfer by lease or
26 assignment thereof, but shall not include a transfer solely for
27 security.

28 (14) "Dealer" means a person who, together with such person's
29 affiliates, owns or has a right to acquire either six or more units
30 in a condominium or fifty percent or more of the units in a
31 condominium containing more than two units.

32 (15) "Declarant" means:

33 (a) Any person who executes as declarant a declaration as defined
34 in subsection (17) of this section; or

35 (b) Any person who reserves any special declarant right in the
36 declaration; or

37 (c) Any person who exercises special declarant rights or to whom
38 special declarant rights are transferred; or

39 (d) Any person who is the owner of a fee interest in the real
40 property which is subjected to the declaration at the time of the

1 recording of an instrument pursuant to RCW 64.34.316 and who directly
2 or through one or more affiliates is materially involved in the
3 construction, marketing, or sale of units in the condominium created
4 by the recording of the instrument.

5 (16) "Declarant control" means the right of the declarant or
6 persons designated by the declarant to appoint and remove officers
7 and members of the board of directors, or to veto or approve a
8 proposed action of the board or association, pursuant to RCW
9 64.34.308 (5) or (6).

10 (17) "Declaration" means the document, however denominated, that
11 creates a condominium by setting forth the information required by
12 RCW 64.34.216 and any amendments to that document.

13 (18) "Development rights" means any right or combination of
14 rights reserved by a declarant in the declaration to: (a) Add real
15 property or improvements to a condominium; (b) create units, common
16 elements, or limited common elements within real property included or
17 added to a condominium; (c) subdivide units or convert units into
18 common elements; (d) withdraw real property from a condominium; or
19 (e) reallocate limited common elements with respect to units that
20 have not been conveyed by the declarant.

21 (19) "Dispose" or "disposition" means a voluntary transfer or
22 conveyance to a purchaser or lessee of any legal or equitable
23 interest in a unit, but does not include the transfer or release of a
24 security interest.

25 (20) "Effective age" means the difference between the estimated
26 useful life and remaining useful life.

27 (21) "Eligible mortgagee" means the holder of a mortgage on a
28 unit that has filed with the secretary of the association a written
29 request that it be given copies of notices of any action by the
30 association that requires the consent of mortgagees.

31 (22) "Foreclosure" means a forfeiture or judicial or nonjudicial
32 foreclosure of a mortgage or a deed in lieu thereof.

33 (23) "Full funding plan" means setting a reserve funding goal of
34 achieving one hundred percent fully funded reserves by the end of the
35 thirty-year study period described under RCW 64.34.380, in which the
36 reserve account balance equals the sum of the deteriorated portion of
37 all reserve components.

38 (24) "Fully funded balance" means the current value of the
39 deteriorated portion, not the total replacement value, of all the
40 reserve components. The fully funded balance for each reserve

1 component is calculated by multiplying the current replacement cost
2 of that reserve component by its effective age, then dividing the
3 result by that reserve component's useful life. The sum total of all
4 reserve components' fully funded balances is the association's fully
5 funded balance.

6 (25) "Identifying number" means the designation of each unit in a
7 condominium.

8 (26) "Leasehold condominium" means a condominium in which all or
9 a portion of the real property is subject to a lease, the expiration
10 or termination of which will terminate the condominium or reduce its
11 size.

12 (27) "Limited common element" means a portion of the common
13 elements allocated by the declaration or by operation of RCW
14 64.34.204 (2) or (4) for the exclusive use of one or more but fewer
15 than all of the units.

16 (28) "Master association" means an organization described in RCW
17 64.34.276, whether or not it is also an association described in RCW
18 64.34.300.

19 (29) "Mortgage" means a mortgage, deed of trust or real estate
20 contract.

21 (30) "Person" means a natural person, corporation, partnership,
22 limited partnership, trust, governmental subdivision or agency, or
23 other legal entity.

24 (31) "Purchaser" means any person, other than a declarant or a
25 dealer, who by means of a disposition acquires a legal or equitable
26 interest in a unit other than (a) a leasehold interest, including
27 renewal options, of less than twenty years at the time of creation of
28 the unit, or (b) as security for an obligation.

29 (32) "Real property" means any fee, leasehold or other estate or
30 interest in, over, or under land, including structures, fixtures, and
31 other improvements thereon and easements, rights and interests
32 appurtenant thereto which by custom, usage, or law pass with a
33 conveyance of land although not described in the contract of sale or
34 instrument of conveyance. "Real property" includes parcels, with or
35 without upper or lower boundaries, and spaces that may be filled with
36 air or water.

37 (33) "Remaining useful life" means the estimated time, in years,
38 before a reserve component will require major maintenance, repair, or
39 replacement to perform its intended function.

1 (34) "Replacement cost" means the current cost of replacing,
2 repairing, or restoring a reserve component to its original
3 functional condition.

4 (35) "Reserve component" means a common element whose cost of
5 maintenance, repair, or replacement is infrequent, significant, and
6 impractical to include in an annual budget.

7 (36) "Reserve study professional" means an independent person who
8 is suitably qualified by knowledge, skill, experience, training, or
9 education to prepare a reserve study in accordance with RCW 64.34.380
10 and 64.34.382.

11 (37) "Residential purposes" means use for dwelling or
12 recreational purposes, or both.

13 (38) "Significant assets" means that the current total cost of
14 major maintenance, repair, and replacement of the reserve components
15 is fifty percent or more of the gross budget of the association,
16 excluding reserve account funds.

17 (39) "Special declarant rights" means rights reserved for the
18 benefit of a declarant to: (a) Complete improvements indicated on
19 survey maps and plans filed with the declaration under RCW 64.34.232;
20 (b) exercise any development right under RCW 64.34.236; (c) maintain
21 sales offices, management offices, signs advertising the condominium,
22 and models under RCW 64.34.256; (d) use easements through the common
23 elements for the purpose of making improvements within the
24 condominium or within real property which may be added to the
25 condominium under RCW 64.34.260; (e) make the condominium part of a
26 larger condominium or a development under RCW 64.34.280; (f) make the
27 condominium subject to a master association under RCW 64.34.276; or
28 (g) appoint or remove any officer of the association or any master
29 association or any member of the board of directors, or to veto or
30 approve a proposed action of the board or association, during any
31 period of declarant control under RCW 64.34.308(5).

32 (40) "Timeshare" shall have the meaning specified in the
33 timeshare act, RCW 64.36.010(11).

34 (41) "Unit" means a physical portion of the condominium
35 designated for separate ownership, the boundaries of which are
36 described pursuant to RCW 64.34.216(1)(d). "Separate ownership"
37 includes leasing a unit in a leasehold condominium under a lease that
38 expires contemporaneously with any lease, the expiration or
39 termination of which will remove the unit from the condominium.

1 (42) "Unit owner" means a declarant or other person who owns a
2 unit or leases a unit in a leasehold condominium under a lease that
3 expires simultaneously with any lease, the expiration or termination
4 of which will remove the unit from the condominium, but does not
5 include a person who has an interest in a unit solely as security for
6 an obligation. "Unit owner" means the vendee, not the vendor, of a
7 unit under a real estate contract.

8 (43) "Useful life" means the estimated time, between years, that
9 major maintenance, repair, or replacement is estimated to occur.

10 (44) "Constructional defect" means a defect in the design,
11 construction, manufacture, repair, or landscaping of a new residence,
12 of an alteration of or addition to an existing residence, or of an
13 appurtenance. "Constructional defect" includes, without limitation,
14 the design, construction, manufacture, repair, or landscaping of a
15 new residence, of an alteration of or addition to an existing
16 residence, or of an appurtenance that:

17 (a) Presents an unreasonable risk of injury to a person or
18 property; or

19 (b) Is not completed in a good and workmanlike manner and
20 proximately causes physical damage to the residence, an appurtenance,
21 or the real property to which the residence or appurtenance is
22 affixed.

23 **Sec. 2.** RCW 64.34.308 and 2011 c 189 s 2 are each amended to
24 read as follows:

25 (1) Except as provided in the declaration, the bylaws, subsection
26 (2) of this section, or other provisions of this chapter, the board
27 of directors shall act in all instances on behalf of the association.
28 In the performance of their duties, the officers and members of the
29 board of directors are required to exercise: (a) If appointed by the
30 declarant, the care required of fiduciaries of the unit owners; or
31 (b) if elected by the unit owners, ordinary and reasonable care.

32 (2) The board of directors shall not act on behalf of the
33 association to amend the declaration in any manner that requires the
34 vote or approval of the unit owners pursuant to RCW 64.34.264, to
35 terminate the condominium pursuant to RCW 64.34.268, to institute,
36 defend, or intervene in litigation or administrative hearings
37 pursuant to RCW 64.34.304, or to elect members of the board of
38 directors or determine the qualifications, powers, and duties, or
39 terms of office of members of the board of directors pursuant to

1 subsection (7) of this section; but the board of directors may fill
2 vacancies in its membership for the unexpired portion of any term.

3 (3) Within thirty days after adoption of any proposed budget for
4 the condominium, the board of directors shall provide a summary of
5 the budget to all the unit owners and shall set a date for a meeting
6 of the unit owners to consider ratification of the budget not less
7 than fourteen nor more than sixty days after mailing of the summary.
8 Unless at that meeting the owners of units to which a majority of the
9 votes in the association are allocated or any larger percentage
10 specified in the declaration reject the budget, the budget is
11 ratified, whether or not a quorum is present. In the event the
12 proposed budget is rejected or the required notice is not given, the
13 periodic budget last ratified by the unit owners shall be continued
14 until such time as the unit owners ratify a subsequent budget
15 proposed by the board of directors.

16 (4) As part of the summary of the budget provided to all unit
17 owners, the board of directors shall disclose to the unit owners:

18 (a) The current amount of regular assessments budgeted for
19 contribution to the reserve account, the recommended contribution
20 rate from the reserve study, and the funding plan upon which the
21 recommended contribution rate is based;

22 (b) If additional regular or special assessments are scheduled to
23 be imposed, the date the assessments are due, the amount of the
24 assessments per each unit per month or year, and the purpose of the
25 assessments;

26 (c) Based upon the most recent reserve study and other
27 information, whether currently projected reserve account balances
28 will be sufficient at the end of each year to meet the association's
29 obligation for major maintenance, repair, or replacement of reserve
30 components during the next thirty years;

31 (d) If reserve account balances are not projected to be
32 sufficient, what additional assessments may be necessary to ensure
33 that sufficient reserve account funds will be available each year
34 during the next thirty years, the approximate dates assessments may
35 be due, and the amount of the assessments per unit per month or year;

36 (e) The estimated amount recommended in the reserve account at
37 the end of the current fiscal year based on the most recent reserve
38 study, the projected reserve account cash balance at the end of the
39 current fiscal year, and the percent funded at the date of the latest
40 reserve study;

1 (f) The estimated amount recommended in the reserve account based
2 upon the most recent reserve study at the end of each of the next
3 five budget years, the projected reserve account cash balance in each
4 of those years, and the projected percent funded for each of those
5 years; and

6 (g) If the funding plan approved by the association is
7 implemented, the projected reserve account cash balance in each of
8 the next five budget years and the percent funded for each of those
9 years.

10 (5)(a) Subject to subsection (6) of this section, the declaration
11 may provide for a period of declarant control of the association,
12 during which period a declarant, or persons designated by the
13 declarant, may: (i) Appoint and remove the officers and members of
14 the board of directors; or (ii) veto or approve a proposed action of
15 the board or association. A declarant's failure to veto or approve
16 such proposed action in writing within thirty days after receipt of
17 written notice of the proposed action shall be deemed approval by the
18 declarant.

19 (b) Regardless of the period provided in the declaration, a
20 period of declarant control terminates no later than the earlier of:
21 (i) Sixty days after conveyance of seventy-five percent of the units
22 which may be created to unit owners other than a declarant; (ii) two
23 years after the last conveyance or transfer of record of a unit
24 except as security for a debt; (iii) two years after any development
25 right to add new units was last exercised; or (iv) the date on which
26 the declarant records an amendment to the declaration pursuant to
27 which the declarant voluntarily surrenders the right to further
28 appoint and remove officers and members of the board of directors. A
29 declarant may voluntarily surrender the right to appoint and remove
30 officers and members of the board of directors before termination of
31 that period pursuant to (i), (ii), and (iii) of this subsection
32 (5)(b), but in that event the declarant may require, for the duration
33 of the period of declarant control, that specified actions of the
34 association or board of directors, as described in a recorded
35 instrument executed by the declarant, be approved by the declarant
36 before they become effective.

37 (6) Not later than sixty days after conveyance of twenty-five
38 percent of the units which may be created to unit owners other than a
39 declarant, at least one member and not less than twenty-five percent
40 of the members of the board of directors must be elected by unit

1 owners other than the declarant. Not later than sixty days after
2 conveyance of fifty percent of the units which may be created to unit
3 owners other than a declarant, not less than thirty-three and one-
4 third percent of the members of the board of directors must be
5 elected by unit owners other than the declarant.

6 (7) Within thirty days after the termination of any period of
7 declarant control, the unit owners shall elect a board of directors
8 of at least three members, at least a majority of whom must be unit
9 owners. The number of directors need not exceed the number of units
10 then in the condominium. The board of directors shall elect the
11 officers. Such members of the board of directors and officers shall
12 take office upon election.

13 (8) Notwithstanding any provision of the declaration or bylaws to
14 the contrary, the unit owners, by a two-thirds vote of the voting
15 power in the association present and entitled to vote at any meeting
16 of the unit owners at which a quorum is present, may remove any
17 member of the board of directors with or without cause, other than a
18 member appointed by the declarant. The declarant may not remove any
19 member of the board of directors elected by the unit owners. Prior to
20 the termination of the period of declarant control, the unit owners,
21 other than the declarant, may remove by a two-thirds vote, any
22 director elected by the unit owners.

23 **Sec. 3.** RCW 64.34.445 and 2004 c 201 s 5 are each amended to
24 read as follows:

25 (1) A declarant and any dealer warrants that a unit will be in at
26 least as good condition at the earlier of the time of the conveyance
27 or delivery of possession as it was at the time of contracting,
28 reasonable wear and tear and damage by casualty or condemnation
29 excepted.

30 (2) A declarant and any dealer impliedly warrants that a unit and
31 the common elements in the condominium are suitable for the ordinary
32 uses of real estate of its type and that any improvements made or
33 contracted for by such declarant or dealer will be:

34 (a) Free from defective materials;

35 (b) Constructed in accordance with sound engineering and
36 construction standards;

37 (c) Constructed in a workmanlike manner; and

38 (d) Constructed in compliance with all laws then applicable to
39 such improvements.

1 (3) A declarant and any dealer warrants to a purchaser of a unit
2 that may be used for residential use that an existing use,
3 continuation of which is contemplated by the parties, does not
4 violate applicable law at the earlier of the time of conveyance or
5 delivery of possession.

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

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

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

13 (7) In a judicial proceeding for breach of any of the obligations
14 arising under this section, the plaintiff must show that the alleged
15 breach has ~~((adversely affected or will adversely affect the~~
16 ~~performance))~~ actually damaged or is likely to cause actual damages
17 of that portion of the unit or common elements alleged to be in
18 breach. ~~((As used in this subsection, an "adverse effect"))~~ The
19 alleged damages must be more than technical and must be material and
20 significant to a reasonable person. To establish ~~((an adverse~~
21 ~~effect))~~ actual damages or the likelihood of damages, the person
22 alleging the breach is not required to prove that the breach renders
23 the unit or common element uninhabitable or unfit for its intended
24 purpose.

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

31 **Sec. 4.** RCW 64.55.100 and 2005 c 456 s 11 are each amended to
32 read as follows:

33 (1) ~~((If the declarant, an association, or a party unit owner~~
34 ~~demands an arbitration by filing such demand with the court not less~~
35 ~~than thirty and not more than ninety days after filing or service of~~
36 ~~the complaint, whichever is later, the parties shall participate in a~~
37 ~~private arbitration hearing. The declarant, the association, and the~~
38 ~~party unit owner do not have the right to compel arbitration without~~
39 ~~giving timely notice in compliance with this subsection. Unless~~

1 ~~otherwise agreed by the parties,))~~ The parties to an action subject
2 to this chapter shall engage in mandatory binding arbitration. The
3 arbitration hearing shall commence no more than fourteen months from
4 the later of the filing or service of the complaint.

5 (2) Unless otherwise agreed by the parties, claims that in
6 aggregate are for less than one million dollars shall be heard by a
7 single arbitrator and all other claims shall be heard by three
8 arbitrators. As used in this chapter, arbitrator also means
9 arbitrators where applicable.

10 (3) Unless otherwise agreed by the parties, the court shall
11 appoint the arbitrator, who shall be a current or former attorney
12 with experience as an attorney, judge, arbitrator, or mediator in
13 construction defect disputes involving the application of Washington
14 law.

15 (4) Upon conclusion of the arbitration hearing, the arbitrator
16 shall file the decision and award with the clerk of the superior
17 court, together with proof of service thereof on the parties. Within
18 twenty days after the filing of the decision and award, any aggrieved
19 party may file with the clerk a written notice of appeal and demand
20 for a trial de novo in the superior court on all claims between the
21 appealing party and an adverse party. As used in this section,
22 "adverse party" means the party who either directly asserted or
23 defended claims against the appealing party. The demand shall
24 identify the adverse party or parties and all claims between those
25 parties shall be included in the trial de novo. The right to a trial
26 de novo includes the right to a jury, if demanded. The court shall
27 give priority to the trial date for the trial de novo.

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

34 (6) If the judgment for damages, not including awards of fees and
35 costs, in the trial de novo is more favorable to the appealing party
36 than the damages awarded by the arbitrator, not including awards of
37 fees and costs, then the court may award costs and fees, including
38 reasonable attorneys' fees, incurred after the filing of the request
39 for trial de novo in accordance with applicable law; provided if such
40 a judgment is not more favorable to the appealing party than the most

1 recent offer of judgment, if any, made pursuant to RCW 64.55.160, the
2 court shall not make an award of fees and costs to the appealing
3 party.

4 (7) If a party is entitled to an award with respect to the same
5 fees and costs pursuant to this section and RCW 64.55.160, then the
6 party shall only receive an award of fees and costs as provided in
7 and limited by RCW 64.55.160. Any award of fees and costs pursuant to
8 subsections (5) or (6) of this section is subject to review in the
9 event of any appeal thereof otherwise permitted by applicable law or
10 court rule.

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