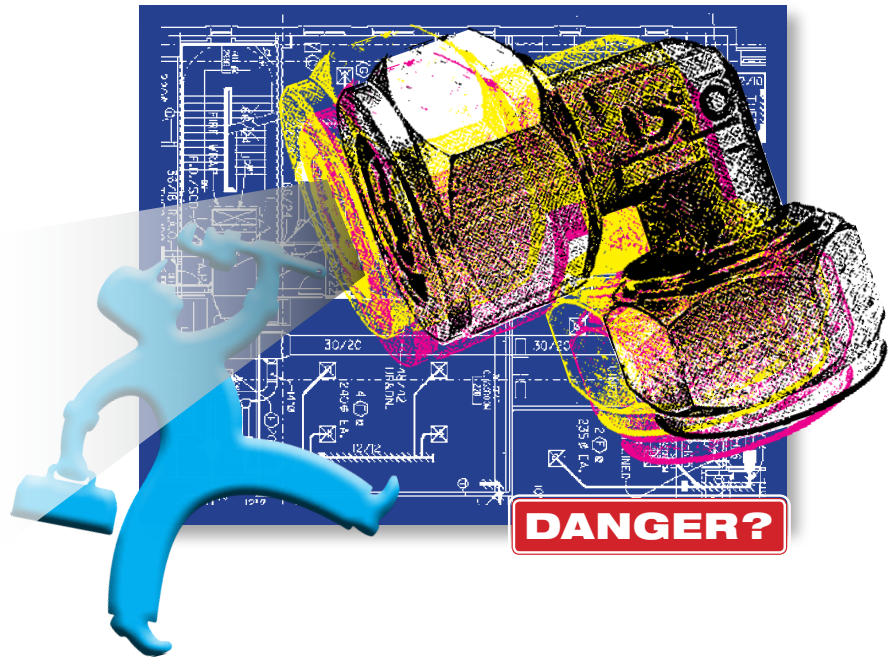




# KITEC Plumbing Update

## What's Coming Down the Pipe?



Much has been written about KITEC-type plumbing in condominium buildings. For those who are not familiar with KITEC-type plumbing, the basics are as follows:

- KITEC (also marketed under other names) is a type of flexible polyethylene piping which was used as a replacement for copper piping in a number of condominium projects built between 1995 and 2007.
- The piping was used in both the common elements and individual units.
- Its flexibility made it easier to work with than traditional copper piping.
- Hot water lines employing KITEC piping have been found to fail in certain conditions. Unlike the familiar “pin-hole” leaks, failure in KITEC pipes usually results in a burst followed by high-volume flooding.
- A class action settlement (worth \$100 million) became effective on January 9, 2012 for replacement claims in the United States and Canada. While condominium corporations are encour-

aged to submit claims, the large number of claims to be paid pro rata will likely result in only nominal recovery per corporation. These amounts will not be finally adjusted until the end of the claims period in 2020 and buildings that have had leaks will be paid out before those that have not.

### Perception versus Reality?

It is worth noting that although it has been 20 years since the first use of KITEC, many corporations have had it in their buildings without incident. This begs the question – were certain batches of the piping or methods of installation more prone to failure than others? We may never be able to answer that question definitively. Anecdotally, at least, many property managers of buildings built with KITEC piping will tell you that they have had far more leaks from other piping than from KITEC.

This may be a case of perception over reality – perception that KITEC piping is

more likely to damage. We in real estate have seen this phenomenon before in the context of other construction materials (such as urea formaldehyde foam installation (UFFI)) where an issue is raised over a construction material issue and, once it seeps into the public consciousness, it can be blown out of proportion and create a stigma that is disproportionate to its actual risk.

Indeed, the Real Estate Council of Ontario (RECO), the governing body for real estate agents in the province, has taken the public position that the existence of KITEC plumbing can be considered a “material fact”, a realtor’s failure of which to disclose could constitute a breach of RECO’s Code of Ethics.

So then, how does a condominium corporation deal with all of this information, and the fears that may accompany it? In particular, how does a condominium corporation deal with disclosure of KITEC in a status certificate? Let’s look at two possible scenarios:

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## 1) The “Imminent Danger” Corporation

While unfortunate, the scenario that is easier to deal with is the corporation in which there has been a KITEC failure or where expert plumbing/engineering advice reveals that there are signs that failure is imminent. For these corporations, there is reasonable evidence to suggest that the KITEC in both the common elements and the units should be replaced, preferably by one contractor retained by the corporation, to ensure consistency. The unit repairs would be billed to the unit owners. The existence of KITEC and replacement efforts should be reflected in paragraph 12 of any status certificates until the replacement project is complete.

## 2) The “Wait-and-See” Corporation

What about cases where a corporation has learned that its building contains KITEC plumbing but which has no reason to believe it is at imminent risk (beyond the general knowledge of KITEC’s flaws)? This is the more difficult situation. The Board is left to balance the competing interests of protecting the Corporation from liability for an incident arising from a KITEC-related leak versus not causing undue alarm (and the related fear of decreased saleability) by disclosing KITEC on a status certificate even though there has never been a leak.

A corporation cannot favour resale prices over complying with the Condominium Act in failing to disclose circumstances which may result in an increase in common expenses. Therefore, in most instances, a building that contains KITEC plumbing ought to disclose this fact in status certificates. Alternatively, if sufficient support can be attained, a building in this situation may opt to replace its KITEC prophylactically so as to remove any mention from its status certificate. There are no easy answers.

## The Blame Game

When owners learn that their corporation contains KITEC, one of the first questions is often - “whom can we sue?” Often, the developer is the first in the crosshairs. After all, say owners, the developer must have known about this! While this may be possible, it is important to remember

that every project is different. It must also be kept in mind that, when KITEC was installed, it was an approved construction product.

KITEC ceased being sold in 2007. The last buildings in which it was installed are nearing a decade in age. Unless there is hard evidence establishing that a declarant knowingly installed a faulty product, it would be difficult to pursue a declarant that probably has no remaining as-

sets, especially where key evidence may be lost to time. In buildings where there have been no incidents, the easiest defence is that there is nothing wrong with the KITEC piping, as indicated by a decade of problem-free performance.

In many cases, the legal fees that would be spent litigating may be better spent on keeping the Corporation well-maintained and competitive in a busy condominium market. **CV**

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