

HOUSE BILL REPORT

E2SHB 1393

As Passed House:

March 11, 2009

Title: An act relating to improving residential real property construction by creating a home construction consumer education office, strengthening warranty protections applicable to residential real property construction, enhancing contractor registration requirements, and establishing worker certification standards.

Brief Description: Addressing residential real property construction improvements through consumer education, warranty protections, contractor registration requirements, and worker certification standards.

Sponsors: House Committee on Ways & Means (originally sponsored by Representatives Springer, Kessler, Eddy, Ormsby, Van De Wege, Liias, Morrell, Roberts, Upthegrove and Sullivan).

Brief History:

Committee Activity:

Judiciary: 2/4/09, 2/19/09 [DPS];

Ways & Means: 2/27/09 [DP2S(w/o sub JUDI)].

Floor Activity

Passed House: 3/11/09, 52-45.

Brief Summary of Engrossed Second Substitute Bill

- Establishes the Office of Consumer Education for Home Construction (Office) to be the primary point of contact for consumers in the area of residential construction.
- Creates a Home Construction Board (Board) within the Office to investigate and mediate construction defect claims.
- Modifies aspects of the common law implied warranty of habitability.
- Requires every contract for the sale or construction of new residential real property to provide written express warranties that meet specified requirements.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Requires applicants for contractor registration to provide additional information and requires contractors who engage in residential construction to pay an annual \$100 consumer education fee;
- Expands the authority of the Department of Labor and Industries to deny or suspend contractor registrations.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Flannigan, Kelley, Kirby, Ormsby and Roberts.

Minority Report: Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Ross and Warnick.

Staff: Edie Adams (786-7180)

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Judiciary. Signed by 14 members: Representatives Linville, Chair; Ericks, Vice Chair; Cody, Conway, Darneille, Haigh, Hunt, Hunter, Kagi, Kenney, Kessler, Pettigrew, Seaquist and Sullivan.

Minority Report: Do not pass. Signed by 8 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Chandler, Hinkle, Priest, Ross and Schmick.

Staff: Trista Zugel (786-7157)

Background:

Consumer Education for Residential Construction.

A number of agencies and entities independently provide consumer education relating to residential contractors and take consumer complaints against contractors. For example, the Department of Labor and Industries (L&I) and the Office of the Attorney General both provide consumer education relating to contractor registration requirements and hiring residential contractors. In addition, private sector entities, such as the Better Business Bureau, provide consumer education regarding residential contractors. These same agencies and entities also take consumer complaints against contractors, but there is no central repository for these complaints and there is little coordination or sharing of complaint information between these entities.

Warranties for Residential Construction.

A homeowner who suffers losses due to defects in the construction of the home may be able to seek redress through a cause of action for breach of contract or for breach of an implied

warranty of habitability. There are no statutory warranties governing residential construction, except in the case of condominiums.

Common Law Implied Warranty of Habitability.

Under the common law, the buyer of a new home may sue the builder of the home for a breach of an implied warranty of habitability. This warranty covers structural defects in the house and its foundation that make the home unfit for its intended purpose. The warranty extends only to the first purchaser who occupies the home and may not be assigned to subsequent purchasers. The sale must be of a commercial nature and the relative bargaining positions of the parties must be inherently unfair to the buyer. The implied warranty of habitability may be disclaimed by the seller if the disclaimer is conspicuous, known to the buyer, and specifically bargained for.

Statutory Warranties for Condominiums.

There are no statutory warranties applicable to new home construction except in the case of condominiums. The Washington Condominium Act (WCA) establishes the following implied warranties: the condominium is suitable for the ordinary uses of real estate of its type and is free from defective materials; and the condominium has been constructed in accordance with sound engineering and construction standards, in a workmanlike manner, and in compliance with all applicable laws. Damages are recoverable only if the breach of the implied warranty had an adverse effect that is more than technical and that would be significant to a reasonable person. Damages that may be awarded for a breach are the cost of repairs. However, if those costs are clearly disproportionate to the diminution in the condominium's market value, damages are limited to the loss in market value.

Right to Cure Statute.

The contractor right to cure statute provides that a homeowner may not file suit against a construction professional for alleged construction defects until the homeowner has given the construction professional notice of the defect and an opportunity to cure the defect within time lines set out in the statute. A suit filed before the owner provides the right to cure notice must be dismissed by the court.

Contractor Registration.

The Contractor Registration Act (Act) requires contractors to register with the L&I. The definition of "contractor" includes any person who undertakes to construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building or other structure.

An applicant for registration must submit a form that contains certain information, including the applicant's unified business identifier number and the names and addresses of owners, principals, members, or officers of the contracting business. The applicant must also file a surety bond and furnish proof of liability insurance. An applicant is not required to take any special classes or tests to register.

The L&I must deny or suspend a contractor registration under certain circumstances, including if the applicant, or a prior business in which the applicant was an owner or principal, has an unsatisfied final judgment in an action based on work performed subject to the Act. The L&I may suspend a registration if an owner, principal, partner, or officer of the

registrant was an owner, principal, or officer of a previous partnership, corporation, or other entity that has an unsatisfied final judgment against it.

Summary of Engrossed Second Substitute Bill:

Office of Consumer Education for Home Construction.

The Office of Consumer Education for Home Construction (Office) is created in the Office of the Attorney General to be the primary point of contact for consumers in matters related to residential construction. The duties of the Office include the following:

- Educate consumers about purchasing homes, contracting for residential construction services, and the legal resources available to consumers.
- Create a pamphlet explaining a homeowner's legal rights and remedies.
- Identify and work collaboratively with agencies and organizations that are already engaged in consumer education efforts in the area of residential construction.
- Develop a uniform manner of receiving, cataloging, analyzing, and responding to consumer complaints about residential construction and tracking claims filed with the Home Construction Board (Board).
- Enter into data-sharing agreements with other agencies with enforcement duties in residential construction to increase assistance to consumers and enforcement of construction-related laws.
- Examine issues involved in establishing a recovery fund to provide compensation to residential real property homeowners through a claim filing process.

The Office must report to the Legislature on an annual basis regarding the collection of complaints and claims filed with the Board. The first report is due on January 1, 2010, with subsequent reports due on November 1 each year. The Office must make recommendations to the Legislature on the creation of a recovery fund by December 1, 2010.

Home Construction Board.

The Home Construction Board (Board) is created within the Office to administer an early resolution mediation program for construction defect claims. The Board consists of the following seven members appointed by the Governor with the consent of the Senate: three members with at least ten years of experience in the construction of residences; one member with at least ten years of experience in the remodeling of residences; one building inspector employed by a city or county; and two members of the general public.

A homeowner must file a construction defect claim with the Board prior to commencing a lawsuit. The Board must dismiss any claim filed against an unregistered contractor. Upon receipt of a claim, the Board initiates a notice and opportunity to cure process by notifying the construction professional of the claim.

If the homeowner and the construction professional do not settle the claim through the notice and opportunity to cure process, the Board must investigate the claim. The Board may use the services of neutral third parties to assist the Board in investigating and assessing the claim. The neutral third party may conduct on-site investigations and make recommendations to the Board. If the parties do not settle the claim based on the findings of the investigation, the claim is mediated by a three-member panel of the Board according to

rules adopted by the Board. All aspects of the mediation proceedings are privileged and not admissible in a court action.

If the parties do not settle the claim through the mediation process, the homeowner may pursue any other right or remedy provided under statutory or common law. However, a homeowner who files an action under the common law implied warranty of habitability waives the right to pursue any applicable express warranty claim, and a homeowner who files a claim under an express warranty waives the right to pursue a claim under the common law implied warranty of habitability.

Consumer Education for Home Construction Account.

The Consumer Education for Home Construction Account (Account) is created to fund the functions of the Office and the Board. The Account is funded with a \$100 annual fee imposed against contractors who engage in residential construction and a fee of up to \$100 that may be imposed by the Board for claims filed with the Board.

Warranties for Residential Construction.

Common Law Implied Warranty of Habitability.

The common law implied warranty of habitability is modified in several respects. First, the implied warranty of habitability may not be contractually disclaimed, waived, or limited. Second, the implied warranty of habitability extends to any homeowner who purchases the property within six years of its construction. Third, the damages that may be awarded for a breach of the implied warranty of habitability are limited to the cost of repairs, or if those are clearly disproportionate to the loss in market value, damages are limited to the loss in market value of the residence.

Express Warranties.

Every contract for the sale or construction of new residential real property must provide for written express warranties to the purchaser or owner of the property. The written express warranties must comply with specified requirements, including the following minimum levels of coverage:

- one-year warranty against defects in workmanship and materials;
- two-year warranty against defects in the wiring, piping and ductwork in the electrical, plumbing, heating, cooling, ventilating, and mechanical systems;
- four-year warranty against damage to basement slabs; and
- ten-year warranty for structural defects.

Additional express warranties requirements include that the coverage: may not be cancelled and must be transferable to subsequent purchasers; provide for timely resolution of claims; provide for settlement of claims for actual cost to correct or for the original sales price of the property; and clearly describe the warranty coverage.

Contractor Registration.

In addition to other required information, an applicant for contractor registration must provide the L&I with the following information:

- whether the work the contractor performs is residential, commercial, or both;
- the social security number, date of birth, and driver's license number of each owner, principal, or officer of the contracting business;

- the registration numbers and unified business identifier account numbers of previously or currently registered businesses involving the same owner, principal, or officer as the applicant;
- disclosure of any bankruptcy proceedings against the applicant;
- information about any construction licenses, certifications, or registrations that have been issued to the applicant by other states; and
- details about any denials, suspensions, revocations, or any construction-related enforcement actions against the applicant by other states.

The L&I must deny or suspend a contractor registration if another state has taken enforcement action against the applicant for activities that would be a violation of Washington's Contractor Registration Act if they had occurred in Washington.

Appropriation: None.

Fiscal Note: Requested on February 25, 2009.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except sections 5-14, regarding the Home Construction Board and residential warranties, which take effect April 1, 2010.

Staff Summary of Public Testimony (Judiciary):

(In support) The purchase of a home is the biggest investment in a person's life. Homeowners deserve to receive adequate quality work when they make this investment. This bill will help address the terrible situation many homeowners face when they discover that their homes have major construction defects and they have no adequate remedies.

The bill is a comprehensive proposal to address construction defects from three approaches. First, it establishes a process for developing certification requirements for construction workers to help keep the bad actors out of the system. Consumers should have confidence that the people who are doing the work know what they are doing. Second, it creates an Office of Consumer Education to help consumers learn how to hire good contractors. The Office will also receive and track complaints against contractors so that the extent of the problem can be identified. Finally, it establishes home construction warranties so that homeowners will have a remedy when defects occur.

The warranties created by the bill are the key component for homeowners who have had their homes ruined by bad contractors. Homeowners do not have adequate remedies. They cannot bring a claim for negligent construction, and they have to sign contracts that severely limit their legal remedies. The implied warranty of habitability is not an adequate remedy and is often waived in the contract. Homeowners need to have access to the courts to hold contractors accountable for shoddy work. The warranties should be broadened to provide greater protection to homeowners consistent with the protections that are currently provided for condominium owners. It makes no sense to provide condominium owners with warranty protections but not other homeowners.

(With concerns) The bill tries to address all aspects of the problem. However, the legal remedies in the bill are not adequate. The warranties in the bill are weaker than most other states' warranties and do not even match the condominium warranties. The warranty should extend for longer and apply to all aspects of the home. Funding sources should be identified to cover the costs of the bill.

The lack of a privity of contract requirement in the bill could create difficulties in determining who is responsible for construction defects. Materials suppliers should not be included in the bill. They are not involved in the construction of the home. There should be more oversight of inspectors to ensure they are fully inspecting the work before the project is allowed to proceed.

(Opposed) The warranties in the bill create new and easier ways to sue builders that will result in increased costs and less availability and affordability of insurance for builders. The warranty language is broad and ambiguous. This ambiguity will create more litigation and greater uncertainty, which will have a dramatic impact on the industry and drive small-business owners out of business. Many construction businesses are barely surviving right now. This is not the time to impose such a burden on the industry.

The vast majority of contractors care about their clients and their work product. Evidence indicates that there are only a small number of contractors who have problems. There are adequate remedies available to consumers, including actions for breach of contract, Consumer Protection Act violations, or actions for breach of implied warranty of habitability. Most contractors provide homeowners with express warranties in their contracts. These warranties are backed by insurance companies. The statutory warranties in this bill are not insurable.

Architects and engineers should not be included in the bill. They will not be covered by professional liability insurance for these warranties and so they will not provide residential design services to homeowners.

Worker certification is not the answer. It will create costs and barriers in an already strapped industry. The focus of the bill should be on the consumer education office and strengthening contractor registrations requirements.

Staff Summary of Public Testimony (Ways & Means):

(In support) This bill protects homeowners from the effects of poor quality construction. Many have suffered significant economic costs because these protections are not in place.

(With concerns) This bill is inadequate to address the real problems. It does not allow consumers to find out whether the contractor has been sued for their work before. The real problem is that home inspections are inadequate. The fiscal note on this bill does not take into account congestion to the court system. Individuals are optimistic that concerns can be addressed, but the bill has too many flaws. A single entity could be held liable for damages. This could be a significant burden.

(Opposed) If bankers find themselves the owners of partially completed structures, the warranty aspects of this legislation will make it very difficult for them to find another contractor to complete a job. This is because they would then take on the liability for any problems with the work done by prior contractors.

Persons Testifying (Judiciary): (In support) Representative Springer, prime sponsor; Paula Cline; Jayne Freitag-Koontz; Cheryl Whitcomb; and Sandy Levy.

(With concerns) Mel Sorenson, Grant Lingg and Karen Weaver, Washington Defense Trial Lawyers; Lisa Erwin, Office of the Attorney General; Natalie McNair-Huff, True Blue Inc.; Shannon Kahn, CLP Resources; Joseph Scuderi; and Blair Anundson, WashPIRG.

(Opposed) Scott Hilderand, Master Builders Association of King and Snohomish Counties; Timothy Harris, Building Industry Association of Washington; Daimon Doyle, Doyle Custom Homes; Jeffrey Hamlett; Architects and Engineers Legislative Council; Timothy Buckley, American Institute of Architects; Chris McCabe, Association of Washington Business; Brian Holtzclaw, The McNaughton Group; Greg Clarke, Foster Pepper PLLC.; Carol DeCoursay; and Scott Hazlegrove, Weyerhaeuser.

Persons Testifying (Ways & Means): (In support) M. Jayne Freitag-Koontz; and Cheryl Whitcomb, Homeowners Against Deficient Dwellings.

(With concerns) Amy Brackenberry, Building Industry Association of Washington; and Mel Sorensen, Washington Defense Trial Lawyers.

(Opposed) Brad Tower, Community Bankers of Washington.

Persons Signed In To Testify But Not Testifying (Judiciary): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): None.