

SENATE BILL REPORT

E2SHB 1393

As Reported by Senate Committee On:
Labor, Commerce & Consumer Protection, March 30, 2009
Ways & Means, April 6, 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, Lias, Morrell, Roberts, Uptegrove and Sullivan).

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

Committee Activity: Labor, Commerce & Consumer Protection: 3/23/09, 3/30/09 [DPA-WM, DNP].

Ways & Means: 4/02/09, 4/06/09 [DPA, DNP].

SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.
Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Franklin and Kline.

Minority Report: Do not pass.
Signed by Senators Holmquist, Ranking Minority Member; Honeyford and King.

Staff: Alison Mendiola (786-7483)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.
Signed by Senators Prentice, Chair; Fraser, Vice Chair, Capital Budget Chair; Tom, Vice Chair, Operating Budget; Keiser, Kline, Kohl-Welles, McDermott, Murray, Oemig, Pridemore, Regala and Rockefeller.

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.

Minority Report: Do not pass.

Signed by Senators Zarelli, Ranking Minority Member; Brandland, Honeyford, Parlette, Pflug and Schoesler.

Staff: Steve Jones (786-7440)

Background: Consumer Education for Residential Construction. There is no central repository for consumer complaints against contractors. A number of agencies and entities, like the Department of Labor and Industries (L&I), the Office of the Attorney General, and the Better Business Bureau, all provide consumer education and receive consumer complaints relating to residential contractors.

Warranties for Residential Construction. A homeowner with construction defects 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. 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.

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.

Contractor Registration. The Contractor Registration Act (Act) requires contractors to register with the L&I. 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.

Summary of Bill (Recommended Amendments): 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; and
- 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 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.

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 Act if they had occurred in Washington.

EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Recommended Amendments): The Attorney General is given expenditure authority over the Consumer Education for Home Construction Account. State and local government

building inspectors are not liable for construction defects. Claims may be filed for construction projects that are commenced after January 1, 2010.

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & CONSUMER PROTECTION COMMITTEE (Recommended Amendments): The responsibilities of the Office of Consumer Education are limited to collecting claims data from the Board, looking into creating a recovery fund and reporting the results of both to the Legislature. Under the Board, a homeowner may bring any available legal action, after going through the mediation process, if not satisfied with the results. Engineers and architects are added back in to the definition of construction professional. State inspectors are excluded from the definition of construction professional.

The State Board Building Council is to develop rules addressing the third party inspection of wood moisture content prior to enclosing. Changes to the Implied Warranty of Habitability include applying it to any defect in design or construction which adversely affects the owner's reasonable enjoyment of the home; it applies to substantial remodels and damages are not limited to the cost of repairs.

Express warranties are struck and replaced with statutory warranties, as provided for in E2SSB 5895. Claims based on fraud must be brought within six years of discovery, or from when an owner should have known. They are not subject to the six-year statute of repose. L&I is to develop recommendations on appropriate certification requirements for persons doing work on the foundation, framing, siding, roofing, windows, and doors. Clarifies that social security numbers and driver's licenses numbers provided as part of the contractor registration/renewal process are not subject to disclosure. Specialty contractors bonds are increased from \$6,000/year to \$12,000/year and general contractors bonds are increased from \$12,000 year to \$24,000/year.

Appropriation: None.

Fiscal Note: Available.

[OFM requested ten-year cost projection pursuant to I-960.]

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect ninety 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 on Engrossed Second Substitute House Bill (Labor, Commerce & Consumer Protection): PRO: Home buyers warranties can be provided in this state under the proposed language by the Homebuyer's Warranty, or four or five other companies. For the express warranty, the builder pays \$500 one time fee and three-tenths of 1 percent per contract. This bill is good for everyone. The Senate bill (5895) is the preferred vehicle. Perfect should not get in the way of good.

CON: Counties are dependent on new construction fees; this bill would hurt new construction. The express warranties referred to have been ruled to be unconscionable. The

Board established isn't balanced; there needs to be more homeowner representation. The Senate bill is preferred, as the warranties similar to warranties provided for condos are better than the express warranties. There is concern about dual exposure with both the implied warranty of habitability and express warranties. The implied warranty is impossible to insure against, not to mention how this will hurt the economy even more. Small contractors would be hurt even more.

OTHER: A different funding mechanism is needed to do what is asked of the Office in Section 1.

Persons Testifying (Labor, Commerce & Consumer Protection): PRO: Representative Springer, prime sponsor; Art Chartraud, Homebuyers Warranty Corporation; Larry Shannon, Washington State Association for Justice.

CON: Marc Boldt, Clark County Commissioner; M. Jayne Freitag-Koontz, citizen; Scott Hildebrand, Master Builders Association of King and Snohomish County; Blair Anundson, Washington Public Interest Research Group; Andrew Villeneuve; Northwest Progressive Institute; Timothy Harris, Building Industry Association of Washington; Cliff Webster, Architects and Engineers Legislative Council.

OTHER: Lisa Erwin, Office of the Attorney General.

Staff Summary of Public Testimony on LCCP Recommended Amended Bill (Ways & Means): PRO: This legislation extends important protections to home buyers who would otherwise be mired in expensive and time-consuming litigation. Families building or remodeling their homes don't budget for costly repairs or litigation costs, so they are at a disadvantage. Construction defects can cause families to lose their homes to foreclosure. Faulty homebuilders have an advantage in litigation because they can prolong the resolution of the claims. Many other states have similar dispute-resolution boards and the frequency of claims is no higher than in other states.

Authorizing the Home Construction Board to authorize expenditures from the dedicated account is unworkable; it should be the Attorney General. The requirement that the mediation panels have at least three members will increase costs and delay case resolutions. The Office of Consumer Education for Home Construction and the Home Construction Board are not necessary; stronger warranty laws will be sufficient. The dispute-resolution process in the bill will simply delay relief.

CON: This bill will simply promote costly litigation and increase the cost of all home construction in the state. By extending the deadline for claims based on fraud, more homeowners will file unjustified fraud claims, which are not covered by the profession liability insurance of architects and engineers. Also, warranty claims are not covered by liability insurance. The Home Construction Board should include architects because architects are subject to the bill. The dispute-resolution process is biased toward the homeowner. For example, the process does not require the homeowner to agree to third-party inspections (unlike the condominium statute).

Persons Testifying (Ways & Means): PRO: Doug Walsh, Attorney General's Consumer Protection Division; Karen Veldheer, M. Jayne Freitag-Koontz, citizen; Blair Anundson, Washington Public Interest Research Group; Andrew Villeneuve, Northwest Progressive Institute; Cheryl Whitcomb, Homeowners Against Deficient Dwellings.

CON: Mel Sorenson, Washington Defense Trial Lawyers; Stan Bowman, American Institute of Architects, Washington Council.