

HOUSE BILL REPORT

HB 1935

As Reported by House Committee On:
Judiciary

Title: An act relating to real property.

Brief Description: Concerning real property.

Sponsors: Representatives Williams, Campbell, Hunt, Moeller, Hasegawa, Conway, Green, Ericks and Flannigan.

Brief History:

Committee Activity:

Judiciary: 2/21/07, 2/27/07 [DPS].

Brief Summary of Substitute Bill

- Creates implied warranties for the construction of new homes or the substantial remodel of homes.
- Provides warranty periods of two, three, five, and 10 years for various aspects and components of construction.
- Provides that any remaining warranty period extends to subsequent purchasers of a covered home.
- Creates a 16-member committee to report to the Legislature by December 31, 2007, on various residential construction issues.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Flannigan, Kirby, Moeller, Pedersen and Williams.

Minority Report: Do not pass. Signed by 3 members: Representatives Warnick, Assistant Ranking Minority Member; Ahern and Ross.

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.

Staff: Bill Perry (786-7123).

Background:

Common Law Warranty of Habitability for Real Property.

At common law in this state, the buyer of a new home may sue the builder of the home for a breach of an implied contractual "warranty of habitability." That is, a builder is held to warrant at least that the house can be lived in. This warranty covers structural defects in the house and its foundation. The warranty extends only to the first purchaser who occupies the home, which must have been purchased soon after construction was completed. The courts have also required that the sale be of a commercial nature and that the relative bargaining positions of the parties must be inherently unfair to the buyer.

Disclosures in the Sale of Real Property.

When residential real estate is sold, certain disclosures must be made by the seller unless disclosure is waived by the buyer. There is a standard disclosure statement form provided in statute. The form covers various items related to the property, including the title to the property, water supply for the property, structural components, and sewer, electrical, plumbing, and other systems and fixtures. Disclosure must also be made about any other "existing material defects affecting the property that a prospective buyer should know about." However, the seller of a newly built home need not make disclosures about structural components or plumbing or electrical systems. A disclosure statement creates no warranties.

Statutory Warranties in the Sale of Other Property.

The Legislature has provided for implied warranties with respect to the sale of some kinds of property.

For instance, the commercial sale of personal property to consumers is covered by the Uniform Commercial Code, which imposes an "implied warranty of merchantability" on the sale of goods. This warranty requires, among other things, that a product will "pass without objection in the trade" and be "fit for the ordinary purposes" for which the product is used.

The Condominium Act also establishes certain implied warranties with respect to condos. The seller of a new condo warrants that the condo is suitable for the ordinary uses of real estate of its type and that it is free from defective materials. The seller also warrants that the condo has been constructed in accordance with sound engineering and construction standards, in a workmanlike manner, and in compliance with all applicable laws. In order to recover damages, a condo owner must show that any breach of this implied warranty has had an adverse effect that is more than technical and that would be significant to a reasonable person.

Mobile homes are covered by statutorily required manufacturing and installation warranties that must run for a minimum of one year.

Statutes of Repose and Limitation.

A legal cause of action accrues when facts sufficient to allow a lawsuit exist. A statute of limitation says how long a plaintiff has to bring a lawsuit after a cause of action has accrued. A statute of repose sets a time limit within which a cause of action must accrue. The discovery

rule is one way of determining when a cause of action has accrued. It says a cause of action accrues when the plaintiff discovers or reasonably should have discovered facts sufficient to allow a law suit. In effect, a statute of repose is a restriction on the discovery rule, *i.e.*, if the cause of action is not discovered within the statute of repose, no lawsuit may be brought.

In the case of claims based on a construction contract, however, a statute provides that the discovery rule does not apply. Construction contract cases are covered by a six-year statute of repose and a six-year statute of limitations. The statute provides that the statute of repose begins at "substantial completion of construction." Since there is no discovery rule, the periods of repose and limitation in effect always run simultaneously, and all claims under a construction contract must be brought within six years of substantial completion of construction.

Claims based on a breach of an implied warranty under the Condominium Act must be brought within four years of accrual. Accrual occurs, regardless of knowledge of a breach, when the purchaser of the condo enters into possession.

Summary of Substitute Bill:

A statutory implied warranty is established for the construction of new residential homes or the substantial remodel of existing residential homes.

Various elements of home construction are warranted for various periods, as follows:

- for two years to be free from any patent defects in materials and workmanship not otherwise covered by a longer period;
- for three years to be free from defects in electrical, plumbing, heating, cooling and ventilation systems, except not longer than any manufacturer's warranty for a particular appliance or other component of one of those systems;
- for five years to be free from defective materials and water penetration, and to be constructed in accordance with sound engineering and construction standards, in a workmanlike manner, and in compliance with all applicable laws, codes and regulations and in compliance with the permitted plans; and
- for 10 years to be free from any structural defects that adversely affect the load bearing function of the home and make it unsafe, unsanitary, or otherwise not reasonably safely inhabitable.

The warranty protection does not apply to:

- parts of a home not covered by the warranty or not included in the purchase price;
- bodily injury;
- materials or work supplied by, or negligent acts of, anyone not acting under the direction of the builder;
- damage due to the owner's failure to mitigate a known defect;
- normal wear and tear;
- insect damage, except when a covered defect is the proximate cause of the insect infestation;

- damage arising while the home is used primarily for nonresidential purposes; and
- acts of God.

In order for a violation of a building code, regulation, or permit to be a "defect" under a warranty, the violation must have an "adverse effect" on the new home. An adverse effect is one that is more than technical and that would be significant to a reasonable person, but an adverse effect need not render the home uninhabitable or unfit for its intended purpose.

The warranty protection applies to the original home purchaser and to subsequent purchasers until the period of the warranty expires.

An owner bringing a warranty claim may recover the costs of repairing a defect and any damage, including incidental and consequential damage, caused by the defect. A builder's liability may not exceed the fair market value of the home without the defect.

An action for breach of a warranty must be brought within six years of when the breach is discovered or reasonably should have been discovered. However, all actions must be brought within 10 years from the beginning of the warranty period.

A warranty may not be waived or modified, and remedies allowed under the warranty do not reduce or replace any other remedy created by law, equity, or agreement.

A 16-member committee on residential construction is created. The committee consists of four legislators, 11 members appointed jointly by the Speaker of the House and the Majority Leader of the Senate, and a chair appointed by the Governor. The committee is to report to the Legislature by December 31, 2007, on its findings regarding:

- the cause, extent, and types of single family residential construction defects;
- existing remedies for defects;
- contractor actions to reduce defects;
- contractor licensing, education and training;
- contractor bonding requirements;
- standards for building inspectors;
- building code changes to avoid water penetration; and
- the costs and benefits of the statutory warranty created by the act.

Substitute Bill Compared to Original Bill:

The substitute bill adds the requirement that a defect have an "adverse effect" on a home. The substitute bill also creates the study committee and delays the effective date of the remainder of the bill until July 1, 2008.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: Sections 1 and 2, which are the portions of the bill other than the study, takes effect July 1, 2008; section 3, relating to the study portion, takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Homebuilding is an especially important part of the state's economy. Military families in particular need assurance that the biggest investment of their lives will meet their expectations. The bill is important consumer protection legislation that will provide minimal protection for homeowners. It will not cause the collapse of the homebuilding industry.

There is a systemic problem in the building industry with defective construction. The warranties sold by builders are bogus at best. These warranties always require arbitration, which is expensive and leads to no solution of the problem. It is very expensive to try to sue a builder.

The study called for in the bill will allow a cost benefit analysis. The bill merely requires builders to be responsible for what they build, and it will not allow claims for insignificant defects. Good builders stand behind their buildings, as all builders should. If all builders just followed basic simple guidelines, there would not be this construction defect crisis. The bill only asks builders to follow sound construction practices.

(Opposed) Providing for the substantive portions of the bill to go into effect presupposes the outcome of the study. The 10-year warranty period is counter to the national trend. Most states are putting restrictions on lawsuits rather than allowing more of them. The Legislature did well over the past several years in responding to the liability insurance crisis in the condominium building industry and should use that as a model for responding to this problem.

The bill creates a perfect storm for a liability insurance crises. The bill will increase insurance rates and reduce the affordability of housing. The bill confuses the distinction between warranties and insurance and will cause insurers to leave the market. We live in a damp climate, and the bill prevents disclaiming liability for mold.

The bill does not go far enough. It does not provide for adequate inspections, and it has no enforcement mechanism. If a builder goes out of business, the remedies in the bill are meaningless.

Persons Testifying: (In support) Representative Williams, prime sponsor; Marlyn Hawkins, Washington Homeowners Coalition; Mark Reikhlín, Western Exterior Services, Inc.; Todd Kilburn, Kilburn Architects, LLC; Mark Jobe, Building Enclosures Design and Inspection Company; and Sandy Levy, Levy von Beck and Associates.

(Opposed) Timothy Harris and Damien Doyle, Building Industry Association of Washington; Shelli Lucas-Kennedy, American Insurance Associates; Cliff Webster, Architects and Engineers Legislative Council; Carol and Mark DeCoursey; Jeff Thomas, Contractors Bonding Insurance Company; and Greg Clark, Washington Defense Trial Lawyers.

Persons Signed In To Testify But Not Testifying: None.