

SB 5895 - S AMD 172

By Senator Holmquist

OUT OF ORDER 3/11/2009

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2 Strike everything after the enacting clause and insert the following:

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"PART 1. NOTICE AND RIGHT TO CURE

5

6 **Sec. 1.** RCW 64.50.010 and 2002 c 323 s 2 are each amended to read
7 as follows:

8 Unless the context clearly requires otherwise, the definitions in
9 this section apply throughout this chapter.

10 (1) "Action" means any civil lawsuit or action in contract or tort
11 for damages or indemnity brought against a construction professional
12 to assert a claim, whether by complaint, counterclaim, or cross-claim,
13 for damage or the loss of use of real or personal property caused by a
14 defect in the construction of a residence or in the substantial
15 remodel of a residence. "Action" does not include any civil action in
16 tort alleging personal injury or wrongful death to a person or persons
17 resulting from a construction defect.

18 (2) "Association" means an association, master association, or
19 subassociation as defined and provided for in RCW 64.34.020(4),
20 64.34.276, 64.34.278, and 64.38.010(1).

21 (3) "Claimant" means a homeowner or association who asserts a
22 claim against a construction professional concerning a defect in the
23 construction of a residence or in the substantial remodel of a
24 residence.

25 (4) "Construction professional" means an architect, builder,
26 builder vendor, contractor, subcontractor, engineer, or inspector,
27 including, but not limited to, a dealer as defined in *RCW

1 64.34.020(12) and a declarant as defined in *RCW 64.34.020(13),
2 performing or furnishing the design, supervision, inspection,
3 construction, or observation of the construction of any improvement to
4 real property, whether operating as a sole proprietor, partnership,
5 corporation, or other business entity.

6 (5) "Homeowner" means: (a) Any person, company, firm,
7 partnership, corporation, or association who contracts with a
8 construction professional for the construction, sale, or construction
9 and sale of a residence; and (b) an "association" as defined in this
10 section. "Homeowner" includes, but is not limited to, a subsequent
11 purchaser of a residence from any homeowner.

12 (6) "Residential construction board claim" means a claim of
13 construction defect for a residence for which either the claimant or
14 the construction professional in good faith believes can be remedied
15 for a total cost of fifty thousand dollars or less.

16 (7) "Residence" means a single-family house, duplex, triplex,
17 quadraplex, or a unit in a multiunit residential structure in which
18 title to each individual unit is transferred to the owner under a
19 condominium or cooperative system, and shall include common elements
20 as defined in RCW 64.34.020(6) and common areas as defined in RCW
21 64.38.010(4).

22 ((+7)) (8) "Response notice" means a written response provided by
23 a construction professional pursuant to RCW 64.50.020(2).

24 (9) "Serve" or "service" means personal service or delivery by
25 certified mail to the last known address of the addressee.

26 ((+8)) (10) "Substantial remodel" means a remodel of a residence,
27 for which the total cost exceeds one-half of the assessed value of the
28 residence for property tax purposes at the time the contract for the
29 remodel work was made.

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32 **Sec. 2.** RCW 64.50.020 and 2002 c 323 s 3 are each amended to read
33 as follows:

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1 (1) In every construction defect action brought against a
2 construction professional, the claimant shall, no later than forty-
3 five days before filing an action, serve written notice of claim on
4 the construction professional. The notice of claim shall state that
5 the claimant asserts a construction defect claim against the
6 construction professional and shall describe the claim in reasonable
7 detail sufficient to determine the general nature of the defect.

8 (2) Within twenty-one days after service of the notice of claim,
9 the construction professional shall serve a written response notice on
10 the claimant by registered mail or personal service. The written
11 response notice shall:

12 (a) Propose to inspect the residence that is the subject of the
13 claim, including a description of the scope of the inspection, and to
14 complete the inspection within a specified time frame. The proposal
15 shall include the statement that the construction professional shall,
16 based on the inspection, offer to remedy the defect, compromise by
17 payment, or dispute the claim;

18 (b) Offer to compromise and settle the claim by monetary payment
19 without inspection. A construction professional's offer under this
20 subsection (2)(b) to compromise and settle a homeowner's claim may
21 include, but is not limited to, an express offer to purchase the
22 claimant's residence that is the subject of the claim, and to pay the
23 claimant's reasonable relocation costs; or

24 (c) State that the construction professional disputes the claim
25 and will neither remedy the construction defect nor compromise and
26 settle the claim.

27 (3)(a) If the construction professional disputes the claim or does
28 not respond to the claimant's notice of claim within the time stated
29 in subsection (2) of this section, the claimant may bring an action
30 against the construction professional for the claim described in the
31 notice of claim without further notice.

32 (b) If the claimant rejects the ((~~inspection proposal or the~~))
33 settlement offer made by the construction professional pursuant to
34 subsection (2) of this section, the claimant shall serve written

1 notice of the claimant's rejection on the construction professional.
2 After service of the rejection, the claimant may bring an action
3 against the construction professional for the construction defect
4 claim described in the notice of claim. If the construction
5 professional has not received from the claimant, within thirty days
6 after the claimant's receipt of the construction professional's
7 response, either an acceptance or rejection of the (~~inspection~~
8 ~~proposal~~ or)) settlement offer, then at anytime thereafter the
9 construction professional may terminate the (~~proposal~~ or)) offer by
10 serving written notice to the claimant, and the claimant may
11 thereafter bring an action against the construction professional for
12 the construction defect claim described in the notice of claim.

13 (4)(a) If the (~~claimant elects to allow the~~) construction
14 professional proposes to inspect (~~in accordance with the construction~~
15 ~~professional's proposal~~) pursuant to subsection (2)(a) of this
16 section, the claimant shall provide the construction professional and
17 its contractors or other agents reasonable access to the claimant's
18 residence during normal working hours to inspect the premises and the
19 claimed defect.

20 (b) Whether conducted by a third party inspector or the
21 construction professional, the person conducting the inspection shall
22 produce a written report which shall describe the scope of the
23 inspection, the findings and results of the inspection, a description
24 of the additional construction necessary to remedy the defect
25 described in the claim, a timetable for the completion of such
26 construction, and an estimate of the costs of repair.

27 (c) Within fourteen days following completion of the inspection
28 and delivery of the inspection report, the construction professional
29 shall serve on the claimant:

30 (i) A written offer to remedy the construction defect at no cost
31 to the claimant(~~, including a report of the scope of the inspection,~~
32 ~~the findings and results of the inspection, a description of the~~
33 ~~additional construction necessary to remedy the defect described in~~
34 ~~the claim, and a timetable for the completion of such construction));~~

1 (ii) A written offer to compromise and settle the claim by
2 monetary payment pursuant to subsection (2)(b) of this section; or

3 (iii) A written statement that the construction professional will
4 not proceed further to remedy the defect.

5 ~~((e))~~ (d) If the construction professional does not proceed
6 further to remedy the construction defect within the agreed timetable,
7 or if the construction professional fails to comply with the
8 provisions of ~~((b))~~ (c) of this subsection, the claimant may bring
9 an action against the construction professional for the claim
10 described in the notice of claim without further notice.

11 ~~((d))~~ (e) If the claimant rejects the offer made by the
12 construction professional pursuant to ~~((b))~~(c)(i) or (ii) of this
13 subsection to either remedy the construction defect or to compromise
14 and settle the claim by monetary payment, the claimant shall serve
15 written notice of the claimant's rejection on the construction
16 professional.

17 (f) For claims that are not residential construction board claims,
18 after service of the rejection notice pursuant to subsection (e) of
19 this subsection (4), the claimant may bring an action against the
20 construction professional for the construction defect claim described
21 in the notice of claim. For claims that are not residential
22 construction board claims, if the construction professional has not
23 received from the claimant, within thirty days after the claimant's
24 receipt of the construction professional's response, either an
25 acceptance or rejection of the offer made pursuant to ~~((b))~~(c)(i) or
26 (ii) of this subsection, then at anytime thereafter the construction
27 professional may terminate the offer by serving written notice to the
28 claimant.

29 (5)(a) Any claimant accepting the offer of a construction
30 professional to remedy the construction defect pursuant to subsection
31 (4)~~((b))~~(c)(i) of this section shall do so by serving the
32 construction professional with a written notice of acceptance within a
33 reasonable time period after receipt of the offer, and no later than
34 thirty days after receipt of the offer. The claimant shall provide

1 the construction professional and its contractors or other agents
2 reasonable access to the claimant's residence during normal working
3 hours to perform and complete the construction by the timetable stated
4 in the offer.

5 (b) The claimant and construction professional may, by written
6 mutual agreement, alter the extent of construction or the timetable
7 for completion of construction stated in the offer, including, but not
8 limited to, repair of additional defects.

9 (6) Any action commenced by a claimant prior to compliance with
10 the requirements of this section shall be subject to dismissal without
11 prejudice, and may not be recommenced until the claimant has complied
12 with the requirements of this section.

13 (7) Nothing in this section may be construed to prevent a claimant
14 from commencing an action on the construction defect claim described
15 in the notice of claim if the construction professional fails to
16 perform the construction agreed upon, fails to remedy the defect, or
17 fails to perform by the timetable agreed upon pursuant to subsection
18 (2)(a) or (5) of this section.

19 (8) Prior to commencing any action with a court or the residential
20 construction board alleging a construction defect, or after the
21 dismissal of any action without prejudice pursuant to subsection (6)
22 of this section, the claimant may amend the notice of claim to include
23 construction defects discovered after the service of the original
24 notice of claim, and must otherwise comply with the requirements of
25 this section for the additional claims. The service of an amended
26 notice of claim shall relate back to the original notice of claim for
27 purposes of tolling statutes of limitations and repose. Claims for
28 defects discovered after the commencement or recommencement of an
29 action may be added to such action only after providing notice to the
30 construction professional of the defect and allowing for response
31 under subsection (2) of this section.

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33 **PART II. RESIDENTIAL CONSTRUCTION BOARD & CONSUMER EDUCATION OFFICE**

34

1 NEW SECTION. **Sec. 3.** For the purposes of sections 4 through 14
2 of this act, the following definitions apply unless the context
3 clearly requires otherwise:

4 (1) "Board" means the residential construction board created
5 under section 4 of this act.

6 (2) "Contractor" means a person registered under chapter 18.27
7 RCW who performed services for the construction, alteration or
8 repair of a residence.

9 (3) "Defect" means a deficiency, an inadequacy or an
10 insufficiency arising out of or relating to the construction,
11 alteration or repair of a residence. "Defect" includes a
12 deficiency, an inadequacy or an insufficiency in a system, component
13 or material incorporated into a residence.

14 (4) "Mediator" means a person selected by the residential
15 construction board to investigate defect complaints under this act.

16 (5) "Owner" means a person that possesses an interest in a
17 residence or in land that is a residential site or has entered into
18 a contract for the purchase of an interest in the residence or land.
19 Owner includes, but is not limited to, a subsequent purchaser of a
20 residence from any owner.

21 (6) "Residence" means a single-family house, duplex, triplex, or
22 quadraplex.

23
24 NEW SECTION. **Sec. 4.** A residential construction board is
25 created in the office of the attorney general. The board shall
26 consist of seven members, appointed by the governor. The governor
27 shall appoint initial members of the board to staggered terms of
28 from two to four years. Thereafter, all members shall be appointed
29 to full four-year terms. Members of the board hold their office
30 until successors are appointed. A vacancy shall be filled by
31 appointment by the governor for the unexpired portion of the term in
32 which the vacancy occurs. Existing members of the board may be re-
33 appointed for additional terms. The board shall select from its
34 members a chair person, vice chair person, and any other officer the

1 board determines is necessary to perform its duties. The board
2 shall consist of:

3 (a) Three members possessing a minimum of ten years of
4 experience in the construction of residences and directly, or as
5 employees or officers of a firm, registered under chapter 18.27 RCW;

6 (b) One member possessing a minimum of ten years of experience
7 in the remodeling of residences and directly, or as employees or
8 officers of a firm, registered under chapter 18.27 RCW;

9 (c) One architect licensed under chapter 18.08 RCW or
10 professional engineer registered under chapter 18.43 RCW;

11 (d) One building inspector employed by a city or county; and

12 (e) One member of the general public.
13

14 NEW SECTION. **Sec. 5.** (1) The board shall form and manage a
15 consumer education office whose duties shall include:

16 (a) Educating consumers about contracting for residential
17 construction services, including the requirements of chapter 18.27
18 RCW and methods available to protect themselves against loss;

19 (b) Producing written and electronic consumer education
20 materials about contracting for residential construction services
21 and legal resources available to consumers;

22 (c) Creating a pamphlet explaining a homeowner's legal rights
23 and remedies and provide contractors and other construction
24 professionals with a downloadable version of the brochure to attach
25 to contracts for purchase and sale of new residential real property
26 or the substantial remodel of existing residential real property.
27 The office shall periodically update this pamphlet;

28 (d) Identifying and working collaboratively with agencies and
29 organizations who are already engaged in consumer education efforts
30 in the area of residential construction, such as the department of
31 labor and industries, the department of licensing, local
32 governments, the construction industry, financial institutions, and
33 other interested organizations and individuals, to increase outreach
34 to consumers;

1 (e) Sharing consumer education materials with and serve as a
2 resource for agencies and organizations who are already engaged in
3 consumer education;

4 (f) Developing a uniform manner of receiving, cataloging,
5 analyzing, and responding to consumer complaints about residential
6 construction;

7 (g) Identifying which agencies and organizations are already
8 receiving complaints and coordinate with them to ensure that all
9 agencies and organizations are requesting the same information from
10 complaining consumers and that all consumers are referred to the
11 office;

12 (h) Entering into data-sharing agreements with the department of
13 labor and industries, local governments, and other agencies with
14 enforcement duties in residential construction to increase
15 assistance to consumers and enforcement of construction-related
16 laws; and

17 (i) Reporting to the legislature on an annual basis the total
18 number of complaints, the nature of the complaints, the monetary
19 value of the complaints, whether complaints have been resolved, and
20 any other information that the office deems relevant. The first
21 report is due on January 1, 2010, and subsequent reports are due on
22 November 1st of each year thereafter.

23 (2) The board shall:

24 (a) Manage a residential construction defect complaint
25 resolution process consistent with the requirements of this act; and

26 (b) Report to the legislature on an annual basis any
27 recommendations for changes in law or rule to improve the quality of
28 residential home construction.

29
30 NEW SECTION. **Sec. 6.** (1) The board shall solicit and review
31 qualifications for mediators based on the following standards:

32 (a) Minimum of ten years of experience in residential
33 construction;

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1 (b) Current contractors registration in the state or former
2 contactors registration in the state, provided registration was not
3 terminated by an action of the department of labor and industries;
4 and;

5 (c) Other qualifications the board may deem appropriate.

6 (2)(a) The board shall select mediators the board deems, by a
7 majority vote, meet the qualifications for the board. There shall
8 be no right of appeal of a selection decision made by the board.
9 All qualified mediator names shall be compiled into a single ranked
10 list. Names of newly selected mediators shall be added to the
11 bottom of the list.

12 (b) Mediators shall not be employees of the board or the state.
13 Mediators shall be paid on a per case basis at a rate set by the
14 board.

15 (c) Mediators may be removed from the list for any reason by a
16 vote of the majority of members of the board. There shall be no
17 right of appeal of a removal decision made by the board.

18
19 NEW SECTION. Sec. 7. (1) The board shall assign a mediator to
20 each complaint filed with the board. The board shall assign the
21 mediator from the top of the list of mediators approved by the board
22 by providing written notice to the arbitrator, owner, and contractor
23 of the assignment.

24 (2) A mediator may reject an assignment for any reason by
25 providing written notice to the board within five business days of
26 receiving the assignment notice from the board. A mediator shall
27 reject an assignment if the mediator is aware of any common
28 financial interest between the mediator and the owner or contractor.

29 (3) The mediator shall disclose in writing within three business
30 days of receiving the assignment notice to the board, the owner, and
31 the contractor any pre-existing personal or professional
32 relationships between the mediator and the owner or the contractor.
33 Presence of a pre-existing relationship shall not be a basis for
34 requiring a mediator to reject an assignment.

1 (4) The owner may reject up to one mediator for any reason, by
2 providing written notice to the board of the rejection within five
3 business days of receiving the assignment notice from the board.

4 (5) The contractor may reject up to one mediator for any reason,
5 by providing written notice to the board of the rejection within
6 five business days of receiving the assignment notice from the
7 board.

8 (6) If a mediator assignment is rejected for any reason, the
9 board shall assign the next mediator in the manner provided for
10 under this section.

11 (7) After the mediator is assigned to a complaint, regardless of
12 whether the mediator rejects or is rejected from further
13 investigation of the complaint, the mediator's name shall be added
14 at the bottom of the list of approved mediators and shall be
15 available for assignment to future cases as the mediator's name
16 advances on the list.

17
18 NEW SECTION. **Sec. 8.** If an owner files a complaint with the
19 board against any contractor to assert a claim arising out of or
20 related to the construction, alteration or repair of a residence
21 located in this state and the owner has not followed the procedure
22 set forth in chapter 64.50 RCW, the board shall dismiss the
23 complaint without prejudice.

24 NEW SECTION. **Sec. 9.** The board shall have the jurisdiction to
25 receive all owner complaints regarding residential construction
26 defects.

27
28 NEW SECTION. **Sec. 10.** A complaint under section 12 of this act
29 must arise from the performance, or a contract for the performance,
30 of work that requires a contractor registered under chapter 18.27
31 RCW.

32
33 NEW SECTION. **Sec. 11.** The board must receive the complaint no
34 later than six years after the completion of construction as defined

1 by RCW 4.16.310. If a claim is filed with the board within the
2 applicable statute of limitations, the filing of the claim tolls the
3 statute of limitations for the period of time until the board issues
4 a decision under section 12 of this act.

5
6 NEW SECTION. **Sec. 12.** (1) Prior to commencing any
7 construction defect action with a court or filing a claim under a
8 written express warranty complying with section 16 of this act, an
9 owner must submit a complaint to the board.

10 (2) The owner must file the complaint with the board in a form
11 prescribed by the board.

12 (3) The board shall suspend processing of the complaint if:

13 (a) The amount of the complaint exceeds \$50,000; or

14 (b) The board determines that the nature or complexity of the
15 dispute described in the complaint is such that a court is the
16 appropriate forum for the adjudication of the dispute; or

17 (c) The board determines the contractor is not registered under
18 chapter 18.27 RCW.

19 (4) The board may dismiss or close the complaint if any of the
20 following conditions apply:

21 (a) The owner does not respond to a mediator request and the
22 request is necessary to the mediator's investigation of the
23 complaint;

24 (b) The owner does not allow the mediator to conduct one or more
25 on-site meetings to mediate or investigate the complaint; or

26 (c) The owner does not permit the contractor against whom the
27 complaint is filed to be present at an on-site investigation made by
28 the mediator; or

29 (d) The mediator determines that the contractor against whom the
30 complaint is filed is capable of complying with recommendations made
31 by the mediator relative to the complaint, but the owner does not
32 permit the contractor to comply with the recommendations.

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1 (5) Upon acceptance of the complaint, the board shall assign a
2 mediator to the complaint in the form and manner prescribed by this
3 act.

4 (6) The mediator shall initiate proceedings to determine the
5 validity of the complaint.

6 (7) At a minimum, the mediator shall conduct one or more on-site
7 meetings to mediate or investigate the complaint.

8 (8) If the mediator is unable to resolve the complaint under
9 this section, the mediator shall issue a written decision, including
10 an indication of an amount of damages. In determining whether a
11 complaint should result in an award of damages, the mediator shall
12 consider:

13 (a) The fitness of the materials selected and used by the
14 contractor;

15 (b) Whether the work was performed in accordance with accepted
16 trade practices;

17 (c) Whether the work was performed in compliance with code
18 regulations in effect at the time it was constructed;

19 (d) Whether the resulting building or improvement was suitable
20 for its intended purpose; and

21 (e) Failure of the current or former owner to conduct normal and
22 routine maintenance of the residence.

23 (9) The mediator shall deliver the decision to the board. The
24 board shall forward the decision to the owner and contractor.

25 (10) The basis for a mediator's decision identified in
26 subsection (8) of this section does not constitute a legal cause of
27 action.

28
29 NEW SECTION. **Sec. 13.** Notwithstanding the provisions of
30 chapter 7.06 RCW, any other provision of law or any contractual
31 provision, failure of a contractor to initiate mediation proceedings
32 within thirty days after notification by the board of a complaint
33 under section 12 of this act is a waiver by the contractor of any
34 contractual right to mediation or arbitration.

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NEW SECTION. **Sec. 14.** (1) Within twenty days after the filing of the mediator's decision with the board, the owner or the contractor may reject the decision of the mediator by delivering written notice of the rejection to the board. The board shall forward written notice of the rejection to the owner and the contractor within five days of receiving the rejection of the decision.

(2) Upon receipt of written notice of rejection of the mediator's decision, an owner pursuing a claim under an implied warranty of habitability may file with the clerk of a superior court with jurisdiction a written notice of request for a trial de novo on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded. Any owner pursuing a claim under an express written warranty may file the claim in the form and manner prescribed by the warranty contract.

Sec. 15. RCW 18.27.075 and 2001 c 159 s 14 are each amended to read as follows:

(1)The department shall charge a fee of one hundred dollars for issuing or renewing a certificate of registration during the 2001-2003 biennium. The department shall revise this amount at least once every two years for the purpose of recognizing economic changes as reflected by the fiscal growth factor under chapter 43.135 RCW.

(2) The department shall also charge a fee of one hundred dollars per year for issuing or renewing a certificate of registration. The department shall remit this fee, without overhead or administrative expense, to the office of the attorney general for the exclusive purpose of funding the activities of the residential construction board and office of consumer education created by this act.

PART III. WARRANTIES

1 NEW SECTION. **Sec. 16.** (1) Except as provided in subsections (2)
2 or (3) of this section, the implied warranty of habitability may not
3 be contractually disclaimed, waived, modified, or limited. The
4 implied warranty of habitability transfers from the homeowner to
5 subsequent purchasers. Subsequent purchasers of a residence may
6 bring an action for breach of implied warranty of habitability.

7 (2) The implied warranty of habitability may be disclaimed or
8 waived if the contractor or seller provides to the homeowner a
9 transferable written express warranty at the time of closing that
10 meets or exceeds the standards approved by the United States
11 department of housing and urban development.

12 (3) The implied warranty of habitability may be modified or
13 limited, provided the contractor performing work disclaims
14 specifically listed components or features of the construction
15 selected or specified by the owner.

16 (4) A disclaimer, waiver, modification, or limitation of an
17 implied warranty of habitability under subsection (2) or (3) of this
18 section must be:

- 19 (a) Written;
- 20 (b) Conspicuous;
- 21 (c) Typed or printed in ten-point bold face type; and
- 22 (d) Signed by the homeowner,

23 (5) Damages awarded for a breach of the implied warranty of
24 habitability are the cost of repairs. However, if it is established
25 that the cost of repairs is clearly disproportionate to the loss in
26 market value caused by the breach, damages are limited to the loss
27 in market value.

28 (6) This section shall not apply to condominium units created
29 pursuant to chapters 64.32 or 64.34 RCW.

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31 NEW SECTION. **Sec. 17.** Sections 3 through 14 and section 16 of
32 this act are each added to chapter 64.50 RCW.

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1 **2SSB 5895** - S AMD 172

2 By Senator Holmquist

3 OUT OF ORDER 3/11/2009

4 On page 1, line 1 of the title, after "Relating to", strike the
5 remainder of the title and insert "establishing a residential
6 construction board; amending RCW 18.27.075, 54.50.010, and 64.50.020;
7 and adding new sections to chapter 64.50 RCW."

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--- END ---