HOUSE BILL REPORT
ESHB 2565

As Passed House:
February 14, 2002

Title: An act relating to construction defect claims asserting property loss and damage.

Brief Description: Requiring an opportunity for a cure before an action on a construction defect may be filed.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Fromhold, Benson, Miloscia, Quall, Carrell, Eickmeyer, Morell, Barlean, Chase, Rockefeller, Lantz, Simpson, Kessler and Haigh).

Brief History:
Committee Activity:
Judiciary: 1/29/02, 2/1/02 [DPS].
Floor Activity:
Passed House: 2/14/02, 97-1.

Brief Summary of Engrossed Substitute Bill

- Provides that the builder or substantial remodeler of a residence must be given an opportunity to cure a construction defect before a lawsuit may be filed against the builder.
- Provides that the time required for an opportunity to cure a defect extends the period of time otherwise allowed for filing a lawsuit.
- Provides that when filing a suit against a builder, the plaintiff must list the alleged defects and must identify which construction professional is responsible for the defect.

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; Hurst, Vice Chair; Carrell, Ranking Minority Member; Boldt, Dickerson, Esser, Jarrett and Lovick.

Minority Report: Without recommendation. Signed by 1 member: Representative Lysen.

Staff: Bill Perry (786-7123).

Background:

In most instances, a lawsuit may be commenced by filing a complaint or serving the defendant with a summons within the period of the applicable statute of limitation. Generally, a plaintiff is not required to take other specific steps prior to commencing the suit. One exception to this general rule is found in the requirement that a tort lawsuit against a state or local government must be preceded by the presentment of the claim to the government at least 60 days before a suit may be commenced.

Generally, the complaint that commences a lawsuit need only contain a "short and plain statement of the claim" and a showing that the plaintiff is entitled to the relief sought. Procedures are available for the defendant to seek clarification and more specificity in the statement of the claim. Once a lawsuit is commenced, both parties also may use various forms of discovery to better understand the nature and strength of a claim.

Various statutes of limitations control the periods of time within which a lawsuit may be brought. These periods begin after a cause of action has accrued. For instance, a lawsuit for breach of contract must be brought within six years of the breach. For most tort cases, the statute of limitations is three years. If one of the many specific statutes of limitations does not apply to a particular kind of case, the default period is two years from accrual.

In some kinds of cases, a statute of "repose" may apply in addition to a statute of "limitations." While a statute of limitations requires an action to be brought within a certain time of its accrual, a statute of repose says that the accrual itself must occur within a certain time. A statute of repose applies to claims against building contractors. It provides that a cause of action must accrue within six years after substantial completion of a project, or no lawsuit can be brought. If the period of repose has expired, the statute of limitations never even begins to run. If a cause of action does accrue within those six years, however, then the statute of limitations that applies begins to run from the time of the accrual.

Under the state's condominium law, a four year statute of limitations generally applies to lawsuits for breaches of express or implied warranties as to the quality of construction. Express warranties are assertions that a builder has made with respect to the condominium and that were relied upon by the buyer. Implied warranties are statutorily created and generally may not be waived by the buyer of a residential unit unless the waiver is specified in writing and has become a part of the bargain for purchase of the unit. Implied warranties by the seller of a condominium include warranties that:

- The units and common areas are suitable for ordinary uses of real estate of that type;
- Any construction is free from defective materials; and

- Construction is in accordance with sound engineering and construction standards, and has been done in a workmanlike manner and in compliance with applicable laws.

Summary of Engrossed Substitute Bill:

Several requirements are placed on a homeowner who wishes to bring a lawsuit against a builder or others for property damage due to alleged defects in the construction of a residence. These requirements apply to the new construction of a residence and to any remodel that costs more that half of the assessed value of the residence. These requirements must be met before a lawsuit can be filed. Requirements are also placed on condominium association boards of directors when they do bring such a lawsuit.

Requirements Before A Lawsuit Can Be Filed.
Before a lawsuit can be filed alleging a defect in the construction of a residence, the homeowner must serve notice on the construction professional alleged to be responsible for the defect. The following terms are defined:

- "Homeowner" includes any person or entity, including a condominium association, that contracts with a construction professional for the construction or sale of a residence. The term also includes a subsequent purchaser from an original homeowner.
- "Residence" includes single family houses, residential structures of four or less units, and condominium units.
- "Construction professional" includes builders, architects, builder vendors, contractors, subcontractors, engineers and others.

The claimant's notice must be given at least 45 days before a suit is filed and must describe the claim in "reasonable detail." The notice must be served by personal service or registered mail. This notice requirement applies to any property damage claim by a homeowner against a construction professional.

Within 21 days of receiving the notice, the construction professional must respond to the homeowner. In the response, the construction professional must do one of the following:

- Offer to inspect the alleged defect and then, based on the inspection, either remedy the defect, pay for it, or dispute the homeowner's claim;
- Offer to settle the claim by paying for the defect, including possibly buying the residence back from the homeowner; or
- Dispute the claim.

If the construction professional fails to respond, or disputes the claim, or the homeowner rejects an offer of inspection or settlement, then the homeowner may file a lawsuit.

Procedures are also laid out for situations in which the homeowner agrees to an

inspection or agrees to an offer of settlement.

If the construction professional fails to perform agreed to repairs, or fails to meet an agreed to timetable, the homeowner may file the lawsuit.

If, after agreed upon repair work has been done, the homeowner discovers defects that were not reasonably discoverable at the time of the repair, the homeowner may sue for those defects only after complying again with the notice requirements of the act.

The serving of notices required by the act tolls any applicable statute of limitations or repose until 60 days after the end of the period during which bringing a lawsuit is barred under this act.

Requirements When A Lawsuit Is Filed.
After a homeowner has served the required notice on the construction professional, if the matter has not been resolved and a lawsuit has been commenced, the homeowner must file with the court and serve on the defendant a list of the alleged construction defects. The list must be filed and served within 30 days after the lawsuit has been commenced and must specify the construction professional responsible for each alleged defect.

Additional Requirements Before A Condominium or Homeowners' Association Can File a Lawsuit.
Before the board of directors of a condominium or homeowners' association may sue a construction professional on behalf of two or more owners, the board must notify all residents regarding the intended suit. The notice must state the nature of the suit and the expected expenses and fees to be incurred in bringing the suit.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill will encourage parties to resolve differences without litigation. It is designed to result in the curing of construction defects without cutting off anyone's rights. There is a crisis in liability insurance availability in the homebuilding industry, especially with respect to condominium construction. Even builders who have never been sued are finding it impossible to get insurance coverage, especially for multiple unit construction. Without liability insurance, builders cannot legally work. There has been excessive litigation caused by the development of a cottage industry that encourages homeowners to find defects. Some of the defects that have resulted in huge awards have been mold problems that are themselves caused by builders having to comply with energy codes that require virtually airtight construction.

The bill will result in construction defects being cured, will help produce affordable housing, and will reduce court congestion.

Testimony Against: The bill completely unbalances the condominium act which represents a carefully worked out compromise among the various interest groups. Among other things, the condominium act has a short and strict four year statute of limitations that can result in a homeowner becoming legally responsible for defects in construction that were impossible to discover within the time limit. Individual unit owners have none of the resources or knowledge available to the builder when it comes to discovering defects. The bill just makes it all the more likely that homeowners will be responsible for defects. Builders can already do all of the things allowed in the bill to cure defects, but they won't, and the bill is just a way to frustrate homeowners' complaints. The procedures in the bill will not solve the cost of housing or insurance problems because the defects are real, and they will still be very expensive to fix. The real problem is that the current building inspection process is completely inadequate.

The bill is one-sided, burdensome, unnecessary, and unworkable. The way to avoid the current crisis in liability insurance availability is for builders to build it right the first time.

Testified: (In support) Representative Fromhold, prime sponsor; Jodi Slavik, Building Industry Association of Washington; Jeff Hansell, Building Industry Association of Washington; Larry Stout, Washington Association of Realtors; and Gary Smith, Independent Business Association.

(Opposed) Jim Strichartz, Law Offices of James L. Strichartz; Jo Flannery, Levin & Stein; Bo Barker, Barker, Martin & Merchant; Dean Martin, Barker, Martin & Merchant; Jack Mooney, homeowner; Ernie Hineman, homeowner; Robert Fjeldstad, Shumway Homeowners Association; and Marshall Johnson, CWD Group.