

# HOUSE BILL REPORT

## ESSB 5550

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**As Reported by House Committee On:**  
Judiciary

**Title:** An act relating to real property.

**Brief Description:** Concerning real property.

**Sponsors:** Senate Committee on Consumer Protection & Housing (originally sponsored by Senators Weinstein, Kohl-Welles, Murray, Kauffman, Kastama, Tom, Rockefeller, Pridemore, Spanel, Marr, Haugen, Eide, McAuliffe, Hargrove, Hatfield, Fraser, Kilmer, Jacobsen, Brown, Keiser, Shin, Franklin, McCaslin, Poulsen, Oemig, Kline and Regala).

**Brief History:**

**Committee Activity:**

Judiciary: 3/23/07, 3/28/07 [DPA].

**Brief Summary of Engrossed Substitute Bill**  
**(As Amended by House Committee)**

- 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 17-member committee to report to the Legislature by December 31, 2007 on various residential construction issues.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. Signed by 7 members: Representatives Lantz, Chair; Goodman, Vice Chair; Flannigan, Kirby, Moeller, Pedersen and Williams.

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*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 3 members: Representatives Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member and Ross.

**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 lawsuit. 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.

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### **Summary of Amended 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 economic 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 homeowner warranty claim is not subject to the general construction claim statutes of repose and limitations.

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 17-member committee on residential construction is created. The committee consists of four legislators, 12 members appointed jointly by the Speaker of the House of Representatives 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.

#### **Amended Bill Compared to Engrossed Substitute Bill:**

The amendment adds one more member to the Residential Construction Study Committee. The member is a representative of the Washington low-income housing alliance to be appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date of Amended Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed, except for section 1 and 2, relating to everything other than the study, which takes effect July 1, 2008.

**Staff Summary of Public Testimony:**

(In support) The purchase of a home is part of the American dream and is the biggest investment in most people's lives. People save and plan for years and then commit themselves to 30 years of payments to buy a home, yet purchasers of everything from condominiums to toasters get more warranty protection than home buyers. At least 33 states have protections for home buyers greater than the protections found in Washington. Protections in other states include warranties as well as causes of action for negligent construction.

The warranty policies that builders offer to buyers are a sham.

Washington has no negligence cause of action for home construction. Homeowners are left with very little recourse and are forced to buy warranty policies from builders that are of little value. The industry will never offer protection to homeowners without this bill in place. A warranty needs to be in place before the study committee does it work. That is what happened with the Condominium Act.

Predictions about the bill's effect on insurance costs are speculative. The bill will not make lawyers rich. The home building industry is doing well in states with strong homeowner protections.

Builders should have to stand behind their products. The person who makes a product and makes money on the sale of the product should be responsible for the quality of the product. Builders control the process.

(Information only) The bill creates mandates, and therefore costs, that will hit small and minority owned businesses the hardest. The complaint rate against home builders is lower than that against lawyers.

(Opposed) There is not a large problem with home building quality in Washington. The bill will harm good builders and drive more of the economy underground where unqualified or unscrupulous builders are. The Pacific Northwest region has one of the lowest incidences of construction defects in the country.

The bill would be the most stringent in the country. There are not 33 states with more stringent requirements than Washington's law. California's law has only a one-year warranty and has an alternative dispute resolution provision.

The bill will scare insurers and will increase premiums for builders, some of whom will stop building in the state. If the bill causes even half of the premium increase experienced last year, it will raise the price of a new home in the state by 10 percent. The insurance market is

not very robust right now and the bill will make it more difficult for insurers to predict their exposure to loss. The bill turns the clock back on recent reforms.

It is important to protect homeowners, but the bill is unfair and will be particularly hard on small builders. Legislation should target the few bad builders.

The bill's reliance on building code standards is a mistake. The building code is designed to ensure basic safety and is not a good basis for a warranty. The bill relies on a very elastic standard for judging defects. Warranties need clear objective standards.

The bill is fundamentally flawed and will create a nightmare for those who have to figure out how various statutes of limitation and repose interact.

The bill puts the cart before the horse. A good study should be done before any legislation is passed, not after.

**Persons Testifying:** (In support) Senator Weinstein, prime sponsor; Scott Stafne; Aaron Belenky; Dennis Coons; Kevin Chandos; Sandy Levy; and Marlyn Hawkins, Washington Homeowners Coalition.

(Information only) Paul Guppy, Washington Policy Center.

(Opposed) Timothy Harris and Greg Clark, Building Industry Association of Washington; Daimon Doyle, Doyle Custom Homes; John Friedman, Friedman Homes; Jeffrey Thomas, Contractors Bonding and Insurance Company; Mel Sorensen, Property Casualty Insurers Association of America; Terence Cooke, Professional Warranty Service Corporation; Larry Mortin, Home Buyers Warranty; Shelli Lucas-Kennedy, American Insurance Association; Chris McCabe, Association of Washington Business; Gene Davis, Finish Works, LLC; Scott Hildebrand, Master Builders Association; and Mark O'Donnell.

**Persons Signed In To Testify But Not Testifying:** Morton James, Morton James Architects; Dirk Holt, Washington Defense Trial Lawyers; Kerry Lawrence; Lawrence and Finkelstein, PLLC; and Cliff Webster, Washington Construction Industry Council, and Architects and Engineers Legislative Council.