

SENATE BILL REPORT

ESB 5334

As Passed Senate, February 25, 2019

Title: An act relating to the Washington uniform common interest ownership act.

Brief Description: Concerning the Washington uniform common interest ownership act.

Sponsors: Senators Pedersen, Padden, Mullet, Fortunato, Carlyle, Rivers, Kuderer, Dhingra, Palumbo, Frockt, Wellman, Salomon, Saldaña, Keiser, O'Ban, Billig, Holy and Darneille.

Brief History:

Committee Activity: Law & Justice: 1/28/19, 1/31/19 [DP].

Floor Activity:

Passed Senate: 2/25/19, 49-0.

Brief Summary of Engrossed Bill

- Modifies the implied warranties for construction of a condominium under the Washington Uniform Common Interest Ownership Act (WUCIOA) by removing the requirement that the condominium be constructed in accordance with all laws and instead requiring the building be constructed in accordance with applicable building codes.
- Requires a purchaser to prove an alleged breach of warranty has or will cause physical damage, materially impairs the performance of some function, or presents an unreasonable safety risk.
- Corrects typographical errors, statutory references, and inadvertent omissions from the initial adoption of WUCIOA.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Holy, Kuderer, Salomon and Wilson, L..

Staff: Shani Bauer (786-7468)

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.

Background: In 2018, the Legislature adopted WUCIOA. Generally, WUCIOA applies to all residential common interest communities (CICs) created after the effective date of the WUCIOA. A CIC includes condominiums, cooperatives, leasehold CICs, miscellaneous communities, and plat communities.

A CIC created before the effective date may elect to amend its declaration to provide that WUCIOA applies. Two sections, one governing adoption of budgets, assessments, and special assessments and another providing a process for an existing CIC to elect to come under the WUCIOA, apply to all CICs, whether created before or after the effective date, and regardless of election. A variety of laws apply to entities created before the effective date of WUCIOA, including the Washington Condominium Act (WCA) which applies specifically to condominiums.

Condominium Liability. The WCA, adopted in 1989, created implied warranties on the quality of construction for condominiums. Those implied warranties were unchanged in WUCIOA. The implied warranties provide that condominium construction must be:

- free from defective materials;
- in accordance with sound engineering and construction standards;
- constructed in a workmanlike manner; and
- in compliance with all laws then applicable to such improvements.

In a proceeding for an alleged breach, the plaintiff must show the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach. An adverse affect must be more than technical and must be significant to a reasonable person. To establish an adverse affect, the person alleging breach must prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose.

Proof of breach is not proof of damages. Damages awarded for a breach of warranty are the reasonable cost of repairs. However, if it is established the cost of repairs is clearly disproportionate to the loss in market value caused by the breach, damages are limited to the loss in market value.

A proceeding for breach must be commenced within four years after the cause of action accrues. Regardless of the purchaser's lack of knowledge of the breach, the cause of action accrues:

- as to a unit, on the date the purchaser first enters into possession of the unit;
- as to any common element, the latest of: (1) the date the first unit was conveyed to a bona fide purchaser; (2) the date the common element was completed; or (3) the date the common element was added to the condominium.

Officer and Board Member Liability. Officers and board members of an association must exercise the degree of care and loyalty to the association required of an officer or director of an organized corporation and are subject to the same conflict of interest rules that apply to directors and officers of nonprofit corporations and mutual corporations.

Summary of Engrossed Bill: Condominium Liability. The implied warranties for the construction of a condominium are modified. The requirement the unit, common elements,

and improvements be constructed in compliance with all laws then applicable to such improvements is removed. Instead, the building must be constructed in accordance with applicable building codes, generally accepted in the state of Washington at the time of construction.

To establish an alleged breach of warranty has an adverse affect on performance, the purchaser must prove the alleged breach:

- is more than technical;
- is significant to a reasonable person; and
- has caused or will cause physical damage to the unit or common elements; has materially impaired the performance of mechanical, electrical, plumbing, elevator, or similar building equipment; or presents an actual unreasonable safety risk to the occupants of the condominium.

Officer and Board Member Liability. Officers and board members of a condominium are entitled to the same immunities from liability available to officers and directors of a nonprofit corporation or mutual corporation.

Technical Corrections. Language is added to address CIC developments where the circumstances may be unclear whether WCA or WUCIOA applies when:

- a CIC was formed prior to the effective date of WUCIOA, a CIC formed after the effective date may be added onto the preexisting CIC if the original declaration expressly provides for the addition and subjects the addition to the declaration of the preexisting CIC; and
- the law in effect at the time a public offering statement was delivered continues to apply to that public offering statement, regardless if the public offering statement addresses construction after the effective date of WUCIOA.

To assist users in knowing which law applies, a declaration of a CIC must include a statement on the first page as to whether the CIC is subject to WUCIOA.

The sale of a cooperative condominium unit is exempt from the requirement that all liens of a declarant or developer be released when the unit is subject to a lien securing indebtedness that represents a common expense liability for which the purchaser expressly agrees in writing to be responsible.

Typographical errors, statutory references, and inadvertent omissions are corrected. Items corrected include:

- the identifying number of each unit is required to be included on the map of a CIC that accompanies the declaration;
- the maximum time period for setting a meeting date to ratify a borrowing decision of the association is changed from 60 days to 50 days to be consistent with other meeting time periods; and
- in addition to outstanding assessments, a lender must also pay the association's legal fees before the association will subordinate its lien to the lender.

Statutory provisions in other parts of the code referencing the WCA are corrected to also reference WUCIOA. References to associations which now might be ambiguous are clarified to specify the type of association it is referring to.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony: PRO: Washington lags far behind other states in the construction of condominiums. Some insurance companies have stopped providing coverage for condominium development in the state due to the warranty language. No matter how well built, there is a 90 percent chance of litigation. This bill goes a long way to helping a builder obtain insurance and avoid litigation. Lawsuits are exhausting and time consuming.

Condominiums are an important part of the housing market, particularly for first-time home buyers. Homeowners have four to five times more assets than a person who rents. Those assets assist people in getting through tough economic times and be self-sustaining. The lack of affordable housing disproportionately affects minority communities.

These reforms are attempting to address why builders are not building condos in Washington. The warranty changes should provide further clarity to the builder, owner, and courts and takes away some of the ambiguity regarding construction defects.

Housing in Washington is less affordable than any other place in the nation. The cost of housing is rising for everyone as a result of a lack of housing units. To bridge the housing gap, we must increase the production of affordable housing units, including condominiums. Warranty provisions increase the cost of insurance, which substantially increases the cost of construction and reduces the number of condos developed. This bill would remove a barrier and allow more people to attain the dream of home ownership. This segment of the market is also important for elderly people looking to downsize.

OTHER: Amending the condominium construction language is a delicate balance which we would like to work on further. There is some concern that the immunity language for directors strips out the gross negligence standard that applies to intentional misconduct and gives a board of directors more protection than is necessary. Currently the business judgment rule applies to the board of directors. The language should stay as it is in current law.

There is no indication from the insurance companies that if these changes are made, they will provide coverage in Washington for condominium construction. These warranties have been around since 1992 and there has been both bust and boom during that time period with regard to condominium construction. We do not agree with the language that removes all laws and replaces with all applicable building codes. This does not include integral laws such as disabled parking or wetlands mitigation. The breach may not pose only an unreasonable risk

to the occupant, but also others that interact with that unit such as visitors or maintenance people. It is unclear why the unfit and uninhabitable language was removed.

Persons Testifying: PRO: Senator Jamie Pedersen, Prime Sponsor; Bill Riley, Local builder developer; Kim Herman, Washington State Housing Finance Commission; Bill Clarke, Washington Realtors; Mike Ennis, Association of Washington Business; Jan Himebaugh, Building Industry Association of Washington; Scott Hazlegrove, Master Builders Association of King and Snohomish Counties; Paul Purcell, Affordable Housing Advisory Board; Greg Wright.

OTHER: Bob Mitchell, Washington REALTORS; Kathryn Hedrick , Washington State Chapter of Community Associations Institute; Greg Coxey, Washington State Chapter of Community Associations Institute; Dean Martin, Washington State Chapter of Community Associations Institute.

Persons Signed In To Testify But Not Testifying: No one.