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## Bad Foundation: Washington's Lack of Homeowner Rights

Brendan Williams

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**BAD FOUNDATION: WASHINGTON’S LACK OF  
HOMEOWNER RIGHTS**

*Brendan Williams\**

<b>I. INTRODUCTION.....</b>	<b>155</b>
<b>II. WEST COAST STATES AND HOMEOWNERS’ RIGHTS.....</b>	<b>159</b>
A. California.....	159
B. Oregon.....	161
<b>III. CONSERVATIVE STATES AND HOMEOWNERS’ RIGHTS.....</b>	<b>163</b>
A. Florida.....	163
B. Texas.....	165
C. Wyoming.....	168
<b>IV. 2007–2008 WASHINGTON HOMEOWNERS’ RIGHTS BILLS.....</b>	<b>169</b>
<b>V. THE WASHINGTON LEGISLATURE SHOULD CURE THE LACK OF     HOMEOWNERS’ RIGHTS.....</b>	<b>177</b>

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I. INTRODUCTION

Washington is one of the nation’s six fastest-growing states, according to the U.S. Census Bureau.<sup>1</sup> In the first two months of 2018, the Economic and Revenue Forecast Council reported 24,800 construction permits were issued for single-family housing.<sup>2</sup> Through April 2018, growth in the prices of single-family homes in

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1. See Press Release, U.S. Census Bureau, Nevada and Idaho are the Nation’s Fastest Growing States (Dec. 19, 2018), <https://www.census.gov/newsroom/press-releases/2018/estimates-national-state.html> [<https://perma.cc/S84S-YEEN>].

2. Economic & Revenue Update, WASH. ECON. & REVENUE FORECAST COUNCIL 1, 3(Apr. 16, 2018), <https://erfc.wa.gov/sites/default/files/public/documents/publications/apr18.pdf> [<https://perma.cc/G9DT-56D7>].

the Seattle metropolitan area had led the nation for twenty straight months—with home prices growing about \$200,000 on average over that time.<sup>3</sup> Yet the state is an outlier in disallowing access to the courtroom, quite apart from other remedies, for those complaining of negligence in the construction of single-family homes.

Under Washington law, the only remedy in such a case is generally an “implied warranty of habitability.” As the Washington Supreme Court has stated:

Washington does not recognize a cause of action for negligent construction on behalf of individual homeowners. Beyond the terms expressed in the contract of sale, the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability, which arises from the sale transaction.<sup>4</sup>

Arguably, this can be read as simply ensuring that a home does not immediately collapse upon its first owner taking possession of it. As Justice Brachtenbach once wrote for the court, “[t]he auto should run down the road without wheels falling off and new houses should provide habitation without foundations falling apart.”<sup>5</sup> Obviously, requiring that the home be unfit for occupancy is not much of a consumer protection, and may turn upon the question of whether there was “evidence of personal or physical injury . . . .”<sup>6</sup> Any claim of economic damages is barred.<sup>7</sup> Furthermore, privity of contract is required to exercise even this minimal right. As a leading Washington construction law attorney has written, “[i]f a family buys a 1-year-old house, then watches it slide down the hill because

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3. Mike Rosenberg, *Seattle's Nation-Leading Streak in Home-Price Increases Now Tied For 2nd Longest on Record*, SEATTLE TIMES (June 26, 2018, 7:01 AM), <https://www.seattletimes.com/business/real-estate/seattles-nation-leading-streak-in-home-price-increases-now-tied-for-2nd-longest-on-record/> [<https://perma.cc/98TV-YR3W>].

4. *Stuart v. Coldwell Banker Commercial Grp., Inc.*, 745 P.2d 1284, 1289–90 (1987) (describing these as “egregious, fundamental defects in homes which, as the name of the warranty indicates, render the houses unfit to be lived in”).

5. *Frickel v. Sunnyside Enterprises, Inc.*, 725 P.2d 422, 424 (1986).

6. *Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 799 P.2d 250, 262 (1990).

7. *See id.* (citing *Stuart v. Coldwell Banker Commercial Group, Inc.*, 745 P.2d 1284 (1987)).

the builder didn't put in a proper foundation, can the owner recover from anyone? No. The law says a second owner has no rights."<sup>8</sup>

Despite its booming housing market and progressive reputation, Washington is alone among West Coast states in failing to provide greater consumer protections for those buying new homes, or for those complaining of defects in the renovation of existing homes. Paradoxically, Washington does guarantee protections for those purchasing new condominiums,<sup>9</sup> many of whom reside in affluent areas of Seattle and the "Eastside" suburban communities.<sup>10</sup> And corporate owners of multi-family housing can recover for construction negligence. For example, when it was announced in 2010 that a nine-year-old, twenty-five-story apartment complex in Seattle was to be torn down due to its dangerous state resulting from certain defects, the apartment complex owner sued the contractors.<sup>11</sup> Similarly, in 2018, when many tenants of two Seattle twenty-four-story apartment towers were displaced over plumbing

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8. Sandy Levy, *Home Buyers Need Warranty Protection*, LEVY LAW (Mar. 16, 2008), <https://levy-law.com/2008/03/16/home-buyers-need-warranty-protection/> [<https://perma.cc/SGB2-GZXP>].

9. See WASH. REV. CODE § 64.34.445 (2018).

10. See Aaron Kunkler, *Eastside State Legislators Talk Carbon Fees, Housing and Cars at UW Bothell*, BOTHELL-KENMORE REPORTER (May 3, 2018) ("Senn's bill would have required at least half of condo owners in a development to approve a lawsuit before an association could sue developers. Senn plans to reintroduce the legislation in 2019."), <http://www.bothell-reporter.com/news/eastside-state-legislators-talk-carbon-fees-housing-and-cars-at-uw-bothell> [<https://perma.cc/MF6E-G3NY>]; see also Daniel Walters, *Demand is Soaring for Condominiums in Washington State — So Why Are So Few of Them Being Built?*, INLANDER (Apr. 19, 2018), <https://www.inlander.com/spokane/demand-is-soaring-for-condominiums-in-washington-state-so-why-are-so-few-of-them-being-built/Content?oid=9381848> [<https://perma.cc/RM5U-X7EF>] (reporting that "while the House Judiciary Committee was supportive, Senn says that Senate Judiciary chair and Seattle Democrat Sen. Jamie Pedersen — concerned about protecting consumers — was opposed to the bill."); see also H.B. 2831, 65<sup>th</sup> Leg., Reg. Sess. (Wash. 2018) (a 2018 effort, led by Democratic legislator Rep. Tana Senn (D., 41<sup>st</sup>) to pare some of these expansive protections, citing a shortage of condominium availability).

11. Susan Kelleher, *Flaws in Doomed High-Rise Flew Under the City's Radar*, SEATTLE TIMES (May 3, 2010, 10:00 PM), <https://www.seattletimes.com/seattle-news/flaws-in-doomed-high-rise-flew-under-the-citys-radar/> [<https://perma.cc/TP3D-DAW3>].

defects—in a complex only five-years-old—the owner sued the mechanical contractor.<sup>12</sup>

Past “homeowners’ rights” efforts have failed in the Washington Legislature.<sup>13</sup> Legislation to require statutory warranties for those purchasing new homes passed the Senate in the 2007 and 2008 sessions, and passed the House Judiciary Committee, only to be denied House floor votes amidst enormous contention.<sup>14</sup> It is an interesting case study in how a state’s legislative process can be held captive by a powerful lobby.

This article examines the protections for purchasers of new single-family homes that exist in other states. In doing so, this article first examines the law in California and Oregon then turns to a sampling of laws from three more conservative states. For this sample, Florida and Texas were chosen as they are the two largest “red” states by population, and Wyoming was also chosen, as a Gallup Poll found it was the nation’s most conservative state.<sup>15</sup> However, any number of states could have been chosen, as no other state in the country offers *less* legal protection to purchasers of new homes than Washington. This article then examines the Washington legislation that failed to pass into law from 2007–08. Finally, it

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**12.** Derek Hall, *Pricey Seattle Apartment Tower Ripping Out Pipes to Fix Leaks, As Tenants Fume*, SEATTLE TIMES (June 14, 2018, 6:00 AM), <https://www.seattletimes.com/business/real-estate/pricey-seattle-apartment-tower-ripping-out-pipes-to-fix-leaks-as-tenants-fume/> [https://perma.cc/F8WV-P2SR].

**13.** See, e.g., SB 5550 Bill History, WASH. ST. LEG, <https://app.leg.wa.gov/billsummary?BillNumber=5550&Year=2007> [https://perma.cc/WH7K-7RPL]; See SB 6385 Bill History, WASH. ST. LEG., <https://apps.leg.wa.gov/billsummary?BillNumber=6385&Year=2007> [https://perma.cc/VK3F-Y7NR].

**14.** See, e.g., Editorial Board, Opinion, *Home Warranty: A Simple Matter*, SEATTLE POST-INTELLIGENCER (Mar. 11, 2008, 10:00 PM), <https://www.seattlepi.com/local/opinion/article/Home-Warranty-A-simple-matter-1266908.php> [https://perma.cc/LZM8-U3KB].

**15.** See Gene Balk, *Liberals Outnumber Conservatives for First Time In Washington State, Gallup Poll Shows*, SEATTLE TIMES (Feb. 27, 2018, 6:00 AM), <https://www.seattletimes.com/seattle-news/data/liberals-outnumber-conservatives-for-first-time-in-washington-state-gallup-poll-shows/> [https://perma.cc/D22Y-K3UJ] (“Wyoming comes out as the most politically right-wing state. Forty-six percent identified as conservative, compared with just 13 percent who say they’re liberal — a 33-point difference.”).

suggests an approach for the Washington Legislature to take based upon the protections in other states.

## II. WEST COAST STATES AND HOMEOWNERS' RIGHTS

### A. California

As is true on many policy issues,<sup>16</sup> California is a progressive leader in homeowners' rights. In California, the builder of a single-family home is strictly liable for construction defects, and an implied warranty standard applies as well.<sup>17</sup>

In a December 2000 opinion, the California Supreme Court addressed this question: “[m]ay plaintiffs recover in negligence from the entities that built their homes a money judgment representing the cost to repair, or the diminished value attributable to, construction defects that have *not* caused property damage?”<sup>18</sup> (emphasis added). The court ruled that they may not:

Home buyers in California already enjoy protection under contract and warranty law for enforcement of builders' and sellers' obligations; under the law of negligence and strict liability for acts and omissions that cause property damage or personal injury; under the law of fraud for misrepresentations about the property's condition; and an exceptionally long 10-year statute of limitations for latent construction defects (Code Civ. Proc., § 337.15). While the Legislature may add whatever additional protections it deems appropriate, the facts of this case do not present a sufficiently compelling reason to preempt the legislative process with a judicially created rule of tort liability.<sup>19</sup>

In response, the California Assembly accepted the court's invitation and passed the Right to Repair Act in 2002. The law

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16. For example, effective 2020, California will require all new homes to be solar-powered. Ivan Penn, *California Will Require Solar Power for New Homes*, N.Y. TIMES (May 9, 2018), <https://nyti.ms/2M9Alku> [<https://perma.cc/QGF8-DJ4T>].

17. See, e.g., A.O. TASVIBI, *Can You Sue a California Builder for New Home Construction Defects?*, NOLO, <https://www.nolo.com/legal-encyclopedia/can-you-sue-california-builder-new-home-construction-defects.html> [<https://perma.cc/4DAF-6GVG>].

18. *Aas v. Superior Court*, 12 P.3d 1125, 1130 (Cal. 2000).

19. *Id.* at 1142–43.

enumerates a large number of actionable defects in exacting detail.<sup>20</sup> For example, “[s]tucco, exterior siding, and other exterior wall finishes and fixtures, including, but not limited to, pot shelves, horizontal surfaces, columns, and plant-ons, shall not contain significant cracks or separations.”<sup>21</sup>

Prior to litigation, the builder must be given notice<sup>22</sup> and may offer to repair the defects.<sup>23</sup> To accomplish those repairs, the homeowner may request references from the builder for up to three other contractors not controlled by the builder.<sup>24</sup> The statute further provides that the homeowner may elect mediation:

The offer to repair shall also be accompanied by an offer to mediate the dispute if the homeowner so chooses. The mediation shall be limited to a four-hour mediation, except as otherwise mutually agreed before a nonaffiliated mediator selected and paid for by the builder. At the homeowner’s sole option, the homeowner may agree to split the cost of the mediator, and if he or she does so, the mediator shall be selected jointly. The mediator shall have sufficient availability such that the mediation occurs within 15 days after the request to mediate is received and occurs at a mutually convenient location within the county where the action is pending. If a builder has made an offer to repair a violation, and the mediation has failed to resolve the dispute, the homeowner shall allow the repair to be performed either by the builder, its contractor, or the selected contractor.<sup>25</sup>

In a unanimous January 2018 decision, the California Supreme Court noted, “[f]or economic losses, the Legislature intended to supersede *Aas* and provide a statutory basis for recovery.”<sup>26</sup> They noted:

Section 944 now specifies that various forms of economic loss are recoverable in an action under the Act. (§944 [listing among

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**20.** See CAL. CIVIL CODE § 897 (West 2018) (“The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage.”).

**21.** CAL. CIVIL CODE § 896(g)(2) (West 2018).

**22.** CAL. CIVIL CODE § 910 (West 2018).

**23.** CAL. CIVIL CODE § 917 (West 2018).

**24.** CAL. CIVIL CODE § 918 (West 2018).

**25.** CAL. CIVIL CODE § 919 (West 2018).

**26.** *McMillin Albany LLC v. Superior Court*, 408 P.3d 797, 803 (Cal. 2018).

recoverable damages “the reasonable value of repairing any violation of the standards set forth in this title, the reasonable cost of repairing any damages caused by the repair efforts, . . . the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income if the home was used as a principal place of a business licensed to be operated from the home, [and] reasonable investigative costs for each established violation . . . .”). Consequently, a party suffering economic loss from defective construction may now bring an action to recover these damages under the Act without having to wait until the defect has caused property damage or personal injury.<sup>27</sup>

The court noted that the Right to Repair Act also precluded a homeowner from pleading common law causes of action.

### *B. Oregon*

Oregon allows purchasers of new homes to sue for negligent construction, although the remedies must be for physical damage, not economic loss. As the Oregon Supreme Court held in 2008 in *Harris v. Suniga*,<sup>28</sup> “this court has identified the potentially limitless economic impacts of negligent conduct as the reason for barring claims for economic losses. That concern, however, is rarely present when the claim is for physical damage to real or other tangible property.”<sup>29</sup> The court noted that “physical damage to property ordinarily can be ascertained, assessed, and paid.”<sup>30</sup>

Oregon also does not require privity of ownership—someone purchasing from the original owner a home alleged to have defects may sue its builder, although the Oregon Supreme Court suggested, in a *Suniga* footnote, that there may be some limits given that “the cost of defending possible claims by successor purchasers, the complexity of construction litigation generally, and the need to protect contractual expectations, require[s] the courts to exercise care in ensuring that builders are not subjected to multiple recoveries for their negligence.”<sup>31</sup>

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27. *Id.* at 802–03.

28. 180 P.3d 12 (Or. 2008).

29. *Id.* at 18.

30. *Id.*

31. *Id.* at 18 n.5.



In *Abraham v. T. Henry Construction, Inc.*,<sup>32</sup> the Oregon Supreme Court examined the issue of “[w]hether a claim for property damage arising from construction defects may lie in tort, in addition to contract, when the homeowner and builder are in a contractual relationship.”<sup>33</sup> It held that a contract could not preclude a negligence claim “[b]y merely reciting the obligation to build plaintiffs' house in a reasonably skilled manner and in accordance with the building code—and, by implication, in such a way as to avoid foreseeable harm to plaintiff—defendants did nothing to supplant the common law standard of care.”<sup>34</sup>

In addition to allowing negligence claims for construction defects, Oregon has a statutory warranty requirement:

A contractor that enters into a contract to construct a new residential structure or zero-lot-line dwelling, or to sell a new residential structure or zero-lot-line dwelling constructed by the contractor, shall make a written offer to the property owner or original purchaser of the structure or dwelling of a warranty against defects in materials and workmanship for the structure or dwelling. The property owner or original purchaser of the structure or dwelling may accept or refuse the offer of a warranty by the contractor. If a contractor makes the written offer of a warranty before the contractor and the property owner both sign a written construction contract and the property owner refuses the offered warranty, the contractor may withdraw the offer to construct the structure or dwelling.<sup>35</sup>

Furthermore, Oregon has implied warranties attendant to new construction. In its 1974 decision in *Yepsen v. Burgess*,<sup>36</sup> the Oregon Supreme Court took note of the fact that “states have cast aside the principle of Caveat emptor in the sale of new houses by the builder-vendor and have recognized an implied warranty of workmanlike construction and habitability.”<sup>37</sup> In response, the court articulated a new rule “applicable only to the sale of new houses. The sale under such circumstances is deemed to carry with it a

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32. 249 P.3d 534 (Or. 2011).

33. *Id.* at 536.

34. *Id.* at 542–43.

35. OR. REV. STAT. § 701.320(1) (2018).

36. 525 P.2d 1019 (Or. 1974).

37. *Id.* at 1021.

warranty that the house is constructed in a reasonably workmanlike manner and is fit for habitation.”<sup>38</sup>

In a 2016 decision, examining the question of whether construction negligence claims were subject to a six-year statute of limitations, the Oregon Supreme Court acknowledged that “the relationship between the various statutes” pertaining to construction defect claims was complicated, and the “history is more than a little convoluted . . . .”<sup>39</sup> However, the court found that “[a] construction defect claim for damage to the property itself is subject to the two-year limitation period of ORS 12.110, unless another limitation period ‘especially enumerated’ in ORS chapter 12 applies.”<sup>40</sup> That does not mean that such claims are barred after two years, because, as in the case at hand, “[t]here remains the factual question about whether plaintiffs knew or should have known of the injuries or damage that form the basis of their claims within the two-year limitation period that ORS 12.110 provides.”<sup>41</sup>

### III. CONSERVATIVE STATES AND HOMEOWNERS’ RIGHTS

#### A. *Florida*

Florida statute establishes the rights of consumers relative to construction defects, favoring alternative dispute resolution. An actionable defect is defined as follows:

“Construction defect” means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:

- (a) Defective material, products, or components used in the construction or remodeling;
  - (b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84;
  - (c) A failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval;
- or

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38. *Id.* at 1022.

39. *Goodwin v. Kingsmen Plastering, Inc.*, 375 P.3d 436, 469 (Or. 2016).

40. *Id.* at 474.

41. *Id.*

(d) A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction.<sup>42</sup>

It is important to note that, as in other states, this protection applies to remodeling. Where a construction defect is alleged, the claimant must file a notice that

[M]ust describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect. Based upon at least a visual inspection by the claimant or its agents, the notice of claim must identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden.<sup>43</sup>

The builder is then given an opportunity to dispute the claim, repair the defect, offer to “compromise and settle the claim by monetary payment,” or “offer to compromise and settle the claim by a combination of repairs and monetary payment[.]”<sup>44</sup> If the claim is disputed, or not responded to in a timely fashion, the claimant may sue.<sup>45</sup>

In Florida there is also an implied warranty of habitability as to new construction. As the District Court of Appeal held in finding this warranty in 1982, “[t]he test for a breach of implied warranty is whether the premises meet ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality. We hold there is an implied warranty of habitability in the package sale of a new house and lot by a builder-vendor to an original purchaser.”<sup>46</sup>

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42. FLA. STAT. § 558.002(5) (2018).

43. FLA. STAT. § 558.004(1)(b) (2018).

44. FLA. STAT. § 558.004(5)(b)–(c) (2018).

45. See FLA. STAT. § 558.004(6) (2018).

46. *Hesson v. Walmsley Const. Co.*, 422 So.2d 943, 945 (Fla. Dist. Ct. App. 1982).

### B. Texas

Although Texas has been described as a “magnet” for those “fleeing liberal states” like Washington,<sup>47</sup> its homeowners’ rights are far more expansive than Washington’s.

In Texas, the Residential Construction Liability Act (RCLA) acts as a limitation upon construction defect claims. It applies to “any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods” as well as “any subsequent purchaser of a residence who files a claim against a contractor.”<sup>48</sup> A claimant must give notice to the contractor “specifying in reasonable detail the construction defects that are the subject of the complaint.”<sup>49</sup> During a thirty-five-day period following receipt of this notice, “and on the contractor’s written request, the contractor shall be given a reasonable opportunity to inspect and have inspected the property that is the subject of the complaint to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect.”<sup>50</sup>

If the contractor fails to make a “reasonable offer” to fix the defects, the claimant may recover only the following economic damages proximately caused by a construction defect:

- (1) the reasonable cost of repairs necessary to cure any construction defect;
- (2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence;
- (3) reasonable and necessary engineering and consulting fees;
- (4) the reasonable expenses of temporary housing reasonably necessary during the repair period;
- (5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure; and

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47. Vanessa Romo, *Texas Becoming A Magnet For Conservatives Fleeing Liberal States Like California*, NPR (Aug. 27, 2017, 6:03 AM), <https://www.npr.org/2017/08/27/546391430/texas-becoming-a-magnet-for-conservatives-fleeing-liberal-states-like-california> [https://perma.cc/K9EL-8LKR].

48. TEX. PROP. CODE ANN. § 27.002(a)(1)–(2) (West 2018).

49. TEX. PROP. CODE ANN. § 27.004(a) (West 2018).

50. *Id.*

(6) reasonable and necessary attorney's fees.<sup>51</sup>

Any lawsuit for “damages arising from a construction defect in an amount greater than \$7,500” either the claimant or defendant may file a motion to compel mediation, with the judge choosing the mediator if the parties cannot agree upon one.<sup>52</sup>

In 2002, in *Centex Homes v. Buecher*,<sup>53</sup> the Texas Supreme Court noted that it had long “recognized that a builder of a new home implied warrants that the residence is constructed in a good and workmanlike manner and is suitable for human habitation.”<sup>54</sup> It also noted that “the two warranties provide separate and distinct protection for the new home buyer.”<sup>55</sup> The implied warranty of good workmanship “requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances.”<sup>56</sup> This would appear to be the equivalent of the tort standard of a reasonable person, similarly-situated.

In contrast, the Texas court noted that the implied warranty of habitability, not unlike Washington’s (actually cited elsewhere in the opinion), “only protects new home buyers from conditions that are so defective that the property is unsuitable for its intended use as a home.”

The court explained that “[t]hese two implied warranties parallel one another, and they may overlap. For example, a builder’s inferior workmanship could compromise the structure and cause the home to be unsafe. But a builder’s failure to perform good workmanship is actionable even when the outcome does not impair habitability.”<sup>57</sup>

Because it is a “gap-filler” that supplies protections that might be unavailable in a contract, the court found that “the implied warranty of good workmanship may be disclaimed by the parties

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51. TEX. PROP. CODE ANN. § 27.004(g) (West 2018).

52. TEX. PROP. CODE ANN. § 27.0041(a) (West 2018).

53. 95 S.W.3d 266 (Tex. 2002).

54. *Id.* at 269 (citing *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968)).

55. *Id.* at 272 (citations omitted).

56. *Id.* at 273 (citing *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354–55 (Tex. 1987)).

57. *Id.* (citing *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985)).

when their agreement provides for the manner, performance or quality of the desired construction.”<sup>58</sup>

For a time *Centex* was superseded, as the Texas Supreme Court acknowledged,<sup>59</sup> by a builder-friendly statute called the Texas Residential Construction Commission Act. This law created a Texas Residential Construction Commission to sit in judgment of construction defect claims.<sup>60</sup>

As a scathing 2009 state report recommending the “sunset” of this law stated:

The Texas Residential Construction Commission was never meant to be a true regulatory agency with a clear mission of protecting the public. It has elements of a regulatory agency in its registration of homebuilders, but this program is not designed to ensure that only qualified persons can enter the field – the way true regulatory agencies work – and so does not work to prevent problems from occurring.<sup>61</sup>

The report noted that the Commission was tasked with a “State Inspection Process, designed to resolve disputes between homeowners and builders before either party may pursue legal action. This lengthy and sometimes difficult process has been a source of frustration for homeowners trying to address defects with

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**58.** *Id.* at 274–75.

**59.** *See* *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 913 n.11 (Tex. 2007) (“After we decided *Centex Homes*, the Legislature created the Texas Residential Construction Commission and gave it rulemaking authority to create statutory warranties of workmanship and habitability as to new residential construction. *See* TEX. PROP. CODE ANN. § 408.001(2) (West 2018). These statutory warranties are exclusive and supercede [sic] all previous implied warranties of workmanship and habitability. *Id.* § 430.006. The Commission created a statutory warranty of habitability obligating a builder to construct a home that is ‘safe, sanitary and fit for humans to inhabit’ and prohibited parties from contractually waiving or modifying the warranty. 10 TEX. ADMIN. CODE § 304.3(f), (i) (West 2005) (Tex. Residential Constr. Comm’n, Limited Warranties”).

**60.** *See generally* *Sunset Advisory Commission Final Rep.*, TEX. RESIDENTIAL CONSTR. COMM’N (July 2009), <https://www.sunset.texas.gov/public/uploads/files/reports/Residential%20Construction%20Commission%20Final%20Report%202009%2081st%20Leg.pdf> [<https://perma.cc/7PXG-F48M>].

**61.** *Id.* at 1.

their homes.”<sup>62</sup> Moreover, the builder-dominated Commission had no authority to require builders to cure defects.

The interaction between the RCLA and the Texas Residential Construction Commission Act was confusing, but with the latter having been repealed the former clearly controls. It has done nothing to inhibit home construction.<sup>63</sup>

### C. Wyoming

In 1993, the Wyoming Supreme Court was confronted with the question of whether it should join those jurisdictions that “have adopted the accepted work doctrine, applying it in cases where a contractor has completed a project, the owner has accepted the contractor's work, and a third party has subsequently been injured by the condition of the work done.”<sup>64</sup> It declined to do so, noting that its prior decisions:

[O]utlined a contractor's duty to exercise skill and care in his selection of materials and in the performance of his work, and his duty to complete the job in a workmanlike manner, in substantial compliance with the owner's plans and specifications. Thus, our decisions in those cases imply a contractor's duty in its various aspects survives after his work has been completed and accepted.<sup>65</sup>

In addition to this implied duty, negligence claims over construction defects are allowed in Wyoming. However, the Wyoming Supreme Court has disallowed damages for emotional distress in construction defect cases, upholding a trial court's dismissal of those claims in such a case while acknowledging that, following the flooding of a new home due to allegedly faulty plumbing installation, “[t]he couple had difficulty adjusting to the destruction they faced and [the wife] has experienced extreme stress

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62. *Id.*

63. See, e.g., Steve Brown, *D-FW tops the country in single-family home construction*, DALLAS NEWS (AUG. 10, 2017) (noting that Houston “was a close second” to Dallas-Fort Worth), <https://www.dallasnews.com/business/real-estate/2017/08/10/d-fw-tops-country-home-construction> [<https://perma.cc/284M-XAZY>].

64. *Lynch v. Norton Constr., Inc.*, 861 P.2d 1095, 1097 (Wyo. 1993).

65. *Id.* at 1098.

in the aftermath of the destruction and suffered emotionally over the loss of their possessions.”<sup>66</sup> The court stated that:

While we do not doubt that the Blagroves were justifiably and seriously distressed over the damage to the home they had built together with their families, adopting a rule allowing trial on the issue and recovery if proved would result in unacceptable burdens for both the judicial system and defendants. We therefore hold that emotional distress damages in connection with property damages are not compensable.<sup>67</sup>

#### IV. 2007–2008 WASHINGTON HOMEOWNERS’ RIGHTS BILLS

In 2007, Senator Brian Weinstein (D., Mercer Island) introduced a homeowners’ bill of rights that, in different forms in two successive years, would pass the Democratic Senate, pass the House Judiciary Committee, and then be killed by the House speaker.

In 2007, Senate Bill 5550 had twenty-six co-sponsors in a forty-nine-member Senate.<sup>68</sup> The bill provided warranty protections for those purchasing new homes. As it passed the Senate floor 30-19,<sup>69</sup> the bill required, as its Senate bill report related:

Every contract for the sale or construction of a new home will include a warranty, from the builder that must warrant as follows:

- for two years, the home is free from defects in materials and workmanship;
- for three years, the home is free from defects in electrical, plumbing, heating, cooling and ventilating systems;
- for five years, the home is free from defects resulting from water penetration; and
- for ten years, the home is free from structural defects.

For the purpose of the warranty, the definition of "new home" includes substantial remodels. New homes do not include

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**66.** Blagrove v. JB Mech., Inc., 934 P.2d 1273, 1276 (Wyo. 1997).

**67.** *Id.* at 1276–77.

**68.** S. B. 5550, 60th Leg., Reg. Sess. (Wash. 2007).

**69.** See S. B. 5550 Bill History, WASH. ST. LEG., <https://app.leg.wa.gov/billsummary?BillNumber=5550&Year=2007> [<https://perma.cc/G6XR-K5RF>].



condominiums, manufactured or mobile homes, timeshares, outbuildings or similar structures.<sup>70</sup>

The bill appeared to have popular support. In a 2007 editorial entitled “*The House That Carmela Built*,” the *Seattle Times* even played off of a popular television series and wrote:

Remember Carmela Soprano in the HBO series “The Sopranos” and her ambitious but disastrous whim to build a house?

Now think of the poor schmuck who buys the place and has to deal with the consequences of inferior materials and the contractor’s general ineptness. Washington residents in that boat shared a litany of dream-turned-to-nightmare stories in a recent Senate hearing on a bill to protect consumers better.<sup>71</sup>

With small changes the bill passed the House Judiciary Committee, although testimony before the committee against the bill asserted, according to the bill report, that “[t]he 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.”<sup>72</sup>

This seems empirically unprovable. It is unclear how a bill providing mere statutory warranty protections could have been “more stringent” than the negligence causes of action other states, including California, permitted. At that time, after all, the Right to Repair Act had been passed into law in California, with its exhaustive list of construction defects. In any event, the bill was killed by the House speaker.<sup>73</sup>

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**70.** See S. B., 60th Sess. (Wash. 2007), *An act relating to real property*, <http://lawfilesexternal.leg.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/Senate/5550-S.SBR.pdf> [https://perma.cc/G5YH-JPUW].

**71.** Seattle Times Staff, Opinion, *The house that Carmela built*, SEATTLE TIMES (Feb. 13, 2007, 12:00 AM), <https://www.seattletimes.com/opinion/the-house-that-carmela-built/> [https://perma.cc/3JLW-RT9P].

**72.** See H. B., 60th Sess. (Wash. 2007), *An act relating to real property*, <http://lawfilesexternal.leg.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/House/5550-S.HBR.pdf> [https://perma.cc/2AQS-634C].

**73.** Jennifer Byrd, *Washington state bill for warranties on new homes appears dead*, SAN DIEGO SOURCE (Apr. 10, 2017),

In 2008, new legislation, Senate Bill 6385, was introduced by Sen. Weinstein, with eight co-sponsors.<sup>74</sup> In the form that passed out of the Senate 27-20,<sup>75</sup> the bill was exceedingly simple, reading in its entirety:

- (1) Any construction professional involved in the construction of improvements upon real property intended for residential use has a duty, which may not be waived, to exercise reasonable care in the construction of the improvement.
- (2) If a breach of the duty imposed under subsection (1) of this section results in damage to any portion of the real property, the current owner of the real property has a right to recover damages independent of any contract right.
- (3) This section does not apply to condominiums subject to chapter 15 64.34 RCW.<sup>76</sup>

Again, the *Seattle Times* editorialized in support:

The law Weinstein offered last year was specific. There was to be a guarantee against defects in materials and workmanship for two years, water penetration for five years, structural defects for 10 years, and so on.

The new bill is more general. It says that if the builder did not exercise reasonable care, and his negligence caused damage to the home, he has to fix the problem, or else you can sue him, with the specifics the same as under the law that has existed for condominiums since 1990.<sup>77</sup>

The bill was then heard by the House Judiciary Committee, where, given complaints by homebuilders that the Senate bill created a negligence cause of action, a striking amendment was introduced to simply confer upon purchasers of single-family

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<http://www.sddt.com/News/article.cfm?SourceCode=20070410crt#.WuoMSUx Fyzk> [<https://perma.cc/ZB7X-P8MU>].

**74.** See S. B. 6385, 60th Leg., Reg. Sess. (Wash. 2008).

**75.** See H. B. 2837, 60th Leg., Reg. Sess. (Wash. 2008). Disclosure: The author, then a state representative, was the prime sponsor of the House companion bill, with 14 co-sponsors. See H.B. 2837, 60th Leg., Reg. Sess. (Wash. 2008).

**76.** See Substitute S.B. 6385, 60th Leg., Reg. Sess. (Wash. 2008).

**77.** Seattle Times Staff, Opinion, *Homeowners protection that's fair, reasonable*, SEATTLE TIMES (Mar. 6, 2008, 12:00 AM), <https://www.seattletimes.com/opinion/homeowners-protection-thats-fair-reasonable/> [<https://perma.cc/RR3V-ZEJY>].

homes the same protections that existed under statute for condominium owners.<sup>78</sup>

As the striking amendment's intent section stated, "[t]he legislature by this act does not intend to create a cause of action in tort for defects in the construction of improvements upon real property intended for residential use[.]"<sup>79</sup> But even with this limitation the amendment was objected to by the homebuilding industry, as the House Bill Report shows in summarizing testimony:

The bill is bad for an industry that is already hanging on by its fingertips. Ninety-eight percent of builders have never had a claim. Most builders are small, building fewer than 12 homes a year, and if there is a problem they have to deal with it or they lose their client base. There are already remedies available to homeowners.

The bill will have a devastating impact on the insurance market. It will result in a lack of predictability, which will lead to less affordable and less available liability insurance, which will increase the cost of homes. This will also impact nonprofit housing because those builders also have to buy insurance.<sup>80</sup>

The House Judiciary Committee passed the bill with its amendment. The then-print *Seattle Post-Intelligencer* embraced the amendment in an editorial:

[T]he new bill makes it clear that contractors won't need liability insurance (as some claim is the case). The latest version gets rid of the negligence clause via an amendment proposed by Rep. Pat Lantz, focusing instead on nonwaivable warranties -- not the flimsy one-year ones contractors often offer home buyers. If a contractor does the job properly, or fixes something that goes wrong, there is no cause. But if the contractor does not resolve the issue, the homeowner will be able to seek compensation.<sup>81</sup>

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**78.** See H. B., 60th Leg. (Wash. 2008), *An act relating to real property*, <http://lawfilesextd.leg.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/House/6385-S.HBR.pdf> [<https://perma.cc/F35S-AZ7Q>].

**79.** See House Judiciary Committee Striking Amendment, Substitute S. B. 6385, <http://lawfilesextd.leg.wa.gov/biennium/2007-08/Pdf/Amendments/House/6385-S%20AMH%20JUDI%20ADAM%20150.pdf> [<https://perma.cc/2FAW-SSJR>].

**80.** Substitute S. B. 6385, *supra* note 76, at 5.

**81.** Editorial Board, Opinion, *Legislature: A Consumer Fix*, SEATTLE POST-INTELLIGENCER (Mar. 11, 2008, 10:00 PM),

Yet the bill again stalled after its House Judiciary Committee passage. Instead, the *Post-Intelligencer* reported, House Speaker Frank Chopp pushed for a plan that sounded a great deal like the now-repealed Texas Residential Construction Commission Act, in that it would require contractor licensing and “create an office for consumer protection for home construction and repair[.]”<sup>82</sup>

After any legislation again failed to progress, the *Associated Press* reported:

House Speaker Frank Chopp, who blocked the vote on the measure last year, has said he still had problems with the current measure.

“I want to see protections for homeowners, but I want the right protections,” Chopp said in a statement released after the 5 p.m. deadline passed. “The current proposal has come a long way toward common-sense solutions, but there are unanswered questions relating to how it would apply in many situations.”<sup>83</sup>

Reaction was decidedly-mixed and revealed how polarizing the issue had been.

In another editorial, the *Seattle Post-Intelligencer* wrote:

It's odd—if not suspicious—that a bill offering Washington homeowners the same protections as the state's condo owners is dying for the second year in a row. Senate Bill 6385 boils down the builder's responsibility to a warranty, and allows builders the chance to repair damage before anyone goes to court.<sup>84</sup>

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<https://www.seattlepi.com/local/opinion/article/Legislature-A-consumer-fix-1265684.php> [<https://perma.cc/9CUN-BFKV>].

**82.** Phuong Cat Le, *State Democrats Feud Over Rival 'Protection' Plans for Home Buyers*, SEATTLE POST-INTELLIGENCER (Mar. 11, 2008, 10:00 PM), <https://www.seattlepi.com/local/article/State-Democrats-feud-over-rival-protection-1266920.php> [<https://perma.cc/UTM9-2M2G>].

**83.** Rachel La Corte, *Rights Bill for Owners of Homes Fails to Get House Vote*, SEATTLE TIMES (Mar. 8, 2008, 12:00 AM), <https://www.seattletimes.com/seattle-news/politics/rights-bill-for-owners-of-homes-fails-to-get-house-vote/> [<https://perma.cc/BMJ6-BDFE>].

**84.** Editorial Board, *supra* note 14. As the editorial noted, “It doesn't look good that Chopp has friends at the Building Industry Association of Washington, the bill's main opponent (BIAW executive VP Tom McCabe said he'd love to see Chopp run for governor.”). *Id.* (hyperlinks omitted). A news article in 2007 had noted that “[a] check of recent reports filed by BIAW lobbyist Tom McCabe

In addition to editorial censure, the House speaker received a satirical “Schrammie” from KOMO television commentator Ken Schram for “‘leaving homeowners in a lurch’ and blocking homeowners from being able to sue for negligent construction[.]”<sup>85</sup>

However, the Building Industry Association of Washington’s monthly newsletter, *Building Insight*, celebrated on its March 2008 front cover with an article headlined “Democrats help kill builder-hating bill.”<sup>86</sup> In that same newsletter was a special insert purporting to debunk global warming, as well as an article entitled “*Hitler’s Nazi party: They were eco extremists.*”<sup>87</sup>

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shows that Chopp is cozy with the BIAW: One of just two wining-and-dining expenses on McCabe’s entire February lobbying report was a \$124 steak dinner at Ricardo’s outside Olympia with Chopp.” Josh Feit, *Misled*, THE STRANGER (Apr. 12, 2007), <https://www.thestranger.com/seattle/misled/Content?oid=196371> [<https://perma.cc/P9CP-K25A>]. Another article noted that “when Chopp’s backers in the state builders’ association spent \$160,000 in 2008 on billboards across the state saying ‘Don’t Let Seattle Steal This Election’—an implicit call for conservative voters to pick Republican Dino Rossi for governor over Democrat Christine Gregoire—Chopp failed to join the Democratic leadership in condemning the campaign.” Eli Sanders, *Swinging at the Speaker*, THE STRANGER (Nov. 19, 2009), <https://www.thestranger.com/seattle/swinging-at-the-speaker/Content?oid=2763084> [<https://perma.cc/2E72-6M3W>].

**85.** JOEL CONNELLY, *CHOPP’S HOUSE HOLDS UP HOMEOWNERS’ RIGHTS*, Seattle Post-Intelligencer (JULY 8, 2008), <https://www.seattlepi.com/local/connelly/article/Chopp-s-House-holds-up-homeowners-rights-1278795.php> [<https://perma.cc/48EA-NGJ5>].

**86.** BUILDING INSIGHT (Building Industry Ass’n of Wash.), Mar. 2008, at 1. As the article noted, not incorrectly, “BIAW emerged miraculously unscathed from a legislative session where Democrats hold a supermajority in both houses.” *See id.*

**87.** *See Id.* at 8. A column, *Homebuilders spared wrath of trial attorney’s legislation*, noted “Mr. Chopp and BIAW members agree that it’s far better to have a spate of bad media than to have trial attorneys knocking on your door. *Id.* at 3. The newsletter drew at least one editorial rebuke. *See* Editorial Board, Opinion, *Builders Group: Bizarre Assertions*, SEATTLE POST-INTELLIGENCER (Mar. 31, 2008, 10:00 PM), <https://www.seattlepi.com/local/opinion/article/Builders-Group-Bizarre-assertions-1268789.php> [<https://perma.cc/9L5F-JPP3>]. The Anti-Defamation League registered its own protest: “While the industry may have concerns about regulation, it is outrageous and false to compare environmentalists and government regulators to Nazis.” Joel Connelly, *ADL Condemns BIAW*, SEATTLE POST-INTELLIGENCER (June 20, 2008, 1:27 PM), <https://blog.seattlepi.com/seattlepolitics/2008/06/20/adl-condemns-biaw/> [<https://perma.cc/T42V-ZAU3>].

A full decade later nothing has changed. The last effort to pass a homeowners' rights bill occurred in 2009. Senator Rodney Tom (D-Medina) introduced Senate Bill 5895 whose title hinted at its breadth:

AN ACT Relating to improving residential real property construction by creating a home construction consumer education office, strengthening warranty protections applicable to residential real property construction, creating remedies, creating municipal liability, requiring third-party inspections, enhancing contractor registration requirements, establishing worker certification standards, and enhancing bonding requirements.<sup>88</sup>

In some of this Sen. Tom was clearly trying to address issues Speaker Chopp had raised.

The bill's most significant consumer protection was creating a new implied warranty, similar to the court-found implied warranty in other states, requiring the following:

A construction professional involved in the construction of new residential real property or the substantial remodel of existing residential real property warrants that the work will not impair the suitability of the property for the ordinary uses of real estate of its type and that the work will be free from defective materials and constructed in accordance with sound engineering and construction standards; constructed in a work-like manner; and be constructed in compliance with all laws then applicable to improvements.<sup>89</sup>

According to the bill report, testimony against the bill asserted that “[b]uilders will not be able to get insurance, even those who never had a claim against them.”<sup>90</sup> No record indicates whether those making this claim were asked how homebuilders get insurance in those states that already recognize this minimal implied warranty. A frustration of the legislative process is that such claims are often made as if in a vacuum.

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**88.** See S. B. 5895, 61st Leg., Reg. Sess. (Wash. 2009).

**89.** SENATE COMMITTEE SERVICES, WASH. ST. S., S. B. 6385 BILL REPORT 1, 4, <http://lawfilesexternal.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/5895%20SBR%20WM%2009.pdf> [<https://perma.cc/H9B3-4SKA>].

**90.** *Id.* at 6.

The bill passed only 25-24,<sup>91</sup> despite support from Governor Gregoire, as a *Seattle Post-Intelligencer* article noted:

Several prominent Democratic senators voted against the legislation.

One “No” vote came from Republican-turned-Democrat Sen. Fred Jarrett, who is thinking about running for King County Executive.

Another came from state Sen. Paull Shin of Edmonds, who has spoken supportively of homeowner legislation in the past.

Another “No” came from state Sen. Mary Margaret Haugen, D-Camano, who has been a past target of the BIAW in past campaigns but took an \$800 contribution in the 2008 campaign cycle.

Poignantly, Jarrett had replaced Weinstein in the Senate, after Weinstein chose not to run again.<sup>92</sup> This time the House Judiciary Committee, with a new chair, did not even bother giving the bill a hearing.<sup>93</sup>

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91. See S. B. 5895 Bill History, WASH. ST. LEG., <http://apps.leg.wa.gov/billsummary?BillNumber=5895&Year=2009> [<https://perma.cc/Z7HX-WZ4K>].

92. See Kate Riley, Opinion, *Aisle-Hopping Jarrett Finds His Groove*, SEATTLE TIMES (Mar. 18, 2008, 12:00 AM), <https://www.seattletimes.com/opinion/aisle-hopping-jarrett-finds-his-groove/> [<https://perma.cc/N3GF-RC8F>] (in which columnist notes that “undone, however, is a worthy homeowners warranty bill that Weinstein got through the Senate in each of the past two years only for it to run around in the House.”). Upon Weinstein’s retirement, it was reported that “Rep. Brendan Williams, D-Olympia, has replaced former Sen. Brian Weinstein as the building group’s great Satan.”; Editorial, *Home Builders Erect A New Pinata: “REP. WILLIAMS IS THE NEW SEN. WEINSTEIN”* ..., THE SPOKESMAN-REVIEW (Jan. 31, 2009, 6:03 AM), <http://www.spokesman.com/blogs/olympia/2009/jan/31/home-builders-erect-new-pinata-rep-williams-new-sen-weinstein/> [<https://perma.cc/8W32-QL2Q>].

93. See S. B. 5895 Bill History, WASH. ST. LEG., <https://apps.leg.wa.gov/BILLSUMMARY?BILLNUMBER=5895&YEAR=2009> [<https://perma.cc/X4BL-ZY6R>]. This drew even more celebration from the homebuilding industry in its newsletter. See Joel Connelly, *The BIAW Gives Bravos to Democratic Legislature*, SEATTLE POST-INTELLIGENCER (June 3, 2009, 3:50 PM), <https://blog.seattlepi.com/seattlepolitics/2009/06/03/the-biaw-gives-bravos-to-democratic-legislature/> [<https://perma.cc/EJ9F-QXUN>].

## V. THE WASHINGTON LEGISLATURE SHOULD CURE THE LACK OF HOMEOWNERS' RIGHTS

After the 2009 setback, there was perhaps some reason to stall on the homeowners' rights front given the toll the economic recession took upon the housing market. Although, conversely, it is worth noting that in Washington, unlike other states, homeowners were also struggling without recourse for the costs of avoidable construction defects in addition to mortgages that may have become unaffordable.

Yet two things have changed. First, the housing market has largely rebounded to its strength prior to the economic downturn. According to the state's February 2018 Economic and Revenue Review, "608,000 new homes were sold in 2017, which is 8.3% above 2016 sales."<sup>94</sup> Second, the state is more progressive than ever, making its status all the more striking as an outlier on protection for the biggest investment a consumer can make. The Gallup Poll found that "more Washingtonians identified as liberal than conservative in 2017 — the first time that's ever happened."<sup>95</sup>

In addressing homeowners' rights, one cannot carelessly dismiss the contribution that homebuilding makes to the economy, through employment and to the state coffers through the Real Estate Excise Tax (REET). The February 2018 revenue forecast noted that "[r]esidential sales have also been stronger than forecasted. Because of this strength, forecasted REET receipts have been increased by \$136 million in the current biennium and \$87 million in the 2019 biennium."<sup>96</sup>

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**94.** *Economic & Revenue Review: Feb. 15, 2018*, WASH. ECON. & REVENUE FORECAST COUNCIL 1, 4 (Feb. 15, 2018), <https://erfc.wa.gov/sites/default/files/public/documents/forecasts/rev20180215.pdf> [<https://perma.cc/46TP-GY52>]. Very few of these homes are built in Seattle. See Mike Rosenberg, *Rapidly Growing Seattle Constrains New Housing Through Widespread Single-Family Zoning*, SEATTLE TIMES (MAY 4, 2018), <https://www.seattletimes.com/business/real-estate/amid-seattles-rapid-growth-most-new-housing-restricted-to-a-few-areas/> [<https://perma.cc/FUW8-AKDT>] ("Going back to 1995 . . . just 8 percent of the city's new housing has gone to the single-family zones that hold two-thirds of the city's residential properties"). This might cause some Seattle legislators to view homeowners' rights as an abstraction.

**95.** See Balk, *supra* note 15.

**96.** See *Economic & Revenue Review: Feb. 15, 2018*, *supra* note 94, at 6.



The legislative debate during the 2007–08 sessions revealed that homebuilders liked neither the negligence nor statutory warranty approaches. Yet it defies credulity to think that the imposition of some statutory protections for homeowners would, as was argued in 2007-08, cause a robust housing market to collapse. Nor is it reasonable to maintain a status quo in which 608,000 new homes sold in 2017 were unprotected by state law.

As the California Supreme Court had held in 1974, a person buying a new home is taking a considerable risk:

[U]nlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus he generally relies on those in a position to know the quality of the work to be sold, and his reliance is surely evident to the construction industry.”<sup>97</sup>

We can add to this imbalance of power the fact that many homebuilders doing business in Washington are not “mom-and-pop” enterprises but instead giants like D.R. Horton, which reported \$3.7 billion in homebuilding revenue for the second quarter of 2018, and a pretax profit of 11.7 percent.<sup>98</sup> Lennar, another homebuilding behemoth, reported in April 2018 that the Tax Cuts and Jobs Act enacted in December 2017 “reduced our expected effective tax rate in 2018 from 34% to 24%”—not bad given a 9.8% operating margin on home sales.<sup>99</sup>

It seems doubtful that such builders would flee, or not be able to insure against risk, were Washington to follow every other state in adopting substantive homeowner protections.

In effect, Washington has adhered to a “caveat emptor” rule that other states long ago discarded. Even the South Carolina Supreme Court, as long ago as 1970, had noted that “the seller and buyer are not on an equal footing” and had “therefore hold that in the sale of a new house by the builder-vendor there is an implied warranty that

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97. Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 91 (Cal. 1974).

98. Press Release, D.R. Horton, D.R. Horton, Inc., America’s Builder, Reports Fiscal 2018 Second Quarter Earnings and Declares Quarterly Dividend of \$0.125 Per Share (Apr. 26, 2018), <http://investor.drhorton.com/news-and-events/press-releases/2018/04-26-2018-113029343.aspx> [<https://perma.cc/T9WS-JP8V>].

99. Press Release, Lennar, Lennar Reports First Quarter Results (Apr. 4, 2018), <http://investors.lennar.com/~media/Files/L/Lennar-IR/documents/earnings-releases/q1-press-release-2018.pdf> [<https://perma.cc/UTV3-X25E>].

the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation.”<sup>100</sup> It is quite remarkable that the Washington Supreme Court, pilloried by some as “liberal and activist,”<sup>101</sup> never followed this trend.<sup>102</sup>

Neighboring Idaho is the nation’s fastest-growing state.<sup>103</sup> Its growth does not appear to be held back by the fact that aggrieved homeowners can file negligence lawsuits over construction defects, after first complying with the state’s Notice and Opportunity to Repair Act.<sup>104</sup>

The statutory warranty legislation of 2007 in Washington was, as it passed the Senate, only eight pages long, and almost two full pages were dedicated to creating a committee on residential construction that would have included industry representatives.<sup>105</sup> The next session’s bill started out as two paragraphs creating a duty to “exercise reasonable care” in construction, but then, in the House,

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**100.** *Rutledge v. Doddenhoff*, 175 S.E.2d 792, 795 (S.C. 1970). This right only extends to the first sale of the home. *See Arvai v. Shaw*, 345 S.E.2d 715 (S.C. 1986). Innumerable other examples could be provided. For example, the Alabama Supreme Court, in 1971, took the opportunity to overrule prior precedent upon the invitation of the state’s Court of Civil Appeals, and recognized the principle of an implied warranty of fitness and habitability for the purpose purchased. *See also Cochran v. Keeton*, 252 So.2d 313 (Ala. 1971). In many conservative states, such implied rights can only be disclaimed by the provision of guaranteed rights; for example, in Vice President Mike Pence’s Indiana, there is a two-year warranty that “the new home will be free from defects caused by faulty workmanship or defective materials” as well as free from defects caused by faulty installation of plumbing, electrical, or HVAC systems. IND. CODE § 32-27-2-8(a)(1)–(2) (2018). The roof must be free of defects for four years, and the home free of “major structural defects” for ten years. IND. CODE § 32-27-2-8(a)(3)–(4) (2018). These warranties must be “backed by an insurance policy in an amount at least equal to the purchase price of the new home.” IND. CODE § 32-27-2-9(a)(2) (2018).

**101.** JIM BRUNNER & NINA SHAPIRO, *STATE SUPREME COURT: ACTIVIST JUSTICES, OR JUST DIFFERENT?*, *Seattle Times* (SEPT. 12, 2015, 6:02 PM), <https://www.seattletimes.com/seattle-news/politics/state-supreme-court-activist-justices-or-just-different/> [HTTPS://PERMA.CC/5FLL-PPEJ].

**102.** In declining to extend protections, the court has only gone so far as to write, comfortingly, “Plaintiff homeowners faced with losses that are not of their own making present a sympathetic case[.]” *See Stuart*, 745 P.2d at 1284.

**103.** *See* Press Release, U.S. Census Bureau, Idaho is Nation’s Fastest-Growing State, CENSUS BUREAU REPORTS (Dec. 20, 2017), <https://www.census.gov/newsroom/press-releases/2017/estimates-idaho.html> [https://perma.cc/E59Z-G295].

**104.** *See* IDAHO CODE ANN. § 6-2503 (West 2018).

**105.** *See* Engrossed Substitute S. B. 5550, 60th Leg., Reg. Sess. (Wash. 2007).

became a longer statutory warranty bill of four pages.<sup>106</sup> The 2009 Senate-passed bill was thirty pages long.<sup>107</sup>

The simpler negligence cause-of-action approach, establishing a duty and a remedy for its breach, is tempting as it creates less opportunity for obfuscation. It requires opponents to argue that there should be no requirement that one engaged in home construction have a duty of “reasonable care” and be liable to a homeowner for failure to meet that duty.

Yet homebuilders and consumers alike should prefer the specificity of statutory warranty protections, comparable to those for condominiums, as opposed to the uncharted, more expansive territory of negligence claims. It also avoids demagoguery over frivolous lawsuits and greedy trial attorneys, especially if a right to repair defects is granted as it has been in other states. Risk that is defined can be more easily insured against than risk that is not.<sup>108</sup> The warranty approach taken by Senate Bill 5550 in 2007 is similar to one that has worked in other states.

As was true with the public support for the failed homeowners’ rights bills of 2007–09, there would surely be public support for conferring rights upon homeowners. In 2007, voters affirmed the Insurance Fair Conduct Act, sponsored by Sen. Weinstein, that creates a cause of action where an insured is “unreasonably denied a claim for coverage or payment of benefits by an insurer” – allowing up to treble damages.<sup>109</sup> Almost fifty-seven percent of voters rejected the histrionic claims against this protection,<sup>110</sup> best illustrated from a passage in the voter’s pamphlet:

As if there weren’t enough frivolous lawsuits jacking up insurance rates, Washington’s trial lawyers have invented yet another way to

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**106.** See Substitute S. B. 6385 Striking Amendment,

**107.** See Engrossed Second Substitute S. B. 5895, 61st Leg., Reg. Sess. (Wash. 2009), <http://lawfilesexternal.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Bills/5895-S2.E.pdf> [<https://perma.cc/P9JJ-LWQQ>].

**108.** The National Association of Home Builders has published its own extensive guide to common construction defects and how they should be remedied. See NAT’L ASS’N OF HOME BUILDERS, RESIDENTIAL CONSTRUCTION PERFORMANCE STANDARDS (3rd ed. 2005).

**109.** WASH. REV. CODE § 48.30.015 (2018).

**110.** See *2007 Election Results*, WASH. SEC’Y OF STATE, <http://results.vote.wa.gov/results/20071106/Referendum-Measure-67-concerns-insurance-fair-conduct-related-to-claims-for-coverage-or-benefits.html> [<https://perma.cc/W389-CHDZ>].

file more lawsuits to fatten their pocketbooks. They wrote and pushed a law through the Legislature that permits trial lawyers to threaten insurance companies with *triple damages* to force unreasonable settlements that will *increase insurance rates for all consumers*.<sup>111</sup>

Just as insurer bad faith in covering property damage is disallowed, homebuilder negligence in building it should be too. In Washington, after all, you can sue your attorney or medical doctor for negligence, and these same professionals can be separately sanctioned through their licensure. However, you have no real recourse against your homebuilder.<sup>112</sup>

A statutory warranty approach with an opportunity for homebuilders to repair defects is intuitively fair, as *The Olympian* editorialized in 2008:

Building contractors doing quality work won't have damages to repair in the first place. And they won't get sued. Surely purchasers of single-family homes deserve the same protection from shoddy workmanship as condo buyers. Home buyers deserve more protection than they have today, and that's why the Legislature must act.<sup>113</sup>

This is no less true today than it was over a decade ago.<sup>114</sup>

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**111** . 2007 *Wash. Voter's Pamphlet*, WASH. SEC'Y OF STATE, <https://weiapplets.sos.wa.gov/MyVoteOLVR/onlinevotersguide/Measures?language=en&electionId=2&countyCode=xx&ismyVote=False&electionTitle=2007%20General%20Election%20#ososTop> [<https://perma.cc/76FA-V38B>].

**112.** That is unless your homebuilder has been so reckless as to act with intentional negligence. For example, a homebuilder was sued for allegedly “having *intentionally* omitted nearly all industry-standard methods for building homes to withstand our wet weather.” Alexa Vaughn, *Homebuilder faces suit over construction at Trilogy of Redmond Ridge*, SEATTLE TIMES (Oct. 11, 2014, 12:55 AM) (emphasis added), <https://www.seattletimes.com/seattle-news/homebuilder-faces-suit-over-construction-at-trilogy-of-redmond-ridge/> [[HTTPS://PERMA.CC/T9CJ-KB6S](https://perma.cc/T9CJ-KB6S)]. That lawsuit was settled. See Paige Cornwell, *Settlement reached in suit against Redmond builder of Trilogy homes*, SEATTLE TIMES (Apr. 6, 2015, 6:23 PM), <https://www.seattletimes.com/seattle-news/eastside/settlement-reached-in-suit-against-redmond-builder-of-trilogy-homes/> [<https://perma.cc/7MMN-UBL9>]. Reporting noted that “[r]esidents alleged that most of Trilogy’s 1,522 houses were rotting because they weren’t properly assembled or waterproofed during construction.” *Id.*

**113.** Editorial, *Bill Would Aid Home Buyers*, THE OLYMPIAN, Mar. 6, 2008.

**114.** With evident sarcasm, a 2008 *Post-Intelligencer* editorial had concluded, “Surely those stuck with flooded homes and rotting walls can wait another year.” See *Home Warranty: A Simple Matter*, *supra* note 14.

