



## Building Industry Association of Washington

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### MEMORANDUM

**TO:** BIAW Members

**FROM:** Randy Gold, BIAW President

**DATE:** May 9, 2003

**RE:** BIAW's Construction Liability Bill—Good News for Builders

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Your state association – the Building Industry Association of Washington – was able to push another bill (HB 2039) through the Legislature this session which will help builders obtain insurance. The bill provides affirmative defenses to builders when they are faced with lawsuits for construction defects. This memo describes what HB 2039 does and what you need to do to take advantage of its benefits.

#### **The Insurance Crisis**

Builders and subcontractors statewide are unable to find affordable or available contractor liability insurance. This lack of insurance has forced BIAW members to go out of business, lose contracts, and become unregistered contractors. As a result, housing prices are skyrocketing and condominium and subdivision development has dropped dramatically.

Last year, BIAW passed the “Cure Bill.” This bill curbs rampant construction defect litigation by preventing a lawsuit until the builder is given the opportunity to fix or pay for the defect. Because the Cure Bill applies only to homes built after July 2002, its impact on the insurance market has yet to be felt. In January, BIAW launched its next strike against frivolous construction litigation with HB 2039, providing affirmative defenses to builders.

#### **What are Affirmative Defenses?**

Affirmative defenses are legal responses a defendant makes to a plaintiff's claim, so even if the plaintiff's complaint is true (the windows are leaking), the affirmative defense (the homeowner failed to annually caulk the windows) prevents the claim. Successful assertion of these defenses may excuse, in whole or in part, a builder from an obligation, damage, loss, or liability. Thus, affirmative defenses are a valuable shield against claims for construction effects, especially defects that show up long after the house is built and occupied.

#### **How Long Are Builders Liable for Defects?**

Currently, a defect must occur or become apparent within six years of substantial completion of the house to be actionable. The homeowner then has another six years from that date to bring a lawsuit.

So, if the defect became apparent on the last day of the sixth year, the homeowner would have until the last day of the twelfth year to bring suit.

**HB 2039 mandates that homeowners have only six years, not twelve years, to file construction defect lawsuits.**

### How Does HB 2039 Work?

HB 2039 puts in statute seven affirmative defenses which builders can use when responding to lawsuits for construction defects. The defenses excuse an obligation, damage, loss or liability:

- If it is caused by an unforeseen act of nature that prevented compliance with codes, regulations or ordinances. "Act of nature" includes weather, earthquake, war, terrorism, or vandalism.
- If it is caused by a homeowner's unreasonable failure to minimize damages.
- If it is caused by the homeowner's substantial failure to follow written maintenance recommendations.
- If it is caused by the homeowner's alteration, use, misuse, abuse, or neglect.
- If the builder obtained a release for the violation.
- If the builder has repaired the violation or defect.
- If the construction defect lawsuit is not brought within six years of substantial completion of the house.

Your attorney is responsible for including one or more affirmative defenses in your legal answer to any complaint filed by a homeowner. If they are not included, affirmative defenses are deemed waived.

### What Should You Do to Take Advantage of HB 2039?

1. **Contact your attorney.** These affirmative defenses can be used in legal proceedings after the bill's effective date of July 27, 2003. A copy of HB 2039 is attached to this memo for your attorney's reference.
2. **Provide a thorough maintenance manual to your customers.** In order to take advantage of the affirmative defense regarding the homeowner's failure to follow a maintenance schedule, you need to give the buyer notice of the schedule. Include reference to the schedule in your signed sale documents. Better yet, have the buyer sign a separate document acknowledging receipt, review, and acceptance of the maintenance schedule. Also, the schedule must be reasonable. Make sure your home care manual reflects commonly accepted maintenance practices. BIAW has a model maintenance manual available for members, entitled "Maintenance Guide for Your Home." Call the BIAW offices if you would like a copy.
3. **Keep thorough records before and after construction.** Not only should you keep detailed records of each construction project, including contracts, change order, correspondence, product information, and pictures, you should also keep record of all activity or contact with the homeowner, other contractors, suppliers, and manufacturers after construction is complete. This information could prevent a lawsuit from happening or stop one in its tracks with the use of affirmative defenses.

If you have any questions regarding the bill or how it relates to your business, feel free to call BIAW General Counsel Timothy Harris at 800-228-4229.