



**2005 DRAFTING REQUEST**

**Senate Substitute Amendment (SSA-SB448)**

Received: **01/18/2006**

Received By: **rnelson2**

Wanted: **Soon**

Identical to LRB:

For: **Luther Olsen (608) 266-0751**

By/Representing: **Heather**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Courts - civil procedure  
Courts - immunity liability  
Courts - miscellaneous**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Olsen@legis.state.wi.us**

Carbon copy (CC:) to: **rprocter@axley.com  
bboycks@wisbuild.org  
rgcwis@charter.net**

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Right to cure dwelling defect

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**Instructions:**

See Attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 01/18/2006	kfollett 01/19/2006		_____			
/P1			pgreensl 01/20/2006	_____	lemery 01/20/2006		
/1	rnelson2	wjackson	chaugen	_____	mbarman	mbarman	

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	01/24/2006	01/24/2006	01/25/2006 _____		01/25/2006	01/25/2006	

FE Sent For:

**<END>**

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/?	rnelson2	1/19 P11gf	1/20 PG	1/20 P81R			

FE Sent For:

<END>

**Nelson, Robert P.**

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**From:** Smith, Heather  
**Sent:** Tuesday, January 17, 2006 3:18 PM  
**To:** Nelson, Robert P.  
**Subject:** Right to repair

Hi Bob,

I understand you're already working on the changes to the assembly version of the right to repair bill, and that I need to ask you to draft those changes as a sub for the Senate version. So if you don't mind, we'd appreciate it.

Thanks,

Heather Smith  
Office of Senator Olsen



AXLEY BRYNELSON, LLP

## MEMORANDUM

TO: Jerry Deschane, Wisconsin Builders Association  
Brad Boycks, Wisconsin Builders Association

FROM: Charles V. Sweeney  
Robert C. Procter

DATE: January 17, 2006

RE: Right to Repair Legislation  
Our File: 12557.56638

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This memorandum is intended to form the basis of the memorandum to be sent to the legislative drafting attorney setting forth the changes in the Right to Repair Legislation (the "Legislation") that are to be incorporated into an amendment. The memorandum incorporates the vast majority of comments and concerns presented by the Department of Agriculture and Consumer Protection ("DATCP") and the Wisconsin Realtors Association (the "WRA"). The page and line numbers refer to Senate Bill 448. All changes are in bold and comments are in regular font.

(1) 101.148(1)(a) should be changed to state:

**"Consumer" means an owner of a dwelling, a tenant or lessee of a dwelling, or an association or other entity with control over the common areas appurtenant to a dwelling, that contracts with a contractor to construct a dwelling, remodel a dwelling, or to remodel a manufactured home.**

The term "Claimant" should be changed to "Consumer" for the purposes of the notice provision because it may be impossible to give every potential Claimant notice as that term is defined. The Contractor should only be required to give the notice to the person he enters into a contract with and not to every potential claimant (i.e., subsequent homeowners) because he or she will not know who all potential claimants are when giving the notice. Please note that the legislation is set up that if a "Claimant" does not receive the required notice, then the Court does not dismiss the lawsuit but only "stays" the lawsuit until the Right to Repair procedures are followed. The result is the acknowledgement that there may be some potential "Claimants" (i.e., subsequent home buyers) that a Contractor cannot provide a notice.

(2) 101.148(1)(b) should be changed to state:

✓ **“Contractor” means a person that enters into a contract, whether written or oral, with a Consumer to construct a dwelling, to remodel a dwelling or to remodel a manufactured home.**

*or portion of a premises*

(3) 101.148(1)(c) should be changed to state:

**“Dwelling” means any residential or non-commercial premises used, in whole or in part, as a home or place of residence by any natural person, whether or not a single- or multi-unit structure, and that part of the lot or site on which it is situated and which is devoted to the residential use of the structure and includes all appurtenant structures. The term extends to other existing structures on the immediate residential premises even though they are not used for residential purposes such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages and basements.**

*the dwelling*

*“Dwelling” includes*

*Insert 3-11*

(4) 101.148(1)(e) should be changed to state:

✓ **“Remodel” means to alter or reconstruct a structure. Remodel does not include maintenance work.**

(5) 101.148(2)(a) should be changed to state:

✓ **Notice required at time of contracting. (a) Prior to entering into a written contract, or in cases of an oral contract as soon as reasonably possible, but prior to commencing any work to construct a dwelling, to remodel a dwelling, or to remodel a manufactured home, the contractor shall give the consumer a copy of the brochure prepared under s. 895.07(12) and a notice worded substantially as follows:**

(6) Section 895.07(1)(b) should be changed to state:

✓ **“Claimant” means an owner of a dwelling, a tenant or lessee of a dwelling, or an association such as a condominium association or homeowners association that has standing to sue a contractor or supplier regarding a construction defect.**

(7) Section 895.07(1)(c) should be created to state:

✓ **“Claim” means a request or demand to remedy any construction defect caused by a contractor or supplier relating to the construction of a dwelling, the remodeling of a dwelling or the remodeling of a manufactured home.**

(8) Section 895.07(1)(c), which was the definition for “Construction Defect”, should become Section 895.07(1)(d) and the subsequent subsections re-lettered. The definition for Construction Defect should be deleted, and the following definition inserted:

**“Construction defect” means a deficiency in the specifications, planning, supervision, construction, or remodeling of a dwelling or in the remodeling of a manufactured home that results from any of the following:**

- (1) Defective Material;**
- (2) Violation of applicable codes;**
- (3) Failure to follow accepted trade standards for workmanlike construction; or**

**(4) In those instances where the contractor or supplier has provided a warranty, the definition of the term “defect” under the warranty shall govern any claim made under the warranty.**

**(9) Section 895.07(1)(e) should be changed to state:**

*ok* **“Serve” or “service” means personal service or delivery by certified mail, return receipt requested, to the last-known address of the addressee.**

**(10) Section 895.07(1)(f) should be changed to state:**

*ok* **“Working day” means any day except Saturday, Sunday, and holidays designated in s. 230.35(4) (a).**

**(11) Section 895.07(1)(g) should be changed to state:**

*✓* **The terms “contractor,” “dwelling,” “manufactured home,” “remodel” and “supplier” shall have the meaning given under s. 101.148(1).**

**(12) Section 895.07(2), *mut* should be changed at page 5, line 17, to state:**

*✓* **If the claimant files an action but fails to comply with the requirements of this subsection and the contractor or supplier can establish that the claimant was provided the notice and brochure pursuant to s. 101.148(2), the circuit court shall dismiss the action without prejudice, and the action may not be re-filed until the claimant has complied with the requirements of this subsection. If the claimant files an action but fails to serve the notice of claim and the contractor or supplier cannot establish that the claimant was provided notice pursuant to s. 101.148(2), the action shall be stayed and the parties ordered to comply with the requirements of this subsection.**

**(13) Section 895.07(3)(a) should be revised at page 5, lines 23-25, to state:**

*✓* **The notice of claim shall state that the claimant asserts a construction defect claim or claim.**

✓ The revision deletes the statement "and is providing notice under this paragraph" pursuant to DATCP's comments.

(14) Section 895.07(3)(a) should be revised at page 6, line 2, in the following manner:

✓ The sentence on line 2 beginning with phrase "The claimant shall provide" and the sentence on line 5 beginning with "In addition, the claimant" should be deleted and replaced with the following statement:

**The claimant shall include in its notice of claim a description of the alleged construction defect and include a comprehensive description of all evidence the claimant knows or possesses, including expert reports, that substantiates the nature and cause of the alleged construction defect.**

✓ (15) Section 895.07(3)(b), at page 6, line 10, the word "may" should be changed to "shall".

(16) Section 895.07(3)(b), at page 6, line 15, the following language should be added:

✓ **If the contractor refuses to settle the claim, the contractor shall state in its written response the reason for refusing to settle the claim and include a comprehensive description of all evidence the contractor knows or possesses, including expert reports, that substantiates the reason for refusing to settle the claim. The contractor shall also include in its/her/his response any settlement offer received from a supplier.**

*deleted*  
✓ (17) Section 895.07(3)(c), should be deleted, and the section you be renumbered accordingly (section 895.07(9) sets forth procedures for the suppliers making (3)(c) redundant).

✓ (18) Section 895.07(3)(c), at page 6, line 20, the following statement should be inserted after the sentence, which ends "subject of the contribution claim":

✓ (19) Section 895.07(3)(d), at page 6, line 24, the word "**wholly**" should be deleted.

✓ (20) Section 895.07(3)(e), at page 7, line 5, should read:

**The notice shall include the specific reasons . . .** (deleting the words "factual and, if known, legal").

✓ (21) Section 895.07(3)(e), at page 7, line 9, should state:

**Were omitted and set forth the . . .** (deleting the words "in detail all")

✓ (22) Section 895.07(3)(f), at page 7, line 15, should state:

**and consultant's reasonable access to the dwelling to inspect the dwelling . . .**  
(deleting the words "prompt and complete")

(23) Section 895.07(3)(f), at page 7, line 23, the following phrase should added to the sentence, which ends "pre-testing condition":

✓ pre-testing condition within a reasonable time after completion of the testing at the contractor's sole expense.

✓ (24) Section 895.07(3)(g), at page 8, line 10, the word "may" should be changed to "shall".

(25) Section 895.07(3)(g), at page 8, line 19, the following phrase should be added to the sentence:

*rejecting*  
the construction defect, and shall state in its written response the reason for denying the claim and include a comprehensive description of all evidence the contractor knows or possesses, including expert reports, that substantiates the reason for denying the claim. The contractor shall also include in its/her/his response any settlement offer received from a supplier.

(26) Section 895.07(3)(j), at page 9, line 12, should state:

✓ The specific reasons . . . (deleting the words "factual and, if known, legal").

(27) Section 895.07(3)(k), at page 9, line 17, the sentence should be revised to state:

Contractor shall, within 5 working days after receiving the rejection, make a supplemental offer of repair or monetary payment to the claimant or provide a written notice that no such offer will be made.

*use this*  
(28) Section 895.07(3)(k), at page 9, line 18, should state:

supplemental offer of repair or monetary payment to the claimant or deny the claim. *??*

(29) Section 895.07(3)(l), at page 9, line 23, should state:

✓ The notice shall include the specific reasons . . . (deleting the words "factual and, if known, legal").

(30) Section 895.07(3)(m), at page 10, lines 6-7, should state:

✓ If a claimant rejects a reasonable offer or reasonable supplemental offer or fails to comply in good faith with the requirements of this subsection . . .

(31) Section 895.07(3)(m), at page 10, lines 12-15, should state:

If the claimant has rejected a reasonable offer or reasonable supplemental offer or fails to comply in good faith with the requirements of this subsection and any other law allows the claimant to recover punitive damages, costs and attorney fees, then the claimant shall not be entitled to recover any punitive damages, costs or attorney fees incurred after the date of its rejection under such laws; however, if the trier of fact determines that the contractor did not make a reasonable offer or supplemental offer or comply in good faith with

✓ the requirements of this subsection, the claimant shall be entitled to pursue claims under any other law that allows the claimant to recover punitive damages, costs and attorney fees.

✓ (32) Section 895.07(3)(n), at page 10, line 18-19, delete the following: "a reasonable period of time after receipt of the contractor's settlement offer, but no later than".

✓ (33) Section 895.07(3)(n), at page 10, line 21, should state "rejected" (deleting the word "accepted").

✓ (34) Section 895.07(3)(o), at page 11, line 3, should state "reasonable access" (deleting the words "prompt and unfettered access")

(35) Section 895.07(3)(r), at page 11, line 14, create subsection (r) to state:

✓ In those cases where a claimant has served a contractor with a notice of claim relating to a construction defect and the contractor has rejected or not responded to the claim and the contractor has not notified a supplier of the claim, the claimant shall, before filing an action against the supplier for a construction defect, serve the supplier with notice of the claim pursuant to s. 895.07(3)(a) and otherwise comply with the requirements of this section. ]?

✓ (36) Section 895.07(4), at page 11, line 15, delete the entire subsection 4.

✓ (37) Section 895.07(7), at page 12, line 18, the term "insurance" should be deleted.

✓ (38) Section 895.07(7), at page 12, line 21, a period should be inserted after the word "prejudice", and the remaining part of the paragraph should be deleted.

(39) Section 895.07(8)(e) should be amended to state:

✓ An association may bring an action against a contractor or supplier to recover damages that result from construction defects in any of the common elements or limited common elements of a condominium, as defined in ss. 703.02(2) and (10), or to the extent it has standing to sue on behalf of its members.

✓ (40) Section 895.07(8)(e)(1) up to Section 895.07(9) should be deleted.

(41) Section 895.07(9)(a) should be deleted and replaced with the following language:

\* Contribution. (a) A contractor may seek contribution from a supplier for a claim that a claimant makes against the contractor by providing written notice of the claimant's claim and the contribution claim within 5 working days after the contractor's receipt of the claim. The contractor shall include in its notice a description of the alleged construction defect and include a comprehensive description of all evidence the claimant knows or possesses, including expert reports, that substantiates the nature and cause of the

✓ **alleged construction defect. Notwithstanding any other provision in this section, failure to provide notice of a contribution claim to a supplier shall not prohibit the contractor from commencing an action for contribution against a supplier resulting from an action filed by a claimant.**

✓ (42) Section 895.07(9)(b), page 16, line 14, the term “may” should be revised to state “shall”.

(43) Section 895.07(9)(b) page 16, line 17, should be revised to include the following statement after sentence that ends with the phrase “contribution claim.”

✓ **If the supplier refuses to settle the claim, the supplier shall state in its written response the reason for denying the claim and include a comprehensive description of all evidence the supplier knows or possesses, including expert reports, that substantiates the reason for denying the claim.**

✓ (44) Section 895.07(9)(c) should be deleted. This section is unnecessary because the contractor already has the right to bring the claim if he/she/it is sued by a claimant.

✓ (45) Section 895.07(9)(d), page 17, line 3, should be deleted starting at the word “and” through the end of the sentence.

✓ (46) Section 895.07(9)(d), page 17, line 4, the phrase “**specific factual and, if known, legal**” should be deleted.

✓ (47) Section 895.07(9)(d), page 17, line 8, the phrase “in detail” should be deleted, and the word “the” inserted.

✓ (48) Section 895.07(9)(d), page 17, line 9, the sentence beginning with the phrase “In any subsequent action” should be deleted.

✓ (49) Section 895.07(9)(e), page 17, line 15, the phrase “prompt and complete” should be deleted and replaced with the word “reasonable”.

(50) Section 895.07(9)(e), page 17, line 23, the following phrase should be inserted after the phrase “pre-testing condition”:

✓ **within a reasonable time after completion of the testing at the supplier’s sole expense.**

✓ (51) Section 895.07(9)(e), page 18, lines 7 – 8, the phrase “**or require the supplier to request in writing a day, at least 3 working days before inspection**” should be deleted.

✓ (52) Section 895.07(9)(f), page 18, line 10, the word “may” should be changed to “shall.”

(53) Section 895.07(9)(g), should be deleted and restated as follows:

If a contractor accepts a supplier’s offer made under par. (f) within 15 working days after receipt of the offer, and the supplier does not proceed to make the monetary payment or

- ✓ remedy the construction defect within the agreed timetable, the contractor may bring an action against the supplier for the claim described in the notice of claim without further notice.
- (54) ✓ Section 895.07(9)(i), page 19, line 11, the phrase "specific factual and, if known, legal" should be deleted.
- (55) ✓ Section 895.07(9)(i), page 19, line 13, the phrase "in detail all" and replaced with the word "the".
- (56) ✓ Section 895.07(9)(i), page 19, lines 14 – 17, the sentence beginning with the phrase "in any subsequent action . . ." should be deleted.
- (57) ✓ Section 895.07(9)(j), page 19, line 19, the word "may" should be changed to "shall."
- (58) ✓ Section 895.07(9)(k), page 19, lines 24-25, the phrase "specific factual and, if known, legal" should be deleted.
- (59) ✓ Section 895.07(9)(k), page 20, line 2, the phrase "shall set forth in detail" should be replaced with the word "the."
- (60) ✓ Section 895.07(9)(k), page 20, lines 3 through 6, the sentence beginning with the phrase "in any subsequent action" should be deleted.
- (61) ✓ Section 895.07(9)(m), page 20, line 21, the word "accepted" should be changed to "rejected".
- (62) ✓ Section 895.07(9) (n), page 20, line 24, the phrase "prompt and unfettered" should be changed to "reasonable."
- (63) ✓ Section 895.07(9) (o), page 21, line 1, the word "person" should be changed to "contractor."
- (64) ✓ Section 895.07(12), page 21, line 13, the sentence should be deleted because it is redundant. Section 101.148(2) requires that the brochure be given to consumers.

**Nelson, Robert P.**

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**From:** Robert Procter [RProcter@axley.com]  
**Sent:** Thursday, January 19, 2006 11:16 AM  
**To:** Nelson, Robert P.  
**Cc:** Jerry Deschane; Brad Boycks; richard chandler; Charles V. Sweeney  
**Subject:** Right to Repair legislation

Dear Mr. Nelson:

We are requesting the following revisions to the legislation in addition to those provided previously.

Section 895.07(3), page 5, line 23 should state: "shall serve written notice of claim under sub. (2) on the contractor *and provide the opportunity to repair the alleged defect.*"

Section 895.07(2), page 5, line 20, please add the following language to the end of the section: "Before filing an action against a supplier seeking contribution for a claim that a claimant has served notice on a contractor, the contractor shall serve the supplier with a contribution claim under sub. (9). If the contractor files an action against a supplier but fails to serve the notice of claim, the circuit court shall stay the action until the contractor has complied with the requirements of this subsection and sub. (9).

Section 895.07(9)(a) should be deleted and restated with the following language: "(9) Contribution. (a) A contractor may not seek contribution from a supplier for a claim that a claimant makes a contractor unless the contractor provides the supplier with a written notice of the claimant's claim and the contribution claim within 5 working days after the contractor's receipt of the claim, except that a contractor may make a contribution claim later than 5 days after the contractor's receipt of the initial claim as long as the contractor has not taken any action to repair the defect, has not performed destructive testing, has not authorized the claimant to take any action to repair the defect, has not otherwise interfered with or altered the property that is the subject of the claim, and has not in any other way taken steps that would preclude a supplier's ability to offer to remedy the defect by making repairs."

Thank you for your assistance. Please call me with any questions or concerns.

Sincerely,

Robert C. Procter  
(608) 283-6762

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01/19/2006