

FIRST REGULAR SESSION

SENATE BILL NO. 168

93RD GENERAL ASSEMBLY

INTRODUCED BY SENATORS DOLAN, SHIELDS, VOGEL, GROSS, ENGLER, CLEMENS, KENNEDY,
MAYER, SCOTT, NODLER, CAUTHORN, PURGASON, CHAMPION, KLINDT, BARTLE, CALLAHAN,
GRIESHEIMER, KOSTER, TAYLOR, STOUFFER, CROWELL, RIDGEWAY AND COLEMAN.

Read 1st time January 12, 2005, and ordered printed.

TERRY L. SPIELER, Secretary.

0780S.02I

AN ACT

To amend chapter 431, RSMo, by adding thereto six new sections relating to resolution of conflicts resulting from alleged residential construction defects.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 431, RSMo, is amended by adding thereto six new sections, to be known as sections 431.300, 431.303, 431.306, 431.309, 431.312, and 431.315, to read as follows:

431.300. As used in sections 431.300 to 431.315, the following terms mean:

(1) "Action", any civil lawsuit, judicial action, or arbitration proceeding asserting a claim, in whole or in part, for damages or other relief in connection with a dwelling, caused by an alleged construction defect;

(2) "Association":

(a) An association or unit owners' association as defined in subdivision (3) of section 448.1-103, RSMo;

(b) A homeowner's association, including but not limited to a nonprofit corporation or unincorporated association of home owners created pursuant to a declaration to own and operate portions of a planned community or other residential subdivision and which has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration, or tenants-in-common with respect to the ownership of common areas or amenities of a planned community or

other residential subdivision; or

(c) Any cooperative form of ownership of multiunit housing;

(3) "Claimant", anyone who asserts a claim concerning a construction defect;

(4) "Construction defect", a matter concerning either the construction of a new dwelling for the first owner or the substantial remodel of an existing dwelling about which a person has a complaint against a contractor, including any physical damage to the dwelling, any appurtenance, or the real property on which the dwelling or appurtenance are affixed, proximately caused by the matter that is subject of such complaint;

(5) "Substantial remodel", a remodel of a dwelling for which the cost exceeds one-half the assessed value of the dwelling for property tax purposes at the time the contract for the remodel work was made;

(6) "Contractor", any person, firm, partnership, corporation, association, or other organization that is engaged in the business of constructing a new dwelling for the first owner or the substantial remodel of an existing dwelling. The term includes:

(a) An owner, officer, director, shareholder, partner, or employee of the contractor;

(b) Subcontractors and suppliers of labor and materials used by a contractor in the construction of a new dwelling or substantial remodel of an existing dwelling; and

(c) A risk retention group registered under applicable law, if any, that insures all or any part of a contractor's liability for the cost to repair a construction defect;

(7) "Dwelling", a single-family house, duplex, triplex, quadraplex, or multifamily unit designed for residential use in which title to each individual unit is transferred to the owner under a condominium or cooperative system and shall include common areas and improvements that are owned or maintained by an association or by members of an association. A dwelling includes the systems, other components, improvements, other structures, or recreational facilities that are appurtenant to the house, duplex, triplex, quadraplex, or multifamily unit at the time of its initial sale, but not necessarily a part of the house, duplex, triplex, quadraplex, or multifamily unit;

(8) "Serve" or "Service", delivery by certified mail, return receipt requested, to the last known address of the addressee. For a corporation, limited partnership, limited liability company, or other registered business organization, it means service on the registered agent or other agency for service or process authorized by the laws of this state.

431.303. 1. In every action subject to sections 431.300 to 431.315, the claimant shall, before initiating an action against a contractor or before becoming a member of a class certified under the applicable rules of civil procedure respecting a construction defect allegedly caused by a contractor, provide service of written notice of claim on that contractor. The notice of claim shall state that the claimant asserts a construction defect claim or claims and is providing notice of the claim or claims under the requirements of sections 431.300 to 431.315. The notice of claim shall describe the claim or claims in detail sufficient to explain the nature of the alleged construction defects and the results of the defects. In addition, the claimant shall provide to the contractor any evidence that depicts the nature and cause of the construction defect, including expert reports, photographs, and videotapes, if that evidence would be discoverable under this state's evidentiary rules. If, after proper request, the claimant fails to provide such evidence, then the claimant shall not be permitted to introduce any such evidence not produced into evidence in any action.

2. Within fourteen days after service of the notice of claim by claimant required in subsection 1 of this section, each contractor who has received the notice of claim may serve on the claimant, and on any other contractor who has received the notice of claim, a written response to the claim or claims that either:

(1) Offers to settle the claim by monetary payment, making repairs, or a combination of both, without inspection; or

(2) Proposes to inspect the dwelling that is the subject of the claim.

3. If the contractor wholly rejects the claim and neither will remedy the alleged construction defect nor settle the claim, or if the contractor does not respond to the claimant's notice of claim within the time stated in subsection 2 of this section, the claimant may at any time

thereafter bring an action against the contractor for the claims described in the notice of claim without further notice except as otherwise provided under applicable law.

4. If the claimant rejects the settlement offer made by the contractor, the claimant shall provide within thirty days written notice of the claimant's rejection to the contractor and, if represented by legal counsel, the contractor's attorney. The notice shall include specific factual and, if known, legal reasons for the claimant's rejection of the contractor's proposal or offer. If the claimant believes that the settlement offer either omits reference to any portion of the claim or was unreasonable in any manner, the claimant shall include in the written notice those items that the claimant believes were omitted and set forth in detail all reasons why the claimant believes the settlement offer is unreasonable. In any subsequent action where claimant asserts the settlement offer was unreasonable, the claimant will not be able to raise any reasons that were not included in its response to the contractor.

5. If a proposal for inspection is made under subsection 2 of this section, the claimant shall, within thirty days of receiving the contractor's proposal, provide the contractor and the contractor's subcontractors, agents, experts, and consultants prompt and complete access to the dwelling to inspect the dwelling, document any alleged construction defects, and perform any destructive or non-destructive testing required to evaluate fully and completely the nature, extent, and cause of the claimed defects and the nature and extent of any repairs or replacements that may be necessary to remedy the alleged defects. If destructive testing is required, the contractor shall give the claimant advance notice of such tests and shall, after completion of the testing, return the dwelling to its pretesting condition. If any inspection or testing reveals a condition that requires additional testing to allow the contractor to evaluate fully and completely the nature, cause, and extent of the construction defect, the contractor shall provide notice to the claimant of the need for such additional testing, and the claimant shall provide access as set forth in this section. If a claim is asserted on behalf of owners of multiple dwellings or multiple owners of units within a multifamily complex, then the contractor shall be entitled to inspect each of the dwellings or units.

6. Within fourteen days following completion of the inspections and testings set forth above, the contractor may serve on the claimant:

(1) A written offer to remedy fully or partially the construction defect at no cost to the claimant. Such offer shall include a description of any additional construction necessary to remedy the defect described in the claim and an anticipated timetable for the completion of such construction;

(2) A written offer to settle the claim by monetary payment;

(3) A written offer including a combination of repairs and monetary payment; or

(4) A written statement that the contractor will not proceed further to remedy the defect.

7. If a claimant accepts a contractor's offer made under subsection 6 of this section and the contractor does not proceed to make the monetary payment or remedy the construction defect within the agreed timetable, the claimant may bring an action at any time thereafter against the contractor for the claim described in the notice of claim without further notice except as otherwise provided by applicable law. In such situation, the claimant may also file the contractor's offer and claimant's acceptance, and such offer and acceptance will create a rebuttable presumption that a binding and valid settlement agreement has been created and should be enforced by the court or arbitrator.

8. If a claimant receives a written statement that the contractor will not proceed further to remedy the defect or receives no response after said inspection by the contractor, the claimant may bring an action at any time thereafter against the contractor for the claim described in the notice of claim without further notice except as otherwise provided by applicable law.

9. If the claimant rejects the offer made by the contractor to remedy the construction defect or to settle the claim by monetary payment or a combination of each after said inspection by the contractor, the claimant shall serve written notice of the claimant's rejection on the contractor within thirty days. The notice shall include the specific factual and, if known, legal reasons for the claimant's rejection of the contractor's offer. If the claimant believes the

contractor's settlement offer is unreasonable, the claimant shall set forth in detail all reasons why claimant believes the settlement offer is unreasonable. In any subsequent action where the claimant asserts that the settlement offer was unreasonable, the claimant will not be able to raise any reasons that were not included in the response to the contractor.

10. Upon receipt of a claimant's rejection and the reasons for such rejection, the contractor may, within fourteen days of receiving the rejection, make a supplemental offer of repair and/or monetary payment to the claimant.

11. If the claimant rejects the supplemental offer made by the contractor to remedy the construction defect or to settle the claim by monetary payment or a combination of each, the claimant shall serve written notice of the claimant's rejection of the contractor's supplemental settlement offer within fourteen days. The notice shall include specific, factual, and if known, legal reasons for the claimant's rejection of the contractor's supplemental offer. If the claimant believes the contractor's supplemental settlement offer is unreasonable, the claimant shall set forth in detail all reasons why the claimant believes the supplemental settlement offer is unreasonable. In any subsequent action where the claimant asserts that the supplemental settlement offer was unreasonable, the claimant will not be able to raise any reasons that were not included in its response to the contractor.

12. If a claimant rejects a reasonable offer, including any reasonable supplemental offer, as provided under sections 431.300 to 431.315, or does not permit the contractor to repair the construction defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of:

(1) The fair market value of the offer of settlement, or the actual cost of the repairs made, whichever is less; or

(2) The amount of a monetary offer of settlement. For purposes of this subsection, the trier of fact shall determine the reasonableness of an offer of settlement made under this section. If the claimant has rejected a reasonable offer, including any reasonable supplemental offer, and any other law allows the claimant to recover costs and attorneys' fees, then the claimant may recover no costs or attorneys' fees incurred

after the date of its rejection.

13. Any claimant accepting the offer of the contractor to remedy a construction defect shall do so by serving the contractor with a written notice of acceptance within a reasonable period of time after receipt of the contractor's settlement offer, but no later than thirty days after receipt of the offer.

14. If a claimant accepts a contractor's offer to repair a construction defect described in a notice of claim, the claimant shall provide the contractor and its subcontractors, agents, experts, and consultants prompt and unfettered access to the dwelling to perform and complete the construction by the timetable stated in the settlement offer.

15. If, during the pendency of the notice, inspection, offer, acceptance, or repair process, an applicable limitations period would otherwise expire, the claimant may file an action against the contractor, but such action shall be immediately abated pending completion of the notice of claim process described in this section. This subsection shall not be construed either to revive a statute of limitations period that has expired prior to the date on which a claimant's written notice of claim is served or extend any applicable statute of repose.

16. After sending the initial notice of claim, a claimant and a contractor may, by written mutual agreement, alter the procedure for the notice of claim process described in this section.

17. In the event that immediate action must be taken by a claimant to prevent imminent injury to persons because of alleged construction defects, including defective garage doors, that threaten the life or safety of persons, or alleged construction defects, including defective garage doors, that if not addressed will result in significant and material additional damage to the residence, the homeowner or another person designated by the homeowner, including the contractor, may undertake reasonable repairs necessary to mitigate the emergency situation. Claimants may thereafter include the cost of such repairs in the written notice of claim of construction defects provided for in sections 431.300 to 431.315. Other than making immediate repairs to remedy an emergency situation, any repairs to construction defects undertaken by homeowners shall not be included in claims initiated under sections 431.300 to 431.315 and shall not be the subject of an

action.

18. A construction defect that is discovered after a claimant has provided a contractor with the initial claim notice may not be alleged in an action until the claimant has given the contractor who performed the original construction:

(1) Written notice of claim regarding the alleged defect as required by sections 431.300 to 431.315; and

(2) An opportunity to resolve the notice of claim in the manner provided in sections 431.300 to 431.315.

19. If a claimant files an action without first complying with the requirements of sections 431.300 to 431.315, an application by a party to the action, the court, or the arbitrator shall dismiss the action, without prejudice, and the action may not be refiled or resumed until the claimant has complied with the requirements of sections 431.300 to 431.315. To the extent that the action includes a cause of action for damages due to personal injury or death, such cause of action shall not be subject to dismissal under this section.

431.306. If the claimant rejects the supplemental offer made by the contractor, the claimant shall serve written notice of the claimants' rejection to the contractor within fourteen days. The contractor shall have fourteen days from receipt of the rejection notice to request mediation with the claimant. The mediation process shall be as follows:

(1) The mediation request by the contractor shall include the name of the proposed mediator and mediation date. If the contractor does not provide written notice for the request of mediation to the claimant within fourteen days, the claimant may at any time thereafter bring an action against the contractor for the claims described in the notice of claim without further notice except as otherwise provided under applicable law;

(2) The claimant who receives a request for mediation from a contractor shall serve a response in writing within fourteen days and shall include in the response either agreement with the proposed mediator and mediation time or objections and suggestion of a proposed mediator and mediation time. Mediation under this section shall be non-binding, and the contractor and claimant shall mutually agree upon a qualified independent mediator and equally share the cost of the

mediator;

(3) If the parties cannot agree upon a mediator within thirty days after the party initiating mediation sends notice of the commencement of the mediation process to the other party, either party may request appointment of a mediator by a court with jurisdiction. The mediation shall take place within a reasonable time period but in no event later than thirty days after the identity of the mediator is determined by the court;

(4) The mediation shall take place in the county where the claimant resides or in a mutually agreed to location;

(5) The contractor or claimant may include in the mediation any person or entity reasonably necessary for resolution of the claim asserted, but shall include persons having full authority to resolve the dispute. This subsection shall not be construed to mandate attendance at mediation by a person or entity other than the contractor or claimant service with notice of a claim;

(6) Except as otherwise provided in sections 431.300 to 431.315, all mediations required to be conducted or actually conducted shall be subject to sections 17.04, 17.05(a), and 17.06 of the Missouri supreme court rule 17, "alternative dispute resolution" and as implemented by local court rules, if any, of the court having jurisdiction.

431.309. 1. The provisions of sections 431.300 to 431.315 shall apply to any claimant or any person or entity acting for, on behalf of, or in place of such claimant. If a claimant accepts an offer made in compliance with sections 431.300 to 431.315, the claimant shall thereafter be barred from bringing an action for the claim described in the notice of claim. Performance of repairs or payment of money to a claimant by a contractor under an accepted offer made under sections 431.300 to 431.315 shall not, by itself, create insurance coverage or otherwise affect an insurer's obligations under a contractor's liability insurance policy or, by itself, be considered a voluntary payment of an otherwise valid insured claim according to the terms and conditions of the contractor's liability insurance policy.

2. In an action relating to a dwelling involving a construction defect, a contractor shall not be liable for damages involving or caused by:

(1) Normal shrinkage due to drying or settlement of construction components within the tolerance of building standards;

(2) The contractor's reliance on written information relating to the dwelling that was obtained from official government records or provided by a government entity;

(3) Any construction defect known by or disclosed to a claimant in writing before his purchase of the dwelling;

(4) If the claimant is not the first owner of the dwelling, any construction defect known by the claimant or that could have been discovered by the claimant through the exercise of reasonable diligence prior to the claimant's purchase of the dwelling; or

(5) Refusal of anyone to allow the contractor or contractor's agents to perform their warranty service work.

431.312. 1. Upon entering into a contract for sale, construction, substantial remodel, or improvement of a dwelling, the contractor shall provide notice to the owner of the dwelling of the contractor's right to resolve alleged construction defects before a claimant may commence litigation against the contractor. Such notice shall be conspicuous and may be included as part of the contract provided nothing in sections 431.300 to 431.315 shall preclude or bar any action if such notice as described in this section is not given to the claimant in accordance with the terms of this section.

2. The notice required by subsection 2 of this section shall provide time frame guidelines for dates to comply with sections 431.300 to 431.315 for both the claimant and contractor and shall be printed in no smaller than ten-point capital letters. The notice shall be in substantially the following form in a single and separate document:

SECTIONS 431.300 TO 431.315 OF THE MISSOURI REVISED STATUTES PROVIDE YOU WITH CERTAIN RIGHTS IF YOU HAVE A DISPUTE WITH A CONTRACTOR REGARDING CONSTRUCTION DEFECTS. SECTION 431.303 CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION AGAINST THE CONTRACTOR WHO CONSTRUCTED YOUR HOME EXCEPT FOR CLAIMS FILED IN SMALL CLAIMS COURT. BEFORE YOU FILE YOUR LAWSUIT OR OTHER

ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR AND/OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

3. In those lawsuits originally filed by a contractor against a homeowner, if a homeowner files a counterclaim or an affirmative defense in such lawsuit that includes a claim based on a construction defect allegedly caused by the contractor, then the provisions of sections 431.300 to 431.315 shall not apply to said lawsuit, and the homeowner or association claimant will not be required to adhere to sections 431.300 to 431.315 or those claims made pursuant to the lawsuit, provided a claimant shall be required to follow those provisions for any claim not otherwise covered by said lawsuit.

4. Nothing herein shall create any cause of action on behalf of any claimant or contractor.

5. Sections 431.300 to 431.315 do not apply to a contractor's right to seek contribution, indemnity, or recovery against a subcontractor, supplier, or design professional for any claim made against a contractor by a claimant.

6. Nothing in sections 431.300 to 431.315 shall be construed to prevent contracts between contractors and the party with whom a contractor enters into a contract for the construction of a new dwelling or the substantial remodel of an existing dwelling from specifying that disputes shall be resolved by binding arbitration under chapter 435, RSMo, or by non-binding mediation, provided that such contracts that specify binding arbitration as the means of dispute resolution shall provide notice under section 435.460 that disputes may be resolved by binding arbitration.

431.315. 1. If an association or an executive board acting on behalf of an association institutes an action asserting defects in the

construction of two or more residences, common elements, or common areas, the provisions of this section shall apply.

2. The board of directors or executive board of the association shall substantially comply with the provisions of this section.

(1) Prior to filing an action alleging a construction defect, the association or board of directors or executive board shall serve written notice of the anticipated commencement of such action to each claimant who is a member of the association at the last known address described in the association's records;

(2) The notice required by subdivision (1) of this subsection shall state a general description of the following:

(a) The nature of the action and the relief sought; and

(b) The expenses and fees that the board of directors or executive board anticipates will be incurred in prosecuting the action.

(3) The association or board of directors or executive board shall obtain written consent to proceed with the action from a majority of the homeowners who are members of the association, but in any event including, if applicable, the homeowner of any unit where the alleged construction defect is located.

3. Nothing in this section shall be construed to:

(1) Require the disclosure in the notice or the disclosure to a unit owner of attorney-client communications or other privileged communications;

(2) Permit the notice to serve as a basis for any person to assert the waiver of any applicable privilege or right of confidentiality resulting from or to claim immunity in connection with the disclosure of information in the notice; or

(3) Limit or impair the authority of the association or executive board to contract for legal services, limit or impair the ability of the association or executive board to make such repairs to a unit, common area, or common element as are required to protect the health, safety, and welfare of the units' owners, or to limit or impair the ability to enforce such a contract for legal services.

4. Sections 431.300 to 431.315 shall apply to all actions commenced on or after August 28, 2005.

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