

## HOUSE BILL No. 2294

By Committee on Judiciary

2-11

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AN ACT concerning civil procedure; relating to the filing of lawsuits concerning construction defects.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. As used in this act:

(a) "Action" means any civil lawsuit between a claimant and a contractor or action or arbitration proceeding for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the construction or condition of the dwelling or a remodel of a dwelling.

(b) "Association" means a non-profit homeowners organization as defined in K.S.A. 60-3611, an amendments thereto.

(c) "Claimant" means a homeowner, including a subsequent purchaser, or association who asserts a claim against a contractor or subcontractor concerning a defect in the construction of a dwelling or in the remodel of a dwelling.

(d) "Construction defect" or "defect" means a deficiency in, or a deficiency arising out of the specifications, planning, supervision or construction of residential improvements that results from any of the following:

(1) Defective material, products or components used in the construction of residential improvements.

(2) Violation of the applicable codes in effect at the time of construction of residential improvements. Compliance with the applicable codes in effect at the time of construction shall conclusively establish construction in accordance with accepted trade standards for good and workmanlike construction with respect to all matters specified in such codes.

(3) Failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. In jurisdictions where there are no applicable codes, compliance with the national association of home builders residential construction performance guidelines, second edition, in effect on the effective date of this act, shall conclusively establish construction with respect to all matters specified in those guidelines.

(e) "Contractor" means any person, firm, partnership, corporation,

1 association or other organization that is engaged in the business of de-  
2 veloping or constructing dwellings.

3 (f) "Dwelling" means a single-family house, duplex or multifamily  
4 unit designed for residential use in which title to each individual unit is  
5 transferred to the owner under a condominium or cooperative system  
6 and shall include common areas and improvements that are owned or  
7 maintained by an association or by members of an association. A dwelling  
8 includes the systems and other components and improvements that are  
9 part of a single or multifamily unit at the time of construction. For the  
10 purposes of this act "dwelling" does not mean manufactured home as  
11 defined in K.S.A. 58-4202, and amendments thereto.

12 (g) "Service" means personal service or delivery by certified mail,  
13 return receipt requested, to the last known address of the addressee.

14 (h) "Subcontractor" means a contractor who performs work on behalf  
15 of another contractor in the construction of a dwelling.

16 (i) "Supplier" means a person who provides materials, equipment or  
17 other supplies for the construction of dwelling.

18 Sec. 2. (a) If a claimant files an action without first complying with  
19 the provisions of this act, on application by a party to the action, the court  
20 shall dismiss the action, without prejudice, and the action may not be  
21 refiled until the claimant has complied with the requirements of this act.

22 (b) This act shall not supersede express warranty, settlement of dis-  
23 putes or other provisions of a contract between the contractor and the  
24 claimant.

25 Sec. 3. Nothing in this act shall apply to actions arising out of claims  
26 for personal injury or death.

27 Sec. 4. (a) In every action brought against a contractor arising out of  
28 the construction of a dwelling, the claimant, at least 90 days before filing  
29 an action, shall serve written initial notice of claim on the contractor. The  
30 initial notice of claim shall state that the claimant asserts a construction  
31 defect claim and the notice of claim shall describe the claim or claims in  
32 detail sufficient to determine the general nature of any alleged construc-  
33 tion defects and a description of the results of the defects, if known.

34 (b) Within 15 days after service of the initial notice of claim, the  
35 contractor shall serve a copy of the notice to each subcontractor and  
36 supplier who may be responsible for a defect specified in the notice and  
37 include with the notice the specific defect for which the contractor be-  
38 lieves the subcontractor or supplier is responsible.

39 (c) On the request of the contractor, subcontractor or supplier who  
40 has received an initial notice of claim, the claimant shall provide to the  
41 contractor, subcontractor or supplier any evidence that depicts the nature  
42 and cause of the defect and the nature and extent of repairs necessary to  
43 remedy the defect, including any assessment provided by a reliable

1 craftsman.

2 (d) Within 30 days after service of the initial notice of claim by claim-  
3 ant required, each contractor, subcontractor or supplier that has received  
4 such notice shall serve a written response on the claimant. The written  
5 response shall:

6 (1) Propose to inspect the dwelling that is the subject of the claim;

7 (2) offer to compromise and settle the claim by monetary payment  
8 without inspection; or

9 (3) state that the contractor, subcontractor or supplier disputes the  
10 claim and will neither remedy the alleged construction defect nor com-  
11 promise and settle the claim.

12 (e) If the contractor, subcontractor or supplier disputes the claim  
13 pursuant to subsection (d)(3) and will neither remedy the alleged con-  
14 struction defect nor compromise and settle the claim, or does not respond  
15 to the claimant's notice of claim within the time stated in subsection (d),  
16 the claimant may bring an action against the contractor, subcontractor or  
17 supplier for the claim described in the initial notice of claim without  
18 further notice.

19 (f) If the claimant rejects the inspection proposal or the settlement  
20 offer made by the contractor, subcontractor or supplier pursuant to sub-  
21 section (d), the claimant shall serve written notice of the claimant's re-  
22 jection on the contractor, subcontractor or supplier. The notice shall in-  
23 clude a statement of the basis for the claimant's rejection of the  
24 contractor, subcontractor or supplier's proposal or offer. After service of  
25 the rejection, the claimant may bring an action against the contractor,  
26 subcontractor or supplier for the claim or claims described in the initial  
27 notice of claim without further notice. The claimant may alternatively  
28 elect an arbitration process pursuant to K.S.A. 5-201 *et. seq.*, and amend-  
29 ments thereto.

30 (g) If the claimant elects to allow the contractor, subcontractor or  
31 supplier to inspect the dwelling in accordance with the contractor, sub-  
32 contractor or supplier's proposal pursuant to subsection (d)(1) the claim-  
33 ant, within 15 days, shall notify the contractor, subcontractor or supplier.  
34 The claimant shall provide the contractor, subcontractor or supplier and  
35 its contractors or other agents access to the claimant's residence during  
36 normal working hours to inspect the premises and the claimed defect to  
37 determine the nature and cause of the alleged defects and the nature and  
38 extent of any repairs or replacements necessary to repair the alleged  
39 defects.

40 (h) Within 30 days following completion of the inspection, the con-  
41 tractor, subcontractor or supplier shall serve on the claimant a written:

42 (1) Offer to remedy the construction defect at no cost to the claimant,  
43 including a report of the scope of the inspection, the findings and results

1 of the inspection, a description of the additional construction necessary  
2 to remedy the defect described in the claim and a timetable for the com-  
3 pletion of such construction;

4 (2) offer to compromise and settle the claim by monetary payment;  
5 or

6 (3) statement that the contractor, subcontractor or supplier will not  
7 proceed further to remedy the defect.

8 (i) If a claimant accepts a contractor, subcontractor or supplier's offer  
9 made pursuant to subsection (h)(1) or (h)(2) and the contractor, subcon-  
10 tractor or supplier does not proceed to remedy the construction defect  
11 or make the monetary payment within the agreed timetable, the claimant  
12 may bring an action against the contractor, subcontractor or supplier for  
13 the claim described in the initial notice of claim without further notice.

14 (j) If a claimant receives a written statement that the contractor, sub-  
15 contractor or supplier will not proceed further to remedy the defect, the  
16 claimant may bring an action against the contractor, subcontractor or  
17 supplier for the claim described in the initial notice of claim required  
18 without further notice.

19 (k) If the claimant rejects the offer made by the contractor, subcon-  
20 tractor or supplier to either remedy the construction defect or to make  
21 the monetary payment, the claimant shall serve written notice of the  
22 claimant's rejection on the contractor, subcontractor or supplier. The no-  
23 tice shall include the basis for the claimant's rejection of the contractor,  
24 subcontractor or supplier's proposal or offer. After service of the rejection  
25 the claimant may bring an action against contractor, subcontractor or  
26 supplier for the claim described in the initial notice of claim without  
27 further notice.

28 (l) If a claimant rejects an offer made as provided by this section or  
29 does not permit the contractor, subcontractor or supplier a reasonable  
30 opportunity to repair the defect pursuant to an accepted offer of settle-  
31 ment, the claimant shall not recover an amount in excess of:

32 (1) The reasonable cost of the offered repairs which are necessary to  
33 cure the construction defect and the responsibility of the contractor, sub-  
34 contractor or supplier; or

35 (2) the amount of the monetary settlement offered by the contractor,  
36 subcontractor or supplier.

37 (m) Any claimant accepting the offer of the contractor, subcontractor  
38 or supplier to remedy the construction defects shall do so by serving the  
39 contractor, subcontractor or supplier with a written notice of acceptance  
40 within a reasonable period of time after receipt of the offer but no later  
41 than 30 days after receipt of the offer.

42 (n) If a claimant accepts a contractor, subcontractor or supplier's of-  
43 fer to repair a defect described in an initial notice of claim, the claimant

1 shall provide the contractor, subcontractor or supplier and its contractors  
2 or other agents reasonable access to the claimant's residence during nor-  
3 mal working hours to perform and complete the construction by the time-  
4 table stated in the offer.

5 (o) A claimant's failure to do any of the following is admissible in any  
6 action and creates a rebuttable presumption that the claimant's damages  
7 may have been mitigated:

8 (1) Allow a reasonable inspection requested by the contractor, sub-  
9 contractor or supplier; or

10 (2) provide a good faith, written response to a contractor, subcon-  
11 tractor or supplier's offer.

12 (p) Absent good cause, the contractor, subcontractor or supplier's  
13 failure to respond in good faith to the claimant's initial notice of claim  
14 shall preclude the contractor, subcontractor or supplier from asserting  
15 that the claimant did not comply with the provisions of this act.

16 (q) A claimant's initial written notice of claim tolls the applicable stat-  
17 ute of limitations from the date the notice is sent until 120 days after the  
18 contractor, subcontractor or supplier receives the notice or until such  
19 time as the agreed upon repairs are completed.

20 Sec. 5. A construction defect which is discovered after a claimant has  
21 provided a contractor with the initial notice of claim required in section  
22 4, and amendments thereto, may not be alleged until the claimant has  
23 given the contractor, subcontractor or supplier who performed the orig-  
24 inal construction:

25 (a) An additional written notice of claim of the alleged defect in the  
26 same manner as provided for in the initial notice of claim required by  
27 section 4, and amendments thereto; and

28 (b) a reasonable opportunity to repair the alleged construction defect  
29 in the manner provided in section 4, and amendments thereto.

30 Sec. 6. (a) A contractor, subcontractor or supplier who receives an  
31 initial notice of claim pursuant to section 4, and amendments thereto,  
32 may present the notice to an insurer who issued a policy of insurance  
33 covering all or part of the conduct or business of the contractor, subcon-  
34 tractor or supplier.

35 (b) Such notice provided to an insurer:

36 (1) Constitutes the making of a claim under the policy; and

37 (2) requires the contractor, subcontractor or supplier and the insurer  
38 to perform any obligations or duties required by the policy upon the  
39 making of a claim.

40 Sec. 7. (a) Upon entering into a contract for sale, construction or  
41 substantial remodel of a dwelling, the contractor, subcontractor or sup-  
42 plier shall provide notice to the potential claimant of the contractor, sub-  
43 contractor or supplier's right to offer to repair construction defects before

1 a claimant may commence litigation against the contractor, subcontractor  
2 or supplier. Such notice shall be conspicuous and may be included as part  
3 of the underlying contract.

4 (b) Such notice shall be in substantially the following form: Kansas  
5 law, sections 1 through 8, and amendment thereto, contains important  
6 requirements you must follow before you may file a lawsuit for defective  
7 construction against the contractor who constructed your home. Ninety  
8 days before you file your lawsuit, you must deliver to the contractor a  
9 written notice of any construction conditions you allege are defective and  
10 provide your contractor and any subcontractors or suppliers the oppor-  
11 tunity to make an offer to repair or pay for the defects. You are not  
12 obligated to accept any offer made by the contractor or any subcontractors  
13 or suppliers. There are strict deadlines and procedures under state law,  
14 and failure to follow them may affect your ability to file a lawsuit.

15 Sec. 8. Each contractor who constructs a new residential dwelling  
16 shall, within 30 days after the close of the sale, provide in writing to the  
17 initial purchaser of the residence:

18 (a) The name, license number if applicable, business address and tel-  
19 ephone number of each subcontractor who performed any work related  
20 to the construction of the dwelling; and

21 (b) a brief description of the work performed by each subcontractor  
22 identified pursuant to this section.

23 Sec. 9. (a) A person shall not provide or offer to provide anything of  
24 monetary value to a property manager of an association or to a member  
25 or officer of an executive board of an association to induce the property  
26 manager, member or officer to encourage or discourage the association  
27 to file a claim for damages arising from a construction defect.

28 (b) A property manager shall not accept anything of value given in  
29 exchange for encouraging or discouraging the association that such prop-  
30 erty manager manages to file a claim for damages arising from a construc-  
31 tion defect.

32 (c) A member or officer of an executive board of an association shall  
33 not accept anything of value given in exchange for encouraging or dis-  
34 couraging the association of which such person is a member or officer of  
35 the executive board to file a claim for damages arising from a construction  
36 defect.

37 (d) A person who willfully violates this section shall be guilty of a class  
38 C nonperson misdemeanor.

39 Sec. 10. (a) An association may bring an action to recover damages  
40 resulting from construction defects in any of the units, common elements  
41 or limited common elements of the common-interest community only:

42 (1) If the association first obtains the written approval of each unit's  
43 owner whose unit or interest in the common elements or limited common

1 elements will be the subject of the action or claim;

2 (2) upon a vote of the units' owners to which at least a majority of  
3 the votes of the members of the association are allocated; and

4 (3) Upon a vote of the executive board of the association.

5 (b) If an action is brought by an association to recover damages re-  
6 sulting from construction defects in any of the units, common elements  
7 or limited common elements of the common-interest community, the  
8 attorney representing the association shall provide to the executive board  
9 of the association and to each unit's owner a statement that includes, in  
10 reasonable detail:

11 (1) The defects and damages or injuries to the units, common ele-  
12 ments or limited common elements;

13 (2) the cause of the defects, if the cause is known;

14 (3) the nature and the extent that is known of the damage or injury  
15 resulting from the defects;

16 (4) the location of each defect within the units, common elements or  
17 limited common elements, if known;

18 (5) A reasonable estimate of the cost of the action or mediation, in-  
19 cluding reasonable attorney fees;

20 (6) an explanation of the potential benefits of the action or arbitration  
21 and the potential adverse consequences if the association does not com-  
22 mence the action or submit the claim to arbitration or if the outcome is  
23 not favorable to the association; and

24 (7) all disclosures that the unit owner's is required to make upon the  
25 sale of the property.

26 (c) An association or an attorney for an association shall not employ  
27 a person to perform destructive tests to determine any damage or injury  
28 to a unit, common element or limited common element caused by a  
29 construction defect unless:

30 (1) The person performing the tests is someone in the business of  
31 performing such tests and analysis;

32 (2) the association has obtained the prior written approval of each  
33 unit's owner whose unit or interest in the common element or limited  
34 common element will be affected by such testing;

35 (3) the person performing the tests has provided a written schedule  
36 for repairs;

37 (4) the person performing the tests is required to repair all damage  
38 resulting from such tests in accordance with state laws and local ordi-  
39 nances and codes relating thereto; and

40 (5) the association or the person so employed obtains all permits re-  
41 quired to conduct such tests and to repair any damage resulting from  
42 such tests.

43 (d) An association may commence an action only upon a vote or writ-

1 ten agreement of the owners of the units to which at least a majority of  
2 the votes of the members of the association are allocated. In such a case,  
3 the association shall provide written notice to the owner of each unit of  
4 the meeting at which the commencement of an action is to be considered  
5 or action is to be taken within 21 calendar days before the meeting.

6 (e) The executive board of an association, without giving notice to the  
7 units' owner's, may employ a contractor and such other persons as are  
8 necessary to make such repairs to a unit or common element within the  
9 common-interest community as are required to protect the health, safety  
10 and welfare of the units' owners.

11 Sec. 11. If any provision of this act or the application thereof to any  
12 person or circumstance is held invalid, the invalidity does not affect other  
13 provisions or applications of this act which can be given effect without  
14 the invalid provision or application, and to this end the provisions of this  
15 act are severable.

16 Sec. 12. This act shall take effect and be in force from and after its  
17 publication in the statute book.

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