

## Substitute for HOUSE BILL No. 2294

By Committee on Judiciary

2-26

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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 action or arbitration proceeding between a claimant and a contractor 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 a remodel of a dwelling.

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

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

(3) Failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

(e) "Contractor" means any person, firm, partnership, corporation, association or other organization that is engaged in the business of constructing dwellings.

(f) "Dwelling" means a single-family house, duplex 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 and other components and improvements that are

1 part of a single or multifamily unit at the time of construction. For the  
2 purposes of this act “dwelling” does not mean manufactured home as  
3 defined in K.S.A. 58-4202, and amendments thereto.

4 (g) “Serve” or “service” means personal service or delivery by certi-  
5 fied mail, return receipt requested, to the last known address of the  
6 addressee.

7 (h) “Subcontractor” means a contractor who performs work on behalf  
8 of a contractor in the construction of a dwelling.

9 Sec. 2. (a) If a claimant files an action against a contractor without  
10 service of notice under this act, the action shall be dismissed without  
11 prejudice upon motion of the contractor filed within 60 days of service  
12 of process. An action against a contractor cannot be refiled until the par-  
13 ties have complied with the provisions of this act. A dismissal pursuant to  
14 this subsection shall not count as a dismissal for purposes of subsection  
15 (a)(1) of K.S.A. 60-241, and amendments thereto.

16 (b) If the statute of limitations would expire during the time period  
17 necessary to allow the parties to comply with the provisions of this act,  
18 the statute of limitations shall be tolled if the claimant gives notice of the  
19 claim to the contractor within 90 days of entry of the order of dismissal  
20 of the action without prejudice pursuant to subsection (a).

21 (c) If the statute of limitations would expire during the time period  
22 necessary to allow the parties to comply with the provisions of this act,  
23 the claimant’s notice of claim shall serve to toll the statute of limitations  
24 for 180 days after the latest of the following three dates: (1) The date the  
25 claimant personally serves or mails the notice of claim; (2) the date agreed  
26 upon for the contractor to make payment under subsection (c)(3) or (g)(2)  
27 of section 4, and amendments thereto; or (3) the date agreed upon for  
28 the contractor to completely remedy the construction defect under sub-  
29 section (c)(2) or (g)(1) of section 4, and amendments thereto.

30 (d) Nothing in this section shall be interpreted to shorten the statute  
31 of limitations under K.S.A. 60-501 *et seq.*, and amendments thereto, oth-  
32 erwise applicable to a claimant’s action against a contractor.

33 Sec. 3. (a) Nothing in this act shall apply to actions arising out of  
34 claims for personal injury or death or where the defect or damage to the  
35 dwelling is so substantial that it is not habitable.

36 (b) This act shall not supersede express warranty, implied warranty  
37 or other provisions of a contract between the contractor and the claimant.

38 Sec. 4. (a) Before the filing of an action brought against a contractor  
39 arising out of the construction of a dwelling, the claimant shall serve  
40 written initial notice of claim on the contractor. The initial notice of claim  
41 shall state that the claimant asserts a construction defect claim and the  
42 notice of claim shall describe the claim or claims in detail sufficient to  
43 determine the general nature of any alleged construction defects.

1 (b) Within 15 days after service of the notice of claim, the contractor  
2 shall serve a copy of the notice to each subcontractor who may be re-  
3 sponsible for a defect specified in the notice and include with the notice  
4 the specific defect for which the contractor believes the subcontractor  
5 may be responsible.

6 (c) Within 30 days after service of the notice of claim by claimant,  
7 each contractor that has received such notice shall serve a written re-  
8 sponse on the claimant. The written response shall:

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

10 (2) offer to remedy the alleged construction defect at no cost to the  
11 claimant including a description of the additional construction necessary  
12 to remedy the defect, a specification of the date when the contractor  
13 proposes to commence the work and the date the work will be completed;

14 (3) offer to compromise and settle the claim by monetary payment  
15 without inspection including a specification of the amount of the payment  
16 and the date the payment will be made; or

17 (4) state that the contractor disputes the claim and will neither reme-  
18 dy the alleged construction defect nor compromise and settle the claim.

19 (d) If the contractor refuses service under subsection (a), disputes  
20 the claim pursuant to subsection (c)(4), does not respond to the claimant's  
21 notice of claim within the time stated in subsection (c), does not com-  
22 mence or complete the work on the alleged construction defect on the  
23 date specified in subsection (c)(2) or does not make the payment in the  
24 time specified in subsection (c)(3), the claimant may bring an action  
25 against the contractor without further notice.

26 (e) If the claimant rejects the inspection proposal or the settlement  
27 offer made by the contractor pursuant to subsection (c), the claimant shall  
28 serve written notice of the claimant's rejection on the contractor. After  
29 service of the rejection, the claimant may bring an action against the  
30 contractor without further notice. The claimant may alternatively elect an  
31 arbitration process pursuant to K.S.A. 5-201 *et. seq.*, and amendments  
32 thereto. Failure to give the notice required by this subsection shall not  
33 require the dismissal of the action under subsection (a) of section 2, and  
34 amendments thereto.

35 (f) If the claimant elects to allow the contractor to inspect the dwell-  
36 ing in accordance with the contractor's proposal pursuant to subsection  
37 (c)(1) the claimant shall notify the contractor and shall provide the con-  
38 tractor and its agents access to the claimant's dwelling during normal  
39 working hours to inspect the premises and the claimed defect to deter-  
40 mine the nature and cause of the alleged defects and the nature and  
41 extent of any repairs or replacements necessary to repair the alleged de-  
42 fects. Such inspection shall occur within 30 days of the claimant's notifi-  
43 cation to the contractor under this section.

1 (g) Within 30 days following completion of the inspection, the con-  
2 tractor shall serve on the claimant a written:

3 (1) Offer to remedy the construction defect at no cost to the claimant,  
4 including a report of the scope of the inspection, the findings and results  
5 of the inspection, a description of the additional construction necessary  
6 to remedy the defect, a specification of the date when the contractor  
7 proposes to commence the work and the date the work will be completed;

8 (2) offer to compromise and settle the claim by monetary payment  
9 including a specification of the amount of the payment and the date the  
10 payment will be made; or

11 (3) statement that the contractor will not proceed further to remedy  
12 the defect.

13 (h) If a claimant accepts a contractor's offer made pursuant to sub-  
14 section (g)(1) or (g)(2) and the contractor does not proceed to remedy  
15 the construction defect or make the monetary payment within the agreed  
16 timetable, the claimant may bring an action against the contractor without  
17 further notice.

18 (i) If the contractor does not respond within the time period specified  
19 by subsection (g) or a claimant receives a written statement that the con-  
20 tractor will not proceed further to remedy the defect, the claimant may  
21 bring an action against the contractor without further notice.

22 (j) If the claimant rejects the offer made by the contractor to either  
23 remedy the construction defect or to make the monetary payment, the  
24 claimant shall serve written notice of the claimant's rejection on the con-  
25 tractor. After service of the rejection the claimant may bring an action  
26 against contractor without further notice.

27 (k) Any claimant accepting the offer of the contractor to remedy the  
28 construction defects shall do so by serving the contractor with a written  
29 notice of acceptance no later than 30 days after receipt of the offer.

30 (l) If a claimant accepts a contractor's offer to repair a defect de-  
31 scribed in a notice of claim, the claimant shall provide the contractor and  
32 its agents reasonable access to the claimant's dwelling during normal  
33 working hours to perform and complete the construction by the timetable  
34 stated in the offer.

35 (m) Absent good cause, the contractor's failure to respond in good  
36 faith to the claimant's notice of claim shall preclude the contractor from  
37 asserting that the claimant did not comply with the provisions of this act.

38 Sec. 5. (a) A contractor who receives a notice of a construction defect  
39 pursuant to this act, may present the notice to an insurer who issued a  
40 policy of insurance covering all or part of the conduct or business of the  
41 contractor or subcontractor.

42 (b) Such notice provided to an insurer:

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

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

4 Sec. 6. (a) Upon entering into a contract for construction or remodel  
5 of a dwelling, the contractor shall provide notice to the potential claimant  
6 of the contractor's right to offer to repair construction defects before a  
7 claimant may commence litigation against the contractor. Such notice  
8 shall be conspicuous and may be included as part of the underlying  
9 contract.

10 (b) Such notice shall be in substantially the following form: Kansas  
11 law contains important requirements you must follow before you may file  
12 a lawsuit for defective construction against the contractor who con-  
13 structed your home. Ninety days before you file your lawsuit, you must  
14 deliver to the contractor a written notice of any construction conditions  
15 you allege are defective and provide your contractor the opportunity to  
16 make an offer to repair or pay for the defects. You are not obligated to  
17 accept any offer made by the contractor. There are strict deadlines and  
18 procedures under state law, and failure to follow them may affect your  
19 ability to file a lawsuit.

20 Sec. 7. Each contractor who constructs a new residential dwelling  
21 shall, within 30 days after the close of the sale, provide in writing to the  
22 initial purchaser of the residence:

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

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

28 Sec. 8. (a) A person shall not provide or offer to provide anything of  
29 monetary value to a property manager of an association or to a member  
30 or officer of an executive board of an association to induce the property  
31 manager, member or officer to encourage or discourage the association  
32 to file a claim for damages arising from a construction defect.

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

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

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

1 Sec. 9. (a) An association may bring an action to recover damages  
2 resulting from construction defects in any of the units, common elements  
3 or limited common elements of the common-interest community only:

4 (1) Upon a vote of the units' owners to which at least a majority of  
5 the votes of the members of the association are allocated; and

6 (2) upon a vote of the executive board of the association.

7 (b) An association or an attorney for an association shall not employ  
8 a person to perform destructive tests to determine any damage or injury  
9 to a unit, common element or limited common element caused by a  
10 construction defect unless:

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

13 (2) the person performing the tests has provided a written schedule  
14 for repairs;

15 (3) the person performing the tests is required to repair all damage  
16 resulting from such tests in accordance with state laws and local ordi-  
17 nances and codes relating thereto; and

18 (4) the association or the person so employed obtains all permits re-  
19 quired to conduct such tests and to repair any damage resulting from  
20 such tests.

21 (c) An association may commence an action only upon a vote or writ-  
22 ten agreement of the owners of the units to which at least a majority of  
23 the votes of the members of the association are allocated. In such a case,  
24 the association shall provide written notice to the owner of each unit of  
25 the meeting at which the commencement of an action is to be considered  
26 or action is to be taken within 21 calendar days before the meeting.

27 (d) In the absence of a contractual provision to the contrary, the ex-  
28 ecutive board of an association, without giving notice to the units' owner's,  
29 may employ a contractor and such other persons as are necessary to make  
30 such repairs to a unit or common element within the common-interest  
31 community as are required to protect the health, safety and welfare of  
32 the units' owners.

33 Sec. 10. If any provision of this act or the application thereof to any  
34 person or circumstance is held invalid, the invalidity does not affect other  
35 provisions or applications of this act which can be given effect without  
36 the invalid provision or application, and to this end the provisions of this  
37 act are severable.

38 Sec. 11. This act shall take effect and be in force from and after its  
39 publication in the statute book.

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