

SENATE BILL NO. 389  
INTRODUCED BY D. MCGEE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING AN ALTERNATIVE DISPUTE RESOLUTION PROCEDURE FOR RESIDENTIAL CONSTRUCTION DISPUTES; REQUIRING A CLAIMANT WITH AN ALLEGED CONSTRUCTION DEFECT TO FILE A NOTICE OF CLAIM WITH THE CONSTRUCTION PROFESSIONAL THAT THE CLAIMANT ASSERTS IS RESPONSIBLE FOR THE DEFECT AND PROVIDING THE CONSTRUCTION PROFESSIONAL WITH THE OPPORTUNITY TO RESOLVE THE CLAIM WITHOUT LITIGATION; LIMITING DAMAGES THAT CAN BE RECOVERED IN RESIDENTIAL CONSTRUCTION DISPUTES; AND AMENDING SECTION 27-2-208, MCA."

WHEREAS, the Legislature finds that Montana needs an alternative method to resolve legitimate construction disputes that would reduce the need for litigation while adequately protecting the rights of homeowners; and

WHEREAS, the Legislature determines that an effective alternative dispute resolution mechanism in certain construction defect matters should require the claimant to file a notice of claim with the construction professional that the claimant asserts is responsible for the defect and providing the construction professional with the opportunity to resolve the claim without litigation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Residential construction disputes -- definitions.** As used in [sections 1 through 4], the following definitions apply:

(1) (a) "Action" means any civil lawsuit or action in contract or tort for damage or indemnity brought against a construction professional to assert a claim, whether by complaint, counterclaim, or cross-claim, for damage or the loss of use of real or personal property caused by a defect in the construction or remodeling of a residence.

(b) The term does not include a civil action in tort alleging personal injury or wrongful death to a person or persons resulting from a construction defect.

(2) "Association" means a unit owners' organization or a nonprofit corporation created to own and operate portions of a planned community that has the power to require unit owners to pay the costs and expenses

incurred in the performance of the association's obligations.

(3) "Claimant" means a homeowner or association that asserts a claim against a construction professional concerning a defect in the construction or remodeling of a residence.

(4) "Construction defect" means a deficiency in or arising out of the design, specifications, surveying, planning, supervision, inspection, construction, or remodeling of a residence that results from any of the following:

- (a) defective materials, products, or components used in the construction or remodeling of a residence;
- (b) violation of the applicable building, plumbing, or electrical codes in effect at the time of the construction or remodeling of a residence;
- (c) failure to construct or remodel a residence in accordance with accepted trade standards.

(5) "Construction professional" means an architect, builder, builder vendor, contractor, subcontractor, engineer, or inspector performing or furnishing the design, specification, surveying, supervision, inspection, construction, remodeling, or observation of the construction or remodeling of any improvement to real property, whether operating as a sole proprietor, partnership, corporation, or other business entity.

(6) (a) "Homeowner" means:

- (i) any person, company, firm, partnership, corporation, or association who contracts with a construction professional for the remodeling, construction, or construction and sale of a residence; or
- (ii) an association as defined in this section.

(b) The term homeowner includes but is not limited to a subsequent purchaser of a residence from any homeowner.

(7) "Residence" means a single-family house or a unit in a multiunit residential structure in which title to each individual unit is transferred to the owner under a condominium or cooperative system.

(8) "Serve" or "service" means personal service or delivery by certified mail to the last-known address of the addressee.

(9) "Unforeseen act of nature" means:

- (a) a weather condition or earthquake, the magnitude of which exceeds the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction; or
- (b) an event such as war, terrorism, or vandalism.

**NEW SECTION. Section 2. Residential construction disputes -- notice and opportunity to repair -- tolling of statute of limitations -- presumption of compliance with construction standards.** (1) Prior to commencing an action against a construction professional for a construction defect, the claimant shall serve

written notice of claim on the construction professional. The notice of claim must state that the claimant asserts a construction defect claim against the construction professional and must describe the claim in reasonable detail sufficient to determine the general nature of the defect. If a written notice of claim is served under this section within the time prescribed for the filing of an action under 27-2-208, the statute of limitations for construction-related claims is tolled until 60 days after the period of time during which the filing of an action is barred.

(2) Within 21 days after service of the notice of claim, the construction professional shall serve a written response on the claimant. The written response must:

(a) propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified timeframe. The proposal must include the statement that the construction professional shall, based on the inspection, offer to remedy the defect, compromise by payment, or dispute the claim;

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

(c) state that the construction professional disputes the claim and will neither remedy the construction defect nor compromise and settle the claim.

(3) (a) If the construction professional disputes the claim or does not respond to the claimant's notice of claim within the time stated in subsection (2), the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice.

(b) If the claimant rejects the inspection proposal or the settlement offer made by the construction professional pursuant to subsection (2), the claimant shall serve written notice of the claimant's rejection on the construction professional. After service of the notice of rejection, the claimant may bring an action against the construction professional for the construction defect claim described in the notice of claim. If the construction professional has not received from the claimant, within 30 days after the claimant's receipt of the construction professional's response, either an acceptance or rejection of the inspection proposal or settlement offer, then at any time after that date the construction professional may terminate the proposal or offer by serving written notice on the claimant. The claimant may, after service, bring an action against the construction professional for the construction defect claim described in the notice of claim.

(4) (a) If the claimant elects to allow the construction professional to inspect in accordance with the construction professional's proposal pursuant to subsection (2)(a), the claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant's residence during normal working hours to inspect the premises and the claimed defect.

(b) Within 14 days following completion of the inspection, the construction professional shall serve on

the claimant:

(i) a written offer to remedy the construction defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction necessary to remedy the defect described in the claim, and a timetable for the completion of the construction;

(ii) a written offer to compromise and settle the claim by monetary payment pursuant to subsection (2)(b);

(iii) a written offer to remedy the claim through a combination of repair and monetary payment pursuant to subsection (2)(b); or

(iv) a written statement that the construction professional will not proceed further to remedy the alleged defect.

(c) If the construction professional does not proceed further to remedy the alleged construction defect within the agreed-upon time or if the construction professional fails to comply with the provisions of subsection (4)(b), the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice.

(d) If the claimant rejects the offer made by the construction professional pursuant to subsection (4)(b)(i) or (4)(b)(ii) to either remedy the construction defect or to compromise and settle the claim by monetary payment, the claimant shall serve written notice of the claimant's rejection on the construction professional. After service of the rejection notice, the claimant may bring an action against the construction professional for the construction defect claim described in the notice of claim. If the construction professional has not received from the claimant, within 30 days after the claimant's receipt of the construction professional's response, either an acceptance or rejection of the offer made pursuant to subsection (4)(b)(i) or (4)(b)(ii), then at any time after that date the construction professional may terminate the offer by serving written notice on the claimant.

(5) (a) Any claimant accepting the offer of a construction professional to remedy the construction defect pursuant to subsection (4)(b)(i) shall do so by serving the construction professional with a written notice of acceptance within 30 days after receipt of the offer. The claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant's residence during normal working hours to perform and complete the construction according to the timetable stated in the offer.

(b) The claimant and construction professional may, by written mutual agreement, alter the extent of construction or the timetable for completion of construction stated in the offer, including but not limited to repair of additional defects.

(6) Subsequently discovered claims of construction defects must be administered separately under this section and [section 4], unless otherwise agreed to by the parties.

(7) This section may not be construed to prevent a claimant from commencing an action on the construction defect claim described in the notice of claim if the construction professional fails to perform the construction agreed upon, fails to remedy the defect, or fails to perform within the time agreed upon pursuant to subsection (4)(b) or (5)(b).

(8) Compliance with the applicable building, plumbing, or electrical codes in effect at the time of construction or remodeling conclusively establishes construction in accordance with accepted trade standards with respect to all matters specified in those codes.

**NEW SECTION. Section 3. Admissibility.** The following are admissible in any action:

(1) a claimant's failure to provide a good faith notice to a construction professional as required by [section 2(1)];

(2) a claimant's failure to allow a reasonable inspection requested by a construction professional as required by [section 2(2)];

(3) a claimant's failure to provide a good faith, written response to a construction professional's offer as required in [section 2(3)]; or

(4) a construction professional's failure to respond in good faith to the claimant's notice as required by [section 2(2)].

**NEW SECTION. Section 4. Residential construction disputes -- limitation on damages.** (1) In a suit subject to [section 2] and this section, the claimant may recover only the following damages proximately caused by a construction defect:

(a) the reasonable cost of repairs necessary to cure any construction defect, including any reasonable and necessary engineering or consulting fees required to evaluate and cure the construction defect, that the contractor is responsible for repairing under [section 2];

(b) the reasonably necessary expenses of temporary housing during the repair period;

(c) the reduction in market value, if any, to the extent the reduction is due to structural failure; and

(d) reasonable and necessary attorney fees.

(2) If a construction professional fails to make a reasonable offer, as required under [section 2], fails to make a reasonable attempt to complete the repairs specified in an accepted offer, or fails to complete, in accordance with accepted trade standards, the repairs specified in an accepted offer, the limitations on damages and defenses to liability provided for in this section do not apply.

(3) If a claimant denies a request to inspect, as provided for in [section 2], unreasonably rejects an offer to remedy the construction defect, or does not permit the construction professional a reasonable opportunity to repair the defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of:

(a) (i) the reasonable cost of the offered repairs that are necessary to cure the construction defect and that are the responsibility of the construction professional; or

(ii) the amount of a reasonable monetary settlement offer made under [section 2]; and

(b) the amount of reasonable and necessary attorney fees and costs incurred before the offer was rejected or considered rejected.

(4) The total damages awarded in a suit subject to [section 2] and this section may not exceed the greater of the claimant's purchase price for the residence or the current fair market value of the residence without the construction defect.

(5) A builder, under the principles of comparative fault pertaining to affirmative defenses, may be excused, in whole or in part, from any obligation, damage, loss, or liability if the builder can demonstrate any of the following affirmative defenses in response to the claimed construction defect:

(a) the defect is caused by an unforeseen act of nature that caused the structure not to meet the standard;

(b) the defect is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under [section 2]. This includes the failure to give timely notice to the builder after discovery of a construction defect but does not include damage due to the untimely or inadequate response of a builder to the homeowner's claim.

(c) the defect is caused by the homeowner or the homeowner's agent, employee, subcontractor, independent contractor, or consultant by virtue of failure to follow the builder's or manufacturer's recommendations or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of these schedules and recommendations and that the recommendations and schedules were reasonable at the time they were issued.

(d) the defect is caused by the homeowner's, homeowner's agent's, or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect or by the structure's use for something other than its intended purpose;

- (e) the time period for filing actions bars the claim;
  - (f) the action applies to a particular claim for which the builder has obtained a valid release;
  - (g) the builder's repair was successful in correcting the particular claimed construction defect to accepted trade standards; and
  - (h) regarding any causes of action to which [section 2] and this section do not apply, all applicable affirmative defenses are preserved.
- (6) [Sections 1 through 4] do not supersede contractual alternative dispute resolution procedures contained in a contract between a claimant and a construction professional.

**Section 5.** Section 27-2-208, MCA, is amended to read:

**"27-2-208. Actions for damages arising out of work on improvements to real property or land surveying.** (1) Except as provided in [section 2(1)] and subsections (2) and (3) of this section, an action to recover damages (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) resulting from or arising out of the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property or resulting from or arising out of land surveying of real property may not be commenced more than 10 years after completion of the improvement or land surveying.

(2) Notwithstanding the provisions of subsection (1), an action for damages for an injury that occurred during the 10th year after the completion of the improvement or land surveying may be commenced within 1 year after the occurrence of the injury.

(3) The limitation prescribed by this section may not affect the responsibility of any owner, tenant, or person in actual possession and control of the improvement or real property that is surveyed at the time a right of action arises.

(4) As used in this section:

(a) "completion" means that degree of completion at which the owner can utilize the improvement for the purpose for which it was intended or when a completion certificate is executed, whichever is earlier;

(b) "land surveying" means the practice of land surveying, as defined in 37-67-101.

(5) This section may not be construed as extending the period prescribed by the laws of this state for the bringing of any action."

**NEW SECTION. Section 6. Codification instruction.** [Sections 1 through 4] are intended to be codified as an integral part of Title 70, chapter 19, part 4, and the provisions of Title 70, chapter 19, part 4, apply to

[sections 1 through 4].

NEW SECTION. **Section 7. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 8. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

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