

CHAPTER 123

(HB 289)

AN ACT relating to construction defect claims asserting property loss and damage.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 to 9 of this Act, unless the context otherwise requires:

- (1) *"Action" means any civil lawsuit or action in contract or tort for damages 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 of a residence. "Action" does not include any civil action in tort alleging personal injury or wrongful death to a person or persons resulting from a construction defect;*
- (2) *"Claimant" means a homeowner who asserts a claim against a construction professional concerning a defect in the construction of a residence;*
- (3) *"Construction professional" means a builder;*
- (4) *"Homeowner" means any person, company, firm, partnership, corporation, association, or other entity that contracts with a construction professional for the construction of a residence. "Homeowner" includes but is not limited to a subsequent purchaser of a residence from any homeowner;*
- (5) *"Residence" means a single-family house, duplex, triplex, or quadraplex, or a unit in a multiunit residential structure in which title to each individual unit is transferred to the owner under a condominium regime as established in KRS 381.815 and shall include general common elements and limited common elements as defined in KRS 381.810; and*
- (6) *"Serve" or "service" means personal service or delivery by certified mail to the last known address of the addressee.*

SECTION 2. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

The General Assembly finds that limited changes in the law are necessary and appropriate concerning actions claiming damages, indemnity, or contribution in connection with alleged residential construction defects. It is the intent of the General Assembly that Sections 1 to 9 of this Act apply to these types of civil actions while preserving adequate rights and remedies for homeowners who bring and maintain such actions.

SECTION 3. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

Sections 1 to 9 of this Act shall:

- (1) *Apply to any claim that arises before, on, or after July 15, 2003, as the result of a construction defect, except a claim for personal injury or wrongful death, if the claim is the subject of an action commenced on or after July 15, 2003;*
- (2) *Prevail over any conflicting law otherwise applicable to the claim or cause of action;*

- (3) *Not bar or limit any claim or defense otherwise available except as otherwise provided in Sections 1 to 9 of this Act; and*
- (4) *Not create a new theory upon which liability may be based.*

SECTION 4. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

In a claim to recover damages resulting from a construction defect, a construction professional is liable for his or her acts or omissions or the acts or omissions of his or her agents, employees, or subcontractors and is not liable for any damages caused by:

- (1) *The acts or omissions of a person other than the construction professional or his or her agent, employee, or subcontractor;*
- (2) *The failure of a person other than the construction professional or his or her agent, employee, or subcontractor to take reasonable action to reduce the damages or maintain the residence;*
- (3) *Normal wear, tear, or deterioration;*
- (4) *Normal shrinkage, swelling, expansion, or settlement; or*
- (5) *Any construction defect disclosed to a claimant before his or her purchase of the residence, if the disclosure was provided in writing and in language that is understandable and was signed by the claimant.*

SECTION 5. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

- (1) *In every construction defect action brought against a construction professional, the claimant shall serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect.*
- (2) *Within twenty-one (21) days after service of the notice of claim, the construction professional shall serve a written response on the claimant by registered mail or personal service. The written response shall:*
 - (a) *Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall 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. A construction professional's offer under this paragraph to compromise and settle a homeowner's claim may include but is not limited to an express offer to purchase the claimant's residence that is the subject of the claim, and to pay the claimant's reasonable relocation costs; 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) of this section,*

then 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) of this section, then the claimant shall serve written notice of the claimant's rejection on the construction professional. After service of the 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 thirty (30) days after the claimant's receipt of the construction professional's response, either an acceptance or a rejection of the inspection proposal or settlement offer, then at any time thereafter the construction professional may terminate the proposal or offer by serving written notice to the claimant, and the claimant may thereafter 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) of this section, then 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 fourteen (14) days following completion of the inspection, the construction professional shall serve on the claimant:

 - 1. 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 this construction; or*
 - 2. A written offer to compromise and settle the claim by monetary payment pursuant to subsection (2)(b) of this section; or*
 - 3. A written statement that the construction professional will not proceed further to remedy the defect.*

The claimant shall have the right to accept or reject the proposed construction defect correction, or the monetary offer to settle the claim.

- (c) If the construction professional does not proceed further to remedy the construction defect within the agreed timetable, or if the construction professional fails to comply with the provisions of paragraph (b) of this subsection, then 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 paragraph (b)1. or 2. of this subsection to either remedy the construction defect or to compromise and settle the claim by monetary payment, then 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 thirty (30) days after the claimant's receipt of the construction professional's*

response, either an acceptance or a rejection of the offer made pursuant to paragraph (b)1. or 2. of this subsection, then at any time thereafter the construction professional may terminate the offer by serving written notice to the claimant.

- (5) (a) *Any claimant accepting the offer of a construction professional to remedy the construction defect pursuant to subsection (4)(b)1. of this section shall do so by serving the construction professional with a written notice of acceptance within a reasonable time period after receipt of the offer, and no later than thirty (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 by 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) *If a claimant files a complaint, counterclaim, or cross-claim prior to meeting the requirements of this section, then the court may issue an order holding the action in abeyance until the parties comply with this section.*
- (7) *Nothing in this section may 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 by the timetable agreed upon pursuant to subsection (2)(a) or (5) of this section.*
- (8) *The service of an amended notice of claim shall relate back to the original notice of claim for purposes of tolling statutes of limitations and repose.*

SECTION 6. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

- (1) *The construction professional shall provide notice to each homeowner, upon entering into a contract for the construction of a residence, of the construction professional's right to offer to cure construction defects before a homeowner may commence litigation against the construction professional. The notice shall be conspicuous and may be included as part of the underlying contract signed by the homeowner.*
- (2) *The notice required by this section shall be in substantially the following form: "SECTIONS 1 TO 6 OF THIS ACT CONTAIN IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE BUILDER OF YOUR HOME. YOU MUST DELIVER TO THE BUILDER A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR BUILDER THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE BUILDER. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT."*
- (3) *Sections 1 to 9 of this Act shall not preclude or bar any action if notice is not given to the homeowner as required by this section.*

SECTION 7. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

- (1) *Nothing in Sections 1 to 9 of this Act shall be construed to hinder or otherwise affect the employment, agency, or contractual relationship between and among homeowners and construction professionals during the process of construction and nothing in Sections 1 to 9 of this Act precludes the termination of those relationships as allowed under other law.*
- (2) *Nothing in Sections 1 to 9 of this Act shall negate or otherwise restrict a construction professional's right to access or inspection provided by law, covenant, easement, or contract.*
- (3) *Noncompliance by the homeowner with Section 5 of this Act shall not operate as an affirmative defense in an action against a construction professional by the homeowner or another construction professional for emergency repairs.*

SECTION 8. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

If a written notice of claim is served under Section 5 of this Act, then the statute of limitation for the underlying action is tolled until seventy-five (75) days after the expiration of the time frame agreed to by the parties as permitted in subsection (2) of Section 5 of this Act, or the date established for inspection pursuant to subsection (2)(a) of Section 5 of this Act, or the expiration of the time frame contained in subsection (4)(b) of Section 5 of this Act, whichever occurs later.

SECTION 9. A NEW SECTION OF KRS CHAPTER 411 IS CREATED TO READ AS FOLLOWS:

Sections 1 to 9 of this Act shall be known as the Notice and Opportunity to Repair Act.

Approved March 18, 2003