

FIRST REGULAR SESSION
HOUSE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 347
93RD GENERAL ASSEMBLY

Reported from the Committee on Local Government February 21, 2005, with recommendation that the House Committee Substitute for House Bill No. 347 Do Pass.

STEPHEN S. DAVIS, Chief Clerk

0817L.03C

AN ACT

To amend chapter 431, RSMo, by adding thereto seven new sections relating to resolution of disputes concerning alleged defective residential construction.

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

Section A. Chapter 431, RSMo, is amended by adding thereto seven new sections, to be known as sections 431.300, 431.303, 431.306, 431.309, 431.312, 431.315, and 1, to read as follows:

431.300. As used in sections 431.300 to 431.315, unless the context clearly requires otherwise, the following terms shall mean:

(1) "Action", any civil lawsuit, action, or proceeding, in contract or tort, or otherwise, for damages or indemnity, brought to assert a claim, whether by petition, complaint, counterclaim, or cross-claim, for damage to, diminution in the value of, or the loss of use of real or personal property caused by an alleged construction defect. Action does not include any claim originating in small claims court, or any civil action in tort alleging personal injury or wrongful death to a person or persons resulting from an alleged construction defect;

(2) "Association":

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

(b) A homeowners' association, including but not limited to, a nonprofit

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

14 corporation or unincorporated association of home owners created pursuant to a
15 declaration to own and operate portions of a planned community or other residential
16 subdivision and which has the power under the declaration to assess association members
17 to pay the costs and expenses incurred in the performance of the association's obligations
18 under the declaration, or tenants-in-common with respect to the ownership of common
19 areas or amenities of a planned community or other residential subdivision; or

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

21 (3) "Claimant", a homeowner or association which asserts a claim against a
22 contractor concerning an alleged construction defect;

23 (4) "Construction defect", for the purposes of sections 431.300 to 431.315, a
24 deficiency in, or a deficiency arising from, any of the following:

25 (a) Defective material, products, or components used in new residential
26 construction or from a substantial remodel;

27 (b) Violation of the applicable codes and ordinances, including those ordinances
28 which regulate zoning and the subdivision of land, in effect at the time of the
29 commencement of construction of residential improvements, or as to a substantive remodel,
30 at the commencement of such substantial remodel; provided however, that any matter that
31 is in compliance with applicable codes and ordinances, including without limitation, those
32 ordinances which regulate zoning and the subdivision of land, in effect at the
33 commencement of construction of residential improvements, or to a substantial remodel
34 as the case may be, shall conclusively establish that such matter is not, nor shall it be
35 deemed or construed to be a construction defect, unless a construction defect as to such
36 matter is established because of defective material, products, or components used in new
37 residential construction or in a substantial remodel;

38 (c) Failure to construct residential improvements in accordance with accepted trade
39 standards for good and workmanlike construction at the time of construction. Compliance
40 with the applicable codes and ordinances, including without limitation, those ordinances
41 which regulate zoning and the subdivision of land, in effect at the commencement of
42 construction, or of a substantial remodeling as the case may be, shall conclusively establish
43 construction in accordance with accepted trade standards for good and workmanlike
44 construction, with respect to all matters specified in those codes;

45 (d) Failure to construct residential improvements in accordance with the agreement
46 between the contractor and the claimant, notwithstanding anything to the contrary in this
47 subdivision;

48 (5) "Contractor", any person, company, firm, partnership, corporation,
49 association, or other entity that is engaged in the business of designing, developing,

50 constructing, or substantially remodeling residences;

51 (6) "Homeowner", any person, company, firm, partnership, corporation,
52 association, or other entity who contracts with a contractor for the construction,
53 substantial remodel of a residence, or the sale of a residence constructed by such
54 contractor. Homeowner also includes a subsequent purchaser of a residence from any
55 homeowner;

56 (7) "Residence", a single-family house, duplex, triplex, quadraplex, or a unit in a
57 multiunit residential structure in which title to each individual unit is transferred to the
58 owner under a condominium or cooperative system, and shall include common areas and
59 common elements as defined in subdivision (4) of section 448.1-103, RSMo. Residence shall
60 include the land and improvements to land under and around the house, unit, or structure.
61 Residence shall not include a manufactured home as defined in section 700.010, RSMo;

62 (8) "Serve" or "service", personal service to the person intended to be notified or
63 mailing to the last known address of such person;

64 (9) "Substantial remodel", a remodel of a residence, for which the total cost exceeds
65 one-half of the assessed value of the residence for property tax purposes at the time the
66 contract for the remodel work was made.

431.303. 1. The contractor shall provide notice to each homeowner upon entering
2 into a contract for sale, construction, or substantial remodel of a residence of the
3 contractor's right to offer to cure construction defects before a claimant may commence
4 action against the contractor pursuant to sections 431.300 to 431.315. Such notice shall be
5 conspicuous and may be included as part of the underlying contract signed by the
6 homeowner. In the sale of a condominium unit, the requirement for delivery of such notice
7 shall be deemed satisfied if contained in a public offering statement in accordance with the
8 laws of this state.

9 2. The notice required by this subsection shall provide time frame guidelines for
10 dates to comply with said act for both the claimant and contractor and shall be in
11 substantially the following form in a single and separate document:

12 **SECTIONS 431.300 TO 431.315 OF MISSOURI REVISED STATUTES**
13 **PROVIDES YOU WITH CERTAIN RIGHTS IF YOU HAVE A DISPUTE WITH A**
14 **CONTRACTOR REGARDING CONSTRUCTION DEFECTS. EXCEPT FOR CLAIMS**
15 **FILED IN SMALL CLAIMS COURT, IF YOU HAVE A DISPUTE WITH A**
16 **CONTRACTOR, YOU MUST DELIVER TO THE CONTRACTOR A WRITTEN**
17 **CLAIM OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE**
18 **AND PROVIDE YOUR CONTRACTOR THE OPPORTUNITY TO MAKE AN OFFER**
19 **TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO**

20 ACCEPT ANY OFFER MADE BY THE CONTRACTOR. UNLESS YOUR
21 CONTRACTOR REFUSES TO RESPOND TO YOUR NOTICE OR REFUSES TO
22 MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS, YOU WILL BE
23 REQUIRED TO ATTEMPT TO RESOLVE YOUR DISPUTE THROUGH MEDIATION
24 PRIOR TO FILING SUIT. BEFORE YOU MAY FILE A LAWSUIT, YOU MUST FILE
25 A CLAIM AS NOTED ABOVE AND ATTEMPT TO RESOLVE THE CONSTRUCTION
26 DEFECT DISPUTE AT LEAST NINETY DAYS BEFORE YOU FILE A LAWSUIT.
27 READ THIS NOTICE CAREFULLY. THERE ARE STRICT DEADLINES AND
28 PROCEDURES UNDER SECTIONS 431.300 TO 431.315 WHICH MUST BE OBEYED
29 IN ORDER TO PRESERVE YOUR ABILITY TO FILE A LAWSUIT. OTHER THAN
30 REPAIRS TO WORK DONE BY THE CONTRACTOR THAT ARE NECESSARY TO
31 PROTECT THE LIFE, HEALTH, OR SAFETY OF PERSONS LIVING IN A
32 RESIDENCE, OR TO AVOID ADDITIONAL SIGNIFICANT AND MATERIAL
33 DAMAGE TO THE RESIDENCE PURSUANT TO SECTION 431.306(10), YOU MAY
34 NOT INCLUDE IN CLAIMS AGAINST YOUR CONTRACTOR THE COSTS OF
35 OTHER REPAIRS YOU PERFORM BEFORE YOU ARE ENTITLED TO FILE A
36 LAWSUIT UNDER SECTIONS 431.300 TO 431.312.

37 3. Nothing in sections 431.300 to 431.315 shall preclude or bar any action if a notice
38 is not given to the claimant as required by this section, and the provisions of sections
39 431.300 to 431.315 shall not apply to any claim of a claimant against a contractor if such
40 contractor failed to provide the written notice required by section 431.303.

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

431.306. 1. In every action against a contractor arising from construction or
2 substantial remodel of a residence, a claimant shall serve the contractor with a written
3 notice of claim of construction defects. Prior to commencing any action alleging a
4 construction defect or after the dismissal of any action without prejudice pursuant to
5 subsection 6 of this section, the claimant must wait ninety days after serving the contractor
6 with the written notice of claim of construction defect before filing an action or before
7 becoming a member of a class certified pursuant to the applicable rules of civil procedure.
8 The notice of claim shall state that the claimant asserts a construction defect claim against

9 the contractor and shall describe the claim in reasonable detail sufficient to determine the
10 general nature of the defect as well as any known results of the defect.

11 2. Within fourteen days after service of the notice of claim, the contractor shall
12 serve a written response on the claimant which shall:

13 (1) Propose to inspect the residence that is the subject of the claim and to complete
14 the inspection within a specified time frame. The proposal shall include the statement that
15 the contractor shall, based on the inspection, thereafter offer to remedy the defect within
16 a specified time frame, compromise by payment, or dispute the claim; or

17 (2) Offer to remedy the claim without an inspection within a specified time frame;
18 or

19 (3) Offer to remedy part of the claim without inspection and compromise and settle
20 the remainder of the claim by monetary payment within a specified time frame; or

21 (4) Offer to compromise and settle all of a claim without inspection. A contractor's
22 offer pursuant to this subdivision to compromise and settle a claimant's or association's
23 claim may include, but is not limited to, an express offer to purchase the claimant's
24 residence that is the subject of the claim; or

25 (5) State that the contractor disputes the claim and will neither remedy the
26 construction defect nor compromise and settle the claim.

27 3. (1) If the contractor disputes the claim pursuant to subdivision (5) of subsection
28 2 of this section or does not respond to the claimant's notice of claim within the time stated
29 in subsection 2 of this section, the claimant may bring an action against the contractor for
30 the defect described in the notice of claim without further notice.

31 (2) If the claimant rejects the inspection proposal or the settlement offer made by
32 the contractor pursuant to subsection 2 of this section, the claimant shall serve written
33 notice of the claimant's rejection on the contractor. The notice shall include the basis for
34 claimant's rejection. After service of the rejection, the claimant and contractor shall
35 attempt to resolve the claim through mediation in accordance with section 431.312. If the
36 claim is not resolved through mediation, the claimant may bring an action against the
37 contractor for the construction defect claim without further notice described in the notice
38 of claim. If the contractor has not received from the claimant within thirty days after the
39 claimant's receipt of the contractor's response either an acceptance or rejection of the
40 inspection proposal or settlement offer, the contractor may at any time thereafter
41 terminate the proposal or offer by serving written notice to the claimant. If the contractor
42 so terminates the proposal, the claimant may thereafter bring an action against the
43 contractor for the defect described in the notice of claim without further notice.

44 (3) If the claimant elects to accept the offer of the contractor to remedy the claim

45 without an inspection pursuant to subdivision (2) of subsection 2 of this section, or if the
46 claimant elects to accept the offer of the contractor to remedy part of the claim without
47 inspection and compromise and settle the remainder of the claim by monetary payment
48 pursuant to subdivision (3) of subsection 2 of this section, the claimant shall provide the
49 contractor and its contractors or other agents reasonable access to the claimant's residence
50 during normal working hours to perform and complete the construction or work in
51 accordance with the timetable stated in the offer. Any dispute relating to performance of
52 the remedial construction or work by the contractor shall be subject to mediation in
53 accordance with section 431.312. If the dispute is not resolved by mediation, the claimant
54 may bring an action against the contractor for the defect described in the notice of claim.

55 4. (1) If the claimant elects to allow the contractor to inspect in accordance with
56 the contractor's proposal pursuant to subdivision (1) of subsection 2 of this section, within
57 fourteen days after the date of the claimant's election to allow an inspection is
58 communicated to the contractor, the claimant and contractor shall agree on a time and
59 date for the inspection, and such inspection shall occur within fourteen days from the date
60 of the communication of such election for an inspection unless the claimant and contractor
61 agree to a later date. The claimant shall provide the contractor and its subcontractors,
62 suppliers, or other agents reasonable access to the claimant's residence during normal
63 working hours to inspect the premises and the claimed defect. The contractor shall
64 perform the inspection at its own cost. If destructive testing is necessary, the contractor
65 shall repair all damage caused by the testing.

66 (2) Within fourteen days following completion of the inspection, the contractor
67 shall serve on the claimant:

68 (a) A written offer to remedy all of the claim at no cost to the claimant, including
69 a report of the scope of the inspection, the findings and results of the inspection, a
70 description of the construction or work necessary to remedy the defect described in the
71 claim, and a timetable for the completion of such construction or work; or

72 (b) A written offer to remedy part of the claim, and compromise and settle the
73 remainder of the claim by monetary payment, within a specified time frame; or

74 (c) A written offer to compromise and settle all of the claim by monetary payment
75 pursuant to subdivision (2) of subsection 2 of this section; or

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

78 (3) If the contractor does not proceed further to remedy the construction defect
79 within the stated timetable, or if the contractor fails to comply with the provisions of
80 subdivision (2) of this subsection, the claimant may bring an action against the contractor

81 for the defect described in the notice of claim without further notice.

82 (4) If the claimant rejects the offer made by the contractor pursuant to paragraph
83 (a), (b), or (c) of subdivision (2) of this subsection to either remedy the construction defect
84 or remedy part of the claim and make a monetary settlement as to the remainder of the
85 claim or to compromise and settle the claim by monetary payment, the claimant shall serve
86 written notice of the claimant's rejection and the reasons for the rejection on the
87 contractor. After service of the rejection notice, the claimant and contractor shall attempt
88 to resolve the dispute through mediation in accordance with section 431.312. If the dispute
89 is not resolved through mediation, the claimant may bring an action against the contractor
90 for the defect described in the notice of claim. If the contractor has not received from the
91 claimant within thirty days after the claimant's receipt of the contractor's response either
92 an acceptance or rejection of the offer made pursuant to paragraph (a), (b), or (c) of
93 subdivision (2) of this subsection, the contractor may at any time thereafter terminate the
94 offer by serving written notice to the claimant. If the contractor so terminates its offer, the
95 claimant may bring an action against the contractor for the claim described in the notice
96 of claim without further notice.

97 5. (1) Any claimant accepting the offer of a contractor to remedy all or part of the
98 construction defect pursuant to paragraph (a) or (b) of subdivision (2) of subsection 4 of
99 this section shall do so by serving the contractor with a written notice of acceptance within
100 a reasonable time period after receipt of the offer, and no later than thirty days after
101 receipt of the offer. The claimant shall provide the contractor and its subcontractors or
102 other agents reasonable access to the claimant's residence during normal working hours
103 to perform and complete the construction or work by the timetable stated in the offer. Any
104 dispute relating to performance of the remedial construction or work by the contractor
105 shall be subject to mediation in accordance with section 431.312. If the dispute is not
106 resolved by mediation, the claimant may bring an action against the contractor for the
107 defect described in the notice of claim.

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

111 6. Any action commenced by a claimant prior to compliance with the requirements
112 of this section shall, upon motion by a party to the action, be subject to dismissal without
113 prejudice, and shall not be recommenced until the claimant has complied with the
114 requirements of this section if the court finds the claimant knowingly violated the sections
115 of said act.

116 7. The claimant may amend the notice of claim to include construction defects

117 discovered after the service of the original notice of claim and shall otherwise comply with
118 the requirements of this section for the additional claims. Claims for defects discovered
119 after the commencement or recommencement of an action may be added to such action
120 only after providing notice to the contractor of the defect and allowing for response under
121 subsection 2 of this section.

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

129 9. A written notice of claim and any written response by a contractor shall be
130 treated as a settlement offer and shall not be admissible in an action related to a
131 construction defect asserted therein, except as otherwise permitted by law. A written
132 notice of claim and any written response by a contractor shall not be admissible as a prior
133 inconsistent statement.

134 10. In the event that immediate action must be taken by a claimant to prevent
135 imminent injury to persons because of alleged construction defects, including defective
136 garage doors, that threaten the life or safety of persons, or alleged construction defects,
137 including defective garage doors, that if not addressed will result in significant and
138 material additional damage to the residence, the homeowner or another person designated
139 by the homeowner including the contractor may undertake reasonable repairs necessary
140 to mitigate the emergency situation. Claimants may thereafter include the cost of such
141 repairs in the written notice of claim of construction defects provided for in subsection 1
142 of this section. Provided, however, that other than the undertaking of immediate repairs
143 to remedy an emergency situation, any repairs to construction defects undertaken by
144 homeowners shall not be included in claims initiated under subsection 2 of this section, and
145 shall not be the subject of an action.

146 11. The mediation shall take place in the county where the claimants resides or in
147 a mutually agreed to location.

431.309. 1. (1) If an association or an executive board acting on behalf of an
2 association institutes an action asserting defects in the construction of two or more
3 residences, common elements, or common areas, the provisions of this section shall apply.
4 For purposes of this section, "action" has the same meaning as set forth in subsection 1 of
5 section 431.300.

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

8 2. (1) Prior to filing an action alleging a construction defect, the association or
9 board of directors or executive board shall serve written notice of the anticipated
10 commencement of such action to each claimant who is a member of the association at the
11 last known address described in the association's records.

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

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

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

17 (3) The association or board of directors or executive board shall obtain written
18 consent to proceed with the action from a majority of the homeowners who are members
19 of the association.

20 3. Nothing in this section shall be construed to:

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

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

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

 431.312. 1. Unless a contractor either fails to respond to a written notice of claim
2 or completely disputes a written notice of claim and refuses to remedy pursuant to
3 subdivision (1) of subsection 3 of section 431.306, or a contractor takes no action to remedy
4 a defect following inspection, or takes no action following an offer to remedy or takes no
5 action following an offer to remedy part of a defect and compromise and settle the
6 remainder, or does not provide a written offer to remedy or compromise as provided in
7 section 431.306, a claimant shall attempt to resolve a claim against a contractor through
8 mediation before commencing an action against a contractor arising from construction or
9 substantial remodel of a residence. Mediation pursuant to this section shall be nonbinding
10 and the contractor and claimant shall mutually agree upon a qualified independent
11 mediator and shall equally share the cost of the mediator. If the parties cannot agree upon

12 a mediator, either party may request appointment of a mediator by a court with
13 jurisdiction. The mediation shall take place within a reasonable time period, but in no
14 event later than forty-five days after service of a request for mediation by a claimant upon
15 a contractor or a request by a contractor upon a claimant. A contractor who receives a
16 request for mediation from a claimant shall serve a response in writing within fourteen
17 days and shall include within the response the name of a proposed mediator and mediation
18 date. A claimant who receives a request for mediation from a contractor shall serve a
19 response in writing within fourteen days and shall include within the response the name
20 of a proposed mediator and mediation date.

21 2. The contractor or claimant may include in the mediation any person or entity
22 reasonably necessary for resolution of the claim asserted. This subsection shall not be
23 construed to mandate attendance at a mediation by a person or entity other than the
24 contractor or claimant served with a notice of claim.

25 3. If all the parties to a dispute agree in writing to submit their dispute to any
26 forum for arbitration, conciliation, or mediation, then no person who serves as arbitrator,
27 conciliator or mediator, nor any agent or employee of that person, shall be subpoenaed or
28 otherwise compelled to disclose any matter disclosed in the process of setting up or
29 conducting the arbitration, conciliation, or mediation.

30 4. Arbitration, conciliation, and mediation proceedings shall be regarded as
31 settlement negotiations.

32 5. Notwithstanding any provisions of law or the agreements of the parties to the
33 contrary, the resolution of the dispute by the parties through mediation or otherwise shall
34 not operate to release any claim of the claimant except the claim described in the notice of
35 defect, and shall not operate to release the claim described in the notice of defect until the
36 agreed upon remedy has been accomplished.

431.315. 1. Nothing in sections 431.300 to 431.315 shall be construed to create a
2 theory or cause of action upon which liability may be based or to limit any causes of action
3 or remedies otherwise available to a homeowner or contractor pursuant to law after giving
4 effect to the provisions of sections 431.300 to 431.315, nor to hinder or otherwise affect the
5 employment, agency, or contractual relationship between homeowners and contractors
6 during the process of construction or remodeling, and does not preclude the termination
7 of those relationships as allowed under current law. Nothing in sections 431.300 to 431.315
8 shall negate or otherwise restrict a contractor's right to access or inspection provided by
9 law, covenant, easement, or contract.

10 2. Nothing in sections 431.300 to 431.315 shall be construed to prevent contracts
11 between contractors and homeowners from specifying that disputes shall be resolved by

12 **binding arbitration pursuant to chapter 435, RSMo. In contracts between contractors and**
13 **homeowners that specify binding arbitration as the means of dispute resolution, sections**
14 **431.300 to 431.315 shall not be applicable; provided, in those contracts between contractors**
15 **and homeowners that specify binding arbitration as the means of dispute resolution, the**
16 **contractor shall provide notice, pursuant to section 435.460, that disputes may be resolved**
17 **by binding arbitration and sections 431.300 to 431.315 are not applicable to such**
18 **transactions.**

19 **3. In the event a claim for a construction defect of which the repair would not**
20 **exceed the applicable dollar limit for a matter before the small claims court having**
21 **jurisdiction over the construction defect claim is mediated pursuant to sections 431.300 to**
22 **431.315, the contractor will pay the first five hundred dollars of any mediator's charges for**
23 **such mediation otherwise paid by the claimant.**

24 **4. The provisions of sections 431.300 to 431.315 shall not apply to an action brought**
25 **by an insurer, subrogated to the rights of a claimant, if payment was made by the insurer**
26 **pursuant to a claim under an insurance policy.**

Section 1. If any provision of sections 431.300 to 431.315, RSMo, is found by a court
2 **of competent jurisdiction to be invalid or unconstitutional it is the stated intent of the**
3 **general assembly that the general assembly would have approved the remaining portions**
4 **of sections 431.300 to 431.315, RSMo, and the remaining portions of sections 431.300 to**
5 **431.315, RSMo, shall remain in full force and effect.**