

FIRST REGULAR SESSION
HOUSE COMMITTEE SUBSTITUTE FOR
SENATE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 168
93RD GENERAL ASSEMBLY

Reported from the Committee on Local Government, April 21, 2005 with recommendation that House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bill No. 168 Do Pass. Referred to the Committee on Rules pursuant to Rule 25(26)(f).

STEPHEN S. DAVIS, Chief Clerk

0780L.10C

AN ACT

To amend chapters 213 and 431, RSMo, by adding thereto eight 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. Chapters 213 and 431, RSMo, is amended by adding thereto eight new sections, to be known as sections 213.041, 431.300, 431.303, 431.306, 431.309, 431.312, 431.315, and 1, to read as follows:

213.041. 1. No declaration or other governing document of a homeowners association shall include a restrictive covenant in violation of section 213.040.

2. Notwithstanding any other provision of law or provision of the governing documents, the board of directors of a homeowners association shall amend, without approval of the owners, any declaration or other governing document that includes a restrictive covenant in violation of section 213.040, and shall restate the declaration or other governing document without the restrictive covenant but with no other change to the declaration or governing document.

3. If after providing written notice to a homeowners association requesting that the association delete a restrictive covenant in violation of section 213.040, and the association fails to delete the restrictive covenant within thirty days of receiving the notice, the

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.

12 Missouri commission on human rights, a city or county in which a common interest
13 development is located, or any person may bring an action against the homeowners
14 association for injunctive relief to enforce the provisions of subsections 1 and 2 of this
15 section. The court may award attorney's fees to the prevailing party.

16 4. The provisions of this section shall become effective on January 1, 2006.

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

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

10 (2) "Association":

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

13 (b) A homeowners' association, including but not limited to, a nonprofit
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 to
10 comply with sections 431.300 to 431.315 for both the claimant and contractor and shall be
11 in substantially the following form:

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. READ THIS NOTICE**
21 **CAREFULLY. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER**
22 **SECTIONS 431.300 TO 431.315 WHICH MUST BE OBEYED IN ORDER TO**
23 **PRESERVE YOUR ABILITY TO FILE A LAWSUIT. OTHER THAN REPAIRS TO**
24 **WORK DONE BY THE CONTRACTOR THAT ARE NECESSARY TO PROTECT THE**
25 **LIFE, HEALTH, OR SAFETY OF PERSONS LIVING IN A RESIDENCE, OR TO**
26 **AVOID ADDITIONAL SIGNIFICANT AND MATERIAL DAMAGE TO THE**
27 **RESIDENCE PURSUANT TO SECTION 431.306.10, YOU MAY NOT INCLUDE IN**
28 **CLAIMS AGAINST YOUR CONTRACTOR THE COSTS OF OTHER REPAIRS YOU**
29 **PERFORM BEFORE YOU ARE ENTITLED TO FILE A LAWSUIT UNDER**
30 **SECTIONS 431.300 TO 431.315.**

31 3. Nothing in sections 431.300 to 431.315 shall preclude or bar any action if a notice
32 is not given to the claimant as required by this section, and the provisions of sections
33 431.300 to 431.315 shall not apply to any claim of a claimant against a contractor if such
34 contractor failed to provide the written notice required by this section.

35 4. In those lawsuits originally filed by a contractor against a homeowner, if a
36 homeowner files a counterclaim or an affirmative defense in such lawsuit that includes a
37 claim based on a construction defect allegedly caused by the contractor, then the provisions

38 of sections 431.300 to 431.315 shall not apply to said lawsuit, and the homeowner or
39 association claimant will not be required to adhere to sections 431.300 to 431.315 for those
40 claims made pursuant to the lawsuit, provided a claimant shall be required to follow those
41 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. The notice of claim shall state that the claimant
4 asserts a construction defect claim against the contractor and shall describe the claim in
5 reasonable detail sufficient to determine the general nature of the defect as well as any
6 known results of the defect.

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

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

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

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

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

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

23 3. (1) If the contractor disputes the claim pursuant to subdivision (5) of subsection
24 2 of this section or does not respond to the claimant's notice of claim within the time stated
25 in subsection 2 of this section, the claimant may bring an action against the contractor for
26 the defect described in the notice of claim without further notice.

27 (2) If the claimant rejects the inspection proposal or the settlement offer made by
28 the contractor pursuant to subsection 2 of this section, the claimant shall serve written
29 notice of the claimant's rejection on the contractor. The notice shall include the basis for
30 claimant's rejection. After service of the rejection, the claimant and contractor may
31 attempt to resolve the claim through mediation in accordance with section 431.312. If the
32 claim is not resolved through mediation, the claimant may bring an action against the

33 contractor for the construction defect claim without further notice described in the notice
34 of claim. If the contractor has not received from the claimant within thirty days after the
35 claimant's receipt of the contractor's response either an acceptance or rejection of the
36 inspection proposal or settlement offer, the contractor may at any time thereafter
37 terminate the proposal or offer by serving written notice to the claimant. If the contractor
38 so terminates the proposal, the claimant may thereafter bring an action against the
39 contractor for the defect described in the notice of claim without further notice.

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

51 4. (1) If the claimant elects to allow the contractor to inspect in accordance with
52 the contractor's proposal pursuant to subdivision (1) of subsection 2 of this section, within
53 fourteen days after the date of the claimant's election to allow an inspection is
54 communicated to the contractor, the claimant and contractor shall agree on a time and
55 date for the inspection, and such inspection shall occur within fourteen days from the date
56 of the communication of such election for an inspection unless the claimant and contractor
57 agree to a later date. The claimant shall provide the contractor and its subcontractors,
58 suppliers, or other agents reasonable access to the claimant's residence during normal
59 working hours to inspect the premises and the claimed defect. The contractor shall
60 perform the inspection at its own cost. If destructive testing is necessary, the contractor
61 shall repair all damage caused by the testing.

62 (2) Within fourteen days following completion of the inspection, the contractor
63 shall serve a report of the scope of the inspection and the findings and results of the
64 inspection on the claimant, and either:

65 (a) A written offer to remedy all of the claim at no cost to the claimant, including
66 a description of the construction or work necessary to remedy the defect described in the
67 claim, and a timetable for the completion of such construction or work; or

68 (b) A written offer to remedy part of the claim, and compromise and settle the

69 remainder of the claim by monetary payment, within a specified time frame; or

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

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

74 (3) If the contractor does not proceed further to remedy the construction defect
75 within the stated timetable, or if the contractor fails to comply with the provisions of
76 subdivision (2) of this subsection, the claimant may bring an action against the contractor
77 for the defect described in the notice of claim without further notice.

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

93 5. (1) Any claimant accepting the offer of a contractor to remedy all or part of the
94 construction defect pursuant to paragraph (a) or (b) of subdivision (2) of subsection 4 of
95 this section shall do so by serving the contractor with a written notice of acceptance within
96 a reasonable time period after receipt of the offer, and no later than thirty days after
97 receipt of the offer. The claimant shall provide the contractor and its subcontractors or
98 other agents reasonable access to the claimant's residence during normal working hours
99 to perform and complete the construction or work by the timetable stated in the offer. Any
100 dispute relating to performance of the remedial construction or work by the contractor
101 may be resolved by mediation in accordance with section 431.312. If the dispute is not
102 resolved by mediation, the claimant may bring an action against the contractor for the
103 defect described in the notice of claim.

104 (2) The claimant and contractor may, by mutual written agreement, alter the extent

105 of construction or the timetable for completion of construction stated in the offer,
106 including, but not limited to, repair of additional defects.

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

112 7. The claimant may amend the notice of claim to include construction defects
113 discovered after the service of the original notice of claim and shall otherwise comply with
114 the requirements of this section for the additional claims. Claims for defects discovered
115 after the commencement or recommencement of an action may be added to such action
116 only after providing notice to the contractor of the defect and allowing for response under
117 subsection 2 of this section.

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

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

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

141 shall not be the subject of an action.

142 **11. Any mediation shall take place in the county where the claimant resides or in**
143 **a mutually agreed to location.**

431.309. 1. If an association's governing board rejects a written settlement offer
2 **from the contractor and has satisfied applicable provisions of section 431.306, and upon**
3 **written request by the contractor as part of said offer that the association hold a meeting**
4 **of the members, the provisions of this section shall apply prior to the association filing an**
5 **action alleging construction defects in the common areas and common elements.**

6 **2. The board shall hold a meeting open to each member of the association. The**
7 **meeting shall be held no less than fifteen days before the association commences an action**
8 **against the contractor.**

9 **3. No less than fifteen days before this meeting is held, a written notice shall be sent**
10 **to each member of the association specifying all of the following:**

11 **(1) That a meeting will take place to discuss construction defects that may lead to**
12 **the filing of an action, and the date, time, and place of the meeting;**

13 **(2) The options that are available to address the construction defects, including the**
14 **filing of an action and a statement of the various alternatives that are reasonably**
15 **foreseeable by the association to pay for those options and whether these payments are**
16 **expected to be made from the use of reserve account funds or the imposition of regular or**
17 **special assessments, or emergency assessment increases;**

18 **(3) The complete text of any written final settlement offer from the contractor and**
19 **a concise explanation of the contractor's specific reasons for the terms of the offer.**

20 **4. The discussions at the meeting and the contents of the notice and the items**
21 **required to be specified in the notice under subsection 3 of this section are privileged**
22 **communications and are not admissible in evidence in any action, unless the association**
23 **consents to their admission.**

24 **5. No more than one request to meet and discuss a written settlement offer under**
25 **this section may be made by the contractor.**

431.312. 1. At any time, either a claimant or contractor may offer to resolve a claim
2 **against a contractor through mediation. Mediation pursuant to this section shall be**
3 **nonbinding and independently administered. The contractor and claimant shall mutually**
4 **agree upon a qualified independent and neutral mediator and shall equally share the cost**
5 **of the mediator. If the parties agree upon a mediator, then the mediation shall take place**
6 **within a reasonable time period, but in no event later than forty-five days after service of**
7 **a request for mediation by a claimant upon a contractor or a request by a contractor upon**
8 **a claimant. A contractor who receives a request for mediation from a claimant shall serve**

9 a response in writing within fourteen days and may include within the response the name
10 of a proposed mediator and mediation date. A claimant who receives a request for
11 mediation from a contractor shall serve a response in writing within fourteen days and
12 may include within the response the name of a proposed mediator and mediation date.

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

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

22 4. Arbitration, conciliation, and mediation proceedings shall be regarded as
23 settlement negotiations and the confidentiality of such proceeding shall be as set forth in
24 supreme court rule 17.

25 5. Notwithstanding any provisions of law or the agreements of the parties to the
26 contrary, the resolution of the dispute by the parties through mediation or otherwise shall
27 not operate to release any claim of the claimant except the claim described in the notice of
28 defect, and shall not operate to release the claim described in the notice of defect until the
29 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. The provisions of sections 431.300 to 431.315 shall not apply to an action brought**
20 **by an insurer, subrogated to the rights of a claimant, if payment was made by the insurer**
21 **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.**