

ACT 119

S.B. NO. 2358

A Bill for an Act Relating to Construction Claims.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that there is a need for a method of resolving construction disputes that reduces the need for litigation while still protect-

ing claimants' rights. The legislature further finds that an effective alternative dispute resolution mechanism for construction defects should require the claimant to serve a notice of claim on the construction professional responsible for the defect and allow the construction professional an opportunity to resolve the dispute without litigation.

The purpose of this Act, therefore, is to enact a notice and opportunity to repair law that requires notice of and an opportunity to repair a construction defect as a condition precedent to legal action between the claimant and contractor, and a notice of claim to any liability insurer.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
CONTRACTOR REPAIR ACT**

§ -1 Definitions. The following terms, whenever used in this chapter, shall have the following meanings, unless a different meaning clearly appears in context:

“Action” means any civil proceeding, including but not limited to arbitration, in which damages or other relief may be awarded or enforced with respect to an alleged construction defect.

“Association” means a nonprofit, incorporated, or unincorporated organization upon which responsibilities are imposed and authority is granted in the organization’s declaration or bylaws.

“Claim” means any notice of claim by a claimant to a contractor of a construction defect.

“Claimant” means any person, entity, partnership, corporation, or association asserting a claim concerning an alleged construction defect.

“Common area” means real property within a planned community that is owned or leased by the association or is otherwise available for the use of its members or designated as common area in or pursuant to the association’s declaration or bylaws.

“Construction defect” means a deficiency in, or arising out of, the design, specifications, surveying, planning, construction, supervision, or observation of construction of a dwelling or premises.

“Contractor” means any person, firm, partnership, corporation, association, or other organization that is engaged in the business of designing, manufacturing, supplying products, developing, constructing, or selling a dwelling.

“Dwelling” means a single-family house, duplex, or multi-family unit designed for residential use, including common areas and improvements that are owned or maintained by an individual, association, or other entity.

“Mediation” means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

“Planned community” means a common interest community, including condominiums and cooperative housing corporations, and excluding time share plans.

“Premises” means a dwelling, including common areas and improvements that are owned or maintained by any person, firm, partnership, corporation, association, or other organization. “Premises” includes the systems, other component improvements, other structures, or recreational facilities appurtenant to, but not necessarily a part of, the dwelling or facility.

“Service” means personal service or delivery by certified mail, return receipt requested, to the last known address of the addressee.

§ -2 **Applicability; administration.** All claimants filing an action alleging construction defects shall comply with this chapter; provided that this chapter shall not apply to any actions that include claims for personal injury or death.

§ -3 **Notice of claim of construction defect.** (a) A claimant, no later than ninety days before filing an action against a contractor, shall serve the contractor with a written notice of claim. The notice of claim shall describe the claim in detail and include the results of any testing done. The notice of claim shall not constitute a claim under any applicable insurance policy and shall not give rise to a duty of any insurer to provide a defense under any applicable insurance policy unless and until the process set forth in section -5 is completed. Nothing in this chapter shall in any way interfere with or alter the rights and obligations of the parties under any liability policy.

(b) A contractor served with a written notice of claim shall serve any other appropriate subcontractor with notice of the claim. The contractor’s notice shall include the claimant’s written notice of claim.

(c) After serving the notice of claim, a claimant shall give to the contractor reasonable prior notice and an opportunity to observe if any testing is done.

§ -4 **Rejection of claim; opportunity to repair construction defect.** (a) The contractor rejects a claimant’s claim of construction defects by:

- (1) Serving the claimant with a written rejection of the claim; or
- (2) Failing to respond pursuant to subsection (b)(1) or (b)(2), to the notice of claim within thirty days after service.

(b) The contractor, within thirty days after service of the notice of claim, shall serve the claimant and any other contractor that has received the notice of claim with a written response to the alleged construction defect that:

- (1) Offers to settle without inspecting the construction defect by:
 - (A) Monetary payment;
 - (B) Making repairs; or
 - (C) Both subparagraphs (A) and (B); or
- (2) Proposes to inspect the premises of the alleged construction defect that is the subject of the claim.

(c) Within thirty days following any proposal for inspection under subsection (b)(2), the claimant shall provide access to:

- (1) Inspect the premises;
- (2) Document any alleged construction defects; and
- (3) Perform any testing required to evaluate the nature, extent, and cause of the asserted construction defect, and the nature and extent of any repair or replacement that may be necessary to remedy the asserted construction defect;

provided that if the claimant is an association of apartment owners, the claimant shall have forty-five days to provide such access. If access to an individual condominium unit is necessary, and the association is unable to obtain such access, then the association shall have a reasonable time to provide access. If destructive testing is required, the contractor shall give advance notice of tests and return the premises to its pre-testing condition. If inspection or testing reveals a condition that requires additional testing to fully and completely evaluate the nature, cause, and extent of the construction defect, the contractor shall provide notice to the claimant of the need for additional testing. Claimant shall provide additional access to the premises. If a claim is asserted on behalf of owners of multiple dwellings, or

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multiple owners of units within a multi-family complex, the contractor shall be entitled to inspect each of the dwellings or units.

(d) Within fourteen days following the inspection and testing, the contractor shall serve on the claimant a written:

- (1) Offer to fully or partially remedy the construction defect at no cost to the claimant. Such offer shall include a description of construction necessary to remedy the construction defect and a timetable for the completion of the additional construction;
- (2) Offer to settle the claim by monetary payment;
- (3) Offer for a combination of repairs and monetary payment; or
- (4) Statement that the contractor will not proceed further to remedy the construction defect.

Any offer of settlement under this section shall reference this section, and shall state that a claimant's failure to respond with a written notice of acceptance or rejection within thirty or forty-five days, whichever applies pursuant to section -5(a), shall mean that the offer is rejected. Failure to serve a written offer or statement under this section shall be deemed a statement that the contractor will not proceed further.

§ **-5 Written notice of acceptance; access to premises.** (a) The claimant, within thirty days after receipt of a contractor's settlement offer, may accept any offer by serving the contractor with a written notice of acceptance; provided that an association shall have forty-five days to respond. If no written notice of acceptance is served, the settlement offer shall be deemed.

(b) If a claimant accepts a contractor's offer to repair, the claimant shall unfettered access to perform and complete the construction within the timetable stated in the settlement offer.

§ **-6 Offer of settlement.** Any time after the service of the notice of claim, any party may serve an offer of settlement. If the offer is accepted, the parties shall be deemed to have resolved the claim in whole or in part pursuant to the offer. An offer not accepted within ten days after service shall be deemed withdrawn and evidence thereof is not admissible except to determine costs. If the judgment or award obtained in a subsequent proceeding is not more favorable than the offer, the offeree shall pay the costs incurred by the offeror after the making of the offer. The fact that an offer is made and not accepted does not preclude a subsequent offer.

§ **-7 Mediation.** If the parties are unable to resolve the claim pursuant to section -5 or -6, all parties shall attempt to resolve the dispute through mediation, even if mediation is not otherwise ordered or mandated by contract or by law.

§ **-8 Statute of limitations on actions exception.** If an applicable statute of limitation or repose would preclude an action after the notice of claim has been served but before the dispute is resolved under this chapter, the claimant may file an action against the contractor but the action shall be immediately stayed pending the contractor's opportunity to repair under section -4, or submission of the dispute to mediation under section -7. This section shall not be construed to revive a statutory period of limitations on actions that have expired prior to the date on which a claimant's written notice of claim is served. After the sending of the initial notice of claim, a claimant and a contractor, by written mutual agreement, may alter the procedure for the notice of claim under this section.

§ **-9 Additional construction defects.** A construction defect discovered after the notice of claim is served may not be alleged in an action until the claimant has given the contractor:

- (1) A written notice of claim regarding the alleged defect under section -3; and
- (2) An opportunity to repair the construction defect or reject the notice of claim under section -4.

§ **-10 Release.** If the parties resolve the claim in whole or in part, the claimant shall be barred from bringing an action for the resolved claims.

§ **-11 Contract of sale; provisions.** (a) Upon entering into a contract for sale of a new structure or the construction or substantial remodeling of a premises, the seller of the new structure shall provide to the purchaser of the new structure, and the contractor of the construction or substantial remodeling of the premises shall provide to the owner of the premises, notice of the contractor's right to resolve alleged construction defects before a claimant may commence litigation against the contractor. The notice shall be conspicuous and included as part of the contract.

(b) The notice required by subsection (a) shall explicitly reference this chapter, and shall be in substantially the following form:

“CHAPTER OF THE HAWAII REVISED STATUTES CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO DESIGNED, REPAIRED, OR CONSTRUCTED YOUR HOME OR FACILITY. NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR AND/OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THE LAW, AND FAILURE TO FOLLOW THEM MAY NEGATIVELY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.”

§ **-12 Other actions.** This chapter shall not interfere with a contractor's right to seek contribution, indemnity, or recovery against a subcontractor, supplier, or design professional for any claim made against a contractor by a claimant.

§ **-13 Dismissal without prejudice.** The court or arbitrator shall dismiss, without prejudice, any action failing to meet the requirements of this chapter, unless:

- (1) The failure to meet the requirements is the direct result of the wrongful conduct of another party;
- (2) Circumstances beyond the control of the party prevented compliance; or
- (3) An applicable statute of limitations on actions would prevent the refiling of an action, in which case the action shall be immediately stayed to provide the claimant with an opportunity to comply with this chapter, but for no longer than six months;

provided that the exceptions provided by this section to any specific requirement of this chapter shall not excuse a party from substantially complying with the remainder of the chapter.”

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SECTION 3. Section 444-25.5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) All licensed contractors performing home construction or improvements shall provide a written contract to the homeowner. The written contract shall:

- (1) Contain the information provided in subsection (a) and any other relevant information that the board may require by rule;
- (2) Contain notice of the contractor’s right to resolve alleged construction defects prior to commencing any litigation in accordance with section

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~~[(2)]~~ (3) Be signed by the contractor and the homeowner; and

~~[(3)]~~ (4) Be executed prior to the performance of any home construction or improvement.”

SECTION 4. Chapter 672, Hawaii Revised Statutes, is repealed.

SECTION 5. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 6. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 7. This Act shall take effect on July 1, 2004.

(Approved June 15, 2004.)