

Senate Bill 909

Sponsored by Senator MINNIS (at the request of Oregon Building Industry Association)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes notice of defect procedure as prerequisite to compelling arbitration or commencing court action to recover damages for residential construction defect. Requires contractor to provide owner with notice of procedures. Specifies wording of notice.

A BILL FOR AN ACT

Relating to residential construction claims.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 8 of this 2003 Act:

(1) **"Contractor" means a person that performed services for the construction, alteration or repair of a residence.**

(2) **"Defect" means a deficiency, an inadequacy or an insufficiency arising out of or relating to the construction, alteration or repair of a residence. "Defect" includes a deficiency, an inadequacy or an insufficiency in a system, component or material incorporated into a residence.**

(3) **"Owner" means a person that possesses an interest in a residence or in land that is a residential site or has entered into a contract for the purchase of an interest in the residence or land. "Owner" includes:**

(a) **A homeowners association as defined in ORS 94.550;**

(b) **A managing entity as defined in ORS 94.803;**

(c) **An owners' association as described in ORS 94.858;**

(d) **An association of unit owners as defined in ORS 100.005; and**

(e) **Any other entity that possesses an interest in a residence or represents owners of a residence.**

(4) **"Remediation" means the repair or replacement of some or all of the defects described in an owner's notice of defect sent under section 2 of this 2003 Act.**

(5) **"Residence" means:**

(a) **A residential structure as defined in ORS 701.005;**

(b) **Common property as defined in ORS 94.550; and**

(c) **A common element as defined in ORS 100.005.**

(6) **"Secondary notice" means a copy of an owner's notice of defect that a contractor, subcontractor or supplier sends to another contractor, subcontractor or supplier that may be responsible for a defect.**

(7) **"Subcontractor" means any person that performed services for the construction, alteration or repair of a residence at the request or direction of a contractor.**

(8) **"Supplier" means any person that furnished or manufactured the systems, compo-**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

nents or materials incorporated into a residence as part of the construction, alteration or repair of the residence.

SECTION 2. (1) An owner may not compel arbitration or commence a court action against a contractor, subcontractor or supplier to assert a claim arising out of or related to any defect in the construction, alteration or repair of a residence or in any system, component or material incorporated into a residence located in this state unless the owner has sent that contractor, subcontractor or supplier a notice of defect as provided in this section and has complied with section 4 of this 2003 Act.

(2) An owner must send a notice of defect by registered mail, return receipt requested. If a notice of defect is sent to a contractor or subcontractor, the owner must send the notice to the last known address for the contractor or subcontractor as shown in the records of the Construction Contractors Board. If a notice of defect is sent to a supplier, the owner must send the notice to the Oregon business address of the supplier or, if none, to the registered agent of the supplier.

(3) A notice of defect sent by an owner must include:

(a) The name and mailing address of the owner or the owner's legal representative, if any;

(b) A statement that the owner may seek to compel arbitration or bring a court action against the contractor, subcontractor or supplier;

(c) The address and location of the affected residence;

(d) A description of:

(A) Each defect;

(B) The remediation the owner believes is necessary; and

(C) Any incidental damage not curable by remediation as described in subparagraph (B) of this paragraph; and

(e) Any report or other document evidencing the existence of the defects and any incidental damage.

SECTION 3. (1) A contractor, subcontractor or supplier that receives a notice of defect sent under section 2 of this 2003 Act shall, not later than 14 days after receiving the notice of defect, send a secondary notice to any other known contractor, subcontractor or supplier that may be responsible for some or all of the defects described in the notice of defect. The contractor, subcontractor or supplier must send the secondary notice by registered mail, return receipt requested, to an address described in section 2 (2) of this 2003 Act. The secondary notice must be accompanied by a statement describing the basis for contending that the other contractor, subcontractor or supplier may be responsible for some or all of the defects.

(2) A contractor, subcontractor or supplier that receives a notice of defect or secondary notice may send the owner a written request to conduct a visual examination of the residence. The written request must be sent not later than 14 days after the requesting contractor, subcontractor or supplier receives a notice of defect or secondary notice. The written request to conduct a visual examination of the residence must state the estimated time required for the visual examination.

(3) A contractor, subcontractor or supplier that receives a notice of defect or secondary notice may send the owner a written request to inspect the residence. The written request must be sent not later than 14 days after the requesting contractor, subcontractor or sup-

plier conducted a visual examination of the residence. The written request to inspect the residence must state the nature and scope of the inspection, whether any testing is to be performed and the estimated time required for the inspection. The recipient of a secondary notice that requests to inspect the residence shall send a copy of the request to the sender of the secondary notice.

(4) A contractor, subcontractor or supplier that sends a secondary notice and intends to hold the recipient of the secondary notice liable for a defect described in a notice of defect shall coordinate the scheduling of any inspection with the owner and all recipients of a secondary notice from the contractor, subcontractor or supplier. The contractor, subcontractor or supplier shall deliver a copy of any written request to inspect the residence to each recipient of the secondary notice in time to provide the recipient with an opportunity to attend the requested inspection and to participate in any remediation. The sender of a secondary notice shall give reasonable advance notice to the owner or the owner's legal representative, if any, of the identity of any contractor, subcontractor or supplier who will attend the inspection.

(5) Unless otherwise agreed to by the owner, a contractor, subcontractor or supplier that receives a notice of defect or secondary notice shall send a written response to the owner not later than 90 days after the contractor, subcontractor or supplier receives a notice of defect or secondary notice. A contractor, subcontractor or supplier that receives a secondary notice also shall send a copy of the written response to the sender of the secondary notice. The written response must be sent by registered mail, return receipt requested. The written response must include:

(a) One or more of the following for each defect described in the notice of defect or secondary notice or discovered during the course of any visual examination or inspection:

(A) An acknowledgement of the existence, nature and extent of the defect without regard to responsibility for the defect.

(B) A statement describing the existence of a defect different in nature or extent from the defect described in the notice of defect or secondary notice, without regard to responsibility for the defect.

(C) A denial of the existence of the defect.

(b) A copy of the documents described in section 4 (4) of this 2003 Act.

(c) One or more of the following:

(A) An offer to perform some or all of the remediation. The offer must specify the date by which the offered remediation will be completed.

(B) An offer to pay a stated amount of monetary compensation to the owner for some or all of the acknowledged defects and any incidental damage. The offer must specify the date by which payment will be made.

(C) A denial of responsibility for some or all of the acknowledged defects or incidental damage.

SECTION 4. (1) An owner sending a notice of defect under section 2 of this 2003 Act shall make the residence available for visual examination pursuant to any written request sent under section 3 of this 2003 Act. The owner shall make the residence available for visual examination, during normal business hours or as otherwise agreed, not later than 20 days after receiving the written request for visual examination.

(2) An owner sending a notice of defect under section 2 of this 2003 Act shall make the

1 residence available for an inspection pursuant to any written request sent under section 3
2 of this 2003 Act. The owner shall make the residence available for inspection during normal
3 business hours or at a time that is mutually agreeable to the owner and the requester.

4 (3) An inspection by a contractor, subcontractor or supplier may include any reasonable
5 measures, including testing, for determining the nature, cause and extent of the defects de-
6 scribed in the notice of defect or incidental damage and the nature and extent of the neces-
7 sary remediation. Unless the contractor, subcontractor or supplier conducting the inspection
8 and the owner agree otherwise, the contractor, subcontractor or supplier conducting the
9 inspection shall repair any damage caused by the inspection. Any damage caused by the in-
10 spection that is not repaired may be sought as incidental damage in any subsequent arbi-
11 tration or court action by an owner against the contractor, subcontractor or supplier
12 conducting the inspection.

13 (4) A contractor, subcontractor or supplier that requests to inspect a residence must
14 include as part of the written response of the contractor, subcontractor or supplier under
15 section 3 of this 2003 Act, a written report or other document evidencing the result of the
16 inspection and the existence or nonexistence of the defects described in the notice of defect
17 or discovered during the inspection.

18 **SECTION 5.** (1) An owner may accept an offer contained in a written response under
19 section 3 of this 2003 Act by delivering a written acceptance to the offering contractor, sub-
20 contractor or supplier within 30 days after receiving the offer. If an owner fails to accept
21 an offer within 30 days after receipt, the offer is deemed rejected.

22 (2) If the owner accepts a contractor, subcontractor or supplier's offer to perform re-
23 mediation or to pay monetary compensation, completion of the remediation or payment sat-
24 isfies the claims by the owner for those defects included in the offer for which remediation
25 was performed or compensation paid, but not for any other defect. Except as provided in
26 subsection (3) of this section, if the owner accepts an offer by a contractor, subcontractor
27 or supplier that received a secondary notice, completion of the remediation or payment sat-
28 isfies claims for those defects included in the offer for which remediation was performed or
29 compensation paid, including claims by the owner and claims for contribution or indemnity
30 against the contractor, subcontractor or supplier by the sender of the secondary notice, but
31 not for any other defect.

32 (3) If the owner accepts an offer by a contractor, subcontractor or supplier that received
33 a secondary notice to perform remediation or to pay monetary compensation and the con-
34 tractor, subcontractor or supplier fails to perform in accordance with the accepted offer,
35 then the sender of the secondary notice may perform the remediation or pay the monetary
36 compensation offered by the nonperforming contractor, subcontractor or supplier.

37 (4) An owner that sends a notice of defect under section 2 of this 2003 Act may compel
38 arbitration or commence a court action against a contractor, subcontractor or supplier if:

39 (a) The contractor, subcontractor or supplier that receives the notice of defect sent un-
40 der section 2 of this 2003 Act does not send a timely written response under section 3 of this
41 2003 Act;

42 (b) The written response of the contractor, subcontractor or supplier that received the
43 notice of defect or a secondary notice does not offer remediation or monetary compensation;

44 (c) The owner rejects a written offer, or any part thereof, made by the contractor, sub-
45 contractor or supplier; or

(d) The contractor, subcontractor or supplier fails to perform in accordance with an accepted offer.

(5) A notice of defect and the documents described in section 4 (4) of this 2003 Act are admissible in any arbitration or court action between or among an owner, contractor, subcontractor or supplier arising out of or related to the construction, alteration or repair of the residence.

(6) Except as provided in this subsection, a written response containing an offer to perform remediation or pay monetary compensation made under section 3 (5) of this 2003 Act that is not accepted by the owner, and any reply by an owner, unless the reply contains a counteroffer accepted by a contractor, subcontractor or supplier, are not admissible during any subsequent arbitration or court action. A response or reply described in this subsection is admissible solely for the purpose of proving that an owner is qualified to compel arbitration or commence a court action under subsection (4)(c) of this section or determining the timeliness of an action under section 6 of this 2003 Act.

SECTION 6. (1) If an owner sends a contractor, subcontractor or supplier a notice of defect within the time allowed for the owner to commence a court action against that contractor, subcontractor or supplier for a claim described in section 2 of this 2003 Act, the time for the owner to commence the action shall be extended, notwithstanding any statute of limitation or statute of ultimate repose, until the later of:

(a) One hundred and twenty days after the owner receives a written response from the contractor, subcontractor or supplier that received the notice of defect if the written response does not contain a written offer to perform remediation or pay monetary compensation for one or more of the defects or incidental damage described in the notice of defect;

(b) One hundred and twenty days after the owner rejects a written offer by any contractor, subcontractor or supplier to perform remediation or pay monetary compensation for one or more of the defects or incidental damage described in the notice of defect; or

(c) Thirty days after the date specified in an accepted written offer by which the offering contractor, subcontractor or supplier is to complete the remediation or complete payment of monetary compensation for one or more of the defects and any incidental damage described in the notice of defect.

(2) Subsection (1) of this section does not shorten or terminate the time for bringing a claim in accordance with applicable statutes of ultimate repose and statutes of limitation.

(3) Delivery of a secondary notice sent by a contractor, subcontractor or supplier under section 3 of this 2003 Act does not act to toll the expiration of any right of the owner to commence a court action against the recipient of the secondary notice.

(4) Any remediation performed pursuant to an accepted offer made under section 3 of this 2003 Act does not constitute a new performance and, for purposes of ORS 12.135, relates back to the earliest date of substantial completion or abandonment of the construction, alteration or repair of the improvement to real property.

SECTION 7. (1) A contractor shall deliver a notice of the procedure contained in sections 2 to 5 of this 2003 Act to an owner along with the consumer notification form required to be delivered to an owner under ORS 701.055 (13). The notice must be conspicuous and may be included as part of the underlying contract.

(2) The notice required by subsection (1) of this section must be in substantially the following form:

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3 OREGON LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BE-
4 FORE YOU MAY COMMENCE ARBITRATION OR A COURT ACTION AGAINST ANY CON-
5 TRACTOR, SUBCONTRACTOR OR SUPPLIER FOR CONSTRUCTION DEFECTS. BEFORE
6 YOU COMMENCE ARBITRATION OR A COURT ACTION YOU MUST DELIVER A WRIT-
7 TEN NOTICE OF ANY CONDITIONS YOU ALLEGE ARE DEFECTIVE TO THE CONTRAC-
8 TOR, SUBCONTRACTOR OR SUPPLIER YOU BELIEVE IS RESPONSIBLE FOR THE
9 ALLEGED DEFECT AND PROVIDE THE CONTRACTOR, SUBCONTRACTOR OR SUPPLIER
10 THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU
11 ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE CONTRACTOR, SUB-
12 CONTRACTOR OR SUPPLIER. THERE ARE STRICT DEADLINES AND PROCEDURES UN-
13 DER STATE LAW. FAILURE TO MEET THOSE DEADLINES OR FOLLOW THOSE
14 PROCEDURES WILL AFFECT YOUR ABILITY TO COMMENCE ARBITRATION OR A
15 COURT ACTION.

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18 SECTION 8. If an owner compels arbitration or commences a court action against any
19 contractor, subcontractor or supplier to assert a claim arising out of or related to the con-
20 struction, alteration or repair of a residence located in this state and the owner has not
21 followed the procedure set forth in sections 2 and 4 of this 2003 Act, the arbitrator or court
22 must dismiss the arbitration or action without prejudice. The owner may not commence a
23 new arbitration or action unless the owner follows the procedure set forth in sections 2 and
24 4 of this 2003 Act.

25 SECTION 9. Sections 1 to 8 of this 2003 Act do not apply:

- 26 (1) To personal injury or death claims.
27 (2) To claims filed pursuant to ORS 671.703 or 701.139.
28 (3) To claims against a person licensed under ORS 671.010 to 671.220.
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