

SENATE No. 661

The Commonwealth of Massachusetts

PRESENTED BY:

Bruce E. Tarr

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act requiring notice and an opportunity to repair certain construction defects

PETITION OF:

NAME:

Bruce E. Tarr

DISTRICT/ADDRESS:

First Essex and Middlesex

15 concerning the design, construction, or repair of a dwelling, of an alteration of or repair or
16 addition to an existing dwelling, or of an appurtenance to a dwelling, on which a person has a
17 complaint against a contractor. The term may include any physical damage to the dwelling, any
18 appurtenance, or the real property on which the dwelling or appurtenance are affixed,
19 proximately caused by a construction defect.

20 “Contractor” shall mean any person, firm, partnership, corporation, association or other
21 organization that is engaged in the business of designing, developing or constructing dwellings,
22 or the alteration of or addition to an existing dwelling, repair of a new or existing dwelling, or
23 construction, alteration, addition, or repair of an appurtenance to a new or existing dwelling. The
24 term includes: (a) an owner, officer, director, shareholder, partner, or employee of the contractor;
25 (b) subcontractors and suppliers of labor and materials used by a contractor in a dwelling; and (c)
26 a risk retention group registered under applicable law, if any, that insures all or any part of a
27 contractor's liability for the cost to repair a construction defect.

28 “Dwelling” shall mean a single-family house, duplex, or multifamily unit designed for residential
29 use in which title to each individual unit is transferred to the owner under a condominium or
30 cooperative system and shall include common areas and improvements that are owned or
31 maintained by an association or by members of an association. A dwelling includes the systems,
32 other components, improvements, other structures, or recreational facilities that are appurtenant
33 to the house, duplex or multifamily unit at the time of its initial sale, but not necessarily a part of
34 the house, duplex, or multifamily unit.

35 “Serve” or “service” shall mean delivery by certified mail, return receipt requested, to the last
36 known address of the addressee. For a corporation, limited partnership, limited liability

37 company, or other registered business organization, it means service on the registered agent or
38 other agent for service of process authorized by the laws of this state.

39 Section 2. If a claimant files an action without first complying with the requirements of
40 this act, on application by a party to the action, the court shall dismiss the action, without
41 prejudice, and the action may not be refiled or resumed until the claimant has complied with the
42 requirements of this act. To the extent that the action includes a cause of action for damages due
43 to personal injury or death, such cause of action(s) shall not be subject to dismissal pursuant to
44 this section.

45 Section 3. A. In every action subject to this act, the claimant shall, no later than ninety
46 days before initiating an action against a contractor, provide service of written notice of claim on
47 that contractor. The notice of claim shall state that the claimant asserts a construction defect
48 claim or claims and is providing notice of the claim(s) pursuant to the requirements of this act.
49 The notice of claim shall describe the claim or claims in detail sufficient to explain the nature of
50 the alleged construction defects and the results of the defects. In addition, the claimant shall
51 provide to the contractor any evidence that depicts the nature and cause of the construction
52 defect, including expert reports, photographs, and videotapes, if that evidence would be
53 discoverable under this state's evidentiary rules. If, after proper request, the claimant fails to
54 provide such evidence then the claimant shall not be permitted to introduce any such evidence
55 not produced into evidence in any action.

56 B. Within thirty days after service of the notice of claim by claimant required in
57 subsection A, each contractor that has received the notice of claim may serve on the claimant,
58 and on any other contractor that has received the notice of claim, a written response to the claim
59 or claims, which either:

60 (i) Offers to settle the claim by monetary payment, the making of repairs, or a
61 combination of both, without inspection; or

62 (ii) Proposes to inspect the dwelling that is the subject of the claim.

63 C. If the contractor wholly rejects the claim and will neither remedy the alleged
64 construction defect nor settle the claim, or does not respond to the claimant's notice of claim
65 within the time stated in subsection B, the claimant may bring an action against the contractor for
66 the claims described in the notice of claim without further notice except as otherwise provided
67 under applicable law.

68 D. If the claimant rejects the settlement offer made by the contractor, the claimant shall
69 provide written notice of the claimant's rejection to the contractor and, if represented by legal
70 counsel, its attorney. The notice shall include the specific factual reasons for the claimant's
71 rejection of the contractor's proposal or offer. If the claimant believes that the settlement offer
72 (i) omits reference to any portion of the claim, or (ii) was unreasonable in any manner, the
73 claimant shall in its written notice include those items that claimant believes were omitted and
74 set forth in detail all reasons why the claimant believes the settlement offer is unreasonable. In
75 any subsequent action where claimant asserts that the settlement offer was unreasonable, the
76 claimant will not be able to raise any reasons that were not included in its response to contractor.

77 E. If a proposal for inspection(s) is made pursuant to subsection B (ii), the claimant shall,
78 within thirty days of receiving contractor's proposal, provide the contractor and its
79 subcontractors, agents, experts and consultants prompt and complete access to the dwelling to
80 inspect the dwelling, document any alleged construction defects, and perform any destructive or
81 non-destructive testing required to fully and completely
82 evaluate the nature, extent and cause of the claimed defects and the nature and extent of

83 any repairs or replacements that may be necessary to remedy the alleged defects. If
84 destructive testing is required, contractor shall give claimant advance notice of such
85 tests and shall, after completion of the testing, return the dwelling to its pre-testing
86 condition. If any inspection or testing reveals a condition that requires additional testing
87 to allow the contractor to fully and completely evaluate the nature, cause and extent of
88 the construction defect, the contractor shall provide notice to the claimant of the need
89 for such additional testing and the claimant shall provide access as set forth herein. If a
90 claim is asserted on behalf of owners of multiple dwellings, or multiple owners of units
91 within a multifamily complex, then the contractor shall be entitled to inspect each of the
92 dwellings or units.

93 F. Within fourteen days following completion of the inspection(s) and testing(s) set forth
94 above, the contractor may serve on the claimant:

95 (i) A written offer to fully or partially remedy the construction defect at no cost to
96 the claimant. Such offer shall include a description of any additional construction
97 necessary to remedy the defect described in the claim, and an anticipated timetable
98 for the completion of such construction;

99 (ii) A written offer to settle the claim by monetary payment;

100 (iii) A written offer including a combination of repairs and monetary payment; or

101 (iv) A written statement that the contractor will not proceed further to remedy the defect.

102 G. If a claimant accepts a contractor's offer made pursuant to subsection F (i) or

103 (F) (ii) and the contractor does not proceed to make the monetary payment or remedy the
104 construction defect within the agreed timetable, the claimant may bring an action against the
105 contractor for the claim described in the notice of claim without further notice except as

106 otherwise provided by applicable law. In such situation, the claimant may also file the
107 contractor's offer and claimant's acceptance, and such offer and acceptance will create a
108 rebuttable presumption that a binding and valid settlement agreement has been created and
109 should be enforced by the court.

110 H. If a claimant receives a written statement that the contractor will not proceed
111 further to remedy the defect, the claimant may bring an action against the contractor for the
112 claim described in the notice of claim without further notice except as otherwise provided by
113 applicable law.

114 I. If the claimant rejects the offer made by the contractor to remedy the
115 construction defect or to settle the claim by monetary payment or a combination of each, the
116 claimant shall serve written notice of the claimant's rejection on the contractor. The notice shall
117 include the specific factual reasons for the claimant's rejection of the contractor's offer. If the
118 claimant believes the contractor's settlement offer is unreasonable, the claimant shall set forth in
119 detail all reasons why claimant believes the settlement offer is unreasonable. In any subsequent
120 action where the claimant asserts that the settlement offer was unreasonable, the claimant will
121 not be able to raise any reasons that were not included in its response to contractor.

122 J. Upon receipt of a claimant's rejection and the reasons for such rejection, the
123 contractor may, within fifteen days of receiving the rejection, make a supplemental offer of
124 repair and/or monetary payment to claimant.

125 K. If the claimant rejects the supplemental offer made by the contractor to remedy the
126 construction defect or to settle the claim by monetary payment or a combination of each, the
127 claimant shall serve written notice of the claimant's rejection on the contractor. The notice shall

128 include the specific factual reasons for the claimant's rejection of the contractor's supplemental
129 settlement offer. If the claimant believes the contractor's supplemental settlement offer is
130 unreasonable, the claimant shall set forth in detail all reasons why claimant believes the
131 supplemental settlement offer is unreasonable. In any subsequent action where the claimant
132 asserts that the supplemental settlement offer was unreasonable, the claimant will not be able to
133 raise any reasons that were not included in its response to contractor.

134 L. If a claimant rejects a reasonable offer, including any reasonable supplemental
135 offer, made as provided by this act or does not permit the contractor to repair the construction
136 defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in
137 excess of:

- 138 (i) the fair market value of the offer of settlement, or the actual cost of the repairs
139 made, whichever is less; or
140 (ii) the amount of a monetary offer of settlement.

141 For purposes of this subsection, the trier of fact shall determine the reasonableness of an offer of
142 settlement made pursuant to this section. If the claimant has rejected a reasonable offer,
143 including any reasonable supplemental offer, and any other law allows the claimant to recover
144 costs and attorneys' fees, then claimant may recover no costs or attorneys' fees incurred after the
145 date of its rejection.

146 M. Any claimant accepting the offer of the contractor to remedy a construction defect
147 shall do so by serving the contractor with a written notice of acceptance within a reasonable
148 period of time after receipt of the contractor's settlement offer, but no later than thirty days after

149 receipt of the offer. If no response is served upon contractor within the thirty-day period, then
150 the offer shall be deemed accepted.

151 N. If a claimant accepts a contractor's offer to repair a construction defect
152 described in a notice of claim, the claimant shall provide the contractor and its subcontractors,
153 agents, experts and consultants prompt access to the dwelling to perform and complete the
154 construction by the timetable stated in the settlement offer.

155 O. If, during the pendency of the notice, inspection, offer, acceptance or repair
156 process, an applicable limitations period would otherwise expire, the claimant may file an action
157 against a contractor, but such action shall be immediately abated pending completion of the
158 notice of claim process described in this section. This subsection shall not be construed to (i)
159 revive a statute of limitations period that has expired prior to the date on which a claimant's
160 written notice of claim is served, or (ii) extend any applicable statute of repose.

161 P. After the sending of the initial notice of claim, a claimant and a contractor may, by
162 written mutual agreement, alter the procedure for the notice of claim process described in this
163 section.

164 Q. In an action relating to a dwelling involving a construction defect, a contractor
165 shall not be liable for damages involving or caused by:

- 166 a. Normal shrinkage due to drying or settlement of construction components within
167 the tolerance of building standards;
- 168 b. The contractor's reliance on written information relating to the dwelling that was
169 obtained from official government records or provided by a government entity;

- 170 c. Any construction defect known by or disclosed to a claimant before his purchase
171 of the dwelling;
- 172 d. If the claimant is not the first owner of the dwelling, any construction defect
173 known by the claimant or that could have been discovered by the claimant
174 through the exercise of reasonable diligence prior the claimant's purchase of the
175 dwelling; or
- 176 e. Refusal of anyone to allow the contractor or contractor's agents to perform their
177 warranty service work.

178 Section 4. A construction defect that is discovered after a claimant has provided a
179 contractor with the initial claim notice may not be alleged in an action until the claimant has
180 given the contractor who performed the original construction:

- 181 i. Written notice of claim regarding the alleged defect as required by section
182 three of this act; and
- 183 ii. An opportunity to resolve the notice of claim in the manner provided in
184 section three of this act.

185 Section 5. If a claimant accepts an offer made in compliance with this act and the
186 contractor fulfills the offer in compliance with this act, (i) the claimant shall thereafter be barred
187 from bringing an action for the claim described in the notice of claim; and (ii) the contractor
188 shall be deemed, for insurance purposes, to have been legally obligated to make the repairs or the
189 monetary payment as if the claimant had recovered a judgment against the contractor in the
190 amount of the cost of the repairs and/or the amount of the monetary payment.

191 Section 6. A. Upon entering into a contract for sale, construction, or improvement of a
192 dwelling, the contractor shall provide notice to the owner of the dwelling of the contractor's

193 right to resolve alleged construction defects before a claimant may commence litigation against
194 the contractor. Such notice shall be conspicuous and may be included as part of the contract.

195 B. The notice required by subsection A shall be in substantially the following form:

196 MASSACHUSETTS GENERAL LAW CHAPTER 183C CONTAINS IMPORTANT
197 REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR
198 OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR
199 WHO CONSTRUCTED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR
200 LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A
201 WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE
202 DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO
203 MAKE AN OFFER TO REPAIR AND/OR PAY FOR THE DEFECTS. YOU ARE NOT
204 OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE
205 STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO
206 FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER
207 ACTION.

208 Section 7. A. A person shall not provide or offer to provide anything of value,
209 directly or indirectly, to a property manager of an association or to a member or officer of an
210 association to induce the property manager, member or officer to encourage or discourage the
211 association to file a claim for damages arising from a construction defect.

212 B. A property manager retained by a homeowner's association shall not accept anything
213 of value, directly or indirectly, in exchange for encouraging or discouraging the
214 association that he manages to file a claim for damages arising from a construction
215 defect.

216 C. A member or officer of an association shall not accept anything of value, directly or
217 indirectly, in exchange for encouraging or discouraging the association of which he is a member
218 or officer to file a claim for damages arising from a construction defect.

219 D. A person who knowingly violates subsections A, B, or C of this section shall be guilty
220 of a misdemeanor.

221 E. An association may bring an action against a contractor to recover damages resulting
222 from construction defects in any of the common elements or limited common elements of the
223 common-interest community only. Such action may be maintained only after:

224 (i) The association first obtains the written approval of each unit's owner whose interest in
225 the common elements or limited common elements will be the subject of the action;

226 (ii) A vote of the units' owners to which at least a majority of the votes of the members of the
227 association are allocated;

228 (iii) The full board of directors of the association and the contractor have met in person and
229 conferred in a good faith attempt to resolve the association's claim, or contractor has definitively
230 declined or ignored the requests to meet with the board of directors of the association; and

231 (iv) The association has otherwise satisfied all of the pre-action requirements for a claimant to
232 commence an action as set forth herein.

233 F. At least three business days in advance of any vote to commence an action by an
234 association to recover damages resulting from construction defects in any of the common
235 elements or limited common elements of the common-interest community, the association shall
236 provide to each unit's owner a written statement that includes, in reasonable detail:

237 (i) The defects and damages or injuries to the common elements or limited common
238 elements;

- 239 (ii) The cause of the defects, if the cause is known;
- 240 (iii) The nature and the extent that is known of the damage or injury resulting from the
241 defects;
- 242 (iv) The location of each defect within the common elements or limited common
243 elements, if known;
- 244 (v) A reasonable estimate of the cost of the action or mediation, including reasonable
245 attorney's fees and costs, expert fees, and the costs of testing;
- 246 (vi) All disclosures that the unit owner is required to make upon the sale of the unit.

247 G. An association shall not employ a person to perform destructive tests to determine any
248 damage or injury to a unit, common element or limited common element caused by a
249 construction defect unless:

- 250 (i) The person is licensed as a contractor pursuant to section ninety-four of chapter
251 one hundred and forty-three.
- 252 (ii) The association has obtained the prior written approval of each unit's owner
253 whose unit or interest in the common element or limited common element will be
254 affected by such testing;
- 255 (iii) The person performing the tests has provided a written schedule for repairs;
- 256 (iv) The person performing the tests is required to repair all damage resulting from
257 such tests in accordance with state laws and local ordinances relating thereto;
- 258 (v) The association or the person so employed obtains all permits required to conduct
259 such tests and to repair any damage resulting from such tests; and
- 260 (vi) Reasonable prior notice and opportunity to observe the tests is given to the
261 contractor against whom an action may be brought as a result of the tests.

262 H. An association may commence an action only upon a vote or written agreement of the
263 owners of the units to which at least a majority of the votes of the members of the association are
264 allocated. In such a case, the association shall provide written notice to the owner of each unit of
265 the meeting at which the commencement of an action is to be considered or action is to be taken
266 at least twenty-one calendar days before the meeting.

267 I. The board of directors of an association may, without giving notice to the units'
268 owners, employ a contractor and such other persons as are necessary to make such immediate
269 repairs to a unit or common element within the common-interest community as are required to
270 protect the health, safety and welfare of the units' owners.

271 Section 8. A. Nothing herein shall create any cause of action on behalf of any claimant
272 or contractor.

273 B. This act does not apply to a contractor's right to seek contribution, indemnity or recovery
274 against a subcontractor, supplier or design professional for any claim made against a contractor
275 by a claimant.

276 SECTION 2. The act shall apply to all actions commenced after the effective date regardless
277 of the date of sale or substantial completion of the dwelling at issue in the action.