SENATE DOCKET, NO. 1408 FILED ON: 1/16/2015

SENATE . . . . . No. 925

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 adoption of the accompanying bill:

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

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Bruce E. Tarr	*First Essex and Middlesex*
Robert L. Hedlund	*Plymouth and Norfolk*
Donald F. Humason, Jr.	*Second Hampden and Hampshire*

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SENATE . . . . . No. 925

By Mr. Tarr, a petition (accompanied by bill, Senate, No. 925) of Bruce E. Tarr, Robert L. Hedlund and Donald F. Humason, Jr. for legislation to require notice and an opportunity to repair certain construction defects. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *617* OF 2013-2014.]

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

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

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after chapter 183C the following new chapter:—

Chapter 183D

Section 1. As used in this chapter the following terms shall have the following meaning unless the context clearly indicates otherwise:

"Action" shall mean any civil lawsuit, judicial action or arbitration proceeding asserting a claim, in whole or in part, for damages or other relief in connection with a dwelling, caused by an alleged construction defect.

9 “Association” shall mean an organization of unit owners of a residential condominium or
10 cooperative.

11 “Claimant” shall mean any one who asserts a claim concerning a construction defect.

12 “Construction defect” has the meaning assigned by a written, express warranty either
13 provided by the contractor or required by applicable statutory law; if no written, express
14 warranty or applicable statutory warranty provides a definition, then “construction defect” means
15 a matter concerning the design, construction, or repair of a dwelling, of an alteration of or repair
16 or 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
29 residential use in which title to each individual unit is transferred to the owner under a
30 condominium or cooperative system and shall include common areas and improvements that are

31 owned or maintained by an association or by members of an association. A dwelling includes
32 the systems, other components, improvements, other structures, or recreational facilities that are
33 appurtenant to the house, duplex or multifamily unit at the time of its initial sale, but not
34 necessarily a part of the house, duplex, or multifamily unit.

35 "Serve" or "service" shall mean delivery by certified mail, return receipt requested, to the
36 last 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 Offers to settle the claim by monetary payment, the making of repairs, or a combination
61 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
65 claim within the time stated in subsection B, the claimant may bring an action against the
66 contractor for the claims described in the notice of claim without further notice except as
67 otherwise provided 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 evaluate the nature, extent and cause of
82 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 tests and
85 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 the
88 construction defect, the contractor shall provide notice to the claimant of the need for such
89 additional testing and the claimant shall provide access as set forth herein. If a claim is asserted
90 on behalf of owners of multiple dwellings, or multiple owners of units within a multifamily
91 complex, then the contractor shall be entitled to inspect each of the dwellings or units.

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

94 A written offer to fully or partially remedy the construction defect at no cost to the
95 claimant. Such offer shall include a description of any additional construction necessary to

96 remedy the defect described in the claim, and an anticipated timetable for the completion of such
97 construction;

98 A written offer to settle the claim by monetary payment;

99 A written offer including a combination of repairs and monetary payment; or

100 A written statement that the contractor will not proceed further to remedy the defect.

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

102 (F) (ii) and the contractor does not proceed to make the monetary payment or remedy the
103 construction defect within the agreed timetable, the claimant may bring an action against the
104 contractor for the claim described in the notice of claim without further notice except as
105 otherwise provided by applicable law. In such situation, the claimant may also file the
106 contractor's offer and claimant's acceptance, and such offer and acceptance will create a
107 rebuttable presumption that a binding and valid settlement agreement has been created and
108 should be enforced by the court.

109 H. If a claimant receives a written statement that the contractor will not proceed

110 further to remedy the defect, the claimant may bring an action against the contractor for
111 the claim described in the notice of claim without further notice except as otherwise provided by
112 applicable law.

113 I. If the claimant rejects the offer made by the contractor to remedy the

114 construction defect or to settle the claim by monetary payment or a combination of each,
115 the claimant shall serve written notice of the claimant's rejection on the contractor. The notice

116 shall include the specific factual reasons for the claimant's rejection of the contractor's offer. If
117 the claimant believes the contractor's settlement offer is unreasonable, the claimant shall set
118 forth in detail all reasons why claimant believes the settlement offer is unreasonable. In any
119 subsequent action where the claimant asserts that the settlement offer was unreasonable, the
120 claimant will not be able to raise any reasons that were not included in its response to contractor.

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

124 K. If the claimant rejects the supplemental offer made by the contractor to remedy the
125 construction defect or to settle the claim by monetary payment or a combination of each, the
126 claimant shall serve written notice of the claimant's rejection on the contractor. The notice shall
127 include the specific factual reasons for the claimant's rejection of the contractor's supplemental
128 settlement offer. If the claimant believes the contractor's supplemental settlement offer is
129 unreasonable, the claimant shall set forth in detail all reasons why claimant believes the
130 supplemental settlement offer is unreasonable. In any subsequent action where the claimant
131 asserts that the supplemental settlement offer was unreasonable, the claimant will not be able to
132 raise any reasons that were not included in its response to contractor.

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

136 (i) the fair market value of the offer of settlement, or the actual cost of the repairs made,
137 whichever is less; or

138 (ii) the amount of a monetary offer of settlement.

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

144 M. Any claimant accepting the offer of the contractor to remedy a construction defect
145 shall do so by serving the contractor with a written notice of acceptance within a reasonable
146 period of time after receipt of the contractor's settlement offer, but no later than thirty days after
147 receipt of the offer. If no response is served upon contractor within the thirty-day period, then
148 the offer shall be deemed accepted.

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

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

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

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

164 Normal shrinkage due to drying or settlement of construction components within the
165 tolerance of building standards;

166 The contractor's reliance on written information relating to the dwelling that was
167 obtained from official government records or provided by a government entity;

168 Any construction defect known by or disclosed to a claimant before his purchase of the
169 dwelling;

170 If the claimant is not the first owner of the dwelling, any construction defect known by
171 the claimant or that could have been discovered by the claimant through the exercise of
172 reasonable diligence prior the claimant's purchase of the dwelling; or

173 Refusal of anyone to allow the contractor or contractor's agents to perform their warranty
174 service work.

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

178 Written notice of claim regarding the alleged defect as required by section three of this
179 act; and

180 An opportunity to resolve the notice of claim in the manner provided in section three of
181 this act.

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

188 Section 6. A. Upon entering into a contract for sale, construction, or improvement of a
189 dwelling, the contractor shall provide notice to the owner of the dwelling of the contractor's right
190 to resolve alleged construction defects before a claimant may commence litigation against the
191 contractor. Such notice shall be conspicuous and may be included as part of the contract.

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

193 MASSACHUSETTS GENERAL LAW CHAPTER 183C CONTAINS IMPORTANT
194 REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR
195 OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR
196 WHO CONSTRUCTED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR
197 LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A
198 WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE
199 DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO
200 MAKE AN OFFER TO REPAIR AND/OR PAY FOR THE DEFECTS. YOU ARE NOT
201 OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE

202 STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO
203 FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER
204 ACTION.

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

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

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

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

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

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

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

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

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

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

234 The defects and damages or injuries to the common elements or limited common
235 elements;

236 The cause of the defects, if the cause is known;

237 The nature and the extent that is known of the damage or injury resulting from the
238 defects;

239 The location of each defect within the common elements or limited common elements, if
240 known;

241 A reasonable estimate of the cost of the action or mediation, including reasonable
242 attorney's fees and costs, expert fees, and the costs of testing;

243 All disclosures that the unit owner is required to make upon the sale of the unit.

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

247 The person is licensed as a contractor pursuant to section ninety-four of chapter one
248 hundred and forty-three.

249 The association has obtained the prior written approval of each unit's owner whose unit
250 or interest in the common element or limited common element will be affected by such testing;

251 (iii) The person performing the tests has provided a written schedule for repairs;

252 (iv) The person performing the tests is required to repair all damage resulting from such
253 tests in accordance with state laws and local ordinances relating thereto;

254 (v) The association or the person so employed obtains all permits required to conduct
255 such tests and to repair any damage resulting from such tests; and

256 (vi) Reasonable prior notice and opportunity to observe the tests is given to the contractor
257 against whom an action may be brought as a result of the tests.

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

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

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

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

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