SENATE DOCKET, NO. 839 FILED ON: 1/20/2011

SENATE . . . . . No. 625

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	

SENATE DOCKET, NO. 839 FILED ON: 1/20/2011

SENATE . . . . . No. 625

By Mr. Tarr, petition (accompanied by bill, Senate, No. 625) of Tarr for legislation to require notice and an opportunity to repair certain construction defects [Joint Committee on Housing].

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *661* OF 2009-2010.]

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

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 183B the following new chapter:—

Chapter 183C

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.

"Association" shall mean an organization of unit owners of a residential condominium or cooperative.

"Claimant" shall mean any one who asserts a claim concerning a construction defect.

"Construction defect" has the meaning assigned by a written, express warranty either provided by the contractor or required by applicable statutory law; if no written, express warranty or applicable statutory warranty provides a definition, then "construction defect" means a matter concerning the design, construction, or repair of a dwelling, of an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling, on which a person has a complaint against a contractor. The term may include any physical damage to the dwelling, any appurtenance, or the real property on which the dwelling or appurtenance are affixed, proximately caused by a construction defect.

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

"Dwelling" shall mean a single-family house, duplex, or multifamily unit designed for residential use in which title to each individual unit is transferred to the owner under a condominium or cooperative system and shall include common areas and improvements that are owned or maintained by an association or by members of an association. A dwelling includes the systems, other components, improvements, other structures, or recreational facilities that are

appurtenant to the house, duplex or multifamily unit at the time of its initial sale, but not necessarily a part of the house, duplex, or multifamily unit.

"Serve" or "service" shall mean delivery by certified mail, return receipt requested, to the last known address of the addressee. For a corporation, limited partnership, limited liability company, or other registered business organization, it means service on the registered agent or other agent for service of process authorized by the laws of this state.

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

Section 3. A. In every action subject to this act, the claimant shall, no later than ninety days before initiating an action against a contractor, provide service of written notice of claim on that contractor. The notice of claim shall state that the claimant asserts a construction defect claim or claims and is providing notice of the claim(s) pursuant to the requirements of this act. The notice of claim shall describe the claim or claims in detail sufficient to explain the nature of the alleged construction defects and the results of the defects. In addition, the claimant shall provide to the contractor any evidence that depicts the nature and cause of the construction defect, including expert reports, photographs, and videotapes, if that evidence would be discoverable under this state's evidentiary rules. If, after proper request, the claimant fails to

provide such evidence then the claimant shall not be permitted to introduce any such evidence not produced into evidence in any action.

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

Offers to settle the claim by monetary payment, the making of repairs, or a combination of both, without inspection; or

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

C. If the contractor wholly rejects the claim and will neither remedy the alleged

construction defect nor settle the claim, or does not respond to the claimant's notice of claim within the time stated in subsection B, the claimant may bring an action against the contractor for the claims described in the notice of claim without further notice except as otherwise provided under applicable law.

D. If the claimant rejects the settlement offer made by the contractor, the claimant shall provide written notice of the claimant's rejection to the contractor and, if represented by legal counsel, its attorney. The notice shall include the specific factual reasons for the claimant's rejection of the contractor's proposal or offer. If the claimant believes that the settlement offer (i) omits reference to any portion of the claim, or (ii) was unreasonable in any manner, the claimant shall in its written notice include those items that claimant believes were omitted and set forth in detail all reasons why the claimant believes the settlement offer is unreasonable. In

any subsequent action where claimant asserts that the settlement offer was unreasonable, the claimant will not be able to raise any reasons that were not included in its response to contractor.

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

any repairs or replacements that may be necessary to remedy the alleged defects. If destructive testing is required, contractor shall give claimant advance notice of such tests and shall, after completion of the testing, return the dwelling to its pre-testing

condition. If any inspection or testing reveals a condition that requires additional testing to allow the contractor 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 such additional testing and the claimant shall provide access as set forth herein. If a claim is asserted on behalf of owners of multiple dwellings, or multiple owners of units within a multifamily complex, then the contractor shall be entitled to inspect each of the dwellings or units.

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

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

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

A written offer to settle the claim by monetary payment;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MASSACHUSETTS GENERAL LAW CHAPTER 183C CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED YOUR HOME. 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 STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This act does not apply to 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.

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