

**First Regular Session
Seventy-first General Assembly
STATE OF COLORADO**

INTRODUCED

LLS NO. 17-0969.01 Duane Gall x4335

HOUSE BILL 17-1279

HOUSE SPONSORSHIP

Garnett and Saine, Wist, Duran

SENATE SPONSORSHIP

Tate and Guzman,

State, Veterans, & Military Affairs

A BILL FOR AN ACT

101 **CONCERNING THE REQUIREMENT THAT A UNIT OWNERS' ASSOCIATION**
102 **OBTAIN APPROVAL THROUGH A VOTE OF UNIT OWNERS BEFORE**
103 **FILING A CONSTRUCTION DEFECT ACTION.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

The bill requires that, before the executive board of a unit owners' association (HOA) in a common interest community brings suit against a developer or builder on behalf of unit owners, the board must:

- ! Notify all unit owners and the developer or builder against whom the lawsuit is being considered;

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

- ! Call a meeting at which the executive board and the developer or builder will have an opportunity to present relevant facts and arguments; and
- ! Obtain the approval of a majority of the unit owners after giving them detailed disclosures about the lawsuit and its potential costs and benefits.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 38-33.3-303.5,
3 **amend** (1); **repeal** (2); and **add** (4) as follows:

4 **38-33.3-303.5. Construction defect actions - disclosure -**
5 **approval by unit owners - definitions - exemptions.** (1) (a) ~~In the event~~
6 ~~BEFORE~~ the executive board, pursuant to section 38-33.3-302 (1)(d),
7 institutes ~~an~~ A CONSTRUCTION DEFECT action, ~~asserting defects in the~~
8 ~~construction of five or more units, the provisions of this section shall~~
9 ~~apply. For purposes of this section, "action" shall have the same meaning~~
10 ~~as set forth in section 13-20-803 (1), C.R.S.~~

11 ~~(b)~~ the executive board shall ~~substantially~~ comply with ~~the~~
12 ~~provisions of this section.~~

13 (b) FOR THE PURPOSES OF THIS SECTION ONLY:

14 (I) "CONSTRUCTION DEFECT ACTION":

15 (A) MEANS ANY CIVIL ACTION OR ARBITRATION PROCEEDING FOR
16 DAMAGES, INDEMNITY, SUBROGATION, OR CONTRIBUTION BROUGHT
17 AGAINST A CONSTRUCTION PROFESSIONAL TO ASSERT A CLAIM,
18 COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM FOR DAMAGES OR
19 LOSS TO, OR THE LOSS OF USE OF, REAL OR PERSONAL PROPERTY OR
20 PERSONAL INJURY CAUSED BY A DEFECT IN THE DESIGN OR CONSTRUCTION
21 OF AN IMPROVEMENT TO REAL PROPERTY, REGARDLESS OF THE THEORY OF
22 LIABILITY; AND

1 (B) INCLUDES ANY RELATED, ANCILLARY, OR DERIVATIVE CLAIM,
2 AND ANY CLAIM FOR BREACH OF FIDUCIARY DUTY OR AN ACT OR OMISSION
3 OF A MEMBER OF AN ASSOCIATION'S EXECUTIVE BOARD, THAT ARISES
4 FROM AN ALLEGED CONSTRUCTION DEFECT OR THAT SEEKS THE SAME OR
5 SIMILAR DAMAGES.

6 (II) "CONSTRUCTION PROFESSIONAL" HAS THE MEANING SET FORTH
7 IN SECTION 13-20-802.5 (4).

8 (c) **Meeting to consider commencement of action - disclosures**
9 **- required terms.** (I) THE EXECUTIVE BOARD SHALL MAIL OR DELIVER
10 WRITTEN NOTICE OF THE ANTICIPATED COMMENCEMENT OF THE ACTION TO
11 EACH UNIT OWNER AT THE OWNER'S LAST-KNOWN ADDRESS DESCRIBED IN
12 THE ASSOCIATION'S RECORDS AND TO THE LAST-KNOWN ADDRESS OF EACH
13 CONSTRUCTION PROFESSIONAL AGAINST WHOM AN ACTION IS PROPOSED.
14 THIS NOTICE REQUIREMENT DOES NOT APPLY TO JOINED PARTIES IN AN
15 ACTION PREVIOUSLY APPROVED BY OWNERS PURSUANT TO SUBSECTION
16 (1)(d) OF THIS SECTION.

17 (II) THE NOTICE GIVEN PURSUANT TO THIS SUBSECTION (1)(c)
18 MUST CALL A MEETING OF THE UNIT OWNERS, WHICH MUST BE HELD NO
19 LESS THAN FIFTEEN DAYS AND NO MORE THAN THIRTY DAYS AFTER THE
20 MAILING DATE OF THE NOTICE, TO CONSIDER WHETHER TO BRING A
21 CONSTRUCTION DEFECT ACTION. A FAILURE TO HOLD THE MEETING WITHIN
22 THIS TIME PERIOD VOIDS THE SUBSEQUENT VOTE. A QUORUM IS NOT
23 REQUIRED AT THE MEETING. THE NOTICE MUST STATE THAT:

24 (A) THE CONCLUSION OF THE MEETING INITIATES THE VOTING
25 PERIOD, DURING WHICH THE ASSOCIATION WILL ACCEPT VOTES FOR AND
26 AGAINST PROCEEDING WITH THE ACTION. THE END OF THE VOTING PERIOD
27 SHALL BE NO LATER THAN ONE HUNDRED TWENTY DAYS AFTER THE

1 MAILING DATE OF THE MEETING NOTICE.

2 (B) THE CONSTRUCTION PROFESSIONAL AGAINST WHOM THE
3 CONSTRUCTION DEFECT ACTION IS PROPOSED WILL BE INVITED TO ATTEND
4 AND WILL HAVE AN OPPORTUNITY TO ADDRESS THE UNIT OWNERS
5 CONCERNING THE ALLEGED CONSTRUCTION DEFECT; AND

6 (C) THE CONSTRUCTION PROFESSIONAL'S PRESENTATION MAY, BUT
7 IS NOT REQUIRED TO, INCLUDE AN OFFER TO REMEDY ANY DEFECT IN
8 ACCORDANCE WITH SECTION 13-20-803.5 (3) OF THE "CONSTRUCTION
9 DEFECT ACTION REFORM ACT".

10 (III) THE NOTICE GIVEN PURSUANT TO THIS SUBSECTION (1)(c)
11 MUST ALSO CONTAIN A GENERAL DESCRIPTION OF THE NATURE OF THE
12 CONSTRUCTION DEFECT ACTION, THE RELIEF SOUGHT, A GOOD-FAITH
13 ESTIMATE OF THE BENEFITS AND RISKS INVOLVED, AND ANY OTHER
14 PERTINENT INFORMATION, AS WELL AS THE FOLLOWING DISCLOSURES:

15 1. THE ALLEGED CONSTRUCTION DEFECTS MIGHT
16 RESULT IN INCREASED COSTS TO THE ASSOCIATION IN
17 MAINTENANCE OR REPAIR OR CAUSE AN INCREASE IN
18 ASSESSMENTS OR SPECIAL ASSESSMENTS TO COVER THE
19 COST OF REPAIRS.

20 2. IF THE ASSOCIATION DOES NOT FILE A CLAIM
21 BEFORE THE APPLICABLE LEGAL DEADLINES, THE CLAIM
22 WILL EXPIRE.

23 3. UNTIL THE ALLEGED DEFECTS ARE REPAIRED,
24 SELLERS OF UNITS WITHIN THE COMMON INTEREST
25 COMMUNITY MIGHT OWE UNIT BUYERS A DUTY TO DISCLOSE
26 KNOWN DEFECTS.

27 4. THE EXECUTIVE BOARD (INTENDS TO ENTER) (HAS

1 ENTERED) INTO A FEE ARRANGEMENT WITH THE ATTORNEYS
2 REPRESENTING THE ASSOCIATION, UNDER WHICH (THE
3 ATTORNEYS WILL BE PAID A CONTINGENCY FEE EQUAL TO
4 _____ PERCENT OF THE (NET) (GROSS) RECOVERY OF THE
5 AMOUNT THE ASSOCIATION RECOVERS FROM THE
6 DEFENDANT(S)) (THE ASSOCIATION'S ATTORNEYS WILL BE
7 COMPENSATED AS FOLLOWS: _____).

8 5. IN ADDITION TO ATTORNEY FEES, THE
9 ASSOCIATION MAY INCUR UP TO \$_____ FOR LEGAL
10 COSTS, INCLUDING EXPERT WITNESSES, DEPOSITIONS, AND
11 FILING FEES. THE AMOUNT WILL NOT BE EXCEEDED
12 WITHOUT THE EXECUTIVE BOARD'S FURTHER WRITTEN
13 AUTHORITY. IF THE ASSOCIATION DOES NOT PREVAIL ON ITS
14 CLAIM, THE ASSOCIATION MAY BE RESPONSIBLE FOR PAYING
15 THESE LEGAL EXPENSES.

16 6. IF THE ASSOCIATION DOES NOT PREVAIL ON ITS
17 CLAIM, THE ASSOCIATION MAY BE RESPONSIBLE FOR PAYING
18 ITS ATTORNEY FEES.

19 7. IF THE ASSOCIATION DOES NOT PREVAIL ON ITS
20 CLAIM, A COURT OR ARBITRATOR SOMETIMES AWARDS
21 COSTS AND ATTORNEY FEES TO THE OPPOSING PARTY.
22 SHOULD THAT HAPPEN IN THIS CASE, THE ASSOCIATION MAY
23 BE RESPONSIBLE FOR PAYING THE OPPOSING PARTY'S COSTS
24 AND FEES AS A RESULT OF SUCH AWARD.

25 8. THERE IS NO GUARANTEE THAT THE ASSOCIATION
26 WILL RECOVER ENOUGH FUNDS TO REPAIR THE CLAIMED
27 CONSTRUCTION DEFECT(S). IF THE CLAIMED DEFECTS ARE

1 NOT REPAIRED, ADDITIONAL DAMAGE TO PROPERTY AND A
2 REDUCTION IN THE USEFUL LIFE OF THE COMMON ELEMENTS
3 MIGHT OCCUR.

4 9. UNTIL THE CLAIMED CONSTRUCTION DEFECTS ARE
5 REPAIRED, OR UNTIL THE CONSTRUCTION DEFECT CLAIM IS
6 CONCLUDED, THE MARKET VALUE OF THE UNITS IN THE
7 ASSOCIATION MIGHT BE ADVERSELY AFFECTED.

8 10. UNTIL THE CLAIMED CONSTRUCTION DEFECT(S)
9 ARE REPAIRED, OR UNTIL THE CONSTRUCTION DEFECT(S)
10 CLAIM IS CONCLUDED, OWNERS IN THE ASSOCIATION MIGHT
11 HAVE DIFFICULTY REFINANCING AND PROSPECTIVE BUYERS
12 MIGHT HAVE DIFFICULTY OBTAINING FINANCING. IN
13 ADDITION, CERTAIN FEDERAL UNDERWRITING STANDARDS
14 OR REGULATIONS PREVENT REFINANCING OR OBTAINING A
15 NEW LOAN IN PROJECTS WHERE A CONSTRUCTION DEFECT IS
16 CLAIMED, AND CERTAIN LENDERS AS A MATTER OF POLICY
17 WILL NOT REFINANCE OR PROVIDE A NEW LOAN IN PROJECTS
18 WHERE A CONSTRUCTION DEFECT IS CLAIMED.

19 (IV) THE SUBSTANCE OF A PROPOSED CONSTRUCTION DEFECT
20 CLAIM MAY BE AMENDED OR SUPPLEMENTED AFTER THE MEETING, BUT AN
21 AMENDED OR SUPPLEMENTED CLAIM DOES NOT EXTEND THE VOTING
22 PERIOD. THE EXECUTIVE BOARD SHALL GIVE NOTICE TO UNIT OWNERS OF
23 ANY AMENDED OR SUPPLEMENTED CLAIM AND SHALL MAINTAIN RECORDS
24 OF ITS COMMUNICATIONS WITH UNIT OWNERS.

25 (d) **Approval by unit owners - procedures.**

26 (I) (A) NOTWITHSTANDING ANY PROVISION OF LAW OR ANY
27 REQUIREMENT IN THE GOVERNING DOCUMENTS, THE EXECUTIVE BOARD

1 MAY INITIATE THE ACTION ONLY IF AUTHORIZED WITHIN THE VOTING
2 PERIOD BY OWNERS OF UNITS TO WHICH A MAJORITY OF VOTES IN THE
3 ASSOCIATION ARE ALLOCATED. SUCH APPROVAL IS NOT REQUIRED FOR AN
4 ASSOCIATION IN A PLANNED COMMUNITY TO PROCEED WITH A
5 CONSTRUCTION DEFECT ACTION WHERE THE ALLEGED CONSTRUCTION
6 DEFECTS DO NOT INCLUDE OR AFFECT STRUCTURES CONTAINING
7 RESIDENTIAL USES.

8 (B) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, AN
9 OWNER'S VOTE MAY BE OBTAINED IN ANY WRITTEN FORMAT CONFIRMING
10 THE OWNER'S VOTE TO APPROVE OR REJECT THE PROPOSED CONSTRUCTION
11 DEFECT ACTION. THE ASSOCIATION SHALL MAINTAIN A RECORD OF ALL
12 VOTES.

13 (II) ANY APPLICABLE STATUTES OF LIMITATION AND REPOSE ARE
14 TOLLED DURING THE ONE-HUNDRED-TWENTY-DAY VOTING AND
15 DISCLOSURE PERIOD; EXCEPT THAT NOTHING IN THIS SECTION ALTERS THE
16 TOLLING PROVISIONS OF SECTION 13-20-805.

17 (III) **Vote count - exclusions.** FOR PURPOSES OF CALCULATING
18 THE REQUIRED MAJORITY VOTE UNDER THIS SUBSECTION (1)(d) ONLY, THE
19 FOLLOWING VOTES ARE EXCLUDED:

20 (A) ANY VOTES ALLOCATED TO UNITS OWNED BY A DEVELOPMENT
21 PARTY. AS USED IN THIS SUBSECTION (1)(d)(III)(A), "DEVELOPMENT
22 PARTY" MEANS A CONTRACTOR, SUBCONTRACTOR, DEVELOPER, OR
23 BUILDER RESPONSIBLE FOR ANY PART OF THE DESIGN, CONSTRUCTION, OR
24 REPAIR OF ANY PORTION OF THE COMMON INTEREST COMMUNITY AND ANY
25 OF THAT PARTY'S AFFILIATES.

26 (B) ANY VOTES ALLOCATED TO UNITS OWNED BY BANKING
27 INSTITUTIONS;

1 (C) ANY VOTES ALLOCATED TO UNITS OF A PRODUCT TYPE IN
2 WHICH NO DEFECTS ARE ALLEGED, IN A COMMON INTEREST COMMUNITY
3 WHOSE DECLARATION PROVIDES THAT COMMON EXPENSE LIABILITIES ARE
4 NOT SHARED BETWEEN THE PRODUCT TYPES.

5 (D) ANY VOTES ALLOCATED TO UNITS OWNED BY OWNERS WHO
6 ARE DEEMED NONRESPONSIVE. IF THE STATUS OF THE NONRESPONSIVE
7 UNIT OWNERS IS CHALLENGED IN COURT, THE COURT SHALL CONSIDER
8 WHETHER THE EXECUTIVE BOARD HAS MADE DILIGENT EFFORTS TO
9 CONTACT THE UNIT OWNER REGARDING THE VOTE AND MAY CONSIDER:
10 WHETHER A MAILING WAS RETURNED AS UNDELIVERABLE; WHETHER THE
11 OWNER APPEARS TO BE RESIDING AT THE UNIT; AND WHETHER THE
12 ASSOCIATION HAS USED OTHER CONTACT INFORMATION, SUCH AS AN
13 ELECTRONIC MAIL ADDRESS OR TELEPHONE NUMBER FOR THE OWNER.

14 (e) **Notice to construction professional.** AT LEAST THREE
15 BUSINESS DAYS BEFORE THE MAILING OF THE NOTICE REQUIRED BY
16 SUBSECTION (1)(c) OF THIS SECTION, THE ASSOCIATION SHALL NOTIFY
17 EACH CONSTRUCTION PROFESSIONAL LISTED IN THE NOTICE OF CLAIM BY
18 MAIL, AT ITS LAST-KNOWN ADDRESS, OF THE DATE AND TIME OF THE
19 MEETING CALLED TO CONSIDER THE CONSTRUCTION DEFECT ACTION
20 PURSUANT TO SUBSECTION (1)(c) OF THIS SECTION.

21 ~~(2) (a) Prior to the service of the summons and complaint on any~~
22 ~~defendant with respect to an action governed by this section, the~~
23 ~~executive board shall mail or deliver written notice of the commencement~~
24 ~~or anticipated commencement of such action to each unit owner at the last~~
25 ~~known address described in the association's records.~~

26 ~~(b) The notice required by paragraph (a) of this subsection (2)~~
27 ~~shall state a general description of the following:~~

1 ~~(I) The nature of the action and the relief sought; and~~
2 ~~(II) The expenses and fees that the executive board anticipates~~
3 ~~will be incurred in prosecuting the action.~~

4 (4) **Provisions not severable.** NOTWITHSTANDING SECTION
5 2-4-204, THE GENERAL ASSEMBLY FINDS, DETERMINES, AND DECLARES
6 THAT IF ANY PROVISION OF THIS SECTION OR ITS APPLICATION TO ANY
7 PERSON OR CIRCUMSTANCE IS HELD INVALID, THE ENTIRE SECTION SHALL
8 BE DEEMED INVALID.

9 **SECTION 2.** In Colorado Revised Statutes, 38-33.3-117, **add**
10 (1.9) as follows:

11 **38-33.3-117. Applicability to preexisting common interest**
12 **communities.** (1.9) EXCEPT AS PROVIDED IN SECTION 38-33.3-119,
13 SECTION 38-33.3-303.5 APPLIES TO ALL COMMON INTEREST COMMUNITIES
14 CREATED WITHIN THIS STATE BEFORE JULY 1, 1992, WITH RESPECT TO
15 EVENTS AND CIRCUMSTANCES OCCURRING ON OR AFTER SEPTEMBER 1,
16 2017.

17 **SECTION 3. Act subject to petition - effective date -**
18 **applicability.** (1) This act takes effect September 1, 2017; except that,
19 if a referendum petition is filed pursuant to section 1 (3) of article V of
20 the state constitution against this act or an item, section, or part of this act
21 within the ninety-day period after final adjournment of the general
22 assembly, then the act, item, section, or part will not take effect unless
23 approved by the people at the general election to be held in November
24 2018 and, in such case, will take effect on the date of the official
25 declaration of the vote thereon by the governor.

26 (2) This act applies to construction defect actions as to which the

1 cause of action accrued on or after the applicable effective date of this
2 act.