

CHAPTER 188

COURTS

HOUSE BILL 03-1161

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also SENATOR(S) McElhany, Andrews, Cairns, Chlouber, Hillman, Jones, Lamborn, May R., and Teck.

AN ACT

CONCERNING LIMITATIONS ON CLAIMS FOR DAMAGES FILED AGAINST CONSTRUCTION PROFESSIONALS.

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

SECTION 1. 13-20-802, Colorado Revised Statutes, is amended to read:

13-20-802. Legislative declaration. The general assembly hereby finds, declares, and determines that ~~limited~~ changes in the law are necessary and appropriate concerning actions claiming damages, indemnity, or contribution in connection with alleged construction defects. ~~resulting in property loss or damage.~~ It is the intent of the general assembly that this part 8 apply to these types of civil actions while preserving adequate rights and remedies for property owners who bring and maintain such actions.

SECTION 2. Part 8 of article 20 of title 13, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

13-20-802.5. Definitions. AS USED IN THIS PART 8, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "ACTION" MEANS A CIVIL ACTION OR AN ARBITRATION PROCEEDING FOR DAMAGES, INDEMNITY, OR CONTRIBUTION BROUGHT AGAINST A CONSTRUCTION PROFESSIONAL TO ASSERT A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD PARTY CLAIM FOR DAMAGES OR LOSS TO, OR THE LOSS OF USE OF, REAL OR PERSONAL PROPERTY OR PERSONAL INJURY CAUSED BY A DEFECT IN THE DESIGN OR CONSTRUCTION OF AN IMPROVEMENT TO REAL PROPERTY.

(2) "ACTUAL DAMAGES" MEANS THE FAIR MARKET VALUE OF THE REAL PROPERTY

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

WITHOUT THE ALLEGED CONSTRUCTION DEFECT, THE REPLACEMENT COST OF THE REAL PROPERTY, OR THE REASONABLE COST TO REPAIR THE ALLEGED CONSTRUCTION DEFECT, WHICHEVER IS LESS, TOGETHER WITH RELOCATION COSTS, AND, WITH RESPECT TO RESIDENTIAL PROPERTY, OTHER DIRECT ECONOMIC COSTS RELATED TO LOSS OF USE, IF ANY, INTEREST AS PROVIDED BY LAW, AND SUCH COSTS OF SUIT AND REASONABLE ATTORNEY FEES AS MAY BE AWARDABLE PURSUANT TO CONTRACT OR APPLICABLE LAW. "ACTUAL DAMAGES" AS TO PERSONAL INJURY MEANS THOSE DAMAGES RECOVERABLE BY LAW, EXCEPT AS LIMITED BY THE PROVISIONS OF SECTION 13-20-806 (4).

(3) "CLAIMANT" MEANS A PERSON OTHER THAN THE ATTORNEY GENERAL OR THE DISTRICT ATTORNEYS OF THE SEVERAL JUDICIAL DISTRICTS OF THE STATE WHO ASSERTS A CLAIM AGAINST A CONSTRUCTION PROFESSIONAL THAT ALLEGES A DEFECT IN THE CONSTRUCTION OF AN IMPROVEMENT TO REAL PROPERTY.

(4) "CONSTRUCTION PROFESSIONAL" MEANS AN ARCHITECT, CONTRACTOR, SUBCONTRACTOR, DEVELOPER, BUILDER, BUILDER VENDOR, ENGINEER, OR INSPECTOR PERFORMING OR FURNISHING THE DESIGN, SUPERVISION, INSPECTION, CONSTRUCTION, OR OBSERVATION OF THE CONSTRUCTION OF ANY IMPROVEMENT TO REAL PROPERTY. IF THE IMPROVEMENT TO REAL PROPERTY IS TO A COMMERCIAL PROPERTY, THE TERM "CONSTRUCTION PROFESSIONAL" SHALL ALSO INCLUDE ANY PRIOR OWNER OF THE COMMERCIAL PROPERTY, OTHER THAN THE CLAIMANT, AT THE TIME THE WORK WAS PERFORMED. AS USED IN THIS SUBSECTION (4), "COMMERCIAL PROPERTY" MEANS PROPERTY THAT IS ZONED TO PERMIT COMMERCIAL, INDUSTRIAL, OR OFFICE TYPES OF USE.

(5) "NOTICE OF CLAIM" MEANS A WRITTEN NOTICE SENT BY A CLAIMANT TO THE LAST KNOWN ADDRESS OF A CONSTRUCTION PROFESSIONAL AGAINST WHOM THE CLAIMANT ASSERTS A CONSTRUCTION DEFECT CLAIM THAT DESCRIBES THE CLAIM IN REASONABLE DETAIL SUFFICIENT TO DETERMINE THE GENERAL NATURE OF THE DEFECT, INCLUDING A GENERAL DESCRIPTION OF THE TYPE AND LOCATION OF THE CONSTRUCTION THAT THE CLAIMANT ALLEGES TO BE DEFECTIVE AND ANY DAMAGES CLAIMED TO HAVE BEEN CAUSED BY THE DEFECT.

SECTION 3. 13-20-803 (1), Colorado Revised Statutes, is amended to read:

13-20-803. List of defects required. (1) IN ADDITION TO THE NOTICE OF CLAIM REQUIRED BY SECTION 13-20-803.5, in every action brought against ~~any architect, contractor, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property,~~ A CONSTRUCTION PROFESSIONAL, the claimant shall file with the court OR ARBITRATOR and serve on the ~~defendant~~ CONSTRUCTION PROFESSIONAL an initial list of construction defects in accordance with this section. ~~As used in this part 8, "action" means any civil action or arbitration proceeding for damages, indemnity, or contribution asserting a claim, counterclaim, cross-claim, or third-party claim for injury or loss to, or the loss of use of, any real property caused by an alleged defect in the construction of an improvement to the real property.~~

SECTION 4. The introductory portion to 13-20-804 (1) and 13-20-804 (1) (a) and (1) (b), Colorado Revised Statutes, are amended to read:

13-20-804. Restriction on construction defect negligence claims. (1) No negligence claim seeking damages for a ~~residential~~ construction defect may be asserted in an action if such claim arises from the failure to construct a ~~residential~~ AN improvement to real property in substantial compliance with an applicable building code or industry standard; except that such claim may be asserted if such failure results in one or more of the following:

- (a) Actual ~~or probable~~ damage to real or personal property;
- (b) Actual ~~or probable~~ loss of the use of real or personal property;

SECTION 5. Part 8 of article 20 of title 13, Colorado Revised Statutes, is amended BY THE ADDITION OF THE FOLLOWING NEW SECTIONS to read:

13-20-803.5. Notice of claim process. (1) NO LATER THAN SEVENTY-FIVE DAYS BEFORE FILING AN ACTION AGAINST A CONSTRUCTION PROFESSIONAL, OR NO LATER THAN NINETY DAYS BEFORE FILING THE ACTION IN THE CASE OF A COMMERCIAL PROPERTY, A CLAIMANT SHALL SEND OR DELIVER A WRITTEN NOTICE OF CLAIM TO THE CONSTRUCTION PROFESSIONAL BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OR BY PERSONAL SERVICE.

(2) FOLLOWING THE MAILING OR DELIVERY OF THE NOTICE OF CLAIM, AT THE WRITTEN REQUEST OF THE CONSTRUCTION PROFESSIONAL, THE CLAIMANT SHALL PROVIDE THE CONSTRUCTION PROFESSIONAL AND ITS CONTRACTORS OR OTHER AGENTS REASONABLE ACCESS TO THE CLAIMANT'S PROPERTY DURING NORMAL WORKING HOURS TO INSPECT THE PROPERTY AND THE CLAIMED DEFECT. THE INSPECTION SHALL BE COMPLETED WITHIN THIRTY DAYS OF SERVICE OF THE NOTICE OF CLAIM.

(3) WITHIN THIRTY DAYS FOLLOWING THE COMPLETION OF THE INSPECTION PROCESS CONDUCTED PURSUANT TO SUBSECTION (2) OF THIS SECTION, OR WITHIN FORTY-FIVE DAYS FOLLOWING THE COMPLETION OF THE INSPECTION PROCESS IN THE CASE OF A COMMERCIAL PROPERTY, A CONSTRUCTION PROFESSIONAL MAY SEND OR DELIVER TO THE CLAIMANT, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OR PERSONAL SERVICE, AN OFFER TO SETTLE THE CLAIM BY PAYMENT OF A SUM CERTAIN OR BY AGREEING TO REMEDY THE CLAIMED DEFECT DESCRIBED IN THE NOTICE OF CLAIM. A WRITTEN OFFER TO REMEDY THE CONSTRUCTION DEFECT SHALL INCLUDE A REPORT OF THE SCOPE OF THE INSPECTION, THE FINDINGS AND RESULTS OF THE INSPECTION, A DESCRIPTION OF THE ADDITIONAL CONSTRUCTION WORK NECESSARY TO REMEDY THE DEFECT DESCRIBED IN THE NOTICE OF CLAIM AND ALL DAMAGE TO THE IMPROVEMENT TO REAL PROPERTY CAUSED BY THE DEFECT, AND A TIMETABLE FOR THE COMPLETION OF THE REMEDIAL CONSTRUCTION WORK.

(4) UNLESS A CLAIMANT ACCEPTS AN OFFER MADE PURSUANT TO SUBSECTION (3) OF THIS SECTION IN WRITING WITHIN FIFTEEN DAYS OF THE DELIVERY OF THE OFFER, THE OFFER SHALL BE DEEMED TO HAVE BEEN REJECTED.

(5) A CLAIMANT WHO ACCEPTS A CONSTRUCTION PROFESSIONAL'S OFFER TO REMEDY OR SETTLE BY PAYMENT OF A SUM CERTAIN A CONSTRUCTION DEFECT CLAIM SHALL DO SO BY SENDING THE CONSTRUCTION PROFESSIONAL A WRITTEN NOTICE OF ACCEPTANCE NO LATER THAN FIFTEEN DAYS AFTER RECEIPT OF THE OFFER. IF AN

OFFER TO SETTLE IS ACCEPTED, THEN THE MONETARY SETTLEMENT SHALL BE PAID IN ACCORDANCE WITH THE OFFER. IF AN OFFER TO REMEDY IS ACCEPTED BY THE CLAIMANT, THE REMEDIAL CONSTRUCTION WORK SHALL BE COMPLETED IN ACCORDANCE WITH THE TIMETABLE SET FORTH IN THE OFFER UNLESS THE DELAY IS CAUSED BY EVENTS BEYOND THE REASONABLE CONTROL OF THE CONSTRUCTION PROFESSIONAL.

(6) IF NO OFFER IS MADE BY THE CONSTRUCTION PROFESSIONAL OR IF THE CLAIMANT REJECTS AN OFFER, THE CLAIMANT MAY BRING AN ACTION AGAINST THE CONSTRUCTION PROFESSIONAL FOR THE CONSTRUCTION DEFECT CLAIM DESCRIBED IN THE NOTICE OF CLAIM, UNLESS THE PARTIES HAVE CONTRACTUALLY AGREED TO A MEDIATION PROCEDURE, IN WHICH CASE THE MEDIATION PROCEDURE SHALL BE SATISFIED PRIOR TO BRINGING AN ACTION.

(7) IF AN OFFER BY A CONSTRUCTION PROFESSIONAL IS MADE AND ACCEPTED, AND IF THEREAFTER THE CONSTRUCTION PROFESSIONAL DOES NOT COMPLY WITH ITS OFFER TO REMEDY OR SETTLE A CLAIM FOR A CONSTRUCTION DEFECT, THE CLAIMANT MAY FILE AN ACTION AGAINST THE CONSTRUCTION PROFESSIONAL FOR CLAIMS ARISING OUT OF THE DEFECT OR DAMAGE DESCRIBED IN THE NOTICE OF CLAIM WITHOUT FURTHER NOTICE.

(8) AFTER THE SENDING OF A NOTICE OF CLAIM, A CLAIMANT AND A CONSTRUCTION PROFESSIONAL MAY, BY WRITTEN MUTUAL AGREEMENT, ALTER THE PROCEDURE FOR THE NOTICE OF CLAIM PROCESS DESCRIBED IN THIS SECTION.

(9) ANY ACTION COMMENCED BY A CLAIMANT WHO FAILS TO COMPLY WITH THE REQUIREMENTS OF THIS SECTION SHALL BE STAYED, WHICH STAY SHALL REMAIN IN EFFECT UNTIL THE CLAIMANT HAS COMPLIED WITH THE REQUIREMENTS OF THIS SECTION.

(10) A CLAIMANT MAY AMEND A NOTICE OF CLAIM TO INCLUDE CONSTRUCTION DEFECTS DISCOVERED AFTER THE SERVICE OF THE ORIGINAL NOTICE OF CLAIM. HOWEVER, THE CLAIMANT MUST OTHERWISE COMPLY WITH THE REQUIREMENTS OF THIS SECTION FOR THE ADDITIONAL CLAIMS.

(11) FOR PURPOSES OF THIS SECTION, ACTUAL RECEIPT BY ANY MEANS OF A WRITTEN NOTICE, OFFER, OR RESPONSE PREPARED PURSUANT TO THIS SECTION WITHIN THE TIME PRESCRIBED FOR DELIVERY OR SERVICE OF THE NOTICE, OFFER, OR RESPONSE SHALL BE DEEMED TO BE SUFFICIENT DELIVERY OR SERVICE.

(12) EXCEPT AS PROVIDED IN SECTION 13-20-806, A CLAIMANT SHALL NOT RECOVER MORE THAN ACTUAL DAMAGES IN AN ACTION.

13-20-805. Tolling of statutes of limitation. IF A NOTICE OF CLAIM IS SENT TO A CONSTRUCTION PROFESSIONAL IN ACCORDANCE WITH SECTION 13-20-803.5 WITHIN THE TIME PRESCRIBED FOR THE FILING OF AN ACTION UNDER ANY APPLICABLE STATUTE OF LIMITATIONS OR REPOSE, THEN THE STATUTE OF LIMITATIONS OR REPOSE IS TOLLED UNTIL SIXTY DAYS AFTER THE COMPLETION OF THE NOTICE OF CLAIM PROCESS DESCRIBED IN SECTION 13-20-803.5.

13-20-806. Limitation of damages. (1) A CONSTRUCTION PROFESSIONAL

OTHERWISE LIABLE SHALL NOT BE LIABLE FOR MORE THAN ACTUAL DAMAGES, UNLESS AND ONLY IF THE CLAIMANT OTHERWISE PREVAILS ON THE CLAIM THAT A VIOLATION OF THE "COLORADO CONSUMER PROTECTION ACT", ARTICLE 1 OF TITLE 6, C.R.S., HAS OCCURRED; AND IF:

(a) THE CONSTRUCTION PROFESSIONAL'S MONETARY OFFER, MADE PURSUANT TO SECTION 13-20-803.5 (3), TO SETTLE FOR A SUM CERTAIN A CONSTRUCTION DEFECT CLAIM DESCRIBED IN A NOTICE OF CLAIM IS LESS THAN EIGHTY-FIVE PERCENT OF THE AMOUNT AWARDED TO THE CLAIMANT AS ACTUAL DAMAGES SUSTAINED EXCLUSIVE OF COSTS, INTEREST, AND ATTORNEY FEES; OR

(b) THE REASONABLE COST, AS DETERMINED BY THE TRIER OF FACT, TO COMPLETE THE CONSTRUCTION PROFESSIONAL'S OFFER, MADE PURSUANT TO SECTION 13-20-803.5, TO REMEDY THE CONSTRUCTION DEFECT DESCRIBED IN THE NOTICE OF CLAIM IS LESS THAN EIGHTY-FIVE PERCENT OF THE AMOUNT AWARDED TO THE CLAIMANT AS ACTUAL DAMAGES SUSTAINED EXCLUSIVE OF COSTS, INTEREST, AND ATTORNEY FEES.

(2) IF A CONSTRUCTION PROFESSIONAL DOES NOT SUBSTANTIALLY COMPLY WITH THE TERMS OF AN ACCEPTED OFFER TO REMEDY OR AN ACCEPTED OFFER TO SETTLE A CLAIM FOR A CONSTRUCTION DEFECT MADE PURSUANT TO SECTION 13-20-803.5 OR IF A CONSTRUCTION PROFESSIONAL FAILS TO RESPOND TO A NOTICE OF CLAIM, THE CONSTRUCTION PROFESSIONAL SHALL BE SUBJECT TO THE TREBLE DAMAGES PROVISION OF SECTION 6-1-113 (2) (a) (III), C.R.S.; EXCEPT THAT A CONSTRUCTION PROFESSIONAL SHALL BE SUBJECT TO THE TREBLE DAMAGES PROVISION ONLY IF THE CLAIMANT OTHERWISE PREVAILS ON THE CLAIM THAT A VIOLATION OF THE "COLORADO CONSUMER PROTECTION ACT", ARTICLE 1 OF TITLE 6, C.R.S., HAS OCCURRED.

(3) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE AGGREGATE AMOUNT OF TREBLE DAMAGES AWARDED IN AN ACTION UNDER SECTION 6-1-113 (2) (a) (III), C.R.S., AND ATTORNEY FEES AWARDED TO A CLAIMANT UNDER SECTION 6-1-113 (2) (b), C.R.S., SHALL NOT EXCEED TWO HUNDRED FIFTY THOUSAND DOLLARS IN ANY ACTION AGAINST A CONSTRUCTION PROFESSIONAL.

(4) (a) IN AN ACTION ASSERTING PERSONAL INJURY OR BODILY INJURY AS A RESULT OF A CONSTRUCTION DEFECT IN WHICH DAMAGES FOR NONECONOMIC LOSS OR INJURY OR DERIVATIVE NONECONOMIC LOSS OR INJURY MAY BE AWARDED, SUCH DAMAGES SHALL NOT EXCEED THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS. AS USED IN THIS SUBSECTION (4), "NONECONOMIC LOSS OR INJURY" HAS THE SAME MEANING AS SET FORTH IN SECTION 13-21-102.5 (2) (b), AND "DERIVATIVE NONECONOMIC LOSS OR INJURY" HAS THE SAME MEANING AS SET FORTH IN SECTION 13-21-102.5 (2) (a).

(b) THE LIMITATIONS ON NONECONOMIC DAMAGES SET FORTH IN THIS SUBSECTION (4) SHALL BE ADJUSTED FOR INFLATION AS OF JULY 1, 2003, AND AS OF JULY 1 OF EACH YEAR THEREAFTER UNTIL AND INCLUDING JULY 1, 2008. THE ADJUSTMENT MADE PURSUANT TO THIS PARAGRAPH (b) SHALL BE ROUNDED UPWARD OR DOWNWARD TO THE NEAREST TEN DOLLAR INCREMENT.

(c) AS USED IN PARAGRAPH (b) OF THIS SUBSECTION (4), "INFLATION" MEANS THE ANNUAL PERCENTAGE CHANGE IN THE UNITED STATES DEPARTMENT OF LABOR,

BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX FOR DENVER-BOULDER, ALL ITEMS, ALL URBAN CONSUMERS, OR ITS SUCCESSOR INDEX.

(d) THE SECRETARY OF STATE SHALL CERTIFY THE ADJUSTED LIMITATION ON DAMAGES WITHIN FOURTEEN DAYS AFTER THE APPROPRIATE INFORMATION IS AVAILABLE, AND SUCH ADJUSTED LIMITATION ON DAMAGES SHALL BE THE LIMITATION APPLICABLE TO ALL CLAIMS FOR RELIEF THAT ACCRUE ON OR AFTER JULY 1, 2003.

(5) CLAIMS FOR PERSONAL INJURY OR BODILY INJURY AS A RESULT OF A CONSTRUCTION DEFECT SHALL NOT BE SUBJECT TO THE TREBLE DAMAGES PROVISIONS OF THE "COLORADO CONSUMER PROTECTION ACT", ARTICLE 1 OF TITLE 6, C.R.S.

(6) IN ANY CASE IN WHICH THE COURT DETERMINES THAT THE ISSUE OF A VIOLATION OF THE "COLORADO CONSUMER PROTECTION ACT", ARTICLE 1 OF TITLE 6, C.R.S., WILL BE SUBMITTED TO A JURY, THE COURT SHALL NOT DISCLOSE NOR ALLOW DISCLOSURE TO THE JURY OF AN OFFER OF SETTLEMENT OR OFFER TO REMEDY MADE UNDER SECTION 13-20-803.5 THAT WAS NOT ACCEPTED BY THE CLAIMANT.

13-20-807. Express warranty - not affected. THE PROVISIONS OF THIS PART 8 ARE NOT INTENDED TO ABROGATE OR LIMIT THE PROVISIONS OF ANY EXPRESS WARRANTY. THE PROVISIONS OF THIS PART 8 SHALL APPLY TO THOSE CIRCUMSTANCES WHERE AN ACTION IS FILED ASSERTING ONE OR MORE CLAIMS FOR RELIEF INCLUDING A CLAIM FOR BREACH OF WARRANTY. THE PROVISIONS OF THIS PART 8 SHALL NOT BE DEEMED TO REQUIRE A CLAIMANT WHO IS THE BENEFICIARY OF AN EXPRESS WARRANTY TO COMPLY WITH THE NOTICE PROVISIONS OF SECTION 13-20-803.5 TO REQUEST ORDINARY WARRANTY SERVICE IN ACCORDANCE WITH THE TERMS OF SUCH WARRANTY. A CLAIMANT WHO REQUIRES WARRANTY SERVICE SHALL COMPLY WITH THE PROVISIONS OF SUCH WARRANTY.

SECTION 6. Applicability. This act shall apply to actions filed on or after the effective date of this act.

SECTION 7. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 25, 2003