# WEST VIRGINIA CODE CHAPTER 21 ARTICLE 11A

WV Legislature

## §21-11A-1. Purpose.

This article is intended to establish procedures for the negotiation of a claim of a construction defect asserted by a claimant against a contractor. The parties to a contract are encouraged to resolve any disagreement concerning the contract short of litigation.

WV Legislature

## §21-11A-2. Applicability of article.

This article does not apply to an action:

(1) Against a contractor for which a claimant, as a consumer, is entitled to a specific remedy pursuant to Chapter 46A of this code;

(2) Against a contractor who is not licensed under the provisions of §30-42-1 *et seq.*, of this code;

(3) Demanding damages of $5,000 or less;

(4) Alleging a construction defect that poses an imminent threat of injury to person or property;

(5) Alleging a construction defect that causes property not to be habitable;

(6) Against a contractor who failed to provide the notice required by §21-11A-5 or §21-11A-6 of this code;

(7) Against a contractor if the parties to the contract agreed to submit claims to mediation, arbitration, or another type of alternative dispute resolution; or

(8) Alleging claims for personal injury or death.

WV Legislature

## §21-11A-3. Suit by contractor; perfecting mechanic's lien.

(a) If a contractor, subcontractor, supplier or design professional files suit against a property owner upon whose property they provided goods or services, this article is not applicable, and a claimant alleging a construction defect may counterclaim or file an independent action, as appropriate.

(b) Nothing in this article precludes a contractor, subcontractor, supplier or design professional from perfecting a lien in accordance with the provisions of article two, chapter thirty-eight of this code.

WV Legislature

## §21-11A-4. Applicability of definitions; definitions.

For the purposes of this article, the words or terms defined in this article, and any variation of those words or terms required by the context, have the meanings ascribed to them in this article. These definitions are applicable unless a different meaning clearly appears from the context.

(1) "Action" means any civil action, or any alternative dispute resolution proceeding other than the negotiation required under this article, for damages, asserting a claim for injury or loss to real or personal property caused by an alleged defect arising out of or related to residential improvements.

(2) "Claim" means a demand for damages by a claimant based upon an alleged construction defect in residential improvements.

(3) "Claimant" means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor concerning an alleged construction defect in residential improvements.

(4) "Construction defect" means a deficiency in, or a deficiency arising out of, the design, specifications, planning, supervision or construction of residential improvements that results from any of the following:

(A) Defective material, products, or components used in the construction of residential improvements;

(B) Violation of the applicable codes in effect at the time of construction of residential improvements;

(C) Failure in the design of residential improvements to meet the applicable professional standards of care;

(D) Failure to complete residential improvements in accordance with accepted trade standards for good and workmanlike construction: *Provided*, That compliance with the applicable codes in effect at the time of construction is prima facie evidence of construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes; or

(E) Failure to properly oversee, supervise, and inspect services or goods provided by the contractor's subcontractor, officer, employee, agent, or other person furnishing goods or services.

(5) "Contract" means a written contract between a contractor and a claimant by the terms of which the contractor agrees to provide goods or services, by sale or lease, to or for a claimant.

(6) "Contractor" means a contractor, licensed under the provisions of §30-42-1 *et seq.*, of this

WV Legislature

code, who has entered into a contract directly with a claimant. The term does not include the contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to a claimant.

(7) "Day" means a calendar day. If an act is required to occur on a day falling on a Saturday, Sunday or holiday, the first working day which is not one of these days should be counted as the required day for purposes of this article.

(8) "Goods" means supplies, materials, or equipment.

(9) "Parties" means: (A) The claimant; and (B) any contractor, subcontractor, agent or other person furnishing goods or services and upon whom a claim of an alleged construction defect has been served under this article.

(10) "Residential improvements" means: (A) The construction of a residential dwelling or appurtenant facility or utility; (B) an addition to, or alteration, modification, or rehabilitation of an existing dwelling or appurtenant facility or utility; or (C) repairs made to an existing dwelling or appurtenant facility or utility; In addition to actual construction or renovation, residential improvements actually added to residential real property include the design, specifications, surveying, planning, goods, services and the supervision of a contractor's subcontractor, officer, employee, agent, or other person furnishing goods or services to a claimant.

(11) "Services" means the furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof.

(12) "Subcontractor" means a contractor who performs work on behalf of another contractor on residential improvements.

(13) "Supplier" means a person who provides goods for residential improvements.

WV Legislature

## §21-11A-5. Contract for residential improvements; notice.

(a) Upon entering into a contract for residential improvements, the contractor shall provide notice to the owner of the real property of the right of the contractor, or any subcontractor, supplier or design professional to offer to cure construction defects before a claimant may commence litigation against the contractor, or a subcontractor, supplier or design professional. Such notice shall be conspicuous and may be included as part of the underlying contract.

(b) The notice required by subsection (a) of this section shall be in substantially the following form:

WEST VIRGINIA STATE LAW, AS SET FORTH IN CHAPTER 21, ARTICLE 11A OF THE WEST VIRGINIA CODE, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO MADE RESIDENTIAL IMPROVEMENTS TO YOUR PROPERTY. AT LEAST NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR CONTRACTOR AND ANY SUBCONTRACTORS, SUPPLIERS OR DESIGN PROFESSIONALS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE CONTRACTOR OR ANY SUBCONTRACTORS, SUPPLIERS OR DESIGN PROFESSIONALS. THERE ARE DEADLINES AND PROCEDURES UNDER STATE LAW AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

WV Legislature

## §21-11A-6. Contractor notification requirements for a new residential dwelling constructed for sale.

(a) A contractor who constructs a new residential dwelling shall, at or before the closing of the sale, provide in writing to the initial purchaser of the residence:

(1) The name, license number, business address and telephone number of each subcontractor, supplier or design professional who provided goods or services related to the design or construction of the dwelling; and

(2) A brief description of the goods or services provided by each subcontractor, supplier or design professional identified pursuant to this section.

(b) At or before the closing of the sale, a notice shall be given to the purchaser that is in substantially the same form as set forth in subsection (b), section five of this article.

WV Legislature

## §21-11A-7. Prerequisites to commencing an action.

(a) The procedures contained in this article are exclusive and required prerequisites to commencing a civil action under the West Virginia rules of civil procedure.

(b) If a claimant files a civil action alleging a construction defect without first complying with the provisions of this article, then on application by a party to the action, the court shall dismiss the action, without prejudice, and the action may not be refiled until the claimant has complied with the requirements of this article.

WV Legislature

## §21-11A-8. Notice of claim of construction defect.

(a) A claimant asserting a claim of a construction defect under this article shall file notice of the claim as provided by this section.

(b) The notice of claim shall:

(1) Be in writing and signed by the claimant or the claimant's authorized representative;

(2) Be delivered by hand, certified mail, return receipt requested or other verifiable delivery service, to the person designated in the contract to receive a notice of claim of a construction defect; if no person is designated in the contract, the notice shall be delivered to the contractor's chief administrative officer; and

(3) State in detail:

(A) The nature of the alleged construction defect and a description of the results of the defect;

(B) A description of damages caused by the alleged construction defect, including the amount and method used to calculate those damages; and

(C) The legal theory of recovery, i.e., a construction defect, including the causal relationship between the alleged construction defect and the damages claimed.

(c) In addition to the mandatory contents of the notice of claim as required by subsection (b) of this section, the claimant may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the claimant's claim.

(d) The notice of claim shall be delivered no later than ninety days prior to filing an action.

WV Legislature

## §21-11A-9. Service on additional parties.

Within fourteen days after the initial service of the notice of claim required in subsection (a) of this section, the contractor shall forward a copy of the notice to each subcontractor, supplier and design professional who the contractor reasonably believes is responsible for a defect specified in the notice and include with the notice a description of the specific defect for which the contractor believes the subcontractor, supplier or design professional is responsible.

WV Legislature

**§21-11A-10. Request for voluntary disclosure of additional information.**

(a) Upon the filing of a claim, parties may request to review and copy relevant information in the possession or custody or subject to the control of the other party that pertains to the alleged construction defect, including, without limitation:

(1) Reports of outside consultants or experts; or

(2) Photographs and videotapes.

(b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.

(c) The claimant and the contractor may seek additional information directly from third parties.

(d) Nothing in this section requires any party to disclose the requested information or any matter that is privileged under West Virginia law.

Within thirty days after service of the notice of claim by the claimant, each contractor, subcontractor, supplier or design professional that has received a notice of claim shall serve a written response on the claimant, delivered by hand, certified mail, return receipt requested or other verifiable delivery service, directed to the claimant or representative of the claimant who signed the notice of claim of a construction defect. The written response shall:

(1) Offer to compromise and settle the claim by monetary payment without inspection;

(2) Propose to inspect the residential improvement that is the subject of the claim; or

(3) State that the contractor, subcontractor, supplier or design professional disputes the claim and will neither remedy the alleged construction defect nor compromise and settle the claim.

(e) If the contractor, subcontractor, supplier or design professional disputes the claim pursuant to subdivision (3), subsection (d) of this section and will neither remedy the alleged construction defect nor compromise and settle the claim or does not respond to the claimant's notice of claim within the time stated in said subsection, the claimant may bring an action against the contractor, subcontractor, supplier or design professional for the claim described in the notice of claim without further notice.

(f) If the claimant rejects the inspection proposal or the settlement offer made by the contractor, subcontractor, supplier or design professional pursuant to subsection (d) of this section, the claimant shall serve written notice of the claimant's rejection on the contractor, subcontractor, supplier or design professional. The notice shall include the basis for the

WV Legislature

claimant's rejection of the contractor, subcontractor, supplier or design professional's proposal or offer.

(g) After service of the rejection required by subsection (f) of this section, the claimant may bring an action against the contractor, subcontractor, supplier or design professional for the claim described in the initial notice of claim without further notice.

(h) If the claimant elects to allow the contractor, subcontractor, supplier or design professional to inspect the residential improvement in accordance with the contractor, subcontractor, supplier or design professional's proposal pursuant to subdivision (2), subsection (d) of this section, the claimant shall provide the contractor, subcontractor, supplier or design professional and its contractors or other agents reasonable access to the claimant's residence during normal working hours to inspect the premises and the claimed defect to determine the nature and cause of the alleged defects and the nature and extent of any repairs or replacements necessary to remedy the alleged defects.

(i) Within fourteen days following completion of the inspection, the contractor, subcontractor, supplier or design professional shall serve on the claimant:

(1) A written offer to remedy the construction defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a description of the additional labor and materials necessary to remedy the defect described in the claim and a timetable for the completion of such construction;

(2) A written offer to compromise and settle the claim by monetary payment; or

(3) A written statement that the contractor, subcontractor, supplier or design professional will not proceed further to remedy the defect.

(j) If a claimant accepts a contractor, subcontractor, supplier or design professional's offer made pursuant to subdivision (1) or (2), subsection (i) of this section and the contractor, subcontractor, supplier or design professional 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, subcontractor, supplier or design professional for the claim described in the initial notice of claim without further notice.

(k) If a claimant receives a written statement that the contractor, subcontractor, supplier or design professional will not proceed further to remedy the defect, the claimant may bring an action against the contractor, subcontractor, supplier or design professional for the claim described in the initial notice of claim without further notice.

(l) If the claimant rejects the offer made by the contractor, subcontractor, supplier or design professional to either remedy the construction defect or to compromise and settle the claim by monetary payment, the claimant shall serve written notice of the claimant's rejection on the contractor, subcontractor, supplier or design professional. The notice shall include the

WV Legislature

basis for the claimant's rejection of the contractor, subcontractor, supplier or design professional's offer. After service of the rejection, the claimant may bring an action against the contractor, subcontractor, supplier or design professional for the claim described in the notice of claim without further notice.

(m) Any claimant accepting the offer of the contractor, subcontractor, supplier or design professional to remedy the construction defects shall do so by serving the contractor, subcontractor, supplier or design professional with a written notice of acceptance within a reasonable period of time after receipt of the offer but no later than thirty days after receipt of the offer.

(n) If a claimant accepts a contractor, subcontractor, supplier or design professional's offer to repair a defect described in an initial notice of claim, the claimant shall provide the contractor, subcontractor, supplier or design professional and its contractors or other agents reasonable access to the claimant's residence during normal working hours to perform and complete the construction by the timetable stated in the offer.

(o) During negotiations under this article, if the running of the applicable statute of limitations would otherwise become a bar to a civil action, service of a claimant's written notice of claim pursuant to this article tolls the applicable statute of limitations until six months after the termination of negotiations under this article.

WV Legislature

## §21-11A-11. Duty to negotiate.

The parties shall negotiate in accordance with the times set forth in section twelve of this article (relating to timetable) to attempt to resolve all claims. No party is obligated to settle with the other party as a result of the negotiation.

WV Legislature

## §21-11A-12. Timetable.

(a) Following receipt of a claimant's notice of claim, the contractor or other designated representative shall review the claimant's claim and initiate negotiations with the claimant to attempt to resolve the claim.

(b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time not to exceed thirty days following the date the contractor receives the claimant's notice of claim.

(c) The parties may conduct negotiations according to an agreed schedule, but must begin negotiations no later than the deadline set forth in subsection (b) of this section.

(d) Subject to subsection (e) of this section, the parties shall complete the negotiations that are required by this article within ninety days after the contractor receives the claimant's notice of claim.

(e) The parties may agree in writing to extend the time for negotiations, on or before the ninetieth day after the contractor receives the claimant's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party and shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

WV Legislature

## §21-11A-13. Conduct of negotiation.

Negotiation is a consensual bargaining process in which the parties attempt to resolve the claim. A negotiation under this article may be conducted by any method, technique or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, by correspondence, by video conference or by any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement and settle.

WV Legislature

## §21-11A-14. Settlement agreement.

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the claimant and the contractor who have authority to bind each respective party.

(c) A partial settlement does not waive parties' rights as to the parts of the claims that are not resolved.

WV Legislature

## §21-11A-15. Costs of negotiation.

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees and expert's fees.

WV Legislature

## §21-11A-16. Commencement of action.

If a claim for a construction defect is not resolved in its entirety through negotiation in accordance with this article on or before the ninetieth day after the contractor receives the notice of claim or after the expiration of any extension agreed to by the parties, the claimant may commence an action.

WV Legislature

## §21-11A-17. Additional construction defects; additional notice of claim.

A construction defect which is discovered after a claimant has provided a contractor with the original notice of claim is subject to the notice requirements and timetable of this article.

WV Legislature