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## WEST VIRGINIA LEGISLATURE

Regular Session, 2003

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# ENROLLED

Committee Substitute for

SENATE BILL NO. 440

(By Senator Rowe, et al                     )

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PASSED March 8, 2003

In Effect 90 days from **Passage**

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OFFICE OF THE CLERK  
SENATE

## ENROLLED

COMMITTEE SUBSTITUTE

FOR

### Senate Bill No. 440

(SENATORS ROWE, WHITE, CHAFIN  
AND GULLS, *original sponsors*)

[Passed March 8, 2003; in effect ninety days from passage.]

AN ACT to amend chapter twenty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article eleven-a, relating to establishing the contractors notice and opportunity to cure act.

*Be it enacted by the Legislature of West Virginia:*

That chapter twenty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article eleven-a, to read as follows:

**ARTICLE 11A. NOTICE AND OPPORTUNITY TO CURE CONSTRUCTION DEFECTS.**

**§21-11A-1. Purpose.**

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

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

1 This article does not apply to an action:

2 (1) Against a contractor for which a claimant, as a  
3 consumer, is entitled to a specific remedy pursuant to  
4 chapter forty-six-a of this code;

5 (2) Against a contractor who is not licensed under the  
6 provisions of article eleven of this chapter;

7 (3) Demanding damages of five thousand dollars or less;

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

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

12 (6) Against a contractor who failed to provide the notice  
13 required by section five or six of this article;

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

17 (8) Alleging claims for personal injury or death.

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

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

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

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

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

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

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

16 (3) "Claimant" means a homeowner, including a subse-  
17 quent purchaser, who asserts a claim against a contractor  
18 concerning an alleged construction defect in residential  
19 improvements.

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

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

26 (B) Violation of the applicable codes in effect at the time  
27 of construction of residential improvements,

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

30 (D) Failure to complete residential improvements in  
31 accordance with accepted trade standards for good and  
32 workmanlike construction: *Provided*, That compliance  
33 with the applicable codes in effect at the time of construc-  
34 tion is prima facie evidence of construction in accordance  
35 with accepted trade standards for good and workmanlike  
36 construction, with respect to all matters specified in those  
37 codes; or

38 (E) Failure to properly oversee, supervise and inspect  
39 services or goods provided by the contractor's subcontrac-  
40 tor, officer, employee, agent or other person furnishing  
41 goods or services.

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

46 (6) "Contractor" means a contractor, licensed under the  
47 provisions of article eleven of this chapter, who has  
48 entered into a contract directly with a claimant. The term  
49 does not include the contractor's subcontractor, officer,  
50 employee, agent or other person furnishing goods or  
51 services to a claimant.

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

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

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

61 (10) "Residential improvements" means: (A) The con-  
62 struction of a residential dwelling or appurtenant facility  
63 or utility; (B) an addition to, or alteration, modification or  
64 rehabilitation of an existing dwelling or appurtenant  
65 facility or utility; or (C) repairs made to an existing  
66 dwelling or appurtenant facility or utility. In addition to  
67 actual construction or renovation, residential improve-  
68 ments actually added to residential real property include  
69 the design, specifications, surveying, planning, goods,  
70 services and the supervision of a contractor's subcontrac-  
71 tor, officer, employee, agent or other person furnishing  
72 goods or services to a claimant.

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

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

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

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

1 (a) Upon entering into a contract for residential im-  
2 provements, the contractor shall provide notice to the  
3 owner of the real property of the right of the contractor, or  
4 any subcontractor, supplier or design professional to offer  
5 to cure construction defects before a claimant may com-  
6 mence litigation against the contractor, or a subcontractor,  
7 supplier or design professional. Such notice shall be  
8 conspicuous and may be included as part of the underlying  
9 contract.

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

12 WEST VIRGINIA STATE LAW, AS SET FORTH IN  
13 CHAPTER 21, ARTICLE 11A OF THE WEST VIRGINIA

14 CODE, CONTAINS IMPORTANT REQUIREMENTS YOU  
15 MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT  
16 FOR DEFECTIVE CONSTRUCTION AGAINST THE  
17 CONTRACTOR WHO MADE RESIDENTIAL IMPROVE-  
18 MENTS TO YOUR PROPERTY. AT LEAST NINETY  
19 DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST  
20 DELIVER TO THE CONTRACTOR A WRITTEN NOTICE  
21 OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE  
22 ARE DEFECTIVE AND PROVIDE YOUR CONTRACTOR  
23 AND ANY SUBCONTRACTORS, SUPPLIERS OR DE-  
24 SIGN PROFESSIONALS THE OPPORTUNITY TO MAKE  
25 AN OFFER TO REPAIR OR PAY FOR THE DEFECTS.  
26 YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER  
27 MADE BY THE CONTRACTOR OR ANY SUBCONTRAC-  
28 TORS, SUPPLIERS OR DESIGN PROFESSIONALS.  
29 THERE ARE DEADLINES AND PROCEDURES UNDER  
30 STATE LAW AND FAILURE TO FOLLOW THEM MAY  
31 AFFECT YOUR ABILITY TO FILE A LAWSUIT.

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

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

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

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

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

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

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

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

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

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

4 (b) The notice of claim shall:

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

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

13 (3) State in detail:

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

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

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



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

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

**§12-11A-9. Service on additional parties.**

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

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

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

6 (1) Reports of outside consultants or experts; or

7 (2) Photographs and videotapes.

8 (b) Subsection (a) of this section applies to all informa-  
9 tion in the parties' possession regardless of the manner in  
10 which it is recorded, including, without limitation, paper  
11 and electronic media.

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

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

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

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

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

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

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

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

49 subcontractor, supplier or design professional's proposal  
50 or offer.

51 (g) After service of the rejection required by subsection  
52 (f) of this section, the claimant may bring an action against  
53 the contractor, subcontractor, supplier or design profes-  
54 sional for the claim described in the initial notice of claim  
55 without further notice.

56 (h) If the claimant elects to allow the contractor, subcon-  
57 tractor, supplier or design professional to inspect the  
58 residential improvement in accordance with the contrac-  
59 tor, subcontractor, supplier or design professional's  
60 proposal pursuant to subdivision (2), subsection (d) of this  
61 section, the claimant shall provide the contractor, subcon-  
62 tractor, supplier or design professional and its contractors  
63 or other agents reasonable access to the claimant's resi-  
64 dence during normal working hours to inspect the pre-  
65 mises and the claimed defect to determine the nature and  
66 cause of the alleged defects and the nature and extent of  
67 any repairs or replacements necessary to remedy the  
68 alleged defects.

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

72 (1) A written offer to remedy the construction defect at  
73 no cost to the claimant, including a report of the scope of  
74 the inspection, the findings and results of the inspection,  
75 a description of the additional labor and materials neces-  
76 sary to remedy the defect described in the claim and a  
77 timetable for the completion of such construction;

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

80 (3) A written statement that the contractor, subcontrac-  
81 tor, supplier or design professional will not proceed  
82 further to remedy the defect.

83 (j) If a claimant accepts a contractor, subcontractor,  
84 supplier or design professional's offer made pursuant to  
85 subdivision (1) or (2), subsection (i) of this section and the  
86 contractor, subcontractor, supplier or design professional  
87 does not proceed to make the monetary payment or  
88 remedy the construction defect within the agreed timeta-  
89 ble, the claimant may bring an action against the contrac-  
90 tor, subcontractor, supplier or design professional for the  
91 claim described in the initial notice of claim without  
92 further notice.

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

99 (l) If the claimant rejects the offer made by the contrac-  
100 tor, subcontractor, supplier or design professional to either  
101 remedy the construction defect or to compromise and  
102 settle the claim by monetary payment, the claimant shall  
103 serve written notice of the claimant's rejection on the  
104 contractor, subcontractor, supplier or design professional.  
105 The notice shall include the basis for the claimant's  
106 rejection of the contractor, subcontractor, supplier or  
107 design professional's offer. After service of the rejection,  
108 the claimant may bring an action against the contractor,  
109 subcontractor, supplier or design professional for the  
110 claim described in the notice of claim without further  
111 notice.

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

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

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

**§12-11A-11. Duty to negotiate.**

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

**§12-11A-12. Timetable.**

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

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

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

12 (d) Subject to subsection (e) of this section, the parties  
13 shall complete the negotiations that are required by this

14 article within ninety days after the contractor receives the  
15 claimant's notice of claim.

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

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

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

**§21-11A-14. Settlement agreement.**

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

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

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

**§21-11A-15. Costs of negotiation.**

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

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

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

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

1 A construction defect which is discovered after a claim-  
2 ant has provided a contractor with the original notice of  
3 claim is subject to the notice requirements and timetable  
4 of this article.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Carly Fiorino*  
.....  
Chairman Senate Committee

*Sharon Spohn*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*Darrell Holmes*  
.....  
Clerk of the Senate

*Bryan R. Saw*  
.....  
Clerk of the House of Delegates

*Carl Ray Tomblin*  
.....  
President of the Senate

*Arthur Skiff*  
.....  
Speaker House of Delegates

The within is approved this the 2nd  
Day of April, 2003.  
*Bob Wise*  
.....  
Governor



PRESENTED TO THE  
GOVERNOR

Date 3/27/03

Time 10:10 am