



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-2307/P2
MJL&RNK:wlj:cb

Offer Soon

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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Regen

1 AN ACT ^{Regen} to create 101.148 and 895.07 of the statutes; relating to: claims against
2 certain building contractors ^{lot suppliers}

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 101.148 of the statutes is created to read:

4 101.148 Contractor notices. (1) DEFINITIONS. In this section:

5 (a) "Building" means any structure that is an improvement to land and that is
6 intended for use as a dwelling.

7 (b) "Claimant" has the meaning given in s. 895.07 (1) (c). ✓

8 (c) "Contractor" means a person ^{that} who enters into a contract with a potential
9 claimant to construct a building on the potential claimant's land, to complete a
10 remodeling project on a building on the potential claimant's land, or to complete a

SECTION 1

(f) ^{Supplier means a person that supplies windows, doors, concrete, or asphalt to a building}

remodeling project on the potential claimant's modular home. "Contractor" includes a subcontractor.

(e) "Remodel" does not include maintenance and repair work.

(2) NOTICE REQUIRED AT TIME OF CONTRACTING. (a) Upon entering into a contract to construct a building, to complete a remodeling project on a building, or to complete a remodeling project on a modular home, the contractor shall give the potential claimant, if any, a notice worded substantially as follows:

NOTICE CONCERNING CONSTRUCTION

DEFECTS

or against window, door, concrete, or asphalt suppliers

Wisconsin law contains important requirements you must follow before you may file a lawsuit for defective construction against the contractor who constructed your building or completed your remodeling project. For example, section 895.07 (2) and (3) of the Wisconsin statutes requires you to deliver to the contractor a written notice of any construction conditions you allege are defective before you file your lawsuit, and you must provide your contractor ^{or window, door, concrete, or asphalt suppliers} the opportunity to make an offer to repair or pay for the construction defects. You are not obligated to accept any offer made by the contractor, but failure to accept a reasonable offer may limit your recoverable damages.

(b) The notice required under par. (a) shall be conspicuous and in writing and may be included within the contract between the contractor and the potential claimant.

SECTION 2. 895.07 of the statutes is created to read:

895.07 Claims against contractors. (1) DEFINITIONS. In this section:

(a) "Action" means a civil action or an arbitration under ch. 788.

(b) "Building" has the meaning given in s. 101.148 (1) (a).

1 (c) “Claimant” means a homeowner, other than a developer or builder, who
2 asserts a claim against a contractor ^{or supplier} concerning a construction defect.

3 (d) “Construction defect” has the meaning assigned by a written, express
4 warranty provided by the contractor or, if no such meaning is assigned by warranty,
5 means a deficiency in the specifications, planning, supervision, construction, or
6 remodeling of a building or in the remodeling of a modular home that results from
7 any of the following:

8 1. Defective material.

9 2. Violation of applicable building codes.

10 3. Failure to follow accepted trade standards for workmanlike construction.

11 (e) “Contractor” means a person ^{that} who enters into a contract with a potential
12 claimant to construct a building or to complete a remodeling project on a building.

13 (g) “Serve” or “service” means personal service or delivery by certified mail,
14 return receipt requested, to the last-known address of the addressee.

15 (2) ACTION, DISMISSAL WITHOUT PREJUDICE. Before filing an action against a
16 contractor ^{or supplier} for a construction defect, the claimant shall serve the contractor ^{or supplier} with a
17 notice of the claim that describes the claim in sufficient detail to determine the
18 general nature of the construction defect. If the claimant files an action but fails to
19 serve the notice of claim, the court shall dismiss the action without prejudice, and
20 the action may not be refiled until the claimant has complied with the requirements
21 of this subsection.

22 (3) NOTICE AND OPPORTUNITY TO REPAIR. (a) No later than 90 days before
23 initiating an action against a contractor ^{or supplier} under this section, the claimant shall serve
24 written notice of claim under sub. (2) on the contractor. The notice of claim shall state
25 that the claimant asserts a construction defect claim or claims and is providing notice

SECTION 2

1 under this paragraph. The notice of claim shall describe the claim or claims in
 2 sufficient detail to explain the nature of the alleged construction defect and the
 3 results of the construction defect. The claimant must provide to the contractor all
 4 evidence ^{for example} ~~for example~~ expert reports, photographs, electronic mail, and videotapes
 5 that depict the nature and cause of the construction defect. Evidence that the
 6 claimant withholds may not be used later in an action under this section. In addition,
 7 the claimant shall provide to the contractor ^{or supplier} any evidence discoverable under ch. 804
 8 that depicts the nature and cause of the construction defect, including expert reports,
 9 photographs, and videotapes. If the claimant fails to provide the evidence then the
 10 claimant may not introduce any such evidence in an action under this section.

11 (b) Within 30 days after the claimant serves notice of claim under par. (a), each
 12 contractor ^{or supplier} that has received the notice of claim may serve on the claimant, and on
 13 any other contractor that has received the notice of claim, a written response to the
 14 claim or claims that either offers to settle the claim by monetary payment, the
 15 making of repairs, or a combination of both, without inspection, or proposes to
 16 inspect the building that is the subject of the claim.

17 (c) If the contractor ^d wholly rejects the claim and will neither remedy the alleged
 18 construction defect nor settle the claim, or does not respond to the claimant's notice
 19 of claim within the time under par. (b), the claimant may bring an action against the
 20 contractor for the claims described in the notice of claim without further notice,
 21 except as otherwise provided under applicable law.

22 (d) If the claimant rejects a settlement offer made by the contractor, the
 23 claimant shall provide written notice of the claimant's rejection to the contractor and,
 24 if represented by legal counsel, the contractor's ^{or supplier's} attorney. The notice shall include the
 25 specific factual and, if known, legal reasons for the claimant's rejection of the

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1 contractor's proposal or offer. If the claimant believes that the settlement offer omits
 2 reference to any portion of the claim, or was unreasonable, the claimant shall in its
 3 written notice include those items that the claimant believes were omitted and set
 4 forth in detail all reasons why the claimant believes the settlement offer is
 5 unreasonable. In any subsequent action in which the claimant asserts that the
 6 settlement offer was unreasonable, the claimant may not raise any reasons that were
 7 not included in its response to the contractor.

8 (e) If a proposal for inspection is made under par. (b), the claimant shall, within
 9 30 days of receiving the contractor's proposal, provide the contractor and its agents,
 10 experts, and consultants prompt and complete access to the building to inspect the
 11 building, document any alleged construction defects, and perform any testing
 12 required to evaluate fully the nature, extent, and cause of the claimed construction
 13 defects and the nature and extent of any repairs or replacements that may be
 14 necessary to remedy them. If destructive testing is required, the contractor shall give
 15 the claimant advance notice of the testing and shall, after completion of the testing,
 16 return the building to its pre-testing condition. If any inspection or testing reveals
 17 a condition that requires additional testing to allow the contractor to evaluate fully
 18 the nature, cause, and extent of the construction defect, the contractor shall provide
 19 notice to the claimant of the need for the additional testing and the claimant shall
 20 provide access under this paragraph. If a claim is asserted on behalf of the owners
 21 of multiple buildings, or multiple owners of units within a multifamily complex, then
 22 the contractor shall be entitled to inspect each of the buildings or units. The claimant
 23 shall either provide a specific day for the inspection upon reasonable notice for an
 24 inspection or require the contractor to request in writing a day, at least 3 days before
 25 the inspection.

and all persons on whom a notice of claim has been served

or suppliers

or supplier

or suppliers

or supplier

or supplier

at least 10 days before commencement of the testing

or supplier

1 (f) Within 14 days following completion of the inspection and receipt of all
2 testing results under par. (e), the contractor may serve on the claimant any of the
3 following:

4 1. A written offer to remedy fully or partially the construction defect at no cost
5 to the claimant. The offer shall include a description of any additional construction
6 necessary to remedy the construction defect and an anticipated timetable for the
7 completion of the construction.

8 2. A written offer to settle the claim by monetary payment.

9 3. A written offer including a combination of repairs and monetary payment.

10 4. A written statement that the contractor will not proceed further to remedy
11 the construction defect.

12 (g) If a claimant accepts a contractor's offer made under par. (f) and the
13 contractor does not proceed to make the monetary payment or remedy the
14 construction defect within the agreed timetable, the claimant may bring an action
15 against the contractor for the claim described in the notice of claim without further
16 notice, except as otherwise provided by applicable law. The claimant may also file
17 the contractor's offer and claimant's acceptance, and the offer and acceptance creates
18 a rebuttable presumption that a binding and valid settlement agreement has been
19 created and should be enforced by the court.

20 (h) If a claimant receives a written statement that the contractor will not
21 proceed further to remedy the construction defect, the claimant may bring an action
22 against the contractor for the claim described in the notice of claim without further
23 notice, except as otherwise provided by applicable law.

24 (i) If the claimant rejects the offer made by the contractor to remedy the
25 construction defect or to settle the claim by monetary payment or a combination of

1 each, the claimant shall serve written notice of the claimant's rejection on the
2 contractor. The notice shall include the specific factual and, if known, legal reasons
3 for the claimant's rejection of the contractor's offer. If the claimant believes the
4 contractor's settlement offer is unreasonable, the claimant shall set forth in detail
5 all reasons why the the claimant believes the settlement offer is unreasonable. In
6 any subsequent action in which the claimant asserts that the settlement offer was
7 unreasonable, the claimant may not raise any new reasons unless the claimant later
8 discovers significant information.

9 (j) Upon receipt of a claimant's rejection and the reasons for the rejection, the
10 contractor may, within 15 days of receiving the rejection, make a supplemental offer
11 of repair or monetary payment to the claimant.

12 (k) If the claimant rejects the supplemental offer made by the contractor to
13 remedy the construction defect or to settle the claim by monetary payment or a
14 combination of each, the claimant shall serve written notice of the claimant's
15 rejection on the contractor. The notice shall include the specific factual and, if
16 known, legal reasons for the claimant's rejection of the contractor's supplemental
17 settlement offer. If the claimant believes the contractor's supplemental settlement
18 offer is unreasonable, the claimant shall set forth in detail all reasons why the
19 claimant believes the supplemental settlement offer is unreasonable. In any
20 subsequent action in which the claimant asserts that the settlement offer was
21 unreasonable, the claimant may not raise any reasons that were not included in its
22 response to the contractor.

23 (l) If a claimant rejects a reasonable offer, including any reasonable
24 supplemental offer, made as provided under this subsection or does not permit the
25 contractor to repair the construction defect pursuant to an accepted offer of

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1 settlement, the claimant may not recover an amount in excess of the fair market
2 value of the offer of settlement, or the actual cost of the repairs made, whichever is
3 less, or the amount of a monetary offer of settlement. For purposes of this paragraph,
4 the trier of fact shall determine the reasonableness of an offer of settlement. If the
5 claimant has rejected a reasonable offer, including any reasonable supplemental
6 offer, and any other law allows the claimant to recover costs and attorney fees, then
7 the claimant may recover no costs or attorney fees incurred after the date of its
8 rejection.

9 (m) A claimant accepting the offer of the contractor to remedy a construction
10 defect shall do so by serving the contractor with a written notice of acceptance within
11 a reasonable period of time after receipt of the contractor's settlement offer, but no
12 later than 30 days after receipt of the offer. If no response is served upon the
13 contractor within the 30-day period, then the offer shall be deemed accepted.

14 (n) If a claimant accepts a contractor's offer to repair a construction defect
15 described in a notice of claim, the claimant shall provide the contractor and its
16 agents, experts, and consultants prompt and unfettered access to the building to
17 perform and complete the construction by the timetable stated in the settlement
18 offer.

19 (o) If, during the pendency of the notice, inspection, offer, acceptance, or repair
20 process, an applicable limitations period would otherwise expire, the claimant may
21 file an action against the contractor, but the action shall be immediately abated
22 pending completion of the notice of claim process described in this section. This
23 paragraph shall not be construed to revive a statute of limitations period that has
24 expired before the date on which a claimant's written notice of claim is served or
25 extend any applicable statute of repose.

or supplier

1 (p) After the sending of the initial notice of claim, a claimant and a contractor
2 may, by written mutual agreement, alter the procedure for the notice of claim process
3 described in this section.

4 (4) ^{(S) or supplier} CONTRACTOR NOT LIABLE FOR CERTAIN DAMAGES. In an action relating to a
5 building involving a construction defect, a contractor ^{or supplier} shall not be liable for damages
6 involving or caused by any of the following:

7 (a) Normal shrinkage due to drying or settlement of construction components
8 within the tolerance of building standards.

9 (b) The contractor's reliance on written information relating to the building
10 that was obtained from official government records or provided by a government
11 entity.

12 (c) Any construction defect known by or disclosed to a claimant in writing before
13 his or her purchase of the building.

14 (d) Any construction defect in a building that is purchased in "as is" condition.

15 (e) If the claimant is not the first owner of the building, any construction defect
16 known by the claimant or that could have been discovered by the claimant through
17 the exercise of reasonable diligence before the claimant's purchase of the building.

18 (f) Refusal of anyone to allow the contractor or the contractor's agents to
19 perform their warranty service work.

20 (5) ⁶ (5) ADDITIONAL CONSTRUCTION DEFECTS AND NOTICE AND OPPORTUNITY TO REPAIR.
21 A construction defect that is discovered after a claimant has provided a contractor
22 with the initial claim notice may not be alleged in an action until the claimant has
23 given the contractor who performed the original construction written notice of the
24 new claim regarding the alleged new construction defect based on the claimant's

^{(S) (5)} WARRANTY TERMS ^(C+J) The claimant and any ^{person} subject to notice under this section is bound by any supplier warranty terms pertaining to products or services supplied ^{to the building}

or supplier
to the building

1 most current records. The contractor ^{or supplier} shall have an opportunity to resolve the notice
2 of the new claim in the manner provided in sub. (3).

3 ~~(6)~~ ⁷ (6) RELEASE; INSURANCE. If a claimant accepts an offer made in compliance with
4 this section and the contractor fulfills the offer in compliance with this section, the
5 claimant is barred from bringing an action for the claim described in the notice of
6 claim and the contractor is, for insurance purposes, legally obligated to make the
7 repairs or the monetary payment as if the claimant had recovered a judgment
8 against the contractor in the amount of the cost of the repairs or the amount of the
9 monetary payment.

10 ~~(7)~~ ⁸ (7) ACTION OF ASSOCIATIONS. (a) In this subsection, "association" means a
11 homeowner's association, condominium association under s. 703.02 (1m), unit
12 owner's association, or a nonprofit corporation created to own and operate portions
13 of a planned community that may assess unit owners for the costs incurred in the
14 performance of the association's obligations.

15 (b) A person may not provide or offer to provide anything of value, directly or
16 indirectly, to a property manager of an association or to a member or officer of an
17 association to induce the property manager, member, or officer to encourage the
18 association to file or discourage the association from filing a claim for damages
19 arising from a construction defect.

20 (c) A property manager retained by an association or a member or officer of an
21 association may not accept anything of value, directly or indirectly, in exchange for
22 encouraging to file or discouraging from filing a claim for damages on behalf of the
23 association arising from a construction defect.

24 (d) A person who knowingly violates par. (b) or ~~(c)~~ ^{STET} is guilty of a misdemeanor.

1 (e) An association may bring an action against a contractor ^{as superior} to recover damages
2 resulting from construction defects in any of the common elements or limited
3 common elements of a condominium, as defined in s. 703.02 (2) and (10). Such an
4 action may be maintained only after all of the following occur:

5 1. The association first obtains the written approval of each unit's owner whose
6 interest in the common elements or limited common elements will be subject of the
7 action.

8 2. A vote is held of the units' owners to which at least a majority of the votes
9 of the members of the association are allocated.

10 3. The full board of directors of the association and the contractor have met in
11 person and conferred in a good faith attempt to resolve the association's claim, or the
12 contractor has definitively declined or ignored the requests to meet with the board
13 of directors of the association.

14 4. The association has otherwise satisfied all of the pre-action requirements
15 for a claimant to commence an action as set forth in this section.

16 (f) At least 3 business days in advance of any vote to commence an action by
17 an association to recover damages resulting from construction defects in any of the
18 common elements or limited common elements of a condominium, the attorney
19 representing the association shall provide to each unit's owner a written statement
20 that includes, in reasonable detail all of the following:

21 1. The construction defects and damages or injuries to the common elements
22 or limited common elements.

23 2. The cause of the construction defects, if the cause is known.

24 3. The nature and the extent that is known of the damage or injury resulting
25 from the construction defects.

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1 4. The location of each construction defect within the common elements or
2 limited common elements, if known.

3 5. A reasonable estimate of the cost of the action, including reasonable attorney
4 fees and costs, expert fees, and the costs of testing.

5 6. All disclosure that the unit owner is required to make upon the sale of the
6 unit.

7 (g) An association or an attorney for an association may not employ a person
8 to perform destructive tests to determine any damage or injury to a unit, common
9 element, or limited common element caused by a construction defect unless all of the
10 following are true:

11 1. The person has expertise in the testing.

12 2. The association has obtained the prior written approval of each unit's owner
13 whose unit or interest in the common element or limited common element will be
14 affected by the testing.

15 3. The person performing the tests has provided a written schedule for repairs.

16 4. The person performing the tests is required to repair all damage resulting
17 from the tests in accordance with state laws and applicable local ordinances.

18 5. The association or the person so employed obtains all permits required to
19 conduct the tests and to repair any damage resulting from the tests.

20 6. Reasonable prior notice and opportunity to observe the tests is given to the
21 contractor ^{or supplier} against whom an action may be brought as a result of the tests.

22 (h) An association may commence an action only upon a vote or written
23 agreement of the owners of the units to which at least a majority of the votes of the
24 members of the association are allocated. In such a case, the association shall
25 provide written notice to the owner of each unit of the meeting at which the

1 commencement of an action is to be considered or action is to be taken at least 21
2 calendar days before the meeting.

3 (i) The board of directors of an association may, without giving notice to the
4 units' owners, employ a contractor and other persons necessary to make immediate
5 repairs to a unit or common element within the condominium as are required to
6 protect the health, safety, and welfare of the units' owners.

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(8) CONTRIBUTION AND INDEMNITY. This section does not apply to a contractor's
right to seek contribution, indemnity, or recovery against a supplier or design
professional for a claim made against a contractor or by claimant.

10 **SECTION 3. Effective date.**

11 (1) This act first applies to actions commenced on the effective date of this
12 subsection.

13 (END)

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(~~1000~~)

= Within 30 days after a supplier has
 received notice that a contractor is seeking
 contribution ^{under sub⁹(7)(b)}, the supplier may ~~also~~ serve ~~to~~ the
 claimant and the contractor with a written response
 that offers to settle the contribution claim
 by payment[^], by repair⁵ or by both payment
 and ~~or~~ repair without inspection or that offers
 to inspect the building that is the subject
 of the contribution claim.

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⑧ { 9
 (8) CONTRIBUTION ①
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(a) A person may not seek contribution against
 a person for a claim under ~~this section~~ sub (2)

unless the person seeking contribution serves
 notice of the contribution claim upon the person
 whom contribution is sought within 10 days after

the person seeking contribution receives notice
 of a claim under sub (2) ① The person ^{and unless the requirement of} ^{para (b) is applicable} ^{if applicable} ^{is met} ^{on}
 whom the contribution claim is served has the
 opportunity to repair under sub (3) ①

⑨ (b) A person seeking contribution who ^{elects} elects to
 inspect a building under sub (3) shall send
 written notice by certified mail of the

inspection date and building address,
^{destructive}
 and whether destructive testing is

contemplated, at least 10 days before the inspection ①



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MJL:WLj:

④ Please note that there were a number of instances where the word "supplier" was inadvertently omitted and in some instances where it appeared to be omitted intentionally. If the intent is to subject suppliers to the same requirements as contractors, then the bill should be redrafted to incorporate the definition of supplier in the definition of contractor.

MJL

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2307/P3dn
MJL:wlj:rs

August 10, 2005

Please note that there were a number of instances where the word "supplier" was inadvertently omitted and some instances where it appeared to be omitted intentionally. If the intent is to subject suppliers, to the same requirements as contractors, then the bill should be redrafted to incorporate the definition of supplier in the definition of contractor.

Madelon J. Lief
Senior Legislative Attorney
Phone: (608) 267-7380

Supplier
↓
Contractor
↓
Homeowner

**Wisconsin Window and Door Manufacturers Coalition
Modifications to LRB-2307/P3
Notice and Opportunity to Repair Legislation**

August 15, 2005

(Note: This list of modifications was developed jointly by the WWDMC and the Wisconsin Builders Association after review of LRB-2307/P3. In some cases, explanatory notes about the specific changes are provided in italics.)

Summary

These changes are intended to accomplish the following:

1. Provide that contractors and window and door manufacturers must receive notice of alleged defects and have an opportunity to repair them before:
 - a. Any suit is filed by a building owner against a contractor or a window and door manufacturer.
 - b. Any contribution for damages is sought by a contractor against a window and door manufacturer after a claim has been filed against the contractor.
2. Provide that the notice and opportunity to repair process for window and door suppliers works as follows:
 - a. If a homeowner has a claim regarding a construction defect, the homeowner must notify the contractor. The contractor can then offer to repair the defect.
 - b. If the contractor believes a window and door supplier has part or all of the responsibility for the defect and wants to seek contribution from the supplier, the contractor must notify the supplier and give it an opportunity to repair.
 - c. The supplier must send any offer to repair or provide other remedies to the contractor (not directly to the homeowner).
 - d. The contractor must forward any supplier offer to repair to the homeowner.
 - e. The contractor and the supplier must coordinate responses to the homeowner as much as possible.
3. Provide that window and door suppliers are the only types of suppliers which are covered by the NOR process.
4. Provide that contribution can be sought by contractors from anyone other than window and door suppliers without going through the NOR process.
5. Provide an exception from the NOR process in the case of a threat to human health or safety.

Specific Changes to LRB-2307/P3

Delete "concrete or asphalt" at the following locations:

P. 2, lines 4, 15, 18, 20-21.

Insert "or" between "window" and "door" at the following locations:

P. 2, lines 4, 14, 18, 20.

P. 2, line 22: After "damages," insert the following: "All parties remain bound by any applicable warranty provisions." (*Note: We want to let the consumer know that all warranty provisions still apply.*)

P. 3, line 2: After "contractors," insert "or suppliers."

P. 3, line 18: After "addressee," insert the following: "(h) 'Supplier' has the meaning given in Sec. 101.148(1)(f)."

Delete "or supplier" at the following locations:

P. 3, line 21.

P. 4, lines 17 and 18.

P. 5, lines 3, 6, 8, 10 (twice) and 20.

P. 6, lines 1, 5, 6, 13 and 16.

P. 7, lines 1, 2, 4, 6, 9, 11, 13, 16, 17, 18 and 24.

P. 8, lines 1-2, 4, 6, 7, 14, 23 and 24.

P. 9, lines 1, 2, 4 and 5-6.

P. 4, line 16: After "par. (a)" insert "or within 45 days if the contractor makes a claim for contribution from a supplier." (*Note: The 45 day provision allows a contractor to receive a supplier's offer to repair before the contractor responds to the claimant in cases where contribution from suppliers is sought.*)

P. 4, line 19: After "claim," insert "and on any supplier that has received a claim for contribution under sub. (10)."

P. 4, line 23: Delete "sub. (9)" and insert "sub. (10)."

P. 4, line 23: Delete "the claimant and."

P. 5, line 2: After "claim," insert the following: "The contractor must forward the supplier's response to the claimant. The supplier and the contractor shall use their best efforts to coordinate responses to claims and contribution claims."

P.5, line 18: After "contractor," insert the following: "The contractor shall forward the claimant's response to any supplier on whom a contribution claim has been made." ✓

P. 5, line 20: After "contractor," delete "or" and insert "and any supplier on whom a contribution claim has been made." ✓

P. 6, lines 2 and 7: After "claim," insert "or a contribution claim." ✓

P. 9, line 8: After that line, insert the language to accomplish the general changes to give suppliers the right to receive notices from contractors seeking contribution and have an opportunity to repair referred to in the "General Changes" section below. This language should parallel Sec. 885.07(3)(d) through (o).] x

P. 9, line 16: After "contractor," insert "and a supplier." ✓

P. 10, lines 1 and 10: After "contractor's," insert "or supplier's." ✓

P. 10, line 10: After "contractor," insert "or supplier." ✓

P. 10, lines 12-13: After "any," delete "person subject to, notice under this section" and insert "contractor or supplier." ✓

P. 10, line 13: After "any," insert "contractor or." ✓

P. 10, lines 16, 17 and 19: After "claimant," insert "or contractor."

P. 10, line 17: After "notice," insert "or contribution claim." ✓

P. 10, lines 16 and 18: After "contractor," insert "or supplier." ✓

P. 10, line 18: After "construction," insert "work or provided supplies." ✓

P. 10, lines 22 and 24, and p. 11, line 1: After "claimant," insert "or contractor." ✓

P. 13, line 25: Delete the language after "health" and replace it with "and safety of the units' occupants." ✓

P. 14, lines 1-6: Delete those lines and insert the following: "(9) CONTRIBUTION. This section does not apply to a contractor's or supplier's right to seek contribution, indemnity or recovery against any party other than a supplier as defined in Sec. 101.148(1)(f) for a claim made against a contractor or by claimant." (*Note: We want to make it clear that contribution can be sought from other parties besides window and door suppliers without going through the notice and opportunity to repair process.*)

P. 14, line 7: At the start of that line, insert the following:

~~“(10) CONTRIBUTION FROM SUPPLIERS.~~ (a) Contribution may not be sought by any contractor against any supplier (as defined in Sec. 101.148(1)(f)) for a claim made against a contractor by a claimant unless such supplier is provided with a written notice by the contractor seeking contribution that a claim has been filed by a claimant and a written claim for contribution is made. A contractor seeking contribution from a supplier must serve (as defined in this act) notice of the contribution claim on the supplier from whom contribution is sought within ten days of the contractor’s receipt of the claim. The contribution claim shall describe the claim in sufficient detail to explain the nature of the alleged construction defect and the results of the construction defect. The contractor must supply to the supplier all evidence known or possessed by the contractor and all information submitted to the contractor by the claimant. [Insert additional language similar to the language in Sec. 895.07(3)(a).] The supplier on whom the contribution claim is served shall have an opportunity to repair under the procedures set forth in Sec. [insert number of section and subsections that give suppliers the right to notice and an opportunity to repair]. Failure to obtain service within ten days on the party sought to be bound shall bar contribution against any party not timely served. Any contractor electing to inspect a building must provide written notice (via certified mail) of the date and building address of the inspection (whether or not destructive testing is contemplated) to any supplier from whom contribution will be sought such that notice is received by the supplier sought to be bound at least ten days prior to the date of the building inspection. Failure to provide timely notice of claim and right to inspection shall bar any contribution claim against any supplier not provided timely notice.”

P. 14, line 7: After “contribution,” insert “from a supplier.”

P. 14, line 11: Before Section 3, or at any other suitable place, add the following language: “(11) A homeowner may, without giving notice under this section, make immediate repairs to a building as required to protect the health and safety of its occupants.”

General Changes to LRB-2307/P3

1. Add language giving suppliers the right to receive notices from contractors seeking contribution and have an opportunity to repair after they receive such notices. This could be done by adding language after the language on p. 9, line 8 which would parallel the sections on pages 4-9 which give contractors the opportunity to repair when they receive notices from homeowners.
2. Add language giving homeowners the right to make immediate repairs if necessary to protect health and safety, similar to the language on p. 13, lines 22-25.

General Notes

1. Many of the changes in this list of modifications are designed to provide that after a supplier receives a claim for contribution from a contractor, the supplier would send its offer to repair to the contractor, rather than directly back to the homeowner.
2. This draft will have to be reviewed to make sure that the provisions giving suppliers the right to receive notices from contractors and have an opportunity to repair mesh with the provisions giving contractors the right to receive notices from homeowners and have an opportunity to repair.

For further information, contact:
Richard G. Chandler
(608) 628-0433



State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-2307/P8
MJL&RNK:wj:rsz

4

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Due
9/7

RM run
D-N ✓

Regen

1 AN ACT to create 101.148 and 895.07 of the statutes; relating to: claims against
2 certain building contractors.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 101.148 of the statutes is created to read:
4 **101.148 Contractor notices.** (1) DEFINITIONS. In this section:
5 (a) "Building" means any structure that is an improvement to land and that is
6 intended for use as a dwelling.
7 (b) "Claimant" has the meaning given in s. 895.07 (1) (c).
8 (c) "Contractor" means a person that enters into a contract with a potential
9 claimant to construct a building on the potential claimant's land, to complete a
10 remodeling project on a building on the potential claimant's land, or to complete a

SECTION 1

1 remodeling project on the potential claimant’s modular home. “Contractor” includes
2 a subcontractor.

3 (e) “Remodel” does not include maintenance and repair work.

4 (f) “Supplier” means a person that supplies windows, ^{or} doors, ~~concrete, or asphalt~~
5 to a building.

6 (2) NOTICE REQUIRED AT TIME OF CONTRACTING. (a) Upon entering into a contract
7 to construct a building, to complete a remodeling project on a building, or to complete
8 a remodeling project on a modular home, the contractor shall give the potential
9 claimant, if any, a notice worded substantially as follows:

10 NOTICE CONCERNING CONSTRUCTION

11 DEFECTS

12 Wisconsin law contains important requirements you must follow before you
13 may file a lawsuit for defective construction against the contractor who constructed
14 your building or completed your remodeling project or against window, ^{or} door,
15 ~~concrete, or asphalt~~ suppliers. For example, section 895.07 (2) and (3) of the
16 Wisconsin statutes requires you to deliver to the contractor a written notice of any
17 construction conditions you allege are defective before you file your lawsuit, and you
18 must provide your contractor or window, ^{or} door, ~~concrete, or asphalt~~ suppliers the
19 opportunity to make an offer to repair or pay for the construction defects. You are
20 not obligated to accept any offer made by the contractor or window, ^{or} door, ~~concrete,~~
21 ~~or asphalt~~ suppliers, ^{or} but failure to accept a reasonable offer may limit your
22 recoverable damages. _{Wif} *All parties are bound by applicable warranty provisions.*

23 (b) The notice required under par. (a) shall be conspicuous and in writing and
24 may be included within the contract between the contractor and the potential
25 claimant.

1 SECTION 2. 895.07 of the statutes is created to read:

2 **895.07 Claims against contractors** ^{and suppliers} (1) DEFINITIONS. In this section:

3 (a) "Action" means a civil action or an arbitration under ch. 788.

4 (b) "Building" has the meaning given in s. 101.148 (1) (a).

5 (c) "Claimant" means a homeowner, other than a developer or builder, who

6 asserts a claim against a contractor ^{or supplier} concerning a construction defect.

7 (d) "Construction defect" has the meaning assigned by a written, express
8 warranty provided by the contractor or, if no such meaning is assigned by warranty,
9 means a deficiency in the specifications, planning, supervision, construction, or
10 remodeling of a building or in the remodeling of a modular home that results from
11 any of the following:

12 1. Defective material.

13 2. Violation of applicable building codes.

14 3. Failure to follow accepted trade standards for workmanlike construction.

15 (e) "Contractor" means a person that enters into a contract with a potential
16 claimant to construct a building or to complete a remodeling project on a building.

17 (g) "Serve" or "service" means personal service or delivery by certified mail,
18 return receipt requested, to the last-known address of the addressee.

19 (2) ACTION; DISMISSAL WITHOUT PREJUDICE. Before filing an action against a
20 contractor or supplier for a construction defect, the claimant shall serve the
21 contractor or ~~supplier~~ with a notice of the claim that describes the claim in sufficient
22 detail to determine the general nature of the construction defect. If the claimant files
23 an action but fails to serve the notice of claim, the court shall dismiss the action
24 without prejudice, and the action may not be refiled until the claimant has complied
25 with the requirements of this subsection.

Ins 3-19 (h) ^{Supplier} has the meaning given in s. 101.148 (1) (A)

SECTION 2

(3) NOTICE AND OPPORTUNITY TO REPAIR. (a) No later than 90 days before initiating an action against a contractor or supplier under this section, the claimant shall serve written notice of claim under sub. (2) on the contractor. The notice of claim shall state that the claimant asserts a construction defect claim or claims and is providing notice under this paragraph. The notice of claim shall describe the claim or claims in sufficient detail to explain the nature of the alleged construction defect and the results of the construction defect. The claimant ~~must~~ ^{shall} provide to the contractor all evidence ~~known or possessed by~~ ^{known or possessed} by the claimant, including expert reports, photographs, electronic mail, and videotapes that depict the nature and cause of the construction defect. Evidence that the claimant ~~withholds~~ ^{alleged STE} may not be used later in an action under this section. ^{that the claimant withholds or fails to produce} In addition, the claimant shall provide to the contractor any evidence discoverable under ch. 804 that depicts the nature and cause of the construction defect, including expert reports, photographs, and videotapes. ^{use evidence} If the claimant fails to provide the evidence then the claimant may not introduce any such evidence in an action under this section.

(b) Within 30 days after the claimant serves notice of claim under par. (a), each contractor ~~or supplier~~ that has received the notice of claim may serve on the claimant, and on any other contractor ~~or supplier~~ that has received the notice of claim, a written response to the claim or claims that either offers to settle the claim by monetary payment, the making of repairs, or a combination of both, without inspection, or proposes to inspect the building that is the subject of the claim.

(c) Within 30 days after a supplier has received notice that a contractor is seeking contribution under sub. (9), ^(a) the supplier may serve the claimant and the contractor with a written response that offers to settle the contribution claim by

and on any supplier that has received a claim for contribution under sub. (9)(a)

Or within 45 days if the contractor makes a claim for contribution from a supplier under sub. (9)(a)

SECTION 2

Not The contractor shall forward the supplier's response to the claimant within 3 days of receipt. The supplier and contractor shall use their best efforts to coordinate their responses to claims and contribution claims.

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to inspect the building that is the subject of the contribution claim.

3

(d) If the contractor ~~or supplier~~ wholly rejects the claim and will neither remedy

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the alleged construction defect nor settle the claim, or does not respond to the

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claimant's notice of claim within the time under par. (b), the claimant may bring an

6

action against the contractor ~~or supplier~~ for the claims described in the notice of

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claim without further notice, except as otherwise provided under applicable law.

8

(e) If the claimant rejects a settlement offer made by the contractor ~~or supplier~~,

9

the claimant shall provide written notice of the claimant's rejection to the contractor

10

~~or supplier~~ and, if represented by legal counsel, the contractor's ~~or supplier's~~

11

attorney. The notice shall include the specific factual and, if known, legal reasons

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for the claimant's rejection of the contractor's proposal or offer. If the claimant

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believes that the settlement offer omits reference to any portion of the claim, or was

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unreasonable, the claimant shall in its written notice include those items that the

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claimant believes were omitted and set forth in detail all reasons why the claimant

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believes the settlement offer is unreasonable. In any subsequent action in which the

17

claimant asserts that the settlement offer was unreasonable, the claimant may not

18

raise any reasons that were not included in its response to the contractor.

19

(f) If a proposal for inspection is made under par. (b), the claimant shall, within

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30 days of receiving the contractor's ~~or supplier's~~ proposal, provide the contractor ~~or~~

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~~supplier~~ and its agents, experts, and consultants prompt and complete access to the

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building to inspect the building, document any alleged construction defects, and

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perform any testing required to evaluate fully the nature, extent, and cause of the

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claimed construction defects and the nature and extent of any repairs or

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replacements that may be necessary to remedy them. If destructive testing is

Not The contractor shall forward the claimant's response to a supplier upon whom a contribution claim has been made.

or contribution claim

1 required, the contractor ~~or supplier~~ shall give the claimant and all persons on whom
2 a notice of claim has been served advance notice of the testing at least 10 days before
3 commencement of the testing and shall, after completion of the testing, return the
4 building to its pre-testing condition. If any inspection or testing reveals a condition
5 that requires additional testing to allow the contractor ~~or supplier~~ to evaluate fully
6 the nature, cause, and extent of the construction defect, the contractor ~~or supplier~~
7 shall provide notice to the claimant and all persons on whom a notice of claim has
8 been served of the need for the additional testing and the claimant shall provide
9 access under this paragraph. If a claim is asserted on behalf of the owners of multiple
10 buildings, or multiple owners of units within a multifamily complex, then the
11 contractor shall be entitled to inspect each of the buildings or units. The claimant
12 shall either provide a specific day for the inspection upon reasonable notice for an
13 inspection or require the contractor ~~or supplier~~ to request in writing a day, at least
14 3 days before the inspection.

15 (g) Within 14 days following completion of the inspection and receipt of all
16 testing results under par. (f), the contractor ~~or supplier~~ may serve on the claimant
17 any of the following:

18 1. A written offer to remedy fully or partially the construction defect at no cost
19 to the claimant. The offer shall include a description of any additional construction
20 necessary to remedy the construction defect and an anticipated timetable for the
21 completion of the construction.

22 2. A written offer to settle the claim by monetary payment.

23 3. A written offer including a combination of repairs and monetary payment.

24 4. A written statement that the contractor will not proceed further to remedy
25 the construction defect.

1 (h) If a claimant accepts a contractor's ~~or supplier's~~ offer made under par. (g)
2 and the contractor ~~or supplier~~ does not proceed to make the monetary payment or
3 remedy the construction defect within the agreed timetable, the claimant may bring
4 an action against the contractor ~~or supplier~~ for the claim described in the notice of
5 claim without further notice, except as otherwise provided by applicable law. The
6 claimant may also file the contractor's ~~or supplier's~~ offer and claimant's acceptance,
7 and the offer and acceptance creates a rebuttable presumption that a binding and
8 valid settlement agreement has been created and should be enforced by the court.

9 (i) If a claimant receives a written statement that the contractor ~~or supplier~~ will
10 not proceed further to remedy the construction defect, the claimant may bring an
11 action against the contractor ~~or supplier~~ for the claim described in the notice of claim
12 without further notice, except as otherwise provided by applicable law.

13 (j) If the claimant rejects the offer made by the contractor ~~or supplier~~ to remedy
14 the construction defect or to settle the claim by monetary payment or a combination
15 of each, the claimant shall serve written notice of the claimant's rejection on the
16 contractor ~~or supplier~~. The notice shall include the specific factual and, if known,
17 legal reasons for the claimant's rejection of the contractor's ~~or supplier's~~ offer. If the
18 claimant believes the contractor's ~~or supplier's~~ settlement offer is unreasonable, the
19 claimant shall set forth in detail all reasons why the the claimant believes the
20 settlement offer is unreasonable. In any subsequent action in which the claimant
21 asserts that the settlement offer was unreasonable, the claimant may not raise any
22 new reasons unless the claimant later discovers significant information.

23 (k) Upon receipt of a claimant's rejection and the reasons for the rejection, the
24 contractor ~~or supplier~~ may, within 15 days of receiving the rejection, make a
25 supplemental offer of repair or monetary payment to the claimant.

1 (L) If the claimant rejects the supplemental offer made by the contractor ~~or~~
2 ~~supplier~~ to remedy the construction defect or to settle the claim by monetary
3 payment or a combination of each, the claimant shall serve written notice of the
4 claimant's rejection on the contractor ~~or supplier~~. The notice shall include the
5 specific factual and, if known, legal reasons for the claimant's rejection of the
6 contractor's ~~or supplier's~~ supplemental settlement offer. If the claimant believes the
7 contractor's ~~or supplier's~~ supplemental settlement offer is unreasonable, the
8 claimant shall set forth in detail all reasons why the claimant believes the
9 supplemental settlement offer is unreasonable. In any subsequent action in which
10 the claimant asserts that the settlement offer was unreasonable, the claimant may
11 not raise any reasons that were not included in its response to the contractor.

12 (m) If a claimant rejects a reasonable offer, including any reasonable
13 supplemental offer, made as provided under this subsection or does not permit the
14 contractor ~~or supplier~~ to repair the construction defect pursuant to an accepted offer
15 of settlement, the claimant may not recover an amount in excess of the fair market
16 value of the offer of settlement, or the actual cost of the repairs made, whichever is
17 less, or the amount of a monetary offer of settlement. For purposes of this paragraph,
18 the trier of fact shall determine the reasonableness of an offer of settlement. If the
19 claimant has rejected a reasonable offer, including any reasonable supplemental
20 offer, and any other law allows the claimant to recover costs and attorney fees, then
21 the claimant may recover no costs or attorney fees incurred after the date of its
22 rejection.

23 (n) A claimant accepting the offer of the contractor ~~or supplier~~ to remedy a
24 construction defect shall do so by serving the contractor ~~or supplier~~ with a written
25 notice of acceptance within a reasonable period of time after receipt of the

1 contractor's ~~or supplier's~~ settlement offer, but no later than 30 days after receipt of
2 the offer. If no response is served upon the contractor ~~or supplier~~ within the 30-day
3 period, then the offer shall be deemed accepted.

4 (o) If a claimant accepts a contractor's ~~or supplier's~~ offer to repair a construction
5 defect described in a notice of claim, the claimant shall provide the contractor ~~or~~
6 ~~supplier~~ and its agents, experts, and consultants prompt and unfettered access to the
7 building to perform and complete the construction by the timetable stated in the
8 settlement offer.

9 (p) If, during the pendency of the notice, inspection, offer, acceptance, or repair
10 process, an applicable limitations period would otherwise expire, the claimant may
11 file an action against the contractor or supplier, but the action shall be immediately
12 abated pending completion of the notice of claim process described in this section.
13 This paragraph shall not be construed to revive a statute of limitations period that
14 has expired before the date on which a claimant's written notice of claim is served
15 or extend any applicable statute of repose.

16 (q) After the sending of the initial notice of claim, a claimant, ~~and~~ a contractor ^{and a supplier}
17 may, by written mutual agreement, alter the procedure for the notice of claim process
18 described in this section.

19 (4) CONTRACTOR OR SUPPLIER NOT LIABLE FOR CERTAIN DAMAGES. In an action
20 relating to a building involving a construction defect, a contractor or supplier shall
21 not be liable for damages involving or caused by any of the following:

22 (a) Normal shrinkage due to drying or settlement of construction components
23 within the tolerance of building standards.

SECTION 2

or supplier's

1 (b) The contractor's reliance on written information relating to the building
2 that was obtained from official government records or provided by a government
3 entity.

4 (c) Any construction defect known by or disclosed to a claimant in writing before
5 his or her purchase of the building.

6 (d) Any construction defect in a building that is purchased in "as is" condition.

7 (e) If the claimant is not the first owner of the building, any construction defect
8 known by the claimant or that could have been discovered by the claimant through
9 the exercise of reasonable diligence before the claimant's purchase of the building.

10 (f) Refusal of anyone to allow the contractor *or supplier* or the contractor's agents to
11 perform their warranty service work.

contractor or supplier

12 (5) WARRANTY TERMS. ~~The claimant and any person subject to notice under this~~
13 *are* section *is* bound by any *contractor or* supplier warranty terms pertaining to products or services
14 supplied to the building.

15 (6) ADDITIONAL CONSTRUCTION DEFECTS AND NOTICE AND OPPORTUNITY TO REPAIR.

16 A construction defect that is discovered after a claimant has provided a contractor

17 *with an* initial claim *or contribution claim* notice may not be alleged in an action until the claimant has
18 given the contractor who performed the original construction *has been provided* written notice of the
19 *work or provided supplies*

19 new claim regarding the alleged new construction defect based on the claimant's *or contractor's*
20 most current records. *or contribution claim* The contractor or supplier shall have an opportunity to resolve
21 the notice of the new claim *or contribution claim* in the manner provided in sub. (3).

22 (7) RELEASE; INSURANCE. If a claimant *or contractor* accepts an offer made in compliance with
23 this section and the contractor or supplier fulfills the offer in compliance with this
24 section, the claimant is barred from bringing an action for the claim described in the
25 notice of claim and the contractor or supplier is, for insurance purposes, legally

1 obligated to make the repairs or the monetary payment as if the claimant had ^{or contractor}
2 recovered a judgment against the contractor or supplier in the amount of the cost of
3 the repairs or the amount of the monetary payment.

4 (8) ACTION OF ASSOCIATIONS. (a) In this subsection, “association” means a
5 homeowner’s association, condominium association under s. 703.02 (1m), unit
6 owner’s association, or a nonprofit corporation created to own and operate portions
7 of a planned community that may assess unit owners for the costs incurred in the
8 performance of the association’s obligations.

9 (b) A person may not provide or offer to provide anything of value, directly or
10 indirectly, to a property manager of an association or to a member or officer of an
11 association to induce the property manager, member, or officer to encourage the
12 association to file or discourage the association from filing a claim for damages
13 arising from a construction defect.

14 (c) A property manager retained by an association or a member or officer of an
15 association may not accept anything of value, directly or indirectly, in exchange for
16 encouraging to file or discouraging from filing a claim for damages on behalf of the
17 association arising from a construction defect.

18 (d) A person who knowingly violates par. (b) or (c) is guilty of a misdemeanor.

19 (e) An association may bring an action against a contractor to recover damages
20 resulting from construction defects in any of the common elements or limited
21 common elements of a condominium, as defined in s. 703.02 (2) and (10). Such an
22 action may be maintained only after all of the following occur:

23 1. The association first obtains the written approval of each unit’s owner whose
24 interest in the common elements or limited common elements will be subject of the
25 action.

SECTION 2

1 2. A vote is held of the units' owners to which at least a majority of the votes
2 of the members of the association are allocated.

3 3. The full board of directors of the association and the contractor have met in
4 person and conferred in a good faith attempt to resolve the association's claim, or the
5 contractor has definitively declined or ignored the requests to meet with the board
6 of directors of the association.

7 4. The association has otherwise satisfied all of the pre-action requirements
8 for a claimant to commence an action as set forth in this section.

9 (f) At least 3 business days in advance of any vote to commence an action by
10 an association to recover damages resulting from construction defects in any of the
11 common elements or limited common elements of a condominium, the attorney
12 representing the association shall provide to each unit's owner a written statement
13 that includes, in reasonable detail all of the following:

14 1. The construction defects and damages or injuries to the common elements
15 or limited common elements.

16 2. The cause of the construction defects, if the cause is known.

17 3. The nature and the extent that is known of the damage or injury resulting
18 from the construction defects.

19 4. The location of each construction defect within the common elements or
20 limited common elements, if known.

21 5. A reasonable estimate of the cost of the action, including reasonable attorney
22 fees and costs, expert fees, and the costs of testing.

23 6. All disclosure that the unit owner is required to make upon the sale of the
24 unit.

1 (g) An association or an attorney for an association may not employ a person
2 to perform destructive tests to determine any damage or injury to a unit, common
3 element, or limited common element caused by a construction defect unless all of the
4 following are true:

5 1. The person has expertise in the testing.

6 2. The association has obtained the prior written approval of each unit's owner
7 whose unit or interest in the common element or limited common element will be
8 affected by the testing.

9 3. The person performing the tests has provided a written schedule for repairs.

10 4. The person performing the tests is required to repair all damage resulting
11 from the tests in accordance with state laws and applicable local ordinances.

12 5. The association or the person so employed obtains all permits required to
13 conduct the tests and to repair any damage resulting from the tests.

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

16 (h) An association may commence an action only upon a vote or written
17 agreement of the owners of the units to which at least a majority of the votes of the
18 members of the association are allocated. In such a case, the association shall
19 provide written notice to the owner of each unit of the meeting at which the
20 commencement of an action is to be considered or action is to be taken at least 21
21 calendar days before the meeting.

22 (i) The board of directors of an association may, without giving notice to the
23 units' owners, employ a contractor and other persons necessary to make immediate
24 repairs to a unit or common element within the condominium as are required to
25 protect the health, ^{and safety} ~~safety~~ and welfare of the units' owners.

SECTION 2

INSERT 14-1

1 (9) CONTRIBUTION. (a) A person may not seek contribution against a person for
2 a claim under this section unless the person seeking contribution serves notice of the
3 contribution claim upon the person whom contribution is sought within 10 days after
4 the person seeking contribution receives notice of a claim under sub. (2) and unless
5 the requirement of par. (b), if applicable, is met. The person on whom the
6 contribution claim is served has the opportunity to repair under sub. (3).

7 (b) A person seeking contribution ^{from a supplier} who elects to inspect a building under sub.
8 (3) shall send written notice by certified mail of the inspection date and building
9 address, and whether destructive testing is contemplated, at least 10 days before the
10 inspection.

11 SECTION 3. Effective date.

12 (1) This act first applies to actions commenced on the effective date of this
13 subsection.

14 (END)

INS 14-11

(10) ^{CS} CLAIMANT REPAIRS Without giving notice
under this section, a claimant may ^{make} make
immediate repairs to a building to protect
the health or safety of its occupants.

2005-2006 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB
.....

INS 14-1

(9) CONTRIBUTION. (a) A contractor may not seek contribution from a supplier for a claim that a claimant makes against the contractor unless the contractor provides the supplier with a written notice of the claimant's claim and the contribution claim within 10 days of the contractor's receipt of the claim. In the contribution claim, the contractor shall explain the claim in sufficient detail to explain the nature and results of the alleged construction defect. The contractor shall provide to the supplier all evidence the contractor knows or possessed, including expert reports, photographs, electronic mail, and videotapes that depict the nature and cause of the alleged construction defect. The contractor may not later use evidence in an action under this section that the contractor withholds or fails to produce. In addition, the contractor shall provide to the supplier any evidence discoverable under ch. 804 that depicts the nature and cause of the alleged construction defect, including expert reports, photographs, and videotapes.

Scott:

(9) I have made all of the suggested ^{revisions} ~~revisions~~ of WWDMC except that I did not ~~include~~ include language like that is so ^{885007(3)(d)} to (c) ^{letter "o"} after page 9, ⁹ ~~because~~ because I did not understand how to integrate this language with the language as it existed after the latest round of revisions. The problem with this current draft ⁹ seems to be that WWDMC made ~~early~~ attempts to introduce the idea of contribution claims in subsection (3) ⁵ on page 4, but then ^{treated} ~~treated~~ them separately in ⁹ subsection (9) of this draft. I recommend that ~~the~~ contribution claims be treated in an entirely separate subsection (subsection 9) IF WWDMC can provide the language ~~for~~ for this subsection (perhaps by ^{cutting} ~~cutting~~ and pushing) that would

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

LRB

enable me to get out another draft
that incorporates these changes that material
in relatively short order ☺

MJL ✓



**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2307/P4dn
MJL:wlj:rs

September 7, 2005

Scott:

I have made all of the suggested revisions of WWDMC, except that I did not include language like that is s. 895.07 (3) (d) to (o) after page 9, because I did not understand how to integrate this language with the language as it existed after the latest round of revisions. The problem with this current draft seems to be that WWDMC made attempts to introduce the idea of contribution claims in subsection (3), on page 4, but then treated them separately in subsection (9) of this draft. I recommend that contribution claims be treated in an entirely separate subsection (subsection 9). If WWDMC can provide the language for this subsection (perhaps by "cutting and pasting") that would enable me to get out another draft that incorporates that material in relatively short order.

Madelon J. Lief
Senior Legislative Attorney
Phone: (608) 267-7380



Lief, Madelon

From: Becher, Scott
Sent: Wednesday, September 14, 2005 2:56 PM
To: Lief, Madelon
Subject: FW: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors
Attachments: NOR leg modif LRB-2307P4 09-09-05.doc

Lonnie - I hope that this is helpful..

If you need further assistance, please call me.

Scott Becher
 Rep. Wieckert

From: richard chandler [mailto:rgcwis@charter.net]
Sent: Wednesday, September 14, 2005 2:42 PM
To: Becher, Scott; bboycks@wisbuild.org
Subject: Re: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

Scott --

Thanks for your e-mail. I will try to clarify what we wanted to do with the suggestions I provided in the September 9 list of modifications, which is attached to this e-mail.

- The September 7 drafter's note recommended that contribution claims be treated in subsection (9) and asked for language that would accomplish this, perhaps by "cutting and pasting" language that had already been created.
- The September 9 list of modifications suggested that the next draft create subsections (9) (b) through (m). The general things these added subsections would accomplish were described on pages 1-3 of the September 9 list. These added subsections would parallel subsections (3) (d) through (o). In other words, I responded to the recommendations in the drafter's note by suggesting the "cutting and pasting" of subsections (3) (d) through (o) to create subsections (9) (b) through (m). The specific language of these added subsections would be very similar to the language of subsections (3) (d) through (o), with appropriate modifications to reflect the contractor-supplier interaction. One important point here: The language should provide that the time frames in the added subsections would be the same as the time frames in subsections (3) (d) through (o) (for example, if a proposal for inspection is made by a supplier, access to the building would have to be provided within 30 days; an acceptance of a supplier's offer would have to be made within a reasonable period of time, and if there's no response to an offer within 30 days, then the offer would be deemed accepted).
- In addition to these changes to add subsections (9) (b) through (m) to create the opportunity to repair process for suppliers, I listed some other specific changes on page 3 of the September 9 list.
- In addition, I listed several questions to be considered on pages 3-4 of the September 9 list. After consulting with the interested parties, I sent you a September 12 e-mail listing the answers to these questions.

I hope this clarifies things. I would certainly be glad to meet in person with you and the drafter to provide further clarification. That might be the best and quickest way to directly answer questions and describe what our goals are. I could also participate in a conference call with you and the drafter. Let me know what would be most helpful.

Thanks,
 Rick Chandler

09/14/2005

(608) 628-0433

----- Original Message -----

From: Becher, Scott
To: bboycks@wisbuild.org ; rgcwis@charter.net
Sent: Wednesday, September 14, 2005 12:49 PM
Subject: FW: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

Brad/Rick- What do you have to say to this response from the drafter.

Scott

From: Lief, Madelon
Sent: Wednesday, September 14, 2005 12:47 PM
To: Becher, Scott
Subject: RE: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

Scott- I left out a significant piece because I didn't know what they wanted (see drafter's note) and they don't seem to have responded to this point. I want to wait until I have all their proposed changes before doing another draft. Would you please ask them how they want to rewrite subsection 9 to include all the provisions related to contribution claims? The response that you sent me suggests that they are still "in process."

From: Becher, Scott
Sent: Tuesday, September 13, 2005 4:09 PM
To: Lief, Madelon
Subject: FW: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

Lonnie-

Could you make these changes to the draft as specified in the attached memo.

Scott Becher
Rep. Wieckert

From: richard chandler [<mailto:rgcwis@charter.net>]
Sent: Monday, September 12, 2005 2:39 PM
To: Becher, Scott
Cc: bboycks@wisbuild.org
Subject: Re: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

Scott --

I had raised several questions on pages 3 and 4 of the list of suggested modifications I sent you last Friday, which is attached.

After consulting with the Builders Association and representatives of the Window and Door Manufacturers Coalition, we'd like to make several recommendations on those points:

- ✓ P. 4, line 3: 90 days should be changed to 135 days.
- ✓ P. 14, line 8: This can stay as is.

09/14/2005

N P. 14, line 9: There should be language inserted after "supplier" saying that this means supplier "as defined in sec. 101.148 (1)(f)."

Not needed - p3, L.19

✓ P. 15, line 1: "Claimant" should be changed to "homeowner."

Not see p. 3, L.5. Want to include sure builder or developer?

Let me know if you have any questions or if you need further information.

Thanks,
Rick
(608) 628-0433

----- Original Message -----

From: richard chandler
To: Becher, Scott
Cc: bboycks@wisbuild.org
Sent: Friday, September 09, 2005 4:24 PM
Subject: Re: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

Scott --

Thanks for sending the latest draft of the NOR legislation. I have reviewed it and I have attached a document with a list of suggested modifications on behalf of the Wisconsin Window and Door Manufacturers Coalition.

In response to the drafter's note, I have suggested some general changes to specify how the notice and opportunity to repair process for window and door suppliers would work. As recommended in the drafter's note, those provisions could be added to subsection 9 of the draft.

I have also suggested a few specific changes to the draft and I have listed a few questions for consideration. Among the questions for consideration is whether there should be a period longer than 90 days for the notice and opportunity to repair process to be completed before actions can be initiated by claimants, in light of the time it would take to have offers made and considered and responded to under the provisions of the bill.

Please give me a call if you have any questions or if you would like further information.

Thanks,
Rick Chandler
(608) 628-0433

----- Original Message -----

From: Becher, Scott
To: Becher, Scott ; bboycks@wisbuild.org ; rgcwis@charter.net
Sent: Wednesday, September 07, 2005 3:53 PM
Subject: FW: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

From: Northrop, Lori
Sent: Wednesday, September 07, 2005 3:16 PM
To: Rep.Wieckert
Subject: Draft review: LRB 05-2307/P4 Topic: Claims against building contractors

Following is the PDF version of draft LRB 05-2307/P4 and drafter's note.

**Wisconsin Window and Door Manufacturers Coalition
Modifications to LRB-2307/P4
Notice and Opportunity to Repair Legislation**

September 9, 2005

Summary

These changes are primarily intended to specify how the notice and opportunity to repair process for window and door suppliers would work. As recommended in the drafter's note for LRB-2307/P3, the process could be spelled out in subsection 9. An outline of the language to accomplish this is provided in the "General Changes" section below.

The overall process is intended to work as follows:

- plumbers?
electricians?
lumber suppliers?
siding suppliers?*
1. If a homeowner has a claim regarding a construction defect, the homeowner must notify the contractor. The contractor can then offer to repair the defect.
 2. If the contractor believes a window and door supplier has part or all of the responsibility for the defect and wants to seek contribution from the supplier, the contractor must notify the supplier and give it an opportunity to repair.
 3. The supplier must send any offer to repair or provide other remedies to the contractor (not directly to the homeowner).
 4. The contractor must forward any supplier offer to repair to the homeowner for the homeowner's review.
 5. The contractor and the supplier must coordinate responses to the homeowner as much as possible.

General Changes to LRB-2307/P4

1. Add language giving suppliers the right to receive notices from contractors seeking contribution and have an opportunity to repair after they receive such notices. As recommended in the drafter's note, this could be done by adding language to subsection (9) on page 14 which would basically parallel the provisions in subsections (3) (d) through (o) on pages 5-9 (the provisions which establish the process giving contractors the opportunity to repair when they receive claims from homeowners).
2. The added language would create subsections (9) (b) through (m) and would provide the following:
 - (a) [Provision in existing draft] A contractor may not seek contribution from a supplier for a claim by a homeowner unless the contractor notifies the supplier in

writing and makes a contribution claim within 10 days of receiving the initial claim.

- (b) If a supplier wholly rejects a contractor's contribution claim, the contractor may bring an action against the supplier for contribution.
- (c) If a contractor rejects a settlement offer made by a supplier, after review by the contractor and the claimant (to whom the contractor will have forwarded the settlement offer), the contractor shall provide written notice of the rejection to the supplier.
- (d) If a proposal for inspection is made by the supplier, the contractor and the claimant shall provide access to the building.
- (e) Within 14 days of inspection, the supplier may serve on the contractor the following:
 - Offer to remedy the defect.
 - Offer to settle the contribution claim by making a monetary payment.
 - Offer to make a combination of repairs and a monetary payment.
 - Statement that the supplier will offer no remedy.
- (f) If a contractor accepts a supplier's offer, and the supplier does not fulfill the terms of the offer, the contractor may bring an action against the supplier for contribution.
- (g) If a contractor receives a statement that the supplier will not offer a remedy, the contractor may bring an action against the supplier for contribution.
- (h) If a contractor rejects a supplier's offer, after review by the contractor and the claimant, the contractor shall notify the supplier in writing.
- (i) Upon receipt of the contractor's rejection of an offer, the supplier may make a supplemental offer within 15 days.
- (j) If a contractor rejects a supplier's supplemental offer, after review by the contractor and the claimant, the contractor shall provide written notice of the rejection to the supplier.
- (k) If a contractor rejects a reasonable offer, after review by the contractor and the claimant, neither the contractor nor the claimant may recover more than the fair market value of the settlement offer.
- (l) A contractor accepting an offer from a supplier shall do so by providing the supplier with written notice of acceptance.

- (m) If a contractor accepts a supplier's offer to repair, the contractor and the claimant shall provide access to the building to the supplier.

Specific Changes to LRB-2307/P4

P. 5, lines 5-6: Revise the full sentence on those lines to read as follows: "If a contribution claim is made, the contractor shall forward all responses from the supplier relating to the contribution claim to the claimant." *(Note: We want to make sure that the claimant sees all responses from the supplier, including the initial response and all subsequent responses.)*

P. 5, line 23: Change "foreword" to "forward."

P. 9, line 23: After "claim," insert "and initial contribution claim."

P. 9, line 24: After "agreement," insert "of all parties involved." *(Note: We want to make sure that all parties involved need to agree before the provisions in the statutes are altered.)*

P. 11, line 3: After "sub. (3)," insert "and sub. (9)."

P. 14, line 20: After "videotapes," insert the following: "The evidence provided to the supplier shall include all evidence provided to the contractor by the claimant."

P. 14, line 21: After that line, insert the language giving suppliers the right to receive notices from contractors seeking contribution and have an opportunity to repair referred to in the "General Changes" section above. This language would parallel Sec. 885.07(3) (d) through (o) and would be subsections (b) through (m).

P. 14, line 22: Change "(b)" to "(n)."

P. 14, line 25: After that line, insert the following: "(o) This section does not apply to a contractor's or supplier's right to seek contribution, indemnity or recovery against any party other than a supplier as defined in Sec. 101.148(1)(f) for a claim made against a contractor or a supplier." *(Note: We want to make it clear that contribution can be sought from other parties besides window and door suppliers without going through the notice and opportunity to repair process.)*

Questions for Consideration

P. 4, line 3: Should the 90 day period before an action can be initiated be changed to a longer period (perhaps 135 days)? Now, the timeline is as follows:

- After a claim is made, the contractor has 30 days to respond (45 days if a claim for contribution is made).

- The contractor may propose to inspect the building. That can take up to 30 days.
- Within 14 days of the inspection, the contractor may make an offer to the claimant.
- If the claimant rejects the offer, the contractor has 15 days to make a supplemental offer.
- If there's no response to an offer from the claimant, the offer is deemed accepted within 30 days.

Adding all these together, the process could take as long as 134 days. If we don't provide for a period of more than 90 days before an action can be initiated, an action could be initiated before the notice and opportunity to repair process has run its course.

P. 14, line 8: Should "owners" be changed to "occupants"? It seems that the key concern in a situation involving health or safety considerations is a threat to the health or safety of the occupants, who may be different from the owners.

P. 14, line 9: Should language be inserted after "supplier" saying that this means supplier "as defined in sec. 101.148(1)(f)"? Is it sufficiently clear that the provisions setting up a notice and opportunity to repair process for contribution claims apply only to window and door suppliers?

P. 15, line 1: Should "claimant" be changed to "homeowner"? A homeowner could be facing an imminent health or safety problem, and they may not be a claimant yet because they have not yet asserted a claim against a contractor or supplier.

General Notes

1. The language will have to be drafted to make sure that the provisions giving suppliers the right to receive notices from contractors and have an opportunity to repair mesh with the provisions giving contractors the right to receive notices from homeowners and have an opportunity to repair.

For further information, contact:
 Richard G. Chandler
 (608) 628-0433