



State of Tennessee

PUBLIC CHAPTER NO. 749

SENATE BILL NO. 2681

By Rose, Johnson

Substituted for: House Bill No. 2706

By Gant, Todd

AN ACT to amend Tennessee Code Annotated, Title 28 and Title 66, relative to construction.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 66-11-124(b), is amended by deleting subdivision (2) and substituting the following:

(2)(A) If a prime contractor or remote contractor solicits any person to sign a contract requiring the person to waive a right of lien in violation of this section, then the person shall notify the state board for licensing contractors of that fact. Upon receiving the information, the executive director of the board shall notify the prime contractor or remote contractor within a reasonable time after receiving the information that the contract is against the public policy of this state and in violation of this section. If the prime contractor or remote contractor voluntarily deletes the waiver of lien provision from the contract and affirmatively states that the language will not be included in any future contracts to perform construction work in this state, then no further action shall be taken by the board against the prime contractor or remote contractor unless a later complaint is filed against the prime contractor or remote contractor for a violation of this section.

(B) If the prime contractor or remote contractor does not delete the waiver of lien provision from the contract, then the executive director shall schedule a hearing for appropriate action by the board. If the board finds after a hearing that the contracts of the prime contractor or remote contractor are in violation of this section, then the board shall immediately revoke the prime contractor's or remote contractor's license.

(C) The board shall send notice of the revocation to the prime contractor's or remote contractor's licensing authority in all states in which the prime contractor or remote contractor is licensed as a contractor.

(D) In any action for damages based on the waiver of a right of lien filed by a person solicited by the prime contractor or remote contractor, the person has the right to recover from the prime contractor or remote contractor reasonable attorney's fees and costs in connection with the enforcement of the lien.

SECTION 2. Tennessee Code Annotated, Section 66-11-126, is amended by deleting the language "an action" wherever it appears and substituting instead "a complaint, petition, or civil warrant"; and by deleting the language "any action" wherever it appears and substituting instead the language "any complaint, petition, or civil warrant".

SECTION 3. Tennessee Code Annotated, Section 66-11-130, is amended by deleting the section and substituting the following:

Upon written demand of the owner, the owner's agent, or prime contractor, served on the lienor, requiring the lienor to file a complaint, petition, or civil warrant to enforce the lienor's lien, and describing the real property in the demand, the proceeding must be commenced, or the claim filed in a creditors' or foreclosure proceeding, within sixty (60) days after service, or the lien is forfeited.

SECTION 4. Tennessee Code Annotated, Section 66-11-131, is amended by deleting the language "an action" and substituting instead the language "a complaint, petition, or civil warrant".

SECTION 5. Tennessee Code Annotated, Section 66-11-132, is amended by deleting the section and substituting the following:

If separate complaints, petitions, or civil warrants to enforce liens provided by this chapter are brought in the same court, then they must be consolidated; and if in different courts, the proceedings may, upon application, be removed into the court, if a court of record, in which the first complaint, petition, or civil warrant was filed, and there consolidated, unless the later proceeding is one for the benefit of all lienors, in the nature of a lien-creditors' bill, in which event earlier proceedings not of that nature must be consolidated into the lien-creditors' bill, on petition.

SECTION 6. Tennessee Code Annotated, Section 66-11-133, is amended by deleting the language "consolidated action" and substituting instead the language "consolidated proceeding".

SECTION 7. Tennessee Code Annotated, Section 66-11-134, is amended by deleting the language "enforced by an action" and substituting instead the language "enforced by a civil warrant".

SECTION 8. Tennessee Code Annotated, Section 66-11-135, is amended by deleting the language "an action" and substituting instead the language "a proceeding".

SECTION 9. Tennessee Code Annotated, Section 66-11-136, is amended by deleting the language "by action on the bond" and substituting instead the language "by filing a complaint, petition, or civil warrant against the bond".

SECTION 10. Tennessee Code Annotated, Section 66-11-139, is amended by deleting the language "in any action to enforce" and substituting instead the language "in any proceeding to enforce".

SECTION 11. Tennessee Code Annotated, Section 66-11-142, is amended by deleting the language "parties to any action" and substituting instead the language "parties to any proceeding in which the person files a complaint, petition, or civil warrant"; by deleting the language "the contractor or owner shall notify" and substituting instead the language "the prime contractor, remote contractor, or owner shall notify"; and deleting the language "The original contractor as principal" and substituting instead the language "The original prime contractor or remote contractor as principal".

SECTION 12. Tennessee Code Annotated, Section 66-11-203, is amended by deleting the section and substituting the following:

Any contractor who is about to enter into a contract, either written or oral, for improving residential real property, as that term is defined by § 66-11-146, with the owner or owners thereof shall, prior to commencing the improvement of the residential real property or making of the contract, deliver, by registered mail or otherwise, to the owner or owners of the residential real property to be improved written notice in substantially the following form:

Delivered this day of , 20 , by ,
Contractor.

The above-captioned contractor hereby gives notice to the owner of the property to be improved, that the contractor is about to begin improving the property according to the terms and conditions of the contract and that under the provisions of the state law (§§ 66-11-101 — 66-11-141) there shall be a lien upon the real property and building for the improvements made in favor of the above-mentioned contractor who does the work or furnishes the materials for such improvements for a duration of one (1) year after the work is finished or materials furnished.

Contractor

SECTION 13. Tennessee Code Annotated, Section 66-11-204, is amended by deleting the language "An owner may reject" and substituting instead the language "An owner of residential real property may reject".

SECTION 14. Tennessee Code Annotated, Section 66-11-205, is amended by deleting the section and substituting the following:

Upon completion of the contract or improvement and upon receipt of the contract price, the prime contractor shall deliver by registered mail or otherwise to the owner or owners of the real property a sworn affidavit and receipt substantially in the following form:

State of Tennessee

County of

On this _____ day of _____, 20____, before me personally appeared _____ (if a corporation use "____ President (or other officer) of (Corporate Name) a corporation"), prime contractor, to me personally known, who being duly sworn by oath, did say that all of the persons, firms, and corporations, including the prime contractor and all remote contractors and laborers, who have furnished services, labor, or materials according to the plans or specifications, or extra items used in the construction or repair of buildings and improvements on the real estate hereinafter described, have been paid in full or will be paid in full no later than ten (10) days from the date a bill is rendered for such services, labor, or materials and that such work has been fully completed and accepted by the owner, and further that such owner has paid the contract price in full, the receipt of which is hereby acknowledged. Affiant further says that no claims have been made to affiant by, nor is any suit pending on behalf of the prime contractor or any remote contractors or laborers, and further that no chattel mortgages or conditional bills of sale have been given or are now outstanding as to any materials, appliances, fixtures, or furnishings placed upon or installed in the aforementioned premises. Affiant as a party does for a valuable consideration hereby agree and guarantee to hold the owner of the real estate, the owner's successors, heirs and assigns, harmless against any lien, claim, or suit by any remote contractor or laborer and against chattel mortgages or conditional bills of sale in conjunction with the construction of such buildings or improvements on such real estate.

The real estate and improvements referred to herein are situated in the County of _____, State of Tennessee, and are described as follows: (give street address)

Prime Contractor

Sworn to and subscribed before me

on the date above first written.

Notary Public

My Commission Expires:

SECTION 15. Tennessee Code Annotated, Section 66-11-206, is amended by deleting from subsection (c) the language "or the contractor's agent" and substituting instead the language "or the owner's agent".

SECTION 16. Tennessee Code Annotated, Section 66-34-103, is amended by deleting subsections (b)-(e) and substituting the following:

(b) The owner, whether public or private, shall release and pay all retainages for work completed pursuant to the terms of any contract to the prime contractor within ninety (90) days after completion of the work or within ninety (90) days after substantial completion of the project for work completed, whichever occurs first. As used in this subsection (b), "work completed" means the completion of the scope of the work and all terms and conditions covered by the contract under which the retainage is being held. The prime contractor shall pay all retainages due any remote contractor within ten (10) days after receipt of the retainages from the owner. Any remote contractor receiving the retainage from the prime contractor shall pay to any lower-tier remote contractor all retainages due the lower-tier remote contractor within ten (10) days after receipt of the retainages.

(c) Any default in the making of the payments is subject to those remedies provided in this part.

(d) If an owner or prime contractor withholds retainage that is for the use and benefit of the prime contractor or its remote contractors pursuant to § 66-34-104(a) and (b), then neither the prime contractor nor any of its remote contractors are required to deposit additional retained funds into an escrow account in accordance with § 66-34-104(a) and (b).

(e)(1) It is an offense for a person, firm, or corporation to fail to comply with subsection (a) or (b) or § 66-34-104(a).

(2)(A) A violation of this subsection (e) is a Class A misdemeanor, subject to a fine only of three thousand dollars (\$3,000).

(B) Each day a person, firm, or corporation fails to comply with subsection (a) or (b) or § 66-34-104(a) is a separate violation of this subsection (e).

(C) Until the violation of this subsection (e) is remediated by compliance, the punishment for each violation is consecutive to all other violations.

(3) In addition to the fine imposed pursuant to subdivisions (e)(2)(A) and (B), the court shall order restitution be made to the owner of the retained funds. In determining the appropriate amount of restitution, the formula stated in § 40-35-304 must be used.

(4) This subsection (e) does not apply to the state, any department, board, or agency thereof, including the University of Tennessee, all counties and municipalities, and all departments, boards, or agencies thereof, including all school and education boards, and any other subdivision of the state.

SECTION 17. Tennessee Code Annotated, Section 66-34-104, is amended by deleting the section and substituting the following:

(a) Whenever, in any contract for the improvement of real property, a certain amount or percentage of the contract price is retained, that retained amount must be deposited in a separate, interest-bearing, escrow account with a third party which must be established upon the withholding of any retainage.

(b) As of the time of the withholding of the retained funds, the funds become the sole and separate property of the prime contractor or remote contractor to whom they are owed, subject to the rights of the person withholding the retainage in the event the prime contractor or remote contractor otherwise entitled to the funds defaults on or does not complete its contract.

(c) If the party withholding the retained funds fails to deposit the funds into an escrow account as provided in this section, then the party shall pay the owner of the retained funds an additional three hundred dollars (\$300) per day as damages, not as a penalty, for each and every day that the retained funds are not deposited into an escrow account. Damages accrue from the date retained funds were first withheld and continue to accrue until placed into a separate, interest-bearing escrow account or otherwise paid.

(d) The party with the responsibility for depositing the retained amount in a separate, interest-bearing escrow account with a third party has the affirmative duty to provide written notice that the party has complied with this section to any prime contractor upon withholding the amount of retained funds from each and every application for payment, including:

(1) Identification of the name of the financial institution with which the escrow account has been established;

(2) Account number; and

(3) Amount of retained funds that are deposited in the escrow account with the third party.

(e) Upon satisfactory completion of the contract, to be evidenced by a written release by the owner, prime contractor, or remote contractor owing the retainage, all funds accumulated in the escrow account together with all interest on the account must be paid immediately to the prime contractor or remote contractor to whom the funds and interest are owed.

(f) If the owner, prime contractor, or remote contractor, as applicable, fails or refuses to execute the release provided for in subsection (e), then the prime contractor or remote contractor, as applicable, may seek equitable relief, including injunctive relief, as provided in § 66-34-602, against the owner, prime contractor, or remote contractor. Relief may not be sought against the person holding the retainage as an escrow agent, and that person bears no liability for the nonpayment of the retainage; however, a court may issue an order to the person holding retainage to pay any sums held in trust pursuant to § 66-34-205. The person paying the sums pursuant to a court order bears no liability to the owner, prime contractor, or remote contractor for the payment. All other claims, demands, disputes, controversies, and

differences that may arise between the owner, prime contractor, or prime contractors, and remote contractors may be, upon written agreement of all parties concerned, settled by arbitration conducted pursuant to the Uniform Arbitration Act, compiled in title 29, chapter 5, part 3, or the Federal Arbitration Act (9 U.S.C. § 1, et seq.), as may be applicable.

(g) Subsections (c), (d), and (j) do not apply to the state and any department, board, or agency thereof, including the University of Tennessee; counties and municipalities, and all departments, boards, or agencies thereof, including all school and education boards; and any other subdivision of the state.

(h) This section applies to all prime contracts and all subcontracts thereunder for the improvement of real property when the contract amount of the prime contract is five hundred thousand dollars (\$500,000) or greater, notwithstanding the amount of the subcontracts.

(i) Compliance with this section is mandatory, and shall not be waived by contract.

(j) Failure to deposit the retained funds into an escrow account as provided in this section, within seven (7) days of receipt of written notice regarding the failure, is a Class A misdemeanor.

SECTION 18. Tennessee Code Annotated, Section 66-34-201, is amended by deleting the section and substituting the following:

Performance by a prime contractor in accordance with a written contract with an owner for improvement of real property entitles the prime contractor to payment from the owner.

SECTION 19. Tennessee Code Annotated, Section 66-34-202, is amended by deleting the section and substituting the following:

(a) If a prime contractor has performed in accordance with the prime contractor's written contract with the owner, then the owner shall pay to the prime contractor the full amount earned by the prime contractor, less only those amounts withheld in accordance with § 66-34-203. The payment must be made in accordance with the schedule for payments established within the contract and within thirty (30) days after application for payment is timely submitted by the prime contractor to the owner, in accordance with the schedule.

(b) Failure of an architect, engineer, or other agent employed by the owner to review and approve an application for payment for work which has been performed in accordance with the contract does not excuse the owner from making payment in accordance with this chapter. This section does not require payment for work not performed if an architect, engineer, or other agent has certified that a contractor has not completed performance for a portion of work covered by the application for payment.

SECTION 20. Tennessee Code Annotated, Section 66-34-203, is amended by deleting the section and substituting the following:

This chapter does not prevent the owner from reasonably withholding payment or a portion of a payment to the prime contractor, as long as the withholding is in accordance with the written contract between the owner and the prime contractor. The owner may also withhold a reasonable amount of retainage as specified in the written contract between the owner and the prime contractor, as long as the retainage amount does not exceed five percent (5%) of the amount of the contract.

SECTION 21. Tennessee Code Annotated, Section 66-34-204, is amended by deleting the language "from an architect charged with" and substituting instead the language "from an architect or engineer charged with"; and by deleting the language "the contractor" wherever it appears and substituting instead the language "the prime contractor"; and by deleting the language "provided, however, that".

SECTION 22. Tennessee Code Annotated, Section 66-34-205, is amended by deleting the section and substituting the following:

(a) Any sums allocated by the owner or provided or committed to the owner by a third party that are intended to be used as payment for improvements made to real property by virtue of a written contract between the owner and the prime contractor must be held by the owner or third party in trust for the benefit and use of the prime contractor and its remote contractors, and are subject to all legal and equitable remedies.

(b) The presence of an otherwise valid agreement to arbitrate does not prevent a prime contractor or remote contractor from seeking equitable relief, including injunctive relief, as permitted by § 66-34-602 against any owner, prime contractor, or remote contractor.

(c) The bankruptcy or insolvency of any party is not a valid defense for the failure of an owner or other third party that controls or holds those sums described in subsection (a), as well as all retainage, to release those sums when they are otherwise due.

(d) This section does not apply to the state, including its departments, boards, or commissions, or to any institution of higher education.

SECTION 23. Tennessee Code Annotated, Section 66-34-301, is amended by deleting the section and substituting the following:

Performance by a remote contractor in accordance with a written contract with a prime contractor for improvement of real property entitles the remote contractor to payment from the prime contractor.

SECTION 24. Tennessee Code Annotated, Section 66-34-302, is amended by deleting the section and substituting the following:

(a) If a remote contractor has performed in accordance with the remote contractor's written contract with the prime contractor, then the prime contractor shall pay to the remote contractor the full amount earned by the remote contractor, subject only to any condition precedent for payment clause in the contract, and less only those amounts withheld in accordance with § 66-34-303. The payment must be made in accordance with the schedule for payments established within the contract and within thirty (30) days after application for payment is timely submitted by the remote contractor to the prime contractor, in accordance with the schedule.

(b) The prime contractor shall also pay the remote contractor its pro rata share of any interest provided for in § 66-34-601 that has been received by the prime contractor.

SECTION 25. Tennessee Code Annotated, Section 66-34-303, is amended by deleting the section and substituting the following:

This chapter does not prevent the prime contractor from reasonably withholding payment or a portion of payment to the remote contractor, as long as the withheld payment is in accordance with the written contract between the prime contractor and the remote contractor. The prime contractor may also withhold a reasonable amount of retainage as specified in the written contract between the prime contractor and remote contractor; except, that the retainage amount must not exceed five percent (5%) of the amount of the contract.

SECTION 26. Tennessee Code Annotated, Section 66-34-304, is amended by deleting the section and substituting the following:

Any sums received by the prime contractor as payment for work, services, equipment, and materials supplied by the remote contractor for improvements to real property must be held by the prime contractor in trust for the benefit and use of the remote contractor, and are subject to all legal and equitable remedies.

SECTION 27. Tennessee Code Annotated, Section 66-34-401, is amended by deleting the section and substituting the following:

A remote contractor contracting in writing with another remote contractor for the improvement of real property shall make payment to the other remote contractor in accordance with part 3 of this chapter.

SECTION 28. Tennessee Code Annotated, Section 66-34-501, is amended by deleting the section and substituting the following:

An architect or engineer furnishing design or contract administration services to an owner, prime contractor, or remote contractor for the improvement of real property is entitled to payment in accordance with part 2 of this chapter, if the architect or engineer contracts in writing with the owner; or in accordance with part 3 of this chapter, if the architect or engineer contracts in writing with a prime contractor or remote contractor.

SECTION 29. Tennessee Code Annotated, Section 66-34-601, is amended by deleting the section and substituting the following:

Any payment not made in accordance with this chapter accrues interest, from the date due until the date paid, at the rate of interest for delinquent payments provided in written contract or, if no interest rate is specified in a written contract, then one and one-half percent (1.5%) per month.

SECTION 30. Tennessee Code Annotated, Section 66-34-602, is amended by deleting the section and substituting the following:

(a)(1) A prime contractor who has not received payment from an owner, or a remote contractor who has not received payment from a prime contractor or other remote contractor, in accordance with this chapter, or any prime contractor or remote contractor that intends to seek to recover funds as permitted by § 66-34-205 and this section, shall notify the party failing to make payment of the notifying party's intent to seek relief against that party as provided in this chapter.

(2) The notification must be made by registered or certified mail, return receipt requested, or by another commercial delivery service that provides written confirmation of delivery.

(3) If the notified party does not, within ten (10) calendar days after receipt of the notice, make payment or provide to the notifying party a response giving adequate legal reasons for failure of the notified party to make payment, then the notifying party may, in addition to all other remedies available at law or in equity, sue for equitable relief, including injunctive relief, for continuing violations of this chapter in the chancery court of the county in which the real property is located.

(4) The failure to make the only payment due under the contract may be considered a continuing violation under this chapter.

(5) The notification required by this part may be sent separately or as part of any notice of nonpayment or other notice required under the contract and may be in substantially the following form:

This letter shall serve as notice pursuant to the Tennessee Prompt Pay Act, Tenn. Code Ann. §§ 66-34-101, et seq., of [prime contractor or remote contractor]'s intent to seek relief under the Prompt Pay Act. [Prime contractor or remote contractor] furnished [description of labor, materials, or services furnished] in furtherance of improvements to real property located at [property description] pursuant to its written contract with [lender, owner, prime contractor, or remote contractor]. [Prime contractor or remote contractor] first furnished labor, materials, or services on [insert first date] and ["is still continuing to perform" or "last furnished labor, materials, or services on (insert date)"]. If [owner, prime contractor, and/or remote contractor] fail(s) to make payment, arrange for payment, or provide a response setting forth adequate legal reasons for the failure to make payment to [prime contractor or remote contractor] within ten (10) days of your receipt of this letter, then [prime contractor or remote contractor] may, in addition to all other remedies at law or in equity, file a lawsuit for equitable relief, including injunctive relief, for continuing violations of this chapter.

(b)(1) If an owner does not make payment to a prime contractor or furnish a response setting forth adequate legal reasons for the owner's failure to make payment within ten (10) days of receipt of the notice required by subsection (a), then the prime contractor may stop work until payment is received or until the owner provides a response setting forth adequate legal reasons for the owner's failure to make payment, as long as the prime contractor is not otherwise in default of the written contract. If, in accordance with subsection (a), the owner makes payment or provides a response setting forth adequate legal reasons for the failure to pay the prime contractor, then the prime contractor shall not stop work pursuant to this section.

(2) If a prime contractor does not make payment to a remote contractor or furnish a response setting forth adequate legal reasons for the prime contractor's failure to make payment within ten (10) days of receipt of the notice required by subsection (a), then the remote contractor may stop work until payment is received or until the prime contractor provides a response setting forth adequate legal reasons for the prime contractor's failure to make payment, as long as the remote contractor is not otherwise in default of the written contract. If, in accordance with subsection (a), the prime contractor makes payment or provides a response setting forth adequate

legal reasons for the failure to pay the remote contractor, then the remote contractor shall not stop work pursuant to this section.

(c) Any work stoppage by a prime contractor or a remote contractor in accordance with this section entitles the prime contractor or remote contractor to an extension of the contract schedule, if any, equal to the length of the work stoppage.

(d) Reasonable attorney's fees may be awarded against the nonprevailing party if the nonprevailing party acted in bad faith.

(e) A bond in the amount claimed or ordered to be paid must be filed with good sureties to be approved by the clerk prior to the issuance of any injunctive relief.

SECTION 31. Tennessee Code Annotated, Title 66, Chapter 34, Part 6, is amended by adding the following section:

(a) In addition to any rights provided for under any contract:

(1) Prior to visible commencement of operations, and upon written request by a prime contractor, the owner shall furnish a prime contractor reasonable evidence the owner has procured a loan, which may be secured by a mortgage or other encumbrance, or has otherwise made financial arrangements sufficient to make all payments in accordance with the contract;

(2) After visible commencement of operations, a prime contractor or a remote contractor may, upon the owner's failure to make payments as required by the written contract, provide notice in accordance with § 66-34-602(a). Included within the notice, a prime contractor or remote contractor may request that the owner provide reasonable evidence that the owner has made financial arrangements sufficient to fulfill its obligation to make all payments in accordance with the written contract;

(3) An owner shall provide a response to a demand for reasonable assurances within ten (10) days of receipt of the request that:

(A) Provides reasonable evidence that the owner has made financial arrangements sufficient to fulfill the owner's obligation to make all payments in accordance with the written contract, including the information set forth in § 66-34-104(d); or

(B) Provides adequate legal reasons for the owner's failure to make payment of the sums owing to the requesting party;

(4) If an owner responds to a demand for adequate assurance with reasonable evidence that the owner has made financial arrangements sufficient to fulfill the owner's obligation to make all payments in accordance with the written contract, then the owner shall not materially vary the owner's financial arrangements from those disclosed under this section without prior notice to the prime contractor or remote contractor; and

(5) A demand for reasonable assurances may be sent separately or as part of any notice of nonpayment, notice pursuant to § 66-34-602(a), or other notice required or permitted under the contract, and may be in substantially the following form:

[Prime contractor or remote contractor] furnished labor, materials, or services in furtherance of improvements to real property located at [property description] pursuant to its written contract with [owner, prime contractor, or remote contractor]. As of the date of this letter, [owner, prime contractor, or remote contractor] owes [prime contractor or remote contractor] the sum of [amount past due], which is past due or for which [prime contractor or remote contractor] asserts it has not been paid from [owner]. Such amounts were due on or before [insert due date] pursuant to the written contract between the parties. Pursuant to T.C.A. § 66-34-603, [prime contractor or remote contractor] demands [owner] furnish reasonable evidence that [owner] has made financial arrangements sufficient to fulfill its obligation to make all payments in accordance with the written contract or setting forth adequate legal reasons for your failure to make payment, within ten (10) days of your receipt of this letter.

(b) This section may not be waived by contract.

(c) This section does not apply to the state and any department, board, or agency thereof, including the University of Tennessee; counties and municipalities and all departments, boards, or agencies thereof, including all school and education boards; and any other subdivision of this state.

SECTION 32. Tennessee Code Annotated, Section 66-34-701, is amended by deleting the section and substituting the following:

As a matter of public policy, except as specifically noted, compliance with §§ 66-11-104, 66-34-205, 66-34-304, 66-34-602, and 66-34-603 may not be waived by contract and these sections are applicable to all private contracts and all construction contracts with this state, any department, board, or agency thereof, including the University of Tennessee, all counties and municipalities and all departments, boards, or agencies thereof, including all school and education boards, and any other subdivision of the state.

SECTION 33. Tennessee Code Annotated, Section 66-34-703, is amended by deleting the section and substituting the following:

(a) This chapter does not apply to any bank, savings bank, savings and loan association, industrial loan and thrift company, other regulated financial institution, or insurance company.

(b) Notwithstanding subsection (a), if a bank, savings bank, savings and loan association, industrial loan and thrift company, other regulated financial institution, or insurance company acts in the capacity of an original owner in the event of building its own structure or assumes a project due to its debtor's default and proceeds with completion of the project, then the entity is subject to this chapter, except for §§ 66-34-104(c) and (j); however, the retained amount may be deposited in an account within the entity's own institution.

(c) Notwithstanding subsection (a) or any other provision of this chapter to the contrary:

(1) A bank, savings and loan association, industrial loan and thrift company, other regulated financial institution, or insurance company shall pay any sums held in trust pursuant to § 66-34-205 in accordance with an order of any court issued pursuant to § 66-34-602; and

(2) A bank, savings and loan association, industrial loan and thrift company, other regulated financial institution, or insurance company is not liable for damages pursuant to § 66-34-104(c) based on the failure of an owner to place retainage in a separate interest-bearing, escrow account as required by § 66-34-104(a).

SECTION 34. Tennessee Code Annotated, Title 66, Chapter 34, Part 7, is amended by adding the following section:

Without limiting any existing law or regulation, it is not against the public policy or public interest of this state for a provision in any agreement relating to the design, planning, supervision, observation of construction, repair, or construction of an improvement to real property to limit the liability of the person furnishing the labor, materials, or services to a reasonable monetary amount.

SECTION 35. Tennessee Code Annotated, Section 66-36-101, is amended by deleting the section and substituting the following:

As used in this chapter:

(1) "Action" means any civil action or binding dispute resolution proceeding for damages or indemnity asserting a claim for damage to or loss of commercial property caused by an alleged construction defect, but does not include any civil action or arbitration proceeding asserting a claim for alleged personal injuries arising out of an alleged construction defect;

(2) "Claimant" means an owner, including a subsequent purchaser, tenant, or association, who asserts a claim against a prime contractor, remote contractor, or design professional concerning a construction defect;

(3) "Commercial property" means all property that is not residential property;

(4) "Construction defect" means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction or remodeling of an improvement resulting from:

(A) Defective material, products, or components used in the construction or remodeling;

(B) A violation of the applicable codes in effect at the time of construction or remodeling;

(C) A failure of the design of an improvement to meet the applicable professional standards of care at the time of governmental approval, construction, or remodeling; or

(D) A failure to construct or remodel an improvement in accordance with accepted trade standards for good and workmanlike construction at the time of construction or remodeling;

(5) "Design professional" means a person licensed in this state as an architect, interior designer, landscape architect, engineer, or surveyor, regardless of whether the person is a prime contractor or remote contractor;

(6) "Improvement" has the same meaning as defined in § 66-11-101;

(7) "Notice of claim" means a written notice sent by a claimant to the last known address of a prime contractor, remote contractor, or design professional against whom the claimant asserts a construction defect that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect;

(8) "Prime contractor" has the same meaning as defined in § 66-11-101;

(9) "Remote contractor" has the same meaning as defined in § 66-11-101;

(10) "Residential property" means property upon which a dwelling or improvement is constructed or to be constructed consisting of one (1) dwelling unit intended as a residence of a person or family; and

(11) "Service" means personal service or delivery by certified mail to the last known address of the addressee, or as otherwise allowed by contract.

SECTION 36. Tennessee Code Annotated, Section 66-36-103, is amended by deleting the section and substituting the following:

(a) In actions brought against a prime contractor, remote contractor, or design professional related to an alleged construction defect, the claimant shall, before filing an action, serve written notice of claim on the prime contractor, remote contractor, or design professional, as applicable. The claimant shall endeavor to serve the notice of claim within fifteen (15) days after discovery of an alleged defect, or as required by contract. Unless otherwise prohibited by contract, the failure to serve notice of claim within fifteen (15) days does not bar the filing of an action, subject to § 66-36-102.

(b) Within ten (10) business days after service of the notice of claim, the prime contractor, remote contractor, or design professional may inspect the structure to assess each alleged construction defect. The claimant shall provide the prime contractor, remote contractor, or design professional and its lower-tier remote contractors or agents reasonable access to the improvement during normal working hours to inspect the improvement, to determine the nature and cause of each alleged construction defect, and the nature and extent of any corrections, repairs, or replacements necessary to remedy each defect. The inspection may include destructive testing. Prior to performing any destructive testing, the person who desires to perform the testing shall notify the claimant in writing of the type of testing to be performed, the anticipated damage to the improvement that will be caused by the testing, and the anticipated corrections or repairs that will be necessary to correct or repair any damage caused by the testing. The person performing the testing shall correct and repair any damage to the improvement caused by the testing.

(c) Within ten (10) days after service of the notice of claim, the prime contractor, remote contractor, or design professional must forward a copy of the notice of claim to each prime contractor, remote contractor, or design professional who it reasonably believes is

responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular prime contractor, remote contractor, or design professional is responsible. Each such prime contractor, remote contractor, or design professional may inspect the improvement as provided in subsection (b) within ten (10) business days after receiving a copy of the notice.

(d) Within ten (10) business days after receiving a copy of the notice of claim, the prime contractor, remote contractor, or design professional must serve a written response to the prime contractor, remote contractor, or design professional who served a copy of the notice of claim. The written response must include a report of the scope of any inspection of the improvement; the findings and results of the inspection; a statement of whether the prime contractor, remote contractor, or design professional is willing to make corrections or repairs to the improvement or whether it disputes the claim; a description of any corrections or repairs it is willing to make to remedy the alleged construction defect; and a timetable for the completion of such corrections or repairs.

(e) Within thirty (30) days after receiving the notice of claim, each prime contractor, remote contractor, or design professional must serve a written response to the claimant. The written response must provide:

(1) A written offer to remedy the alleged construction defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a detailed description of the corrections or repairs necessary to remedy the defect, and a timetable for the completion of the repairs;

(2) A written offer to compromise and settle the claim by monetary payment to be paid within thirty (30) days after the claimant's acceptance of the offer; or

(3) A written statement that the prime contractor, remote contractor, or design professional disputes the claim and will not remedy the defect or compromise and settle the claim.

(f) If the prime contractor, remote contractor, or design professional offers to remedy the alleged construction defect or compromise and settle the claim by monetary payment, then the written response must contain a statement that the claimant is deemed to have accepted the offer if, within fifteen (15) days after service to the written response, the claimant does not serve a written rejection of the offer on the prime contractor, remote contractor, or design professional.

(g) If the prime contractor, remote contractor, or design professional does not respond to the claimant's notice of claim within the time provided in subsection (e), then the claimant may, without further notice, proceed with an action against the prime contractor, remote contractor, or design professional for the claim described in the notice of claim.

(h) A claimant who rejects a settlement offer made by the prime contractor, remote contractor, or design professional must serve written notice of the rejection on the prime contractor, remote contractor, or design professional within fifteen (15) days after service of the settlement offer. The claimant's rejection must contain the settlement offer with the word "rejected" printed on it.

(i) If the claimant accepts the offer of a prime contractor, remote contractor, or design professional and the prime contractor, remote contractor, or design professional does not make the payment, correction, or repair the defect within the agreed time and in the agreed manner, then the claimant may, without further notice, proceed with an action against the prime contractor, remote contractor, or design professional. If a claimant accepts a prime contractor, remote contractor, or design professional's offer and the prime contractor, remote contractor, or design professional makes payment, correction, or repairs the defect within the agreed time and in the agreed manner, then the claimant is barred from proceeding with an action against the prime contractor, remote contractor, or design professional for the claim described in the notice of claim.

(j) If the claimant accepts the offer of a prime contractor, remote contractor, or design professional to correct or repair an alleged construction defect, then the claimant shall provide the prime contractor, remote contractor, or design professional and their remote contractors or other agents reasonable access to the claimant's improvement during normal working hours to perform the correction or repair by the agreed-upon timetable as stated in the offer.

(k) The failure of a claimant or a prime contractor, remote contractor, or design professional to follow the procedures in this section is admissible in an action. However, this

section does not prohibit or limit the claimant from making any necessary emergency corrections or repairs to the improvement. In addition, the offer of a prime contractor, remote contractor, or design professional to remedy an alleged construction defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability with respect to the defect.

(l) A claimant's written notice of claim under subsection (a) tolls the applicable statute of limitations until the later of:

(1) One hundred eighty (180) days after the prime contractor, remote contractor, or design professional receives the notice; or

(2) Ninety (90) days after the end of the correction or repair period stated in the offer, if the claimant has accepted the offer. By stipulation of the parties, the period may be extended and the statute of limitations is tolled during the extension.

(m) The procedures in this section apply to each alleged construction defect. However, a claimant may include multiple defects in one (1) notice of claim.

(n) This chapter does not:

(1) Bar, limit, or replace any rights, obligations, or duties under a contract that provides for notice and opportunity to cure any construction defects. Those contractual provisions control, take precedence, and are in lieu of any obligation or right provided by this chapter;

(2) Bar or limit any rights, including the right of specific performance to the extent that right would be available in the absence of this chapter, any causes of action, or any theories on which liability may be based, except as specifically provided in this chapter;

(3) Bar or limit any defense, or create any new defense, except as specifically provided in this chapter;

(4) Create any new rights, causes of action, or theories on which liability may be based; or

(5) Extend any existing statute of limitations except as specifically provided in subsection (l).

SECTION 37. Tennessee Code Annotated, Section 28-1-101, is amended by deleting the section.

SECTION 38. Tennessee Code Annotated, Section 28-3-202, is amended by deleting the section and substituting the following:

All actions, arbitrations, or other binding dispute resolution proceedings to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, must be brought against any person performing or furnishing the design, planning, supervision, observation of construction, or construction of the improvement within four (4) years after substantial completion of an improvement.

SECTION 39. Tennessee Code Annotated, Section 28-3-203, is amended by deleting the section and substituting the following:

(a) Notwithstanding § 28-3-202, in the case of an injury to property or person or injury causing wrongful death, which injury occurred during the fourth year after substantial completion, an action, arbitration, or other binding dispute resolution proceeding to recover damages for the injury or wrongful death must be brought within one (1) year after the date on which the injury occurred, without respect to the date of death of the injured person.

(b) The action, arbitration, or other binding dispute resolution proceeding must, in all events, be brought within five (5) years after the substantial completion of the improvement.

SECTION 40. Tennessee Code Annotated, Section 28-3-204, is amended by deleting the section and substituting the following:

(a) This part does not extend the period or periods provided by the laws of this state or by agreement between the parties for the bringing of any action, arbitration, or other binding dispute resolution proceeding.

(b) This part does not create any cause of action not previously existing or recognized.

SECTION 41. Tennessee Code Annotated, Section 28-3-205, is amended by deleting the section and substituting the following:

(a) The limitation provided by this part must not be asserted as a defense by any person in actual possession or the control, as owner, tenant, or otherwise, of an improvement at the time any deficiency in the improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action, arbitration, or other binding dispute resolution proceeding.

(b) The limitation provided by this part is not available as a defense to any person who has been guilty of fraud in performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying, in connection with an improvement, or to any person who wrongfully conceals any such cause of action.

SECTION 42. This act shall take effect July 1, 2020, the public welfare requiring it, and applies to actions occurring and contracts entered into, amended, or renewed on or after that date.

SENATE BILL NO. 2681

PASSED: June 16, 2020


RANDY McNALLY
SPEAKER OF THE SENATE


CAMERON SEXTON, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 22nd day of June 2020


BILL LEE, GOVERNOR