

Don't Lose Your Construction Defect Claim!

“Notice and Opportunity to Repair” Laws Abound

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RIGHT ALONG WITH PRODUCT DEFECTS, CONSTRUCTION DEFECTS ARE WELL WITHIN THE WHEELHOUSE OF PROPERTY DAMAGE PROFESSIONALS. IF IT FEELS LIKE YOU ARE HANDLING MORE RESIDENTIAL CONSTRUCTION DEFECT CLAIMS THESE DAYS THAN YOU USED TO, IT IS PROBABLY BECAUSE YOU ARE. THE RESIDENTIAL HOUSING INDUSTRY SHIFTED IN THE LAST 20 YEARS FROM ONE DOMINATED BY SINGLE FAMILY HOMES TO THE MASS PRODUCTION OF CONDOMINIUMS.



For example, in 2005 – the year that condos peaked at 48% of the multifamily market – one in three single-family properties sold in Massachusetts was a condominium.¹

Although we have seen a slight retreat from those record levels, the last decade shows that condos and other multi-family developments are here to stay. Because condominiums are often the go-to choice for developers and homebuyers, particularly in urban centers, a plot of land that might have previously been the site

of a single-family detached home, a duplex, or a couple of small houses, now often holds ten to fifty (or more) homes piled right on top of each other.² While any given house might not manifest a construction defect, it is a near certainty that a building with fifty homes will. Those affected make claims with their insurers, who in turn look for recovery from the builders responsible for the defective work.

Many states, reeling under the sheer number of these contentious construction defect suits, now require

that homeowners – and, of course, their subrogated insurers – take certain steps before filing suit over construction defects in new residential homes. Although a few such laws existed in the mid-1990s, most were enacted after 2001 in no small part due to the efforts of National Association of Home Builders (“NAHB”) lobbyists.³ These statutes, known as “right to cure” or “notice and opportunity to repair” (“NOR”) laws, are geared towards resolving construction defect conflicts informally and mitigating the burdensome effects of litigation.⁴

The failure to follow NOR procedures waives the right to litigate damages arising from a construction defect.

Presently, a majority of states⁵ have some variation of prelitigation claims procedures; most use the framework designed by the NAHB, some have developed their own particular schemes, and some simply add a few NOR provisions to preexisting home warranty or contractor licensing laws.⁶ Whatever the schema, the failure to follow NOR procedures waives the right to litigate damages arising from a construction defect. This applies to the homeowner and, through subrogation, an insurer seeking to recoup policy payments. We are used to navigating statutes of limitation and repose, but strict compliance with NOR statutes is the next item to add to your recovery checklist for newly constructed properties.

Initially, it is important to identify what structures are subject to NOR requirements. Most states' NOR laws apply only to single family homes, condominiums, duplexes, or some combination of these properties constructed after a certain date (see table at the end of the article for the relevant construction dates for the states with NOR statutes). For example, California's NOR statute applies to original constructions intended to be sold as an individual dwelling unit after January 1, 2003, but not to condominium conversions.⁷ Florida includes manufactured and modular homes.⁸ Colorado includes commercial property, too.⁹

If your structure falls within the statutory requirements, the next step is to determine whether any of your subrogation targets are entitled to notice of

the defect and an opportunity to repair it. Although most states' NOR laws apply to any person or business involved in the construction of the property (like Missouri¹⁰), some statutes, like Minnesota's, exclude subcontractors and material suppliers.¹¹

Of primary importance to subrogation professionals is ensuring proper and timely notice. Once you determine that both the property and the subrogation target fall within the pertinent NOR statute, recovery will ultimately be dependent upon giving the responsible party timely notice and an appropriate opportunity to repair the defect. Failure to do so will prohibit an insurer from pursuing a subrogation claim against the builder.¹²

The process commences with service of notice on the construction professional, generally including:

1. a statement that the claimant asserts a construction defect;
2. a description of the claim sufficient to determine the nature of the defect; and
3. a description of the resulting damage, if known.¹³

The time period for giving notice varies for each state, but it is of utmost importance to provide notice immediately. Because the NOR procedures can be time-consuming, in the interests of getting the insured back into her home, subrogation professionals should begin the process as soon as possible.

A builder has between 10 and 60 days to respond to the demand, depending

upon the state. The response can take the form of:

1. a request for the opportunity inspect the defect;
2. an offer to make the necessary repairs;
3. an offer of monetary payment in lieu of repairs; or
4. a denial of the claim.¹⁴

In most (if not all) cases, the builder will want an opportunity to inspect the defect before agreeing to fix or pay for it. Once the inspection occurs, the builder will again have a short time to respond to the claim. Any response but a denial must include a time frame within which the remedy – whether payment or repair – must be completed.¹⁵ If the builder denies the claim, fails to respond to the notice within the prescribed time, or does not comply with an agreed-to inspection and repair protocol, suit can then be filed without further obstruction.

It is also important to remember that a homeowner or subrogated insurer is not obligated to accept an offer made under these NOR statutes. Although typically a rejection must be conveyed in writing, suit can generally follow the rejection of any of the builder's proposals for inspection, repair, or monetary payment. Be warned, however, that an *unreasonable* rejection may be the basis for a costs and fees award or a limitation on recoverable damages.¹⁶

In light of the various statutory prerequisites for litigating construction defect claims arising in newly constructed homes and the potential for waiving the

Table 1. State NOR Statutes

State	Statute	Effective Date	Properties
Alaska	Alaska Stat. §09.45.881 <i>et seq.</i>	10/08/2003	Residential
Arizona	Ariz. Rev. Stat. §12-1361 <i>et seq.</i>	05/21/2002	Residential
California	Cal. Civ. Code §895 <i>et seq.</i>	01/01/2003	Residential
Colorado	Colo. Rev. Stat. §13-20-801, <i>et seq.</i>	07/01/2003	Residential, Commercial
Florida	Fla. Stat. §558.004	05/27/2003	Commercial
Georgia	Ga. Code Ann. §8-2-38	05/17/2004	Residential
Hawaii	Haw. Rev. Stat. §672E-3 <i>et seq.</i>	06/15/2004	Residential
Idaho	Idaho Code Ann. §6-2503	03/27/2003	Residential
Indiana	Ind. Code §32-27-3 <i>et seq.</i>	07/01/2003	Residential
Kansas	Kan. Stat. Ann. §60-4701 <i>et seq.</i>	07/01/2003	Residential
Kentucky	Ky. Rev. Stat. Ann. §411.250 <i>et seq.</i>	06/24/2003	Residential
Louisiana	La. Rev. Stat. Ann. §9:3141 <i>et seq.</i> ("New Home Warranty Act")	1986	Residential
Maryland	Md. Code Ann., Bus. Reg. §4.5-705 ("Home Builder Guaranty Fund")	01/01/2009	Residential
Minnesota	Minn. Stat. §327A.01 <i>et seq.</i>	2006	Residential
Mississippi	Miss. Code Ann. § 83-58-1 <i>et seq.</i>	07/01/1997	Residential
Missouri	Mo. Rev. Stat. §436.350 <i>et seq.</i>	10/10/2005	Residential
Montana	Mont. Code Ann. §70-19-426 <i>et seq.</i>	04/17/2003	Residential
Nevada	Nev. Rev. Stat. §40.600	08/01/2003	Residential
New Hampshire	N.H. Rev. Stat. Ann. §359-G <i>et seq.</i>	01/01/2006	Residential
North Dakota	N.D. Cent. Code §43-07-26	04/20/2005	Residential
Ohio	Ohio Rev. Code Ann. §1312 <i>et seq.</i>	05/27/2005	Residential
Oklahoma	Okla. Stat. tit. 15, §765.5	11/01/2006	Residential
Oregon	Or. Rev. Stat. §701.560	01/01/2004	Residential
South Carolina	S.C. Code Ann. §40-59-810 <i>et seq.</i>	07/02/2003	Residential
South Dakota	S.D. Codified Laws §21-1-16	03/05/2007	Residential
Tennessee	Tenn. Code Ann. §66-36-101 <i>et seq.</i>	05/24/2004	Commercial
Texas	Tex. Prop. Code Ann. §27.001 <i>et seq.</i>	09/01/2003	Residential
Virginia	Va. Code Ann. §55-70.1	07/01/2002	Residential
Washington	Wash. Rev. Code §64.50 <i>et seq.</i>	06/13/2002	Residential
West Virginia	W. Va. Code §21-11A-1 <i>et seq.</i>	06/06/2003	Residential
Wisconsin	Wis. Stat. §895.07	10/01/2006	Residential

opportunity to recover if repairs are made precipitously, it is imperative that claims and subrogation professionals take extra care in evaluating construction defects and following statutory NOR requirements where appropriate. In some cases, following the procedures will result in an earlier and less costly resolution of a subrogation claim, as is the very purpose of the NOR statutes. In any event, claims handlers should take several steps as soon as a construction defect is identified as the cause of an insurance claim:

- **First**, when an insured reports a potential construction defect claim, the claims adjuster should identify the age of the building, the potential defect, and the identities of any potentially responsible contractors, architects, or other construction professionals to determine whether this loss is subject to the state's NOR statute. This will likely require explaining the prelitigation procedures to the insured homeowner and ensuring he understands the importance of the NOR requirements.
- **Second**, the claims adjuster should immediately place the appropriate parties on written notice of the construction defect claim. This may require working in close conjunction with a subrogation adjuster or counsel to ensure that subrogation interests are preserved.
- **Third**, the claims adjuster should ensure the property is preserved

and that the defect does not undergo any repairs or alterations until after the builder has had the opportunity to inspect or otherwise respond to the claim (or until the requisite time period for a response has lapsed). If the defect is repaired without first affording the construction professional the opportunity to respond to the claim, there is no avenue of recovery.

These steps may require more open and effective communications between a claims adjuster and the insurer's subrogation department or adjuster. Also, because homeowners will likely be frustrated by the delays occasioned by the notice procedure, action should be taken immediately to ensure expeditious completion of the prelitigation process. It may even be beneficial to consult with or retain counsel at the onset of adjustment. The NOR provisions are often somewhat convoluted, and it would likely be helpful to speak with an attorney licensed in the pertinent state and who has expertise with understanding the state's NOR laws.

Although it may call for some education and tweaking of claims handling procedures, taking advantage of the various statutory NOR processes may ultimately provide a faster and cheaper method of resolving construction defect claims. Even if not, strict adherence to NOR procedures will ensure that you retain the right to later seek recovery through the courts.

¹ William Quatman and Herber O. Gonzalez, *Right-to-Cure Laws Try to Cool off Condo's Hottest Claims*, CONSTRUCTION LAWYER (ABA Publishing, Chicago, Ill.), Summer 2007.

² *Id.*

³ Alice M. Noble-Allgire, *Notice and Opportunity to Repair Construction Defects: An Imperfect Response to the Perfect Storm*, 43 REAL PROP., TRUST AND ESTATE L.J. 729, 747 (Winter 2009).

⁴ Quatman, *supra* note 1.

⁵ The following states have no prelitigation NOR requirements: Alabama, Arkansas, Connecticut, Delaware, D.C., Illinois, Iowa, Maine, Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Utah, Vermont, and Wyoming. States with NOR requirements and citations to the pertinent statutes are contained in Table 1, *infra*.

⁶ Noble-Allgire, *supra* note 3, at 748.

⁷ Cal. Civil Code §§ 896 and 938.

⁸ Fla. Stat. Ann. § 558.002(8).

⁹ Colo. Rev. Stat. Ann. § 13-20-801, *et seq.*

¹⁰ Mo. Ann. Stat. § 436.350 ("any person, company, firm, partnership, corporation, association, or other entity that is engaged in the business of designing, developing, constructing, or substantially remodeling residences").

¹¹ Minn. Stat. Ann. § 327A.01.

¹² See, e.g., *Standard Pacific Corp. v. Superior Ct.* (2009) 176 Cal.App.4th 828, 833-34.

¹³ See, e.g., Cal. Civ. Code, § 910.

¹⁴ See, e.g., N.H. Rev. Stat. Ann. § 359-G:4.

¹⁵ See, e.g., Ariz. Rev. Stat. Ann. § 12-1363.

¹⁶ See, e.g., Alaska Stat. Ann. § 09.45.889.