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Golden Opportunities: Maximizing the Utility of Notice and Opportunity to Cure Statutes

Construction Defect and the "Right to Cure":

In addition to the time limits which apply in construction defect law, some states also have a "**right to cure**" statute. These laws say that before filing a lawsuit, a project owner, such as a homeowner, must first notify the construction professional of the alleged defects and allow them the opportunity to repair the defect, or pay you for the problem. This process varies from state to state, and one of the key differences is the amount of time you have to wait after notifying the professional before you can proceed with the lawsuit. Other additional requirements can differ between states depending on the parties involved in the action. Florida, for example, possesses specific statutory requirements and timelines for actions involving certain size parties. Overall, notice and opportunity to cure statutes are a great tool for attorneys in navigating a proceeding and allowing for possible dispute resolution through means other than litigation.

Overview:

State	Statute of Limitations	State of Repose	Right to Cure	State Statutes
South Carolina	3 or 10 years for contracts 3 years for torts	8 years after substantial completion	Yes; notify contractor at least 90 days before filing action and allow for inspection and offer to remedy defects.	§15-3-520, 530, & 640; 40-59-810 et seq.
Florida	4 years for construction defect claims	10 years (from latest of various dates listed in statute)	Yes; notify professional 60 days before filing suit, and allow offer of payment or repair	95.11; 558.001 et seq.
Georgia	6 years for contracts 2 years for personal injury 4 years for damage	8 years (may be extended 2 years for injuries occurring in 7th or 8th year).	Yes; must serve written notice to each responsible contractor at least 90 days before	9-3-24; 9-3-33; 9-3-32; 9-3-51

	to property		initiating a lawsuit; contractor has right to inspect the defects; homeowner can reject the offer to cure.	
North Carolina	3 years for contracts and torts	6 years from later of substantial completion or last act or omission giving rise to cause of action	No; possible implied right under judicial interpretation	1-52; 1-50; *Weaver's Asphalt & Maint. Co., Inc. v. Williams*, 710 S.E.2d 709 (N.C. Ct. App. 2011)
Tennessee	6 years for contracts 1 year for personal injury 3 years for property damage	4 years after substantial completion (may be extended to 5 years for injuries occurring during 4th year)	Yes; notify professional before filing lawsuit (15 days after discovery of alleged defect – but this failure does not bar claim) and allow for inspection and offer to remedy.	§28-3-109; 28-3-104; 28-3-105; 28-3-201 et seq.; 66-36-101 et seq. 66-36-101 et seq.

II. State Statutes

(1) South Carolina - SC Code Ann. Section 40-59-810-860

In 2003 the South Carolina legislature enacted the "South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act" in the hopes that it would provide an "effective alternative dispute resolution mechanism in certain construction defect matters" so that construction defects disputes might be resolved without resorting to litigation. Plaintiffs asserting defective construction of their dwelling must give specific written notice to any contractor or sub against whom a claim is sought at least ninety (90) days prior to filing suit. Pursuant to 59-840, the notice of claim must contain: (1) a statement that the claimant asserts a construction defect; (2) a description of the claim in reasonable detail sufficient to determine the general nature of the construction defect; and (3) a description of any results of the defect, if known.

Within thirty (30) days of receipt of the required notice, the contractor or sub may elect, through written notice, to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects. The claimant, in turn, must allow the contractor or sub access to the dwelling for inspection, and if repairs are agreed upon, then reasonable access to accomplish the repairs. The homeowner, however, is under NO obligation to accept the proposed repairs.

If the claimant files an action in court before first complying with the requirements of the statute, upon motion of a party, the court must stay the action until the claimant has complied with the requirements of the article. *Yusenko v. Lennar Corp.,* No. C/A 0:09-2395-JFA, 2009 WL 4799556, at *1 (D.S.C. Dec. 4, 2009).

"In cases where a discrete custom-made element of a home is at issue, among a multitude of other construction defects, homeowners have been willing to allow such craftsmen the opportunity to repair and craftsmen-clients are also eager to repair their own work. Equally, local developer-general contractors whose business is built on local reputation have been eager to make repairs rather than risk their business; admittedly, however, homeowners are less willing to discuss repairs in these cases."

(2) Florida - Fla. Stat. Ann. § 558.004

Florida's "Construction Defects" statute (Section 558.004) sets forth the procedural requirements a claimant must follow before filing action for a construction defect. Specifically, a claimant must first "serve written notice of claim on the contractor, subcontractor, supplier, or design professional," before filing the claim. However, there are different time requirements depending upon who's involved in the action.

> (1)(a) In actions brought alleging a construction defect, the claimant shall, at least 60 days before filing any action, OR at least 120 days before filing an action involving an association representing more than 20 parcels, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable. If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted.

The notice must describe in reasonable detail the nature of each alleged construction defect and the resulting damage / loss. The notice must also identify the location of each alleged defect sufficiently to enable the responding parties to locate the defect without undue burden. The claimant must serve the notice within 15 days after discovery of an alleged defect, but the failure to serve notice of claim within 15 days does NOT bar the filing of an action.

Upon receipt the notice, the recipient "must serve a written response to the claimant" within the statutorily specified time-period (where Florida law is unique), providing either an offer "to remedy the alleged construction defect at no cost to the claimant," "to compromise and settle the claim by monetary payment," "to compromise and settle the claim by a combination of repairs and monetary payment," a statement disputing the claim, or a statement that any monetary payment will be determined by the recipient's insurer. Once the claimant "receives a timely settlement offer," the claimant "must accept or reject the offer" in writing. Once again, however, there are different statutory time requirements depending on the nature of the action and those involved in the dispute.

> (2) Within 30 days after service of the notice of claim, or within 50 days after service of the notice of claim involving an association representing more than 20 parcels, the person served with the notice of claim under subsection (1) is entitled to perform a reasonable inspection of the property or of each unit subject to the claim to assess each alleged construction defect.

Once the notice requirement is satisfied, the claimant may proceed with an action if the parties either agree to "a partial settlement or compromise of the claim," the recipient "disputes the claim and will neither remedy the defect nor compromise and settle the claim," or the claimant does not receive a response "within the time provided." If the offeror satisfies the parties' agreement within a reasonable period of time, "the claimant is barred from proceeding with an action for the claim. But, "if a claimant initiates an action without first accepting or rejecting the offer, the court shall stay the action upon timely motion until the claimant complies with the statutes requirements.

The Florida Legislature finds this statute beneficial as an alternative method to resolve construction disputes and therefore reduce the need for litigation. However, chapter 558 does NOT place any obligation on the insured to participate in the "notice and opportunity to cure" process. The chapter 558 framework has never been anything other than a voluntary dispute resolution mechanism on the part of the insured, despite its requirement that the claimant serve the insured with a notice before initiating a lawsuit. The Chapter 558 process is an "alternative dispute resolution proceeding," the same as mediation would be. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273, 276–77 (Fla. 2017).

(3) Georgia – O.C.G.A. Section 8-2-36 et seq.

Under Georgia statute 8-2-36 et seq., a homeowner desiring to file suit against a contractor for construction defects must first serve written notice to each responsible contractor at least 90 days before initiating a lawsuit. If, during this time, the **statute of limitations** is due to expire, a homeowner may go ahead and file the lawsuit, but notice is still required to complete the notice process. This notice requirement does not apply in a situation where defective construction resulted in personal injury or death. The notice must state that as the homeowner, you are making a claim due to one or more construction defects and that the purpose of providing the notice is to meet the statutory requirements. It must also specify both the type and the results of any defects you are claiming. The homeowner must provide the contractor with any expert reports that describe the nature and cause of the defect(s), including inspections, photographs or videos.

The contractor has 30 days to reply in writing and choose whether to inspect the house or settle without inspection. The contractor may inform the homeowner that he or she intends to settle the claim by means of a monetary payment, repairs, or a combination of both, without inspection. Alternatively, the contractor has the right to inspect the defects and determine the need for any repairs. If no repair is considered necessary, the contractor may serve the homeowner with a written statement explaining his or her reasons for refusing to fix the defect. If the contractor proposes inspection of the home, an owner must provide access within 30 days. If the contractor decides to fix the defect,

he or she must serve you within 14 days of completion of the inspection with a written offer to do one of the following: Fix the defect fully or partially, at no cost to you; Settle by monetary payment; or settle by a combination of the two.

If the homeowner decides to accept the contractor's offer, he or she must serve the contractor with the written acceptance within 30 days of the offer. If the homeowner does not respond to the offer, it is deemed that they have legally accepted it, and they must provide the contractor prompt access to your home to make the necessary repairs. The homeowner may reject the offer; they would need to serve the contractor with a written notice of rejection that explains their reasons in detail. The contractor may, within 15 days of the rejection, make a supplemental offer to fix or pay for the defect, which the homeowner has the option of rejecting as well. However, if the homeowner later files a lawsuit, the court may take into consideration any reasonable offers that the contractor has made previously. If it is determined that the homeowner rejected a reasonable offer, any legal remedy to the owner will be limited, and they cannot recover any attorney's fees they incurred after the rejection. If the homeowner rejects a settlement offer, or the contractor has either refused to fix the defect(s) or failed to respond to the owner within 30 days, the owner may file a lawsuit. Failure to follow the statutory procedures will affect an owner's ultimate ability to pursue a claim.

(4) North Carolina

Unlike its neighboring states, North Carolina does not provide contractors with an express right to cure alleged construction defects. There is no North Carolina case law that holds that there is an implied right to cure in the absence of an express contractual provision.

However, A recent Court of Appeals case suggests that the North Carolina courts might imply a right to cure relying on the Restatement (Second) of Contracts. "When a breach occurs by nonperformance or defective performance, ' [e]ven if the failure is material, it may still be possible to cure it by subsequent performance without a material failure,' Restatement (Second) Contracts § 237 cmt. b, and the non-breaching party's obligations are not excused. A failure to cure within a reasonable time may then be treated as a repudiation, see id. § 251 cmt. c, illus. 5, as would a positive statement by the breaching party that it does not intend to cure its nonperformance. For repudiation to result in a breach of contract where there is still time to cure, 'the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute.' Pr*ofile Invs. No. 25, LLC v. Ammons E. Corp*., — N.C.App. —-, —-, 700 S.E.2d 232, 235 (2010)." *Weaver's Asphalt & Maint. Co., Inc. v. Williams*, 710 S.E.2d 709 (N.C. Ct. App. 2011) (unpublished opinion).

The *Weaver's Asphalt* case could be read to insert an implied right to cure in every contract. The opinion itself, however, does not indicate whether the contract had an express right to cure only referring to the contractor's obligation to provide three days' notice to the subcontractor. The contractor apparently violated that provision by beginning corrective work on the day after the notice was given. The opinion does not

recite the exact contract language but if the contract did not contain an express right to cure the Court must have held that the subcontractor had an implied right.[1]

(5) Tennessee – Tennessee Code Title 66. Property § 66-36-103

Tennessee's notice and opportunity to cure statute states that for actions brought against a contractor, subcontractor, supplier, or design professional (i.e., construction professionals) related to an alleged construction defect, the claimant must serve written notice of claim on the contractor before filing suit. The claimant must serve the notice of claim within fifteen (15) days after discovery of the alleged defect. Similar to other states, the failure to serve notice of claim within fifteen (15) days does not bar the filing of an action.

Within ten (10) *business* days after service of the notice of claim, the contractor, may inspect the structure to assess each alleged defect. The claimant must provide the contractor and its agents reasonable access to the structure for inspection 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. Additionally, within ten (10) days after service of the notice of claim, the contractor must forward a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional who it reasonably believes is responsible for each defect specified in claim and must note the specific defect for which it believes the particular construction professional is responsible for. Each construction professional may then also inspect the building/structure within ten (10) *business* days after receiving a copy of the notice.

Within thirty (30) days after receiving the notice of claim, each construction professional given notice 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 such 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 contractor, subcontractor, supplier, or design professional disputes the claim and will not remedy the defect or compromise and settle the claim.

If the construction professional offers to remedy the alleged defect or compromise and settle the claim, a claimant will be deemed to have accepted the offer if the claimant does not serve a written rejection of the offer on the contractor within 15 days after service to the written response.

However, If the contractor, fails to respond to the claimant's notice, the claimant may, without further notice, proceed with an action against the contractor for the claim described in the notice. A claimant who rejects a settlement offer made by the contractor

[1] http://www.businesslawyer-nc.com/a-right-to-cure/

must serve written notice of such rejection within fifteen (15) days after service of the offer. The claimant's response must contain the settlement offer with the word "rejected" printed on it. If a claimant accepts an offer and the contractor makes payment or repairs the defect within the agreed time and in the agreed manner, the claimant is barred from proceeding with an action against the contractor for the claim described in the notice of claim.

As aforementioned, notice and opportunity to cure statutes offer a unique possibility for construction dispute resolution. These statutory requirements are in place for the benefit of both the claimant and respondent and can be a useful tool for construction defense attorneys due to the inability for a claimant to continue with litigation without strict adherence to the requirements. It is important to remember that in all construction defects cases that the provisions in these acts are mandatory and can be extremely useful.