

## Washington Construction Defect “Cure” Statute: A Bill of Rights or a Bill of Goods?

— by Martin M. Rall and Julie E. Dutton

In response to the rise in construction defect litigation and the resulting increase in the cost of insurance contractors are required to carry, the Washington Legislature passed RCW 64.50.005 *et seq.*, which became effective June 13, 2002. The statute (referred to by some as a “bill of rights” for contractors) requires that homeowners and condominium homeowners’ associations (collectively “homeowner”) give construction professionals an opportunity to cure any defects in the construction or substantial remodel of their homes prior to filing a lawsuit. The statute sets out a series of steps that a homeowner must comply with prior to filing a complaint with the court. If the homeowner fails to comply with the notice requirements of the statute, then the complaint will be dismissed without prejudice until the claimant has fully complied with all of the requirements. At that time, the homeowner may refile his or her complaint.

### Mechanics of the Statute

By definition, this Act applies to any civil lawsuit in contract or tort (remember, there is no claim for negligent construction in Washington) for damages or indemnity brought by a homeowner against a construction professional for defects in the construction or substantial remodel of a residence. See RCW 64.50.010. The phrase “construction professional” includes architects, builders, builder vendors, contractors, subcontractors, engineers, and condominium

dealers and declarants. RCW 64.50.010(4). (For purposes of this article, we will refer to construction professionals as “contractors.”) The term “substantial remodel” is defined as the “remodel of a residence, for which the total cost exceeds one-half of the assessed value of the residence for property tax purposes at the time the contract for the remodel work was made.” RCW 64.50.010 (8).

**1. Notice of Claims and the Contractor’s Response Pre-Litigation** The first step toward filing a claim against a contractor begins with the service of a notice of the homeowner’s claim. This must be done at least 45 days prior to filing a complaint with the court. The contractor then has 21 days to serve a written response containing one of the following: (1) a proposal to inspect the residence within a specified time frame; (2) an offer to settle the claim without an inspection; or (3) a denial of responsibility for the claim. If the contractor does not respond within 21 days from the time of service of the homeowner’s notice of the claim, or if the contractor chooses to contest the claim without inspecting the residence or offering to settle, then the homeowner may go forward with his or her claim.

#### a) Contractor’s Proposal to Inspect

If the homeowner **accepts** the contractor’s proposal to inspect the premises, the homeowner must make the premises avail-

able to the contractor for inspection. The statute provides no specific timeline for access by the contractor, but simply refers to a right of reasonable access during normal working hours. Within 14 days from the date of the inspection, the contractor must serve on the homeowner one of the following: (1) a written offer to remedy the defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a description of additional construction necessary and a timetable for completion; or (2) a written offer of compromise to settle the homeowner's claim; or (3) a written notice that the contractor will not remedy the alleged defect. If the contractor fails to respond within 14 days, or does not proceed to remedy the defect within the agreed upon time, the homeowner may then file his or her lawsuit without further notice.

If the homeowner **rejects** the contractor's proposal to inspect, he or she must do so in writing. After service of the homeowner's rejection notice, he or she may file a lawsuit against the contractor.

If, after the inspection, the contractor makes an offer in writing to cure the defect, or an offer of settlement, and the homeowner rejects the contractor's offer, then the homeowner must do so in writing. After service of the written rejection, the homeowner may file his or her lawsuit against the contractor. If the homeowner does not respond to the offer to cure or compromise the claim within 30 days, then the contractor may terminate the offer by serving written notice. If, however, the homeowner accepts the contractor's offer to cure or compromise the claim, he or she must do so in writing not later than 30 days after receipt of the offer.

## **b) Offers of Settlement Without Inspection**

An offer of settlement without an inspection could, according to the statute, include an offer to purchase claimant's residence and pay the claimant's reasonable relocation costs. If the contractor makes a settlement offer and the homeowner rejects it, the rejection must be in writing. After service of the homeowner's rejection, he or she may file a lawsuit against the contractor. If, however, the homeowner does not respond to the contractor's offer within 30 days, the contractor may terminate the offer in writing.

## **2. Commencement of Litigation**

If the parties are unable to resolve the dispute through the "cure" process, and litigation commences, the homeowner must file with the court, and serve on the contractor, a list of known construction defects containing a description of the work the claimant alleges is defective. The list must be served within 30 days after the commencement of the action. The list must specify, to the extent the homeowner knows, which contractor is responsible for each alleged defect. Prior to commencing the action, the homeowner may amend the notice of defects to include newly discovered defects and the service of the amended notice will relate back to the original notice. Claims of defects discovered after the commencement of a lawsuit may be added only after providing notice of the defect to the contractor and allowing time for a response.

### **a) Third Parties**

The notice requirements only apply to homeowners, not to contractors making third-party claims. If a subcontractor or supplier is added as a party or a third party, however, then the party making the claim against the subcontractor or supplier must serve the list of the construction defects within 30 days after service of the complaint

against the subcontractor or supplier.

### **b) Effect on Statutes of Limitations and Repose**

At first blush, it would seem that the notice requirement would force a homeowner to give notice of the alleged defect at least 45 days prior to the running of the statute of ultimate repose. However, this is not the case. The Washington Legislature also chose to modify RCW 4.16.310, the statute of ultimate repose that applies to construction claims in conjunction with the new notice requirements of RCW 64.50.005 *et seq.* If you recall, in Washington, the statutes of repose and limitations work in conjunction with each other. Washington's statute of repose requires a claim to "accrue" within 6 years from the date of substantial completion, or the date the contractor last performed work on the premises, whichever date is later. However, a homeowner then has the applicable statute of limitations period to file his or her claim with the court. The modification of the statute of repose tolls the statute of limitation and repose periods by a total of 105 days from the date of the homeowner's notice to the contractor, as long as that notice occurred within the time allowed by the applicable statute of limitation, and the claim accrued within the 6 year repose period.

### **California and Oregon's Responses**

California has passed a similar statute that became effective January 1, 2003. Now, Oregon too may be jumping onto the band wagon. In January 2003, House Bill 2389 was first introduced in the Oregon Legislature. This Bill also contains time periods for performance of required steps prior to a homeowner being allowed to bring a claim against a contractor, but it is more comprehensive than Washington's statute. A few of the highlights of this piece of leg-

islation are that, as currently written, the Oregon statute includes a provision similar to an offer of judgment that would limit a homeowner's recovery if the fair market value of the proposed remediation work, or the offered monetary settlement, is equal to, or greater than, the amount actually recovered by a homeowner at arbitration or in court. The Oregon Bill, like the Washington statute, also proposes to toll Oregon's statute of limitations during the notice and offer period, but by a longer period of time. Notably, however, if the contractor performs any remedial work in response to the homeowner's notice, then, under the proposed legislation, the performance of the work relates back to the date the contractor substantially completed work on the structure, and would not constitute new performance for purposes of a future claim.

### **Practical Application and Concerns**

The Washington statute, and presumably the final version of Oregon's proposed legislation, if passed, raises some practical considerations in the handling of construction defect claims. Some issues to keep in mind include:

1. Contractors will need to be aware of the statutory time limits imposed on both parties.
2. Insurers will need to communicate closely with their insureds pre-litigation to ensure that contractors notify them of any notice given under the statute and preserve their right to respond in a timely manner.
3. Insurers and contractors will need to monitor whether a timely homeowner notice is given as the statute of limitation approaches.
4. What form of notice of a claim by a homeowner will trigger the statutory notice requirement? Is a simple letter to the con-

tractor referencing alleged defects adequate?

5. Can insurers respond on behalf of their insureds under the statute to preserve the insured's rights? This is particularly important in cases of late notice of claims by homeowners and/or in cases where locating the insured may prove difficult.

6. Because of potential coverage problems contractors may want to consider an opportunity to cure defects pre-litigation.

7. Insurers should expect their insureds to look to them for financial assistance in financing a cure of any defects.

8. If insurers and contractors engage experts to perform the inspections, they need to keep in mind that this raises issues regarding discovery of experts, work product issues, etc., if litigation commences.

9. How extensive an inspection is permissible, and are follow-up inspections permissible to allow adequate discovery of all defects prior to an offer to cure?

10. If a homeowner knows the identity of a subcontractor and what work that subcontractor performed, is the homeowner required to notify the subcontractor of the defect and give that subcontractor an opportunity to cure even though the homeowner cannot bring a direct claim against him?

11. Is a subcontractor who is not notified directly by a homeowner entitled to an opportunity to cure defects even though the general contractor chose not to inspect and/or denies responsibility for the defect?

12. Will a pre-litigation inspection be counted as the inspection permitted under the discovery rules if litigation commences?

13. Can failure to comply with the statute be raised by either party in the pleadings as a statutory claim or defense, especially

with regard to mitigation of damages?

This list could go on and on, and the issues outlined above are only a few of the more obvious concerns that need to be addressed.

The authors will continue to monitor the progress of Oregon HB 2389 and will supplement this article once a final outcome has been achieved. Members are encouraged to share information regarding their experience with the practical application of the Washington Statute to any claims. If you have any questions, please feel free to contact the authors, Julie E. Dutton and Martin M. Rall, by phone at (503) 768-9600, or by email at [julie@lerlaw.com](mailto:julie@lerlaw.com) and [marty@lerlaw.com](mailto:marty@lerlaw.com).

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