

NEWSLETTERS

Notice And Right To Cure Statutes: Turning A Shield Into A Sword In Indiana And Elsewhere

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In response to a perceived boom in construction litigation involving new homes, a number of states have enacted notice and right to cure statutes. Typically, these statutes mandate prospective plaintiffs to provide builders and other construction professionals with notice and an opportunity to cure the alleged defects prior to initiating litigation.

The goal of these statutes is to steer potential litigants toward a dispute resolution process that avoids costly litigation. California, Indiana and Ohio have such statutes and they are also discussed in Gary A. Poliakoff's book, "The Law of Condominium Operations." See, e.g., Cal. Civ. Code §§895 to 945.5; Ind. Code §§ 32-27-3-1 to 32-27-3-14; Ohio Rev. §§ 1312.01 to 1312.08. See also Gary A. Poliakoff, 2 Law of Condominium Operations § 9.34 (2017).

The statutes are intended to shield builders of new homes and condominiums and construction professionals from frivolous claims or unnecessary litigation expenses. Instead of simply being hit with a lawsuit, builders are afforded a chance to solve any problems before the matter lands in court. However, if builders and others ignore these statutes, then their shield can become a sword in the hands of a residential property owner, at least in Indiana.

Many times, builders and other construction professionals faced with claims involving home construction fail to insist on compliance with these statutes. Just as often, construction professionals receiving notice of defect claims fail to fully comply with the statutory procedures or, worse, ignore the notice altogether. This can have very significant consequences. Indiana and other states provide for attorney fee shifting in cases in which a claimant or a construction professional ignores statutory procedures. The threat of a one-way fee award in construction defect litigation arising out of a failure to follow the statute can put significant pressure on a party or its insurer to settle and resolve the dispute. Notice and right to cure statutes such as Indiana's can strengthen or weaken a party's position in any subsequent litigation.

Indiana has an especially robust notice and right to cure statute. It provides an avenue to avoid litigation but also creates traps for the unwary. At least 60 days prior to filing a construction defect action, a residential property owner must serve a notice on the construction professional. The notice must be sent via certified mail or served in person and must describe the defect with sufficient detail to allow the

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construction profession to determine the general nature of the alleged defect, according to the Indiana Code. The construction professional receiving the notice has 21 days to serve a written response. An appropriate response may be a request to inspect the premises, an offer to settle the claim by payment without inspection, or a statement that the construction professional disputes the claim.

If, as often happens, the construction professional makes a proposal to inspect, the homeowner must provide reasonable access to the property, the statute says. Fourteen days after the completion of the inspection, the construction professional must serve an offer to repair at no cost, an offer to settle with a monetary payment or a statement that the construction professional disputes the claim and will take no further action. The homeowner has 60 days to accept or reject a settlement offer.

Indiana's statute also says a construction professional can get a claim dismissed if a homeowner fails to comply with the notice and opportunity to cure statute. A homeowner who unreasonably rejects a settlement offer or does not permit an inspection and an opportunity to repair can be liable for the builder's attorney's fees. Conversely, a construction professional who unreasonably disputes a homeowner's claim, fails to settle the claim, fails to make repairs within a reasonable time, or fails to respond to a notice could be liable for the homeowner's attorney's fees and costs.

The scope of notice and opportunity to cure statutes are not necessarily restricted to builders. In Indiana, the notice and opportunity to cure statute also covers architects, engineers, subcontractors, or "any person performing or furnishing the design, supervision, construction, or observation of the construction of any improvement to real property." Nor are notice and opportunity to cure statutes limited to single family dwellings. Indiana's statute applies to multiple unit residential structures. The statute's scope includes large condominium buildings as well as single family homes. Defects include any deficiency in "residential construction, design, specifications, surveying, planning, supervision, testing, inspection, or observation of construction."

Since the Great Recession, condominium construction has made a comeback in the Hoosier state. Indianapolis alone has had a number of new developments begin over the past couple of years, according to an article in the Indianapolis Business Journal entitled "[Condos make comeback amid apartment boom](#)." With the resurgence of condominium construction in Indiana, construction defect claims are sure to follow. Construction professionals and those managing condominium properties need to have a clear understanding of Indiana's notice and opportunity to cure statute.

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