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CLIENT ALERT

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OHIO RESIDENTIAL RIGHT TO CURE STATUTE

During the past few years, many states, including Ohio, have enacted statutes known as “Right To Cure” statutes. These statutes apply almost universally in the residential construction contract setting. They are intended to reduce litigation by providing residential contractors with the right to both receive notice of construction defects and the opportunity to remedy the defects before the Owner pursues litigation.

Chapter 1312 of the Ohio Revised Code became effective in 2005 and embodies Ohio’s Right to Cure Statute. It sets forth the procedure under which a residential contractor may cure a defect prior to an Owner commencing arbitration proceedings or a civil action. The Chapter is applicable only to Owners and contractors who enter into contracts for the construction of or substantial rehabilitation of residential buildings. It applies only to claims for construction defects and property damages and has no applicability to suits for personal injury.

The statute is often overlooked by both homebuilders and Owners. Failure to abide by the statute can have adverse consequences. Unwary contractors will find their opportunity to cure defects limited. Owners can find legal actions dismissed until such time as they do comply.

DEFINITIONS

A “Construction Defect” is defined by O.R.C. § 1312.01(A) as “a deficiency that arises directly or indirectly out of the construction or the substantial rehabilitation of a residential building.” “Substantial rehabilitation” includes the addition of a room and the removal or installation of a wall, partition, or portion of the structural design.” Therefore, any problem, issue or defect, which has as its genesis the construction of or substantial rehabilitation of a residential building is a “Construction Defect” under the statute.

“Residential buildings” include one-family, two-family, or three-family dwelling houses or a dwelling units within that structure, any accessory structures incidental to that dwelling house, and a unit in a condominium development in which the Owner holds title to that unit. “Residential building” includes any structure that is used as a model to promote the sale of a similar dwelling house. O.R.C. § 1312.01(D).

An Owner as “an Owner or a prospective Owner of a residential building or a dwelling unit in a residential building who enters

into a contract with a residential contractor for the construction or substantial rehabilitation of that residential building or unit.” O.R.C. § 1312.01(C). Finally, a “Residential Contractor” means a person or entity who, for pay, enters into a contract with an Owner for the construction or the substantial rehabilitation of a residential building and who has primary responsibility for the construction or substantial rehabilitation of a residential building. O.R.C. § 1312.01(E).

RESIDENTIAL CONTRACTOR’S REQUIRED NOTICE

O.R.C. § 1312.03 requires that Residential Contractors in Ohio provide an Owner with a statutory notice designed to alert the Owner of the Residential Contractor’s right to resolve any alleged construction defects before the Owner pursues any legal action or arbitration. The Notice must be provided to the Owner upon entering into a contract for the construction or substantial rehabilitation of a residential building. While the Notice can be contained on a separate document, it must be conspicuous and be in substantially the following form:

OHIO LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR COMMENCE ARBITRATION PROCEEDINGS FOR DEFECTIVE CONSTRUCTION AGAINST THE RESIDENTIAL CONTRACTOR WHO CONSTRUCTED YOUR HOME. AT LEAST SIXTY DAYS BEFORE YOU FILE A LAWSUIT OR COMMENCE ARBITRATION PROCEEDINGS, YOU MUST PROVIDE THE CONTRACTOR WITH A WRITTEN NOTICE OF THE CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER CHAPTER 1312. OF THE OHIO REVISED CODE, THE CONTRACTOR HAS AN OPPORTUNITY TO OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER THE CONTRACTOR MAKES. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR COMMENCE ARBITRATION PROCEEDINGS.

OWNER’S REQUIRED NOTICE

At least sixty (60) days prior to the commencement of any legal proceeding or arbitration for a construction defect, the

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Owner must provide the Residential Contractor with written notice of the construction defect which would form the basis of a legal action or arbitration against the Residential Contractor. The notice must be mailed, sent by telegram, delivered in person, or sent by any means the Residential Contractor has indicated it may be sent, including facsimile transmission or electronic mail. O.R.C. § 1312.04(A)

The notice must provide the Residential Contractor with information sufficient to respond to the notice. In particular, it must (1) itemize the construction defects and describe those defects, (2) include or attach a copy of documentation concerning the construction defect prepared by a person who inspected the Residential Building and (3) include the name, address and telephone number of the Owner, the Residential Contractor and the address of the Residential Building that is the subject of the claim. O.R.C. § 1312.04(B)

After receiving a requisite statutory notice, but within the time period required for response, the Residential Contractor may, but is not required to, request further information of the Owner in the form of a description of the cause(s) of the construction defect(s) and the nature and extent of the repairs necessary to remedy those defects. Likewise, the Owner need only provide the requested information if the Owner has knowledge of the cause of the defects and the repairs necessary.

NOTICE OF CONSTRUCTION DEFECT EXCEPTION

Unwary Residential Contractors anxious to secure their Mechanic's Lien rights will find that in preserving their lien rights they have precluded their ability to remedy construction defects under the law. O.R.C. § 1312.04(D) exempts Owners from having to provide the Residential Contractor with Notice of Construction Defects when the Residential Contractor has filed a Mechanic's Lien or has commenced any legal action or arbitration proceeding against the Owner. If the Residential Contractor has filed a Mechanic's Lien or commenced a legal action or arbitration, the Owner is not required to provide any notice to the Residential Contractor. Instead, the Owner is permitted to immediately counterclaim or commence a legal action or arbitration against the Residential Contractor.

THE CONTRACTOR'S OFFER AND OWNER'S REJECTION

A Residential Contractor wishing to avail himself of the opportunity to both inspect and cure a residential construction defect afforded by Chapter 1312, must provide must provide the Owner with a "good faith" written response within twenty-one (21) days of the receipt of the Owner's Notice. The Residential Contractor's response must contain an offer to do one of the following:

- (1) Inspect the residential building;
- (2) Compromise the claim without inspection; or
- (3) Dispute the claim.

If the Residential Contractor fails to respond or disputes the claim, O.R.C. § 1312.05(B) provides that the Owner has complied with the Chapter and may commence a legal action or arbitration for the recovery of damages without any further notice to the Residential Contractor.

The Owner is required to reject the Residential Contractor's offer to inspect, compromise or settle the claim within fourteen (14) days after receiving the Contractor's Offer. Any such rejection shall be in writing and must state the reason for any such rejection. Once the rejection has been made, the Owner is deemed to have complied and may commence legal action or arbitration proceedings without further notice to the Residential Contractor.

OWNER'S ACCEPTANCE OF CONTRACTOR'S OFFER

An Owner wanting to accept the Residential Contractor's Offer to Inspect, must do so within fourteen (14) of receipt of the Contractor's Offer. Thereafter, the Owner must allow the Residential Contractor to inspect the Residential Building during normal working hours. The inspection must take place within fourteen (14) days of the Owner's acceptance. The Contractor must take reasonable measures, including testing, to determine the nature and causes of the construction defects and the appropriate remedy.

Once the inspection takes place, the Residential Contractor must provide the Owner with one of the following:

- (1) An offer to remedy the defects at no cost to the Owner. This offer must be accompanied by an inspection report, a prediction of the work necessary to remedy the defect(s) and a timetable for repairs;
- (2) A written offer to settle the Claim; or
- (3) A written statement that the Residential Contractor does not intend to remedy the defect(s).

O.R.C. § 1311.06(C) provides that an Owner has complied with the Notice requirements and may commence a legal or arbitration proceeding without further notice if the Residential Contractor does not inspect within fourteen (14) days, following inspection, the contractor does not provide a written response or the contractor fails to remedy the defect(s) within the timetable the contractor has provided.

Once an Owner accepts the Offer a Residential Contractor makes to compromise and settle the Owner's claim, to remedy the defect(s), or to settle the claim and the Residential Contractor fulfills that offer, the Owner is barred from pursuing any legal action or arbitration proceeding against the Residential Contractor for that claim.

TOLLING OF THE APPLICABLE STATUTES OF LIMITATION OF ACTION AND REPOSE

From the time the Owner sends the Notice of Construction Defect under O.R.C. § 1311.04 until the Owner has complied

with Chapter 1312, all applicable statutes of limitation and repose are tolled.

PENALTY FOR NON-COMPLIANCE

A court or arbitrator confronted with a Residential Owner's failure to comply with the notice requirements of Chapter 1312 has not choice but to dismiss the action without prejudice. O.R.C. § 1311.08(B) allows the Owner to re-file once he or she has complied with the Chapter.

CONCLUSION

Ohio's Right to Cure Law is intended as a means to help homeowners and their contractors amicably resolve their disputes. Used appropriately and meaningfully, the statute can assist in the resolution of claims by both Owners and Contractors. A home is an Owner's most valuable investment. A construction defect is very personal to that Owner. Communication between the parties is very often the first victim in such a dispute. By establishing procedures for the resolution of disputes, the lines of communication remain open between the parties and assist them in resolving their differences.

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