

Contracts BULLETIN

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NOTICE AND OPPORTUNITY TO REPAIR STATUTES

NEW NOTICE AND OPPORTUNITY TO REPAIR STATUTES --- CONTRACTUAL AND OTHER IMPLICATIONS

A majority of states have adopted Notice and Opportunity to Repair statutes (“NOR”). These statutes, applicable to new construction as well as renovation work, require homeowners to notify new home builders and remodelers of alleged construction defects. The builders (and also subcontractors in some states) can then perform an inspection and make an offer to repair before the homeowners commence a lawsuit. SMACNA members who act as residential general contractors, subcontractors or suppliers need to be aware of these new NOR statutes, how they impact contracts, and, in turn how to respond if a notice is provided.

NOTICE AND OPPORTUNITY TO REPAIR STATUTES

Various state and national builder associations, along with consumer groups, have pushed for states to adopt NOR statutes. The goal of these statutes is to give the builders, subcontractors, and/or suppliers an opportunity to resolve disputes with homeowners prior to litigation. As noted by the governmental affairs directors for the Builders Association of Minnesota, these statutes are “really important to allow a builder and home owner to work out their differences before the insurance agents and attorneys get involved.” Finance & Commerce Daily (May 30, 2006).

Despite the enthusiasm of some builder organizations, SMACNA members must recognize that these statutes impose additional duties which may require modification of contracts and/or greater awareness of the members’ obligations under the statutes, if notices are received from homeowners or general contractors.

STATE APPROACHES VARY WIDELY EXAMPLE: MINNESOTA vs. WISCONSIN

While NOR statutes are becoming more widespread, no single statute has been used uniformly in every state. Legislative approaches have varied widely, even between similarly situated states.

For example, Minnesota and Wisconsin are neighboring states with similar populations and geography, yet they have taken profoundly different approaches to NOR statutes. These differences are not attributable to the political persuasion of the state legislatures, rather they reflect the differing NOR statutes adopted around the country. A brief examination of these two states statutes’ demonstrates why SMACNA members should be especially careful when they receive any written notice of defective work from homeowners or general contractors.

Minnesota

On May 16, 2006, Minnesota's Governor signed a NOR bill into law. The statute (Minn. Stat. §§ 327A.02 and .03) is less than a page long and contains the following major provisions:

- Tolls (i.e. puts the statute of limitations on hold) for up to 180 days while the homeowner and builder address the defect.
- Requires builders to respond to homeowners written complaints about alleged defects within 30 days of the homeowners' written complaint.
- Upon completion of the repairs, the builder must provide the homeowner with a list of repairs made and a notice that the homeowner may pursue a warranty claim.
- Requires, if communication breaks down, a third party to make an offer to inspect and repair an alleged defect under the warranty statutes.

Wisconsin

Wisconsin's legislation became effective on October 1, 2006 (Wis. Stat. §§ 101.148 and 895.07). While dealing with the same general concept as Minnesota, Wisconsin's NOR statute is a far more detailed and lengthy. The primary provisions of the Wisconsin statute provide:

- The contractors must notify homeowners of the dispute resolution process at the time of building services. This necessarily implies that Wisconsin contracts with homeowners need to be modified to include the new provisions and builders will be required to give homeowners a brochure created by the Department of Commerce (attached). Available at: <http://commerce.wi.gov/SBdocs/SB-UdcRightCureBrochureV4.pdf>
- At least 90 working days before commencing a lawsuit against a builder, the homeowner must deliver to the builder a written description of the alleged defect.
- Within 15 days after receiving the homeowner's notice of claim, or within 25 days if the builder intends to seek the assistance or contribution from a window or door supplier, the builder must serve the homeowner a written proposal to repair the construction defect at no cost, offering to settle for a monetary payment, or some other settlement, or rejecting the claim.
- After receiving the builder's proposal, the homeowner shall respond within 15 days. The homeowner shall also permit testing and inspection by the builder.
- If the homeowner rejects the builder's settlement proposal, the builder shall have 5 days after receiving the homeowner's response to provide a supplemental offer. If at the end of this procedure the issues are still not resolved between the parties, then the homeowner may commence an action.
- Within 5 days of receipt of the initial written claim from a homeowner, a builder can seek financial or other contribution from a window or door supplier to the extent the builder believes a supplier is responsible for the problem. A builder must send a notice to that subcontractor along with the reason for seeking contribution. There is then a similar exchange of written notice requirements and efforts to settle the dispute.

Obviously a crucial difference between the Minnesota and Wisconsin NOR statutes is that Wisconsin requires modifications of all contracts and the attachment of a brochure created by the Department of Commerce. Additionally, Wisconsin's law contains explicit provisions requiring notification to subcontractors of defects. Such detailed provisions will require general contractors and subcontractors to consider modifying their contracts to conform with statutory requirements.

KEY POINTS FOR NOR STATUTES

The following are general observations based upon the NOR statutes adopted by most states.

1. **Modify Your Contract.** As is the case in Wisconsin, some states' NOR statutes have the practical effect of requiring contractors to modify their contracts to accommodate the NOR provisions or attach a brochure. You should review your contracts and the statute to see if your contract needs to be modified given the law of your state.

2. **Punch Lists.** Pre-closing punch lists are generally not subject to NOR. The warranties do not generally go into effect until a statutory or common law warranty commences upon the homeowner's first occupancy of the dwelling or the date on which the homeowner takes legal or equitable title to the dwelling. Therefore, punch lists completed before closing and before a buyer takes occupancy (or in the case of a home improvement, before the work is completed) are not subject to the new law. So, when receiving such a punch list, the NOR law will not apply. Nevertheless, it is a good idea to require such punch lists be completed and signed off in writing so that a good record of the items raised by the homeowner is maintained.

3. **Respond Promptly.** As is true with all things involving consumers, the sooner you address a problem, the better. If you receive a written notice of loss or damage by a homeowner, make sure you perform your investigation and make your offer within the brief period provided under your state's NOR law. For those items which are clearly covered by statutory warranties, making an investigation, presenting an offer to repair, and then completing the repair will be important. When in doubt, make the repair.

4. **Make a Clear Refusal to Repair.** If the written notice you receive from a homeowner involves matters which are clearly not covered by home warranties, or are not your responsibility, make sure you respond within the NOR required period by stating just that – the loss or damage is not covered by any warranty and you will not be making any repair. This is an important notice because in many states this starts the statute of limitations running on that claim. Until you say “no,” the statute of limitations may not begin to run.

5. **Notice of Completion.** One downside to the NOR law in many states is that, even after you have completed the repairs, you must provide the homeowner with a list of the repairs and include a notice that says that the homeowner may have the right to pursue a warranty claim. While this seems at odds with the fact that you just performed the warranty work, the notice is likely required under the new law.

6. **Keep Copies.** Make sure to retain copies of all written notices you receive from the homeowner and your written responses. This paperwork will document your compliance with the new law. The paperwork may also be helpful if a warranty claim is subsequently made.

7. **Oral Notices Do Not Apply.** The NOR law does not apply to oral notices. You do not need to insist upon written notices, especially where your obligations are clear and you will be performing the warranty work. However, if you have doubt about a claim, it is good practice that you insist upon receiving the written notice and ask the homeowner to provide a detailed description of the claimed loss or damage so that you are able to respond, in writing, as to whether you believe the claim is covered and, if so, the work you will perform.

CONCLUSION

While there are significant differences between NOR statutes, most have the similar requirements. A written notice by the homeowner to a new home builder or remodeler, and a written response by the builder to request to repair a defect is the general rule.

If you receive a notice from either a homeowner or a general contractor, there is a good chance that your state has passed an NOR statute requiring a specific written and timely response. Failure to respond can result in sanctions or prejudice.

Some states (like Wisconsin) require you to modify your contracts to include NOR provisions. Regardless, residential contractors, subcontractors, and suppliers need to be more aware if they receive a written notice of a defect.

(This article contains a general discussion of the law. You should consult with your attorney on the law in your state, as well as the issues regarding your contract. This article does not constitute and should not be treated as legal advice as to any particular situation).

SMACNA wants the Contracts Bulletins to serve our members. Your feedback or topic suggestions are welcomed by contacting Steve Yoch (e-mail: syoch@felhaber.com; telephone 651/312-6040) or Tom Soles (e-mail: tsoles@smacna.org; telephone 703/803-2988).

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