Building a Framework for Fixing Construction Issues[1]

by Joseph S. McCue and Charles L. Appleby

For much of the past 20 years, South Carolina has experienced a boom in the construction of single family homes, duplexes, multifamily homes and condominium complexes. This construction boom, coupled with litigation over synthetic stucco (EIFS) has resulted in a dramatic increase in construction lawsuits over the same period of time. The proliferation of construction litigation also has placed a drain on the court system in South Carolina.

Construction lawsuits typically take one-and-a-half to three years to conclude. During which time homes go unrepaired and contractors, subcontractors and other defendants in the lawsuit, have to spend time and energy defending the lawsuit rather than focusing on growing their business.

To address the growing number of construction lawsuits and the time, effort and expense involved, the state legislature enacted the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act[1] (The Right to Cure Act). The Act is intended to address the need for efficiently resolving construction defect claims without litigation while adequately protecting homeowners' rights. The Act requires would-be Plaintiffs (Homeowners) in construction defects matters to file a Notice of Claim with the would-be Defendant (Contractors and subcontractors) and provide an opportunity to resolve the claim without litigation.[2]

The Right to Cure Act

The Right to Cure Act generally provides the following framework for resolving construction defects:

The homeowner may not file suit for a construction defect or deficiency arising out of the design, specification, surveying, planning, supervision or observation of construction without first giving the contractor or subcontractor notice of the claim.

However, if the homeowner files suit without providing notice and an opportunity to cure, the contractor or subcontractor can file a motion, and the court will stay the case until the claimant complies with the requirements of the Act.

Upon receiving notice, the contractors or subcontractors have 30 days to inspect the premises, and the homeowner is required to provide reasonable access for the inspection.

After inspection, the contractor or subcontractor may serve the homeowner an offer of resolution. The homeowner must respond to the contractor's offer within 10 days. If the contractor or subcontractor fails to respond to the initial notice of the claim, the claim is deemed denied.

If the parties cannot resolve the dispute through this process, the homeowner may proceed with civil action.[3]

Enforcing the Act

So are courts actually enforcing the Right to Cure Act? Yes, in Yusenko v. Lennar Corporation, Chief South Carolina Federal District Court Judge Joseph Anderson addressed the issue of notice[4]. In the case, Yusenko sent correspondence to the contractor that included complaints of construction problems prior to filing the lawsuit. Yusenko argued this correspondence combined with the allegations in the lawsuit provided Lennar the notice required under the Right to Cure Act. Judge Anderson disagreed, stating the Right to Cure Act requires a "clear statement of the alleged defects…so that an informed decision [by the contractor or subcontractor] may be made as to how to address the allegations." Judge Anderson found in favor of the contractor and stayed the case. He ordered the Yusenkos to provide proper notice, work through the process set out in the Right to Cure Act and report back to him if the parties were unable to resolve the issues.

In the 2010 case of Grazia v. SC State Plastering[5], the South Carolina Supreme Court also stated that when a motion is made based on non-compliance with the Right to Cure Act, a court is required to stay the lawsuit filed until the homeowner provides the notice required.

Does It Matter?

So why does it matter that courts are enforcing the Right to Cure Act? Enforcement of the Right to Cure Act means contractors and subcontractors will have a fair opportunity to both learn of the allegations and make an offer to resolve them prior to being dragged into litigation. Not all cases are capable of resolution without litigation, but for the ones that are, both parties win. At Collins and Lacy, our advice is to be proactive by doing the following:

When you receive a complaint from a customer, talk with the customer to determine the exact reasons and cause of the issues.

When you receive a summons and complaint prior to receiving a letter from the homeowner with the problems clearly outlined or a chance to inspect the home, tell your attorney so he or she can make a motion to stay the case until the homeowner complies with the Right to Cure Act.

If you believe you and the homeowner can reach a resolution as to the alleged issues, do so. If you are worried about doing work for free and the customer continuing to complain, consult with your attorney. Your attorney can provide advice about written agreement options that may protect you from future complaints about the original construction.

While the cases mentioned above illustrate the notice provision of the Right to Cure Act is being enforced, the South Carolina Supreme Court's decision in Grazia unfortunately also left some unresolved questions. One is whether all homeowners in a class action must provide the notice required by the Right to Cure Act, or just the homeowner who initially files the lawsuit. We expect the Court to address this and other issues and will provide an update in the future.

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1 S.C. Code Ann. §40-59-810 et sec. (Enacted in 2003, Supp. 2009)
2 2003 South Carolina Laws Act 82 (S.B. 433).
3 The offers of settlement or concessions made by the homeowners, contractor or subcontractor during this process are not admissible at trial.
4 2009 WL 479956 (D.S.C.)
5 S.C. S. Ct. Opinion 26882 October 10, 2010. The defendants in this case have asked the Supreme Court to reconsider its opinion on other issues and the opinion in this case may be changed. However, the court is unlikely to change its decision about when notice must be given.