

## **CONSTRUCTION DISPUTES IN GEORGIA**

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The potential legal issues which may be implicated during a given construction project, whether residential or commercial, are far more numerous than most people realize. Architects, laborers, designers, foremen, electricians and engineers each provide their respective contributions whether the finished project is a backyard garage or a skyscraper thousands of feet tall. Accordingly, the umbrella of “construction disputes” which may arise during a given project encompasses a wide spectrum of potential claims and legal issues. These topics are the subject of countless legal treatise and court decisions.

Rather than paint with a broad brush, this paper focuses on a subset of construction issues under Georgia law in order to provide the practitioner with a general understanding of (1) the Georgia Right to Repair Act, (2) Arbitration, (3) Construction Warranties, and (4) Materialman’s and Mechanic’s Liens. These issues are of significant importance because they are frequently encountered by the construction practitioner as a result of their general applicability to disputes extending from the construction of single family homes to complex residential development to multi use facilities.

### **GEORGIA’S RIGHT TO REPAIR ACT**

In 2004, the Georgia Legislature enacted O.C.G.A. § 8-2-35 et seq., commonly referred to as the “Georgia Right to Repair Act” (herein, the “Act”). The Act was passed in order to create an additional “alternative method to resolve legitimate construction disputes that would reduce the need for litigation while adequately protecting the rights of homeowners.”<sup>1</sup> For decades, residential construction disputes between homeowners and contractors absorbed a

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<sup>1</sup> O.C.G.A. § 8-2-35.

disproportionate share of judicial resources considering the extent of such disputes is often relatively minor. With this issue in mind, the Act implements a back-and-forth type procedure between homeowner and contractor aimed to resolve construction defect claims before they mature into full blown litigation.

In addition to the alternative dispute resolution provision, the Act provides a number of benefits to contractors with corresponding obstacles to homeowners. For example, the Act provides a stay of any actions (both traditional lawsuits and arbitrations) against contractors until a homeowner has complied with the Act, a right for the contractor to inspect a residential property at his or her disposal, the potential for the automatic acceptance of a contractor's offer to repair, the potential for a contractor to cap recoverable damages by making a "reasonable offer," and the potential elimination of recovery of attorneys' fees and costs by a homeowner. Despite these somewhat one-sided benefits, the Act does not create an independent cause of action.<sup>2</sup> The implications of the Act, along with its major provisions, are outlined by this paper.

#### **A. Applicability of the Act**

##### *Contractors to Which The Act Applies*

The Act demands compliance from two broad categories of persons, "contractors" and "claimants." The former are defined as "any person, firm, partnership, corporation, association, or other organization that is in the business of designing, developing, constructing, or selling dwellings or common areas, alterations of or additions to existing dwellings or common areas, or the repair of such improvements."<sup>3</sup> The Act explicitly extends the definition of "contractor" to an "owner, officer, director, shareholder partner, or employee of the contractor . . . subcontractors and suppliers, and [a] risk retention group . . . that insures all or any part of a

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<sup>2</sup> O.C.G.A. § 8-2-43(a).

<sup>3</sup> O.C.G.A. § 8-2-36(6).

contractor's liability for the cost to repair a construction defect.”<sup>4</sup> Despite this broad definition of “contractor,” the Act is inapplicable to those who are not required to be officially licensed as a contractor in Georgia, meaning that architects and some other persons are excluded from the requirements of the Act.<sup>5</sup>

#### Structures to Which the Act Applies

The Act applies to “dwellings” and “common areas” which extend to include nearly every conceivable residential structure. Under the Act a “dwelling” is a “single-family house, duplex, or multifamily unit designed for residential use in which title to each individual residential unit is transferred to the owner under a condominium or cooperative system.”<sup>6</sup> Relatedly, a “common area” is any common area, improvement, or facility that is owned or maintained by the association in a “common interest community.”<sup>7</sup> Taken together, these broad definitions extend the Act to nearly every conceivable residential structure other than apartment buildings and hotels.<sup>8</sup> Commercial structures are also not implicated by the Act.

#### What Constitutes a “Construction Defect”?

In the absence of an express warranty related to the underlying construction, the Act defines a “construction defect” as any “matter concerning the design, construction, repair, or alteration of a dwelling or common area, of an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling or common area on which a person has a complaint against a contractor.”<sup>9</sup> The term extends to “any physical damage to the dwelling or common

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<sup>4</sup> O.C.G.A. § 8-2-36(6)(A)-(C).

<sup>5</sup> O.C.G.A. § 43-41-1, et seq.

<sup>6</sup> O.C.G.A. § 8-2-36(6).

<sup>7</sup> O.C.G.A. § 8-2-26(4).

<sup>8</sup> Jai Ganesh Lodging, Inc. v. David M. Smith, Inc., 328 Ga. App. 713 (2014) (finding no merit in defendant's contention that negligent construction claim regarding hotel construction was barred by failure to give notice under the Act).

<sup>9</sup> O.C.G.A. § 8-2-36(5).

area.”<sup>10</sup> Where an express warranty exists regarding the underlying construction, the term “construction defect” as defined in that contract applies, as opposed to the statutory definition in the Act.<sup>11</sup> While a homeowner is free to remedy alleged defects prior to providing notice under the Act, mitigating repairs may lessen the potential damages available at trial.<sup>12</sup>

## **B. The Act’s Procedural Requirements**

### *Homeowner’s Written Notice of Defect Claim*

Upon a homeowner’s determination that a construction defect exists, the homeowner must provide written notice to the contractor of a claim based upon such defect “no later than 90 days before initiating an action.”<sup>13</sup> This written notice must explicitly state that a construction defect claim is asserted under the Act, that such notice is being provided under the Act, and must describe the defect in “detail sufficient to explain the nature of the alleged construction defects and the results of the defects.”<sup>14</sup> Any additional defect discovered following a homeowner’s initial notice may not be alleged in an action until a contractor is given written notice regarding the additional defect and the same opportunity to resolve the defect.<sup>15</sup> If litigation has commenced at the time it is discovered, an additional defect may be added to pending defect litigation if legal rights would be prejudiced in its absence and so long as a homeowner complies with the notice requirements.<sup>16</sup>

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<sup>10</sup> O.C.G.A. § 8-2-36(5).

<sup>11</sup> O.C.G.A. § 8-2-36(5).

<sup>12</sup> Lumsden v. Williams, 307 Ga. App. 163, 166 (2010) (holding that “nothing in the [Act] prevents a potential claimant from taking action to mitigate his losses”).

<sup>13</sup> O.C.G.A. § 8-2-38(a).

<sup>14</sup> O.C.G.A. § 8-2-38(a).

<sup>15</sup> O.C.G.A. § 8-2-39(a)(1)-(2).

<sup>16</sup> O.C.G.A. § 8-2-39(b). The term “serve” under the Act means delivery by certified mail or statutory overnight delivery of the last known address of the contractor. See O.C.G.A. § 8-2-36(8).

In conjunction with notice, a homeowner must provide a contractor with any evidence depicting the nature and cause of the alleged defect, “including expert reports, photographs, and videotapes.”<sup>17</sup> In the event that a homeowner files suit based on the defect without first complying with this written notice provision, any party to the subsequent action may apply for and shall receive a stay until a homeowner complies with these notice requirements.<sup>18</sup> Following this initial notice, however, a homeowner and contractor “may, by written mutual agreement, alter the procedure for the notice of claim” under the Act.<sup>19</sup>

#### Contractors’ Response to Homeowner’s Notice

The Act vests a contractor with several responsive options once served with a homeowner’s notice of construction defect. A contractor should choose carefully, however, as his or her response will dictate how the scheme provided by the Act will ultimately play out. First, a contractor may wholly reject the homeowner’s claim or otherwise refuse to respond.<sup>20</sup> Second, within 30 days of such notice, a contractor may offer to settle the claim “by monetary payment, the making of repairs, or a combination of both” without the need for any inspection of the alleged defect(s).<sup>21</sup> Also within 30 days of the defect notice, a contractor may propose “to inspect the dwelling or common area” that is the subject of the homeowner’s claim.<sup>22</sup> The consequence of each potential response by a contractor is discussed in the following section.

#### Contractor Rejects Homeowner’s Defect Claim

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<sup>17</sup> O.C.G.A. § 8-2-38(a).

<sup>18</sup> O.C.G.A. § 8-2-37. While a homeowner’s failure to comply with the notice requirement renders a stay appropriate in both traditional litigation and in arbitration, such a failure is not grounds for an outright dismissal. See Lumsden v. Williams, 307 Ga. App. 163, 168 (2010) (“[N]othing in the [Act] contemplates that a claimant’s action be dismissed for failing to provide pre-litigation notice under O.C.G.A. § 8-2-38.”)

<sup>19</sup> O.C.G.A. § 8-2-38(p).

<sup>20</sup> O.C.G.A. § 8-2-38(c).

<sup>21</sup> O.C.G.A. § 8-2-38(b)(1).

<sup>22</sup> O.C.G.A. § 8-2-38(b)(2).

In the event that a contractor wholly rejects a homeowner's defect claim, or fails to respond in writing within 30 days of the notice, the homeowner is free to pursue litigation against the contractor.<sup>23</sup> This response (or lack thereof) by a contractor effectively frees a homeowner from the constraints of the Act.

*Contractor Offers to Settle Homeowner's Defect Claim*

Should a contractor make an offer to settle the claim, the homeowner has the option to accept its terms via service of written notice of acceptance within 30 days.<sup>24</sup> Importantly, a contractor's offer shall be deemed accepted by a homeowner in the event that a homeowner fails to respond to a contractor's offer within 30 days.<sup>25</sup> Once a contractor's offer is accepted, a homeowner must provide a contractor and its agents "prompt and unfettered access . . . to perform and complete the construction by the timetable stated in the settlement offer."<sup>26</sup> Such acceptance bars a homeowner "from bringing an action for the claim described in the notice of claim."<sup>27</sup> A contractor is obligated to proceed with "the monetary payment or remedy the construction defect or both within the agreed timetable," although there does not appear to be any Georgia cases interpreting this provision.<sup>28</sup> If a contractor does not proceed accordingly, a homeowner may bring a defect claim without further notice and may file the offer to create a rebuttable presumption that a valid settlement was reached and should be enforced.<sup>29</sup>

A homeowner may also choose to reject such offer, and if he or she does, must provide written notice of such rejection to the contractor and to the contractor's legal counsel, if

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<sup>23</sup> O.C.G.A. § 8-2-38(c). Further, if a contractor fails to respond to a claim within 30 days, he or she "may not claim or assert that the absence [the evidence provided by a homeowner] . . . relieved the contractor's obligation to respond." Id.

<sup>24</sup> O.C.G.A. § 8-2-38(m).

<sup>25</sup> O.C.G.A. § 8-2-38(m).

<sup>26</sup> O.C.G.A. § 8-2-38(n).

<sup>27</sup> O.C.G.A. § 8-2-40(a)(1).

<sup>28</sup> O.C.G.A. § 8-2-38(g).

<sup>29</sup> O.C.G.A. § 8-2-38(g).

represented.<sup>30</sup> This written notice of rejection must include the reasons for the homeowner's rejection and, if applicable, items the homeowner believes were omitted from the contractor's offer and the reasons why the contractor's offer was unreasonable in any manner.<sup>31</sup> Upon 15 days of a homeowner's tender of such rejection and reasons, a contractor may provide a supplemental offer to repair or monetary payment or both, though this is not required by the Act.<sup>32</sup>

A homeowner must exercise some caution in considering a contractor's offer because the rejection of a reasonable offer may limit his or her ultimate recovery. The Act states that in the event that a homeowner rejects an offer that the trier of fact finds reasonable, whether initial or supplemental, a homeowner "may not recover an amount in excess of (1) [t]he fair market value of the offer of settlement or the actual cost of the repairs made; or (2) [t]he amount of a monetary offer of settlement."<sup>33</sup>

#### *Contractor Exercises Right to Inspect*

If a contractor proposes to inspect the alleged defect(s) under O.C.G.A. § 8-2-38(b)(2), a homeowner must, within 30 days of receiving such proposal, provide a contractor and its agent "prompt and reasonable access to inspect the dwelling s or common area, document any alleged construction defects, and perform any . . . testing required to fully and completely evaluate . . . the claim defects and . . . any repairs . . . that may be necessary to remedy the alleged defects."<sup>34</sup> In the event that "destructive testing" is required to complete such inspection, a contractor must provide advance notice of such testing and thereafter "return the dwelling or common area to its

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<sup>30</sup> O.C.G.A. § 8-2-38(d).

<sup>31</sup> O.C.G.A. § 8-2-38(d)(1)-(2).

<sup>32</sup> O.C.G.A. § 8-2-38(j).

<sup>33</sup> O.C.G.A. § 8-2-38(l)(1)-(2).

<sup>34</sup> O.C.G.A. § 8-2-38(e).

pretesting condition.”<sup>35</sup> While a contractor must “diligently pursue completion of all the desired inspections” within 30 days of a homeowner’s initial notice, an inspection is still timely outside of this period so long as it is completed “within a reasonable period thereafter.”<sup>36</sup>

Within 14 days of the actual inspection, a contractor must provide a written response to a homeowner which includes an offer of ‘next steps.’<sup>37</sup> Such notice must provide either (1) a written offer to fully or partially remedy the defect at no cost along with a description of and timetable for the required construction, or (2) a written offer to settle the claim by monetary payment, or (3) a written offer combining repairs and monetary payment, or (4) a written statement that the contractor will not proceed to remedy the defect and the reasons why.<sup>38</sup>

Thereafter, a homeowner has the option to accept or deny a contractor’s post-inspection offer. If he or she wishes to accept, a homeowner must serve a contractor with written acceptance within 30 days after the offer.<sup>39</sup> A contractor’s offer is deemed accepted if a homeowner fails to respond within 30 days of the offer.<sup>40</sup> Upon a homeowner’s acceptance, the contractor must “proceed to make the monetary payment or remedy the construction defect or both within the agreed timetable.”<sup>41</sup> A homeowner must give a contractor “prompt and unfettered access” to the property to complete any offered repairs.<sup>42</sup> If a contractor fails to comply with this requirement, a homeowner is excused from the Act and may bring suit against a contractor during which he or she may file the offer and acceptance to create a “rebuttable

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<sup>35</sup> O.C.G.A. § 8-2-38(e).

<sup>36</sup> O.C.G.A. § 8-2-38(e).

<sup>37</sup> O.C.G.A. § 8-2-38(f).

<sup>38</sup> O.C.G.A. § 8-2-38(f)(1)-(4). If a contractor refuses to remedy the defect, or otherwise fails to provide the post-inspection offer within 14 days of the actual inspection, a homeowner may bring an action against a contractor. O.C.G.A. § 8-2-38(h).

<sup>39</sup> O.C.G.A. § 8-2-38(m).

<sup>40</sup> O.C.G.A. § 8-2-38(m).

<sup>41</sup> O.C.G.A. § 8-2-38(g).

<sup>42</sup> O.C.G.A. § 8-2-38(n).

presumption that a binding and valid settlement agreement has been created and should be enforced.”<sup>43</sup>

If a homeowner opts to reject the post-inspection offer, he or she must serve written notice of the reasons for such rejection.<sup>44</sup> Thereafter, a contractor has the option to make a supplemental [post-inspection] offer of repair or monetary payment or both.”<sup>45</sup> In the event that a homeowner rejects a contractor’s offer which is later deemed “reasonable” by the trier of fact, a homeowner’s recovery in an action based on the construction defect is limited to “the fair market value of the offer of settlement or the action cost of the repairs made; or the amount of monetary offer of settlement” from a contractor.”<sup>46</sup>

### **C. Miscellaneous Provisions of the Act**

Although a majority of the notoriety regarding the Act is given to the back-and-forth repair procedure, there are a few additional provisions which are important to note to the practitioner.

#### *Effect on Statutes of Limitation*

The Act specifically disclaims that it may be construed to either revive a statute of limitation period that has expired prior to a homeowner’s written notice or extend any applicable statute of repose.<sup>47</sup> However, if a homeowner is up against an applicable statute of limitation, he or she may file the action which “shall be immediately stayed until completion of the notice of claim process” described in the Act.<sup>48</sup>

#### *Subrogation Rights*

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<sup>43</sup> O.C.G.A. § 8-2-38(g).

<sup>44</sup> O.C.G.A. § 8-2-38(i).

<sup>45</sup> O.C.G.A. § 8-2-38(j).

<sup>46</sup> O.C.G.A. § 8-2-38(l)(1)-(2).

<sup>47</sup> O.C.G.A. § 8-2-38(o).

<sup>48</sup> O.C.G.A. § 8-2-38(o).

In the event that a contractor makes repairs or payments or a combination of both pursuant to an accepted settlement offer, the performance of the same “shall not, by itself, create insurance coverage or otherwise affect the mutual rights and obligations of the parties under a contractor’s liability insurance policy or . . . be considered a voluntary payment of an otherwise valid insured loss.”<sup>49</sup> Further, an insurer paying out a claim under the Act “shall be subrogated . . . to whom the amounts were paid against the person causing the construction defect.”<sup>50</sup>

*Required Notices to Be Provided By A Contractor*

The Act requires a contractor to provide notice of the provisions of the act to a homeowner “[u]pon entering into a contractor for sale, construction, or improvement of a dwelling.”<sup>51</sup> Such notice “shall be conspicuous and may be included as part of the contract.”<sup>52</sup> However, in the event “of any conflict or inconsistency between the provisions of [the Act] and the provisions of any contract” between a contractor and a homeowner, “the provisions of the contract shall govern and control.”<sup>53</sup>

**ARBITRATION**

At its most basic level, arbitration is an agreed-upon (typically) alternative dispute resolution process through which a dispute between two or more parties is resolved by an independent third party or panel of third parties in order to eliminate the need for traditional litigation. Regardless of how the parties actually reach arbitration, its conclusion renders a binding, out-of-court resolution which may be enforced by a court of competent jurisdiction. Needless to say, the ongoing increase in demand for arbitration is driven largely by the potential

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<sup>49</sup> O.C.G.A. § 8-2-40(a)(2).

<sup>50</sup> O.C.G.A. § 8-2-40(b).

<sup>51</sup> O.C.G.A. § 8-2-41(a).

<sup>52</sup> O.C.G.A. § 8-2-41(a).

<sup>53</sup> O.C.G.A. §8-2-43(c).

cost savings to the parties among other perceived benefits of this type of proceeding. To demonstrate the popularity of arbitration, information released by the American Arbitration Association (“AAA”) indicates that it alone administered approximately 20,000 arbitration proceedings during the period between January 2011 and December 2015.<sup>54</sup> Considering there are additional arbitration organizations conducting private arbitrations on a daily basis, the total number of arbitrations completed in a given year is likely measured in the high tens of thousands. Based on this prevalence alone, the prudent practitioner must obtain at least a general familiarity with arbitration, which is precisely what this paper provides for those practicing in Georgia.

#### **A. Advantages and Disadvantages of Arbitration**

Like litigation, or any other form of alternative dispute resolution, arbitration comes with its own set of advantages and disadvantages. For instance, many parties seek arbitration because it normally takes less time than traditional litigation to reach a resolution, is less expensive, confidential, and less formal all while having the same binding effect as a civil judgment. Further, the parties to an arbitration are free to consent to their own procedural rules and may designate the principles and parameters which are to be applied by the arbitrator in reaching a final decision. While the parties may also agree to discovery of their preferred scope, depositions are usually excluded as is the requirement that parties respond to seemingly endless written discovery requests. In many instances, arbitration discovery is limited to the exchange of exhibits shortly before the proceeding. The parties are also able to select their arbitrator or

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<sup>54</sup> *Commercial Arbitration Statistics*, The American Arbitration Association, 2016, (available at [https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat?\\_afLoop=1144420464129128&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D1144420464129128%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D10op42158p\\_4](https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat?_afLoop=1144420464129128&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D1144420464129128%26_afWindowMode%3D0%26_adf.ctrl-state%3D10op42158p_4)).

provide a list of potential arbitrators from which one may be selected, as opposed to being assigned at random to a judge of varying familiarity with the relevant subject matter.

Of course, arbitration is not without its disadvantages. The primary drawback of arbitration is its finality—except in limited circumstances involving a statutory right to appeal, there is no permissible means by which to overturn the decision of an arbitrator. There is no appellate body or other method to which a party can challenge an unfavorable result or flawed decision. Therefore, a party seeking arbitration must assess the risk of receiving an undesired result with no possible resource. Additionally, the cost savings in an arbitration, compared to traditional litigation, is not as substantial as it once was. The hourly rates of arbitrators, particularly those with considerable experience, continue to rise. Further, arbitration organizations charge considerable filing fees and other cost for their administrative services. Despite these cost increases, and contingent upon the nature of the dispute, an arbitration is likely a less expensive dispute resolution option than traditional litigation.

## **B. Essential Arbitration Statutes**

### *Georgia Arbitration Code*

In 1978, the Georgia Legislature enacted the Georgia Arbitration Code (the “Code”), found at O.C.G.A. § 9-9-1, et seq., to provide official statutory regulation over the majority of disputes in which parties have privately agreed to arbitrate. The Code “repealed common law arbitration in its entirety” and is therefore strictly construed.<sup>55</sup> As such, any party seeking to compel arbitration “bears the burden of demonstrating the existence of a valid and enforceable agreement to arbitrate.”<sup>56</sup> While the tenor of the Code is undoubtedly intended to encourage arbitration, it remains inapplicable to certain cases including the arbitration of medical

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<sup>55</sup> Greene v. Hundley, 266 Ga. 592, 594 (1996).

<sup>56</sup> Life Care Centers of America v. Smith, 298 Ga. App. 739, 741 (2009).

malpractice claims, collective bargaining agreements, most insurance contracts, loan agreements for less than \$25,000, and any contract for the purchase of consumer goods.<sup>57</sup> Therefore, it is incumbent upon the prudent practitioner to ensure that the subject matter of an arbitration falls within the purview of the Code.

So long as it does, under Georgia law, “the question of arbitrability, i.e., whether an agreement creates a duty for the parties to arbitrate the particular grievance, is undeniably an issue for judicial determination.”<sup>58</sup> This “arbitrability” is an extremely broad concept, as the Code specifically states that any dispute may be arbitrated “without regard to the justiciable character of the controversy” and further confers jurisdiction upon Georgia courts to “enforce . . . and the enter judgment on an [arbitration] award.”<sup>59</sup> Georgia courts have interpreted this provision broadly to provide that courts are “required to uphold valid arbitration provisions.”<sup>60</sup> As an additional means for encouraging arbitration, a court is vested with the discretion to determine whether an applicable statute of limitation will bar arbitration of a claim.<sup>61</sup> Therefore, it is possible that a party may compel arbitration of a claim which would otherwise be time barred at law.

In Georgia, the procedure for compelling an unwilling party to arbitration is relatively straightforward. The aggrieved party must apply to the court for an order compelling arbitration, which must be granted so long as there is “no substantial issue” concerning the arbitration agreement and the claim is not barred by the applicable statute of limitation.<sup>62</sup> The venue for

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<sup>57</sup> O.C.G.A. § 9-9-2(c)(1)-(10).

<sup>58</sup> Pickle v. Rayonier Forest Resources, 282 Ga. App. 295, 296 (2006).

<sup>59</sup> O.C.G.A. § 9-9-3.

<sup>60</sup> Saturna v. Bickley Const. Co., 252 Ga. App 140, 141 (2001) (upholding arbitration provision in residential construction contract).

<sup>61</sup> O.C.G.A. § 9-9-5(a).

<sup>62</sup> O.C.G.A. § 9-9-6(a).

such an application, and other matters related to an arbitration dispute, is the superior court of the county provided for in the relevant agreement or, if not provided therein, the in the county where any party resides or does business.<sup>63</sup> In opposition to an application to compel arbitration, the opposing party may apply to stay the arbitration based on limited grounds—either that no arbitration agreement exists, that the arbitration agreement was not followed, or that the arbitration is barred by limitation of time.<sup>64</sup> If none of these conditions exist, the court will issue an order compelling arbitration.<sup>65</sup> However, where res judicata would otherwise bar the claims asserted, no arbitrable claims exist to be submitted to an arbitrator.<sup>66</sup>

Once an arbitration has commenced, whether by agreement or by court order, the Code defers greatly to the underlying arbitration agreement for matters ranging from the appointment of an arbitrator or panel of arbitrators to the time and place for the arbitration hearing.<sup>67</sup> A court may intervene to provide clarity on these types of issues in the event that the relevant arbitration agreement is inadequate or silent. For example, it is a court’s responsibility to appoint an arbitrator where the agreement does not provide for a method of appointment or otherwise fails.<sup>68</sup> A court may also issue and enforce subpoenas to compel the appearance of witnesses and the production of documents and other evidence at arbitration.<sup>69</sup>

As for post-arbitration procedures, the general rule in Georgia is that “in proceedings to confirm or vacate an arbitration award the role of the trial court should be limited so that the

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<sup>63</sup> O.C.G.A. § 9-9-4(b)(1)-(4).

<sup>64</sup> O.C.G.A. § 9-9-6(b)(1)-(3).

<sup>65</sup> See Order Homes, LLC v. Iverson, 300 Ga. App. 332 (2009) (reversing trial court’s denial of motion to compel arbitration).

<sup>66</sup> See Bryan County v. Yates Paving & Grading Co., Inc., 281 Ga. 361 (2006) (holding that res judicata barred second arbitration of claims previously decided in separate arbitration).

<sup>67</sup> O.C.G.A. §§ 9-9-7, 9-9-8.

<sup>68</sup> O.C.G.A. § 9-9-7(b)(1)-(4).

<sup>69</sup> O.C.G.A. § 9-9-9(a).

purpose of avoiding litigation by resorting to arbitration is not frustrated.”<sup>70</sup> From this, upon the completion of arbitration, the Code requires that a written award signed by the arbitrator must be delivered to the parties within 30 days, unless some other period of time is agreed to by the parties.<sup>71</sup> Within one year of its delivery, the court “shall confirm an award upon application of a party” unless the award is otherwise vacated or modified by the court.<sup>72</sup>

An application by the non-prevailing party to vacate an arbitration award must be filed within three months after delivery of the award and will be granted only upon a court’s finding of prejudice based upon exclusive circumstances including fraud, partiality of an arbitrator, or the manifest disregard of the law.<sup>73</sup> An arbitration award may also be vacated in limited instances upon the application of a party who did not participate in the arbitration.<sup>74</sup> Once vacated, the court “may order a rehearing and determination of . . . any of the issues either before the same arbitrators or before new arbitrators.”<sup>75</sup> Despite these seemingly clear legislative directives, Georgia courts are “severely limited in vacating an arbitration award so as to not frustrate the legislative purpose of avoiding litigation by resort to arbitration.”<sup>76</sup>

As an alternative to vacating an arbitration award in its entirety, a court may also modify an arbitration award upon application of a party within three months of the delivery of the award.<sup>77</sup> However, such modification may occur only if there was (1) a miscalculation or mistake in the award, (2) the award is premised on a manner not submitted during the arbitration,

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<sup>70</sup> See Hardin Const. Group, Inc. v. Fuller Enterprises, Inc., 265 Ga. 770, 771 (1995).

<sup>71</sup> O.C.G.A. § 9-9-10.

<sup>72</sup> O.C.G.A. § 9-9-12.

<sup>73</sup> O.C.G.A. § 9-9-13(b). See also Greene v. Hundley, 266 Ga. 592 (1996) (holding that Georgia Arbitration Code contains only available means for vacating arbitration award).

<sup>74</sup> O.C.G.A. § 9-9-13(c).

<sup>75</sup> O.C.G.A. § 9-9-13(e).

<sup>76</sup> See Brookfield Country Club, Inc. v. St. James-Brookfield LLC, 287 Ga. 408, 411 (2010).

<sup>77</sup> O.C.G.A. § 9-9-14(a).

or (3) the award of imperfect in form not affecting the merits.<sup>78</sup> Upon such application, if the court chooses to modify the award, it shall then “confirm the award as modified.”<sup>79</sup> If the court refrains from modification, it must “confirm the award made by the arbitrators.”<sup>80</sup>

Following confirmation of an arbitration award, whether modified or original, a court shall enter judgment “in the same manner as provided in [O.C.G.A. § 9-11-54 et seq.] and be enforced as any other judgment or decree.”<sup>81</sup> Such procedure contemplates the entry of both an order confirming the arbitration award and a separate judgment on the award, although these two orders may be entered on the same document.<sup>82</sup> Any such judgment or order entered by a court is considered a final judgment and may be appealed pursuant to the normal appellate procedures for such appeals under O.C.G.A. § 5-6-34 et seq.<sup>83</sup>

#### Federal Arbitration Act

The Federal Arbitration Act (“FAA”), passed in 1925, is the primary source of federal law affecting arbitration.<sup>84</sup> This statute extends to govern a range of arbitration-related matters including the validity of arbitration clauses in private contracts, general arbitration procedure, and the confirmation of resulting arbitration awards. All of these provisions were drafted to uphold a strong federal policy in favor of voluntary commercial arbitration.<sup>85</sup> In order to advance such policy, the FAA seeks to uphold nearly every private arbitration clause to the extent that a “written provision in any . . . contract evidencing a transaction involving commerce

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<sup>78</sup> O.C.G.A. § 9-9-14(b)(1)-(3).

<sup>79</sup> O.C.G.A. § 9-9-14(c).

<sup>80</sup> O.C.G.A. § 9-9-14(c).

<sup>81</sup> O.C.G.A. § 9-9-15(a).

<sup>82</sup> See Green Tree Servicing, LLC v. Jones, 333 Ga. App. 184, 185 (2015) (overruling prior cases which required award and judgment be entered on separate documents).

<sup>83</sup> O.C.G.A. § 9-9-16.

<sup>84</sup> See 9 U.S.C.S. §§ 1-16.

<sup>85</sup> See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011) (“[The FAA] reflects a liberal federal policy favoring arbitration”).

to settle by arbitration . . . shall be valid, irrevocable, and enforceable.”<sup>86</sup> Not only does this provision promote arbitration generally, it also eliminates the expense and delay of protracted court proceedings aimed to determine whether arbitration is appropriate.<sup>87</sup> From this, federal courts across the country have followed a policy of liberally construing arbitration clauses to hold that they apply to any dispute “reasonably contemplated” by arbitration clauses, and the resolve all doubts in favor of arbitration.<sup>88</sup>

In conjunction with its policy of advancing arbitration, the FAA provides a procedure through which parties who have completed their arbitration may file the resultant award in court to affect a binding judgment. Specifically, the FAA instructs the parties to specify the court in which their arbitration award should be filed in the relevant arbitration agreement and if they fail to do so, to file the arbitration award “in the United States court in and for the district within which such award was made.”<sup>89</sup> Unless the arbitration award is vacated, modified, or otherwise corrected pursuant to the FAA, the filing of the same results in a binding judgment.<sup>90</sup> Relatedly, the FAA preempts any statute statutes which purport to create an alternative ground for confirming or vacating arbitration awards.<sup>91</sup> However, the FAA does provide some limited defenses which may invalidate an otherwise enforceable arbitration provision which include, but are not limited to, fraud, duress, unconscionability, and manifest disregard of law.<sup>92</sup>

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<sup>86</sup> 9 U.S.C.S. § 2.

<sup>87</sup> See Trafalgar Shipping CO. v. International Mill Co., 401 F.2d 568, 572 (2nd Cir. 1968) (discussing the policy of the FAA to eliminate expense and delay of traditional litigation).

<sup>88</sup> See Metro Industrial Painting Corp. v. Terminal Const. Co., 287 F.2d 382, 286 (1961) (outlining federal arbitration policy).

<sup>89</sup> 9 U.S.C.S. § 9.

<sup>90</sup> Id.

<sup>91</sup> See C.T. Shipping, Ltd. v. DMI (U.S.A.) Ltd., 774 F. Supp 146, 148 (S.D.N.Y. 1991) (overriding NY state statute advancing grounds for vacating or modifying arbitration award).

<sup>92</sup> 9 U.S.C.S. § 2.

### **C. Drafting An Arbitration Clause**

A well-drafted arbitration clause requires a great deal of precision and its length, complexity and content will be greatly influenced by the involved parties' respective needs and desires. The advantages However, the ultimate advantages of arbitration may only be enjoyed when the details of an arbitration clause are drafted with care. Therefore, the practitioner should be sure to consider the following in any arbitration clause.

First, the drafter should explicitly articulate the applicable rules for any ensuing arbitration. For example, an arbitration agreement may state that "any controversy or claim arising out of or relating to this contract, or any breach thereof, shall be submitted to arbitration administered by the American Arbitration Association Commercial Arbitration Rules." AAA publishes various sets of arbitration rules depending on the nature of the controversy and the drafter should be cognizant of which set(s) may be applicable. Additionally, the drafter should specifically identify which issues are to be included or excluded from arbitration. Because courts interpret arbitration clauses broadly to further the intent of the Code, the drafter must clearly and unambiguously exclude any areas from arbitration.

A drafter must also contemplate the selection of an arbitrator or panel of arbitrators. The complexity of the agreement and the relative amount of money involved must be considered with regard to this factor. With that in mind, it may also be appropriate to loosely define the qualifications of a preferred arbitrator. For example, an agreement may require that the arbitrator have a certain amount of experience which would render him or her able to understand the facts of a complex construction defect matter. The selection provision should also define the method for arbitration selection. By way of further example, an arbitration clause should also outline the overall arbitration process including any written discovery, depositions, exhibit exchange, and a

timetable for the completion of any remaining pre-arbitration processes. The clause should also define what constitutes a “prevailing party” and the apportionment of damages, attorneys’ fees, costs, and other relief following the arbitration hearing.

### **CONSTRUCTION WARRANTIES**

Construction contracts generally contain express warranties offered to ensure (and insure) that the materials and workmanship provided are free from defect for some defined period of time. Such warranties are offered as an added incentive to prospective homebuyers considering the size of the financial investment necessary to purchase a single family home. Contractors benefit from such warranties by mitigating future risk by way of limiting the term of the warranty and the items protected therein. In the event that a homeowner asserts a claim for breach of warranty, such claim is subject to the six year contractual statute of limitations.<sup>93</sup> This statute of limitations begins to run from the date the contract is notified of the alleged defects at the structure.<sup>94</sup> Breach of warranty claims are treated separately from construction defect claims.<sup>95</sup>

Additionally, purchase agreements often contain express language which may seek to exclude “all warranties, express or implied.”<sup>96</sup> In the event that a dispute arises over conflicting warranty language, the Georgia Code expressly states that “[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit [such] warranty shall be construed as consistent with each other.”<sup>97</sup> While still subject to parol or extrinsic evidence, any reading of such warranty provisions which limits or negates the same is statutorily

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<sup>93</sup> O.C.G.A. § 9-3-24.

<sup>94</sup> Danjor, Inc. v. Corporate Const., Inc., 272 Ga. App. 695, 698 (2005) (holding that six year statute of limitation applied to warranty claim).

<sup>95</sup> Ga. Construction Mechanics’ And Materialmen’s Liens § 13:1.

<sup>96</sup> 5 Ga. Jur. UCC § 2:128.

<sup>97</sup> O.C.G.A. § 11-2-316(1).

unreasonable.<sup>98</sup> Therefore, when a homeowner brings a claim for breach of express warranty, the terms of the written warranty control over any limitation and all parts of the warranty “must be considered together and reconciled, if possible.”<sup>99</sup>

### **MATERIALMAN’S AND MECHANIC’S LIENS**

Under Georgia law, a materialman’s lien or mechanic’s lien (herein “lien” or “liens”) is a security interest on an owner’s property which may be created in favor of an unpaid laborer or supplier of construction services and/or materials on a non-public project.<sup>100</sup> The statutory provisions regarding such liens may be found at O.C.G.A. § 44-14-361 *et seq.* Because these liens are in derogation of common law, however, this statute is “strictly construed against the lien claimant and in favor of the landowner.”<sup>101</sup> The importance of such liens should not be understated as they are perhaps the most significant remedy available to an unpaid contractor, subcontractor, or supplier, particularly where an owner is experiencing financial issues and the property is the primary asset from which payment may be compelled. In cases where these persons or entities lack contractual privity with the property owner, a lien may be the only potential source of monetary recovery. As such, practitioners should possess a general understanding of liens and the general statutory framework for pursuing one, regardless of whether the practitioner represents the interests of the owner or the lien claimant.

#### **A. Who May File A Lien**

The parties with whom the Georgia Legislature has vested the right to file liens against real estate and other property “for which they furnish labor, services, or materials” are listed at

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<sup>98</sup> O.C.G.A. § 11-2-316(1).

<sup>99</sup> 5 Ga. Jur. UCC § 2:128.

<sup>100</sup> Claims of lien on public works projects are handled under what is known as Georgia’s “Little Miller Act” codified at O.C.G.A. § 36-82-101, *et seq.*

<sup>101</sup> Ben Hill Ready Mix Concrete Co. v. Prather, 160 Ga. App. 149, 150 (1981).

O.C.G.A. § 44-14-361(a).<sup>102</sup> These persons include “all contractors, subcontractors and all materialman furnishing material to subcontractors, and all laborers furnishing labor to subcontractors, materialmen, and persons furnishing material for the improvement of real estate.”<sup>103</sup> All “mechanics of every sort” who have done work and/or furnished material in “building, repairing, or improving any real estate of their employers” are also included.<sup>104</sup> In this context, “mechanic” and “materialman” should be interpreted broadly to include “all persons furnishing materials, tools, appliances, machinery, or equipment.”<sup>105</sup> Under this statute, persons with more specialized tasks related to construction, including surveyors and engineers, also have a right to claim a lien against real estate.<sup>106</sup>

#### **B. When To File A Claim of Lien**

As of March 31, 2009, a claim of lien must be filed in the office of the Clerk of the Superior Court of the county in which the property at issue is located within 90 days “after the completion of the work,” meaning the last date the “labor, services, or materials were supplied to the premises.”<sup>107</sup> The statute further provides that the rules for calculating time for a claim of lien are the same as those expressed in O.C.G.A. § 1-3-1, meaning that the lien may be filed on the ninetieth day.<sup>108</sup> If such ninetieth day falls over a weekend or on a holiday, the claim of lien is timely if filed on the immediately following business day.<sup>109</sup> Failure to file a claim of lien within this time period renders it invalid and unenforceable. No later than two business days after the date of filing of the claim of lien, the lien claimant must send a true and accurate copy

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<sup>102</sup> O.C.G.A. § 44-14-361(a).

<sup>103</sup> O.C.G.A. § 44-14-361(a)(2).

<sup>104</sup> O.C.G.A. § 44-14-361(a)(1).

<sup>105</sup> O.C.G.A. § 44-14-360(4).

<sup>106</sup> O.C.G.A. § 44-14-361(a)(5).

<sup>107</sup> O.C.G.A. § 44-14-361(a)(2).

<sup>108</sup> O.C.G.A. § 44-14-369.

<sup>109</sup> O.C.G.A. § 44-14-369.

of the claim of lien via registered or certified mail to the owner of the property or the contractor, as the agent of the owner.<sup>110</sup>

### **C. How To File a Claim of Lien**

The filing procedures for a lien in Georgia are extremely strict, including the timing element discussed above, as the lien claimant attempting to enforce a lien “has but one bite at the apple.”<sup>111</sup> A practitioner must therefore take great caution in pursuing a claim of lien because failure to comply with any of the requirements renders a lien invalid and unenforceable. Even more serious, there are no second chances for a claimant “to breathe new life into [an] extinguished right to a lien so as to give the materialman another bite at the apple it had missed on its first bob.”<sup>112</sup>

In order to obtain any legal effect, a claim of lien must contain specific information. First the name of the lien claimant must be stated on the face of the lien.<sup>113</sup> If the lien claimant is a corporation or other legal entity, the name in the claim of lien must reflect that of the entity and not any individual who may control the entity.<sup>114</sup> A claim of lien which contains an incorrect name or otherwise fails to name the lien claimant is subject to a motion to dismiss.<sup>115</sup> Second, a claim of lien must identify the name of the present owner of the property to be encumbered.<sup>116</sup> In the event that a lien claimant incorrectly names a previous owner, as opposed to the present

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<sup>110</sup> O.C.G.A. § 44-14-361.1(a)(2).

<sup>111</sup> Weber Air Conditioning, Inc. v. Tripe-R Pooler, Inc., 245 Ga. App. 590, 592 (2000).

<sup>112</sup> Weber, 245 Ga. App. at 592.

<sup>113</sup> O.C.G.A. § 44-14-361.1(a)(2).

<sup>114</sup> See Georgia North Contracting, Inc. v. Haney & Haney Const. & Management Corp., 204 Ga. App. 366 (1992) (holding that name on lien was not sufficient to assert a lien done by corporation under contract).

<sup>115</sup> See Georgia North Contracting, Inc. v. Haney & Haney Const. & Management Corp., 204 Ga. App. 366 (1992) (holding that name on lien was not sufficient to assert a lien done by corporation under contract).

<sup>116</sup> Melton v. Pacific Southern Mortg. Trust, 144 Ga. App. 600 (1978) (rev'd on other grounds).

owner, the lien will be voided despite the fact that the error did not result in any prejudice.<sup>117</sup> Third, a claim of lien must contain a property description sufficient to identify the real property to be encumbered, and an incorrect description may deny any right to a lien.<sup>118</sup> Finally, the Georgia Code provides a lien form which any lien claimant must substantially follow.<sup>119</sup> Failure to substantially conform to this form may invalidate any resulting claim of lien.<sup>120</sup>

#### **D. How To Perfect A Claim of Lien**

As the name implies, the filing of a claim of lien establishes precisely only that—a *claim* to a right to lien real property. The Georgia Code provides specific procedures for the perfection and foreclosure of the lien which require substantial compliance with the relevant notice and filing procedures in order to recover the amount due. The lien claimant must file an action against the contract or other entity from whom the debt is owed (i.e., the “lien action”) within 365 days from the date the lien is filed of record.<sup>121</sup> Effectively, the lien claimant has a maximum of 455 days from the last day materials or labor was provided to commence such action. The lien action is a prerequisite for filing a direct action against the property owner.<sup>122</sup> Within 30 days after filing such lien action, the lien claimant must file a notice of the lien action in the superior court of the county in which the property is located.<sup>123</sup> If the lien claimant fails to commence the lien action within this time period, the claim of lien is extinguished forever.

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<sup>117</sup> A&A Heating & Air Conditioning Co. v. Burgess, 148 Ga. App. 859, 859 (1978) (“[W]hen a lien is filed in the name of a person or entity other than the correct owner’s name, the lien is void”).

<sup>118</sup> King v. Rutledge, 208 Ga. 172 (1951) (invalidating lien containing property description which differed from the actual legal description).

<sup>119</sup> O.C.G.A. § 44-14-361.1(a)(2).

<sup>120</sup> U.S. Filter Distribution Group, Inc. v. Barnett, 241 Gap App. 759 (1999) (stating that lien statute is strictly construed against lien claimant and in favor of property owner).

<sup>121</sup> O.C.G.A. § 44-14-361.1(a)(3).

<sup>122</sup> Eurostyle, Inc. v. Jones, 197 Ga. App. 188 (1990).

<sup>123</sup> O.C.G.A. § 44-14-361.1(a)(4).

However a lien action is not required when the contractor or other entity absconds, dies, removes from the state, or is adjudicated bankrupt.<sup>124</sup> In such situations, the lien claimant may proceed directly against the property owner.<sup>125</sup>

#### **E. Bond To Discharge Lien**

From the property owner's perspective, once a claim of lien has been filed, the owner may discharge a lien as an encumbrance on the property by filing a bond with the clerk of the superior court in which the property is located.<sup>126</sup> Such bond may be filed before or after the commencement of a lien action and its filing serves to discharge the real estate from the claim of lien and acts as a substitute for the same.<sup>127</sup> If the lien property is the owner's domicile, the bond must be in the amount claimed under the lien.<sup>128</sup> In all other instances, the bond must be for double the amount of the claim of lien.<sup>129</sup> Further, the bond must promise or be conditioned to pay the sum that may be found due owed in a trial on the claim of lien to the lien claimant.<sup>130</sup> Within seven days of filing the bond in the respective superior court, the filing party must send notice and a copy of the bond to the lien claimant.<sup>131</sup>

#### **F. Lien Waivers and Contractor's Affidavits**

Georgia law allows for a written waiver of a claim of lien so long as certain requirements are met. However, the right to a claim of lien may not be waived in advance of furnishing labor, services, or materials.<sup>132</sup> Any attempt to preemptively waive such lien rights is null, void, and

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<sup>124</sup> O.C.G.A. § 44-14-361.1(a)(4).

<sup>125</sup> Adair Mortgage Company v. Allied Concrete Enterprises, Inc., 144 Ga. App. 354 (1977).

<sup>126</sup> O.C.G.A. § 44-14-364.

<sup>127</sup> Few v. Capitol Materials, Inc., 274 Ga. 784 (2002).

<sup>128</sup> O.C.G.A. § 44-14-364(a).

<sup>129</sup> O.C.G.A. § 44-14-364(a).

<sup>130</sup> O.C.G.A. § 44-14-364(a).

<sup>131</sup> O.C.G.A. § 44-14-364(b).

<sup>132</sup> O.C.G.A. § 44-14-366.

unenforceable.<sup>133</sup> A valid written lien waiver must (1) be made pursuant to a waiver and release form duly executed by the lien claimant and (2) be made upon the claimant's receipt of payment for the claim or any potential claim.<sup>134</sup> The corresponding lien waiver must substantially follow the prescribed statutory form.<sup>135</sup> Such waiver is to be signed by the lien claimant, dated, and witnessed by one witness.<sup>136</sup>

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<sup>133</sup> O.C.G.A. § 44-14-366.

<sup>134</sup> O.C.G.A. § 44-14-366(b)(1).

<sup>135</sup> O.C.G.A. § 44-14-366(c).

<sup>136</sup> O.C.G.A. § 44-14-366(d).