**OVERVIEW OF GEORGIA’S RIGHT TO REPAIR ACT**

Brandon C. Arnold

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.”[[1]](#footnote-1) For decades, residential construction disputes between homeowners and contractors absorbed a 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 issues 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 any independent cause of action.[[2]](#footnote-2) The implications of the Act, along with its major provisions, are outlined by this paper.

**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.”[[3]](#footnote-3) 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 contractor’s liability for the cost to repair a construction defect.”[[4]](#footnote-4) Despite this broad definition of “contactor,” the Act is inapplicable to those who are not required to be officially licensed as a contractor in Georgia, meaning that architects are excluded from the requirements of the Act.[[5]](#footnote-5)

 *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.”[[6]](#footnote-6) Relatedly, a “common area” is any common area, improvement, or facility that is owned or maintained by the association in a “common interest community.”[[7]](#footnote-7) Taken together, these broad definitions provided by the Act extend this statute to nearly every conceivable residential structure other than apartment buildings and hotels.[[8]](#footnote-8) 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.”[[9]](#footnote-9) The term extends to “any physical damage to the dwelling or common area.”[[10]](#footnote-10) 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.[[11]](#footnote-11)

**The Act’s Procedural Requirements**

*Homeowner’s Written Notice of 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.”[[12]](#footnote-12) 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.”[[13]](#footnote-13) Any additional defect discovered after 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.[[14]](#footnote-14) If litigation has already commenced when the additional defect is discovered, an additional defect may be added if legal rights would be prejudiced in its absence and so long as a homeowner complies with the notice requirements.[[15]](#footnote-15)

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.”[[16]](#footnote-16) 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.[[17]](#footnote-17) 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.[[18]](#footnote-18)

*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.[[19]](#footnote-19) 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).[[20]](#footnote-20) 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.[[21]](#footnote-21) The consequence of each potential response by a contractor is discussed in the following section.

Contractor Rejects Homeowner’s Defect Claim

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.[[22]](#footnote-22) 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.[[23]](#footnote-23) 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[[24]](#footnote-24) 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.”[[25]](#footnote-25) Such acceptance bars a homeowner “from bringing an action for the claim described in the notice of claim.”[[26]](#footnote-26) 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.[[27]](#footnote-27) 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.[[28]](#footnote-28)

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 represented.[[29]](#footnote-29) 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.[[30]](#footnote-30) 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.[[31]](#footnote-31)

A homeowner must exercise some caution in rejecting 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.”[[32]](#footnote-32)

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.”[[33]](#footnote-33) 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 pretesting condition.”[[34]](#footnote-34) 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.”[[35]](#footnote-35)

Within 14 days of the actual inspection, a contractor must provide a written response to a homeowner which includes an offer of ‘next steps.’[[36]](#footnote-36) 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.[[37]](#footnote-37)

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.[[38]](#footnote-38) A contractor’s offer is deemed accepted if a homeowner fails to respond within 30 days of the offer.[[39]](#footnote-39) 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.”[[40]](#footnote-40) A homeowner must give a contractor “prompt and unfettered access” to the property to complete any offered repairs.[[41]](#footnote-41) 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 presumption that a binding and valid settlement agreement has been created and should be enforced.”[[42]](#footnote-42)

If a homeowner opts to reject the post-inspection offer, he or she must serve written notice of the reasons for such rejection.[[43]](#footnote-43) Thereafter, a contractor has the option to make a supplemental [post-inspection] offer of repair or monetary payment or both.”[[44]](#footnote-44) 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.”[[45]](#footnote-45)

**Miscellaneous Provisions**

 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.

*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.[[46]](#footnote-46) 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.[[47]](#footnote-47)

 *Subrogation Rights*

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.”[[48]](#footnote-48) Further, an insurer paying out a claim under the Act “shall be subrogated . . . to whom the amounts wre paid against the person causing the construction defect.”[[49]](#footnote-49)

 *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.”[[50]](#footnote-50) Such notice “shall be conspicuous and may be included as part of the contract.”[[51]](#footnote-51) 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.”[[52]](#footnote-52)

Reject

 No Response

Recovery Limited if C’s Offer is Reasonable

Supp Offer Option

Option

Written Notice

File Agmt + Presumption of Settlement

Homeowner May Sue

Proceed w Agmt

Reject

Accept

Offer to Settle

Homeowner May Sue

See Inspection Flow Chart

Must Allow Inspection w/in 30 days

Demand Inspection

**Homeowner**

Provides Notice of Defect

1. O.C.G.A. § 8-2-35. [↑](#footnote-ref-1)
2. O.C.G.A. § 8-2-43(a). [↑](#footnote-ref-2)
3. O.C.G.A. § 8-2-36(6). [↑](#footnote-ref-3)
4. O.C.G.A. § 8-2-36(6)(A)-(C). [↑](#footnote-ref-4)
5. See O.C.G.A. § 43-41-1, et seq. [↑](#footnote-ref-5)
6. O.C.G.A. § 8-2-36(6). [↑](#footnote-ref-6)
7. O.C.G.A. § 8-2-26(4). [↑](#footnote-ref-7)
8. See 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). [↑](#footnote-ref-8)
9. O.C.G.A. § 8-2-36(5). [↑](#footnote-ref-9)
10. O.C.G.A. § 8-2-36(5). [↑](#footnote-ref-10)
11. O.C.G.A. § 8-2-36(5). [↑](#footnote-ref-11)
12. O.C.G.A. § 8-2-38(a). [↑](#footnote-ref-12)
13. O.C.G.A. § 8-2-38(a). [↑](#footnote-ref-13)
14. O.C.G.A. § 8-2-39(a)(1)-(2). [↑](#footnote-ref-14)
15. 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). [↑](#footnote-ref-15)
16. O.C.G.A. § 8-2-38(a). [↑](#footnote-ref-16)
17. See 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.”) [↑](#footnote-ref-17)
18. O.C.G.A. § 8-2-38(p). [↑](#footnote-ref-18)
19. O.C.G.A. § 8-2-38(c). [↑](#footnote-ref-19)
20. O.C.G.A. § 8-2-38(b)(1). [↑](#footnote-ref-20)
21. O.C.G.A. § 8-2-38(b)(2). [↑](#footnote-ref-21)
22. 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. [↑](#footnote-ref-22)
23. O.C.G.A. § 8-2-38(m). [↑](#footnote-ref-23)
24. O.C.G.A. § 8-2-38(m). [↑](#footnote-ref-24)
25. O.C.G.A. § 8-2-38(n). [↑](#footnote-ref-25)
26. O.C.G.A. § 8-2-40(a)(1). [↑](#footnote-ref-26)
27. O.C.G.A. § 8-2-38(g). [↑](#footnote-ref-27)
28. O.C.G.A. § 8-2-38(g). [↑](#footnote-ref-28)
29. O.C.G.A. § 8-2-38(d). [↑](#footnote-ref-29)
30. O.C.G.A. § 8-2-38(d)(1)-(2). [↑](#footnote-ref-30)
31. O.C.G.A. § 8-2-38(j). [↑](#footnote-ref-31)
32. O.C.G.A. § 8-2-38(l)(1)-(2). [↑](#footnote-ref-32)
33. O.C.G.A. § 8-2-38(e). [↑](#footnote-ref-33)
34. O.C.G.A. § 8-2-38(e). [↑](#footnote-ref-34)
35. O.C.G.A. § 8-2-38(e). [↑](#footnote-ref-35)
36. O.C.G.A. § 8-2-38(f). [↑](#footnote-ref-36)
37. 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 within1 4 days of the actual inspection, a homeowner may bring an action against a contractor. O.C.G.A. § 8-2-38(h). [↑](#footnote-ref-37)
38. O.C.G.A. § 8-2-38(m). [↑](#footnote-ref-38)
39. O.C.G.A. § 8-2-38(m). [↑](#footnote-ref-39)
40. O.C.G.A. § 8-2-38(g). [↑](#footnote-ref-40)
41. O.C.G.A. § 8-2-38(n). [↑](#footnote-ref-41)
42. O.C.G.A. § 8-2-38(g). [↑](#footnote-ref-42)
43. O.C.G.A. § 8-2-38(i). [↑](#footnote-ref-43)
44. O.C.G.A. § 8-2-38(j). [↑](#footnote-ref-44)
45. O.C.G.A. § 8-2-38(l)(1)-(2). [↑](#footnote-ref-45)
46. O.C.G.A. § 8-2-38(o). [↑](#footnote-ref-46)
47. O.C.G.A. § 8-2-38(o). [↑](#footnote-ref-47)
48. O.C.G.A. § 8-2-40(a)(2). [↑](#footnote-ref-48)
49. O.C.G.A. § 8-2-40(b). [↑](#footnote-ref-49)
50. O.C.G.A. § 8-2-41(a). [↑](#footnote-ref-50)
51. O.C.G.A. § 8-2-41(a). [↑](#footnote-ref-51)
52. O.C.G.A. §8-2-43(c). [↑](#footnote-ref-52)