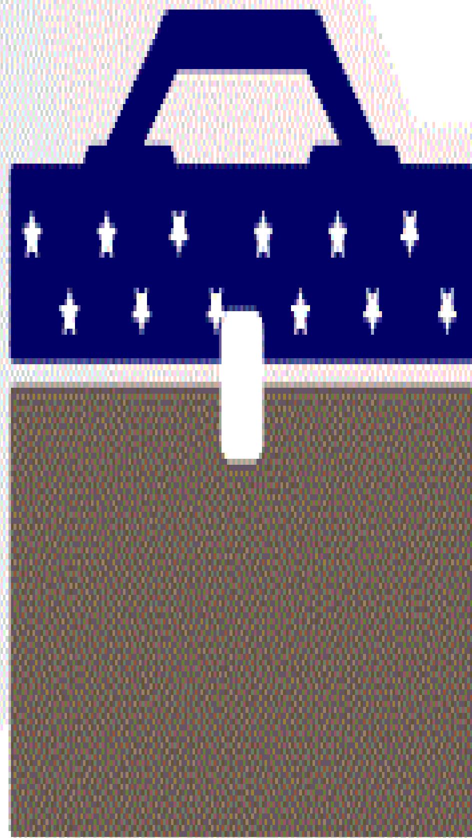

LEGAL TOOLBOX

Contractor's Legal Source Book

By: Charles R. "Chip" Carson

Carson & Associates
2494 Jett Ferry Road, Suite 210
Atlanta, Georgia 30338

Legal Toolbox

2014

About the Author:

Chip is a seasoned AV rated trial lawyer with 20 years of experience in civil litigation and trial practice in State and Federal Court. Chip graduated with his Bachelor of Science Degree in Architectural Engineering from Southern Polytechnic State University in 1988 and worked in architecture and construction before attending law school. Chip graduated from Georgia State University Law School in 1993 and started his law practice as an associate at Nall & Miller, LLP in Atlanta, being made partner at that firm in 2001. In January 2009, Chip formed Carson & Associates to focus on construction matters.

Chip has tried large loss cases in the areas of negligent construction, products liability and automotive liability. Chip has over 30 trials in state and federal court as leads counsel and has extensive experience in mediation. Chip has extensive experience drafting and interpreting construction contracts and knows building materials and methods. He also has extensive experience litigating in the areas of lien prosecution and defense, negligent design, negligent construction, delay of work claims, payment issues and bond issues.

About this book: This book addresses legal issues faced by contractors and subcontractors in the construction industry. This book is divided into 10 chapters, each chapter addressing a legal issue common to the construction trades. This book is designed to be user friendly with the idea that many of the concepts addressed can be incorporated directly by the contractor to help in their construction practice and to proactively eliminate many legal issues before they arise.

This book is not intended to offer legal advice or counsel. Nor is it intended to serve as a substitute for professional representation. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Table of Contents

Chapter 1	Liability Insurance Coverage	Page 4
Chapter 2	Contract provisions to ensure timely payment	Page 5
Chapter 3	Paying your sub when you haven't been paid	Page 7
Chapter 4	Materialman Liens	Page 9
Chapter 5	Getting paid on for a destroyed project or Other Disaster	Page 11
Chapter 6	What to do when there's a delay in your project	Page 12
Chapter 7	Construction claims, how long are you at risk?	Page 15
Chapter 8	What to do when a mistake has been made	Page 17
Chapter 9	Dealing with home owners's claims	Page 19
Chapter 10	Dealing with differing site conditions	Page 22

Chapter 1

Having insurance coverage that will protect you down the road.

What happens when, years after construction, a roof on a house you built starts to leak and it is determined that the chimney on the house was not properly flashed? The roofer subcontractor you used is out of business and you have no way of collecting from them. The construction contract between you and the owner provides that, as the contractor, you are to provide general liability insurance to cover damages caused by your negligence or the negligence of your subcontractors. Will that insurance cover the damages? If insurance coverage isn't available to cover the damage, your company could face direct financial exposure. How can you ensure, when the contract is made, that you will have the insurance coverage you need years down the road?

Know your insurance options. . . Insurance coverage wise, there are two basic types of policies: "claims made" policies and "occurrence" policies. A claims made policy provides coverage for claims made during the policy period. This type of policy won't do you any good if you don't become aware of the claim until years after the policy period has lapsed. An occurrence policy provides coverage for an event which occurs during the policy period, even if a claim regarding the occurrence isn't made until after the policy period has passed.

Make sure the general liability policy that provides coverage under your contract does not include an exclusion for damage caused by the negligence of the contractor. This policy language is commonly found in general liability policies applicable to construction matters. When obtaining general liability insurance from your insurance agent, notify the agent in writing that you want a policy that will provide coverage notwithstanding the possibility of negligence on your part. It may cost you more in insurance premium but it will be worth it to have the coverage when you need it. At the end of the day, an insurance policy is a contract which calls for the insurance company to provide coverage for certain defined losses. Make sure that contract covers your company for losses you might reasonably anticipate in your construction business.

IN SUMMARY

1. Make sure you have appropriate insurance coverage in place as called for by your construction contract.

2. Ask your insurance agent for an occurrence policy which covers claims which occurred during the policy period, even if the claim is made after the policy period.

3. Notify your insurance agent in writing (keeping a copy of the correspondence) that you need insurance coverage that applies whether or not there is negligence on your part as the contractor.

4. Be aware that the premium for a policy that covers contractor's negligence will be more than a policy which contains an exclusion for contractor negligence.

Chapter 2

Contract provisions to ensure timely payment.

The life blood of any construction company is cash flow. Delayed payment to you means the loss of that money as working capital for your business. It could also mean delayed payment by you to downstream subcontractors. You need provisions in your construction contract to ensure timely payment and to recover your legal costs if you need to take legal action to secure payment.

Use a written and enforceable contract for every construction project. Review the construction contracts your company has in place to make sure they are enforceable. The use of estimates or invoices may not be enforceable if they aren't signed by both parties. In order to be enforceable, a contract must include an offer and acceptance. There must be consideration (services or goods in exchange for money) and there must be a meeting of the minds as to the terms of the contract. The best way to prove a meeting of the minds is to have clear contract language regarding the terms and the signature of both parties on the document.

Attorney's fees: Under the Georgia Prompt Pay Act, if you are working on a commercial job or a multi-unit residential job involving 13 or more units, and are not timely paid (for contractors, 15 days from contractor's payment request to owner) (for subcontractors, 10 days from contractor's receipt of payment from owner) you can recover your reasonable attorney's fees if you have to pursue a claim for nonpayment and you win. See O.C.G.A. §13-11-8.

If you are working on a residential job involving 12 or fewer units, your contract should include a provision which awards attorney's fees and expenses to the prevailing party. This provision ensures you are made whole if you are required to enforce your rights under the contract. Georgia law does not typically allow for the recovery of legal fees by the winning party, except when specifically allowed by statute or when there is an express attorney's fee provision. Having an attorney's fee provision in your contract will serve as a warning to those inclined to breach the contract that if they do and they lose, they will have to pay your attorney's fees and expenses incurred in that dispute.

Interest on late payments

Under the Georgia Prompt Pay Act, if payment is not timely made under the Act (15 days for contractors and 10 days for subcontractors) interest shall apply to any outstanding balance in the amount of 1% per month. See O.C.G.A. §13-11-7. In order for interest to apply under this code section, the contractor or subcontractor shall include notice to the person being charged interest of the application of this Code section at the time the request for payment is made.

Nothing in the Georgia Prompt Pay Act prohibits the parties from agreeing to a rate of interest different from that set forth in O.C.G.A. §13-11-7.

Georgia law allows interest at a set rate (7% per annum simple interest) if the interest rate is not specifically set forth in a written contract. Subject to applicable conditions and exceptions, Georgia law allows parties to a written contract to establish any rate of interest they choose.

If you are not working on a job to which the Georgia Prompt Pay Act applies, you should include a specific rate of interest in your contract, at least equal to what you could recover under the Prompt Pay Act.

Include a provision in your construction contract that "time is of the essence" and include specific language which sets forth in detail what happens if payment is late. This provision should include the interest rate charged for overdue invoices, and how and when that rate is calculated.

Include a reminder regarding your interest rate policy on your outgoing invoices. This can give you a great tool to leverage if you want to encourage prompt payment on a past due invoice.

IN SUMMARY

1. Use a written contract which is signed by both parties.

2. Under the Georgia Prompt Pay Act, include a notice provision on all invoices that the interest provisions of O.C.G.A. § 13-11-7 apply to your invoice.

3. For jobs to which the Georgia Prompt Pay Act does not apply, include an interest provision for late payments in your construction contract with a rate equal, at least, to that set forth by O.C.G.A. § 13-11-7 (1% per month).

4. Include a "time is of the essence" provision in your contract.

5. Include a prevailing party attorney's fee provision in your contract.

Chapter 3

Paying your sub when you haven't been paid

Paying Subcontractors When Owners Haven't Paid for Work: What to Do

One of the biggest potential points of contention between general contractors and subcontractors is timely payment. If there is a delay in the owner paying the general contractor, the general contractor may not have the working capital to pay the subcontractor. It is not appropriate to comingle funds between jobs and the general contractor might not have the cash on hand to pay his subcontractors if he has not been paid.

General contractor: Use a "Pay When Paid" Provision

If you are a general contractor using subcontractors, one of the best ways you can deal with the issue of down stream payment is to include a "pay when paid" provision in your written contract with the subcontractor. The "pay when paid" clause provides generally that the general contractor's obligation to pay subs for their work is triggered when the owner has paid the general contractor for that work. This can help eliminate work stoppages, which is good for everyone. A "pay when paid" provision also makes it clear to the sub that they'll get paid when you're paid, which promotes a smoother work relationship and can resolve payment conflicts before they happen. The General contractor can also rely on contract terms controlling the submission of subcontractor invoices in terms of timing and content, as well as approval of the subcontractor's work before payment. Also, any interest provision in the subcontract must coordinate with and be subject to the "pay when paid" provision in the contract.

Subcontractor: file a materialman lien: If the subcontractor has complied with the requirements of the subcontract regarding the submission of invoices and the interim approval of work prior to payment, and payment is delayed, the subcontractor has several options. Depending on the length of delay in payment, the subcontractor can 1) file a materialman lien; 2) stop work and/or 3) pursue legal action for breach of contract. Materialman liens are covered in Chapter 4.

If payment is delayed beyond the "pay when paid" window set forth in the contract, the subcontractor is entitled to interest on any outstanding invoices. Stopping work can have negative effects beyond the immediate trade of the subcontractor at issue. Filing suit should be used as a last ditch effort to secure payment. Often, the threat of stopping work or filing suit will be sufficient to encourage payment as the general contractor realizes that the work stoppage of one subcontractor can impact the critical path schedule and all subsequent work.

IN SUMMARY

1. General contractors use a "pay when paid" provision. Other contract provisions covering invoice submission by the subcontractor, as well as interest provisions, must work in conjunction with the "pay when paid" clause.

2. If payment is delayed beyond the "pay when paid" provision of the contract, the subcontractor has several options as to how to proceed including stopping work, filing a materialman lien or filing a suit.

Chapter 4
Materialman Liens

One option for a contractor or subcontractor concerned about not getting paid is to file a materialman lien (called a claim of lien) for labor and material provided on the job. A materialman lien, if properly perfected, acts as a lien against the property on which the labor and/or materials have been provided. In the event the owner or general contractor with whom you have contracted cannot or will not pay, a materialman lien provides a mechanism to proceed against the property on which the improvements have been made.

There are very specific requirements regarding the content of a claim of lien and the time of filing of that claim of lien and the failure to meet those requirements can result in invalidation of the lien. The lien perfection process is a two-step process. First, the lien holder must prevail on the underlying claim giving rise to the lien. Once the lien holder as prevailed on the underlying claim, he or she can proceed to foreclose on the lien against the property.

Materialman liens can be an effective tool to leverage payment as property owners do not like to have liens on their property. Liens on property can act as a cloud to the property title and can have a negative impact on the marketability and salability of the property (existing liens must be satisfied on the sale of the property). Owners who have the ability to pay often do so to avoid having a lien filed against their property.

The claim of lien itself is a usually a one or two page document that contains information regarding 1) the name of the claimant and a description of the claimant's business; 2) the amount of the claim; 3) name of the property owner; 4) a description of the real property; 5) the date on which the claim became due; and 6) the name of the person requesting the labor, material or services if other than the owner (for example the general contractor). See O.C.G.A. §44-14-361.

The claim of lien must be filed within 10 days after the date of mailing of a Demand for Filing Claim of Lien, see O.C.G.A. § 44-14-361.4 **or** within 90 days of the last delivery of labor, materials or services. See O.C.G.A. §44-14-361.1(a)(2). The owner must be served with the claim of lien within two business days of filing the lien. The contractor must also be served in that same time period if a Notice of Commencement was filed at the outset of the job by the owner or contractor. See O.C.G.A. § 44-14-361.5(b).

An action on the lien must be commenced within 60 days after receipt of a Notice of Contest of Lien or within 365 days after claim of lien has been filed. See O.C.G.A. § 44-14-361.1(a)(3)-(4).

IN SUMMARY

1. A materialman lien is based on labor, material or services provided to improve real property.

2. A materialman lien (claim of lien) has very strict content and filing requirements.

3. The materialman lien, if properly perfected, attaches to the real property upon which the improvements have been made.

4. The materialman lien can be an effective tool to leverage payment as owners want to avoid liens being filed on their property.

Chapter 5

How to get paid for a project destroyed by Fire, Flood or Other Disaster.

In the event of a natural disaster, the owner's and contractor's ability to recover for lost work will often be based on whether insurance coverage is available for the loss. **Builder's Risk Insurance or Course of Construction Insurance** is designed to cover perils such as fire or wind during the time the project is under construction. The owner or general contractor purchase this insurance which is usually included as a requirement of the construction contract between the owner and general contractor.

Submitting a Claim on the Loss

If you are the owner or general contractor on the project, you should place the Builder's Risk insurer on notice of the loss. Time is of the essence in placing the insurer on notice. The insurer will investigate the loss and provide direction as to what documentation is needed to support the claim.

If you are a subcontractor, you should submit documentation to the general contractor for work completed but not yet paid for, as well as purchased materials on site that were destroyed. All parties to the construction contract should consult the force majeure provisions of the contract as to their rights and obligations regarding the project in the event of a force majeure event.

IN SUMMARY

1. Builder's Risk or Course of Construction Insurance protects against perils such as
   wind or fire during the course of construction.

2. This insurance is purchased by the owner or general contractor and is usually a requirement of the main contract between the owner and the general contractor.

3. Time is of the essence in placing the insurance company on notice of the loss.

4. If you are a subcontractor working on a job which is destroyed by natural disaster, place the general contractor on notice of the loss as soon as the event occurs and provide documentation regarding your loss to the general contractor as soon as possible after the loss so that information can be forwarded to the insurance company.

Chapter 6
What to do when there's a construction delay on your project

Are you a general contractor who is running late on a project because of delays with a subcontractor? Or is the owner making changes that are making the project run over time? If you are facing construction delays, here's what you can do to protect your interests:

If you are a general contractor and a subcontractor is causing the delay:

As the general contractor, project timeliness is ultimately your responsibility. A large part of that equation involves subcontractors meeting their individual deadlines. Your first responsibility as the general contractor is to meet your deadlines. You rely on your subcontractors to do meet their deadlines in order to complete your project on time. To protect yourself in the event of subcontractor delays:

Make time of the essence. Include Time-Related Provisions in Your Contract: Under Georgia law, in dealing with construction contracts, time is not generally "of the essence" unless it is specifically set forth in the contract. If time is not of the essence, the subcontractor will have a reasonable time to complete the work, not a set deadline. It is more difficult to define and enforce what is a "reasonable time" rather than a date and time certain. Include a "time is of the essence" clause in your contract, and specify a time for completion of the work in the contract or make reference to a schedule which provides the time for completion.

Include time certain provisions in your contract. As a general contractor, you can protect yourself by including time-related provisions in your sub's contracts. Include deadlines for completion of the work. Be specific as to the scope of the work and when the work should be complete. If the project is large, organize the work in phases, and be specific about when each phase should be completed. Breaking the work down into phases and imposing individual deadlines helps ensure the sub doesn't back-load the work and run over at the end. This will help keep the project moving forward smoothly. This is critical if you are waiting on a portion of the work to be completed before another sub can begin their work, or before you can proceed with a different part of the project.

Liquidated Damages: One way a general contractor can protect themselves from subcontractor delay is to include a liquidated damages clause in the construction contract. A liquidated damages clause is an agreement by the parties to a contract to a certain amount of money damages in advance of a breach of the contract. In the case of construction contracts, the anticipated breach is often for delay in timely completion of the work. In order for a liquidated damages clause to be found valid, certain conditions must be met:

1. The damage or injury caused by the breach must be difficult or impossible to estimate accurately when the contract is formed;
2. The liquidated damages must be intended as compensatory damages and not as a penalty; and
3. The amount of liquidated damages must be based on a reasonable estimate of the loss in the event of a breach.

A liquidated damages clause in a general contract between the general contractor and the owner may be passed down to subcontractors on the job if an "incorporation by reference" or "flow down" clause is included in the general contract and the general contract is incorporated by reference into the subcontracts.

Be aware of the no damages for delay clause: If a "no damages for delay" clause is included in your contract, the only remedy for delay will be an extension of the contract equal to the time of the delay. Unless you want contract extension to be your remedy for delay, have your contract reviewed and ask that the no damages for delay clause be deleted.

Once the project is under way:

Enforcing a "time is of the essence" clause: A "time is of the essence clause" can be waived by conduct of the parties to the contract. For instance, if a general contractor allows a subcontractor to complete work after a deadline and the sub is paid for that work, the "time is of the essence provision" will be waived unless notice is provided to the offending party of the general contractor's intent to rely on the specific terms of the contract. In this instance, if the general contractor intends to pursue a claim for delay in performance, the general contractor must provide notice and a reasonable time to cure the default before proceeding with the claim.

If both the owner and the contractor are causing the delay, generally the law does not allow delay damages. The logic there is that if one party's delay was caused by the delay of another, the delay should be excused. However, if one party's delay was in no way related or caused by delay of another, delay damages can still be recovered.

Even if a no damage for delay clause is included in the contract, there are situations when that clause will not be enforceable:

1. The no damage for delay clause will not be applicable to delays that were not anticipated by the parties to the contract;

2. The no damage for delay clause may not apply to delays caused by another party's willful or grossly negligent conduct;

3. The no damage for delay clause may not apply when the delay is so unreasonable that it constitutes an intentional abandonment of the contract.

Impose a Penalty in the Event of a Delay: Include a penalty clause in your contract if the sub runs over the deadline. You may be entitled to receive liquidated damages for delays past set deadlines, so spell this out in your contract with the sub. Detail when the damages begin to accrue, and how much.

Provide Notice and Time to Cure Default: If your sub does run over a deadline, your first duty is to give notice. Let your subcontractor know that he's passed the deadline and the work isn't completed to your specification. Remind him of the damages provision in the contract. After you've given notice, you should give the subcontractor time to cure the default before you take action to rescind the contract. Most of the time, when faced with the prospect of a lost job, a subcontractor will do whatever is necessary to get the work done in a timely manner.

If the sub fails to meet the new deadline, then you can take action to rescind the contract for failure to achieve a timely completion. This is typically a worst-case scenario because you are left with a partially completed project, the hassle of rescinding the contract and the challenge of finding a new sub to finish the job, which can be tough to achieve in a short timeframe. You still have a remedy to recoup your losses in the event you need to find another subcontractor to complete the job. Working with the sub to complete the project, rather than rescinding the contract entirely, is often the better economic option.

Owner changes as the cause for delay:

Often, during the course of a project, the owner will decide they want things done differently than originally planned. Some changes have little impact. Some changes have major impact on the construction schedule. Every change to the project should be reduced to writing in a change order that covers the new scope of work, payment and time table for completion. If the work covered by the change order represents a major deviation from the original schedule, that fact should be taken into account and a new time table should be established. That time table should be reduced to writing in the change order. Finally, every change from the original construction documents should be documented by a change order, without exception.

IN SUMMARY

1. Make time "of the essence" in the construction contract in order to make deadlines enforceable.

2. Include deadlines which are applicable to subparts or phases of the work.

3. Include a liquidated damages clause.

4. Look for the "no damages for delay" clause.

5. Always use change orders for any material change in the project.

Chapter 7
Construction claims, how long are you at risk?

There is a period of time after the construction projected is completed during which claims can be made regarding the project. The amount of time during which a claim can be made is dependent on the nature of the claim. Knowing the window of potential liability on claims is important because that will dictate how long insurance should be kept on the job. That is, once the period of time to file a claim on a job has passed, in most instances the claim can no longer be brought and the need to have insurance to cover that claim no longer exists.

Key terms that refer to the time limit during which an injured or damaged party can take legal action include:

- **Statute of Limitations**: the statute of limitations is the time period during which an injured or damaged party can file a claim to pursue a legal remedy. The statute of limitations begins to run with the occurrence of an "event" which is alleged to be the cause of the Plaintiff's injuries or damages. The statute of limitations runs when the time period specified by the statute has passed. After the statute of limitations has run (the time period specified by the statute has passed) any claims relating to the event in question are time barred and can no longer be brought.

- **Statute of Repose**: a statute of repose is an overall time limitation that bars any claims that occur after a certain time period, even if the applicable statue of limitation would have allowed a claim to filed at a later date. A statute of repose is different from a statute of limitations in that the time limitation set forth by a statute of repose cannot be moved and is final whereas a statute of limitation can start and therefore end at different times based on the triggering event. **For construction claims, the statute of repose is eight years from the date of substantial completion.**

Specific Statutes of Limitations: The statute of limitations is dependent on the type of construction claim involved. Construction claims fall into several categories, depending on the incident itself and the type of damage involved.

- **Breach of Written Contract Claim:**

The statute of limitations on a claim arising from breach of contract in a construction setting usually begins to run six years from the date of substantial completion of the job which is the subject matter of the contract. There are fact specific exceptions and the statute of limitations can be triggered at different points depending on the nature of the claim.

- **Negligence Claim:**

The statute of limitations on a negligence claim involving property damage is four years from the date of substantial completion. The statute of limitations on a negligence claim involving personal injury is two years from the date of the incident causing injury.

IN SUMMARY

1. The statute of limitations for breach of construction contract is usually six years from the date of substantial completion. Depending on the facts, it could be later.

2. The statute of limitations on a property damage claim arising from negligence (design or construction) is four years from the date of substantial completion.

3. The statute of limitations on a personal injury claim arising from negligence (design or construction) is two years from the date of the injury.

4. The statute of repose for construction matters runs eight years from the date of substantial completion.

5. Keep these time limitations in mind when purchasing insurance to cover your construction project or if you need to pursue a claim for breach of contract.

Chapter 8

What to do when a mistake has been made.

There are so many moving parts and different areas of responsibility on a construction job, as a general contractor, you are responsible for your work as well as the work of your subcontractors and making sure the job is running on time. When a mistake occurs or is discovered, take the following action:

- **Notice**. . . .immediately place the owner and architect, as well as your insurance company and your subcontractor's insurance company on notice of the issue. Failing to provide timely notice to the insurance companies can result in a denial of coverage.

- **Be proactive**. . .if a mistake in construction is found, find a solution to the problem and put a plan in place as quickly as possible to correct the issue. Delays cause more delays. If there is hesitation in the handling of a construction mistake, more downstream work will be completed and therefore need to be redone.

- **Document**. . .thoroughly document the issue with photographs and notes regarding conversations and meetings with individuals involved with the issue. This will make it easier to recreate the chain of events at a later date.

- **Use Change Orders**. . . .once the scope of the problem is determined, as well as responsibility for the problem, use the change order process to document correction of the issue. Documenting the corrective work is critical both for recovery of insurance proceeds and for the pursuit of potential claims after the fact.

- **Adjust the schedule**. . . .rework the schedule for downstream subcontractors. After you've completed the change order process to correct the issue, you may need to rework the schedule for downstream subcontractors. Build time into the new schedule to resolve the original issue, and reschedule subcontractors to come later in the process based on your change orders and new schedule.

If you are a subcontractor:

- **Notify the GC Immediately**: It's the general contractor's job to manage the subcontractors, and to deal with the logistics of the construction process. The general contractor will need to know if a mistake has been made so they can start the process of correcting the issue.

- **Place your General Liability Insurer on Notice**

- **Determine the Scope of the Mistake**: If it's a simple mistake, you can notify the general contractor and work together to determine the scope of the impact. If it's a more complex mistake, the general contractor may work with the architect or engineer to determine the extent of the problem and organize a fix. Depending on the severity of the mistake, you may or may not be expected to participate in this step. Either way, document the mistake as well as the fix in the event you need to defend against claims later on.

IN SUMMARY

1. Be proactive in addressing the problem.

2. Place your insurance carrier on notice. Have any effected subcontractor place their insurance carrier on notice.

3. Document the problem.

4. Document the fix.

5. Adjust the critical path schedule as necessary.

Chapter 9

What to do when a residential owner makes a claim against you?

Homeowners' claims arising from alleged defective construction in a residential setting are governed by the **Resolution of Construction Defects Act**, O.C.G.A. § 8-2-35 through 8-2-42. This act provides a mechanism for homeowners and contractors to resolve residential construction based disputes prior to litigation.

§ 8-2-37: If a homeowner files an action without first complying with the requirements of the Resolution of Construction Defects Act, the Court will put the case on hold until the homeowner has complied with the requirements of the Act.

§ 8-2-38: Homeowner must provide notice of the claim no later than 90 days before filing suit. Notice to contractor must be written and shall include the following:

- That the homeowner is asserting a construction defect claim pursuant to the
  Resolution of Construction Defects Act.
- A description of the defect and results of the defect.
- Any evidence which depicts the alleged defect, including photographs,
  videotapes or expert reports (if the evidence would be discoverable under
  evidentiary rules.

Within 30 days of service of written notice by the homeowner, the contractor shall service a written notice on the homeowner and on any other contractor who also received the homeowner's notice which includes:

- An offer to settle the claim by payment, making repairs or both, or
- Proposes to inspect the area subject to the claim, or
- Rejects the claim.

If the contractor rejects the claim or does not respond within the 30 day period, the homeowner may file suit against the contractor for the alleged defects set forth in the notice.

If the homeowner rejects the contractor's settlement offer, the homeowner must provide notice of the rejection in writing to the contractor. The notice shall include the reasons for the homeowners rejection of contractor's settlement offer.

If the contractor proposes an inspection of the area of alleged construction defect, the homeowner must, within 30 days, provide the contractor with access to the area of alleged construction defect for the inspection, documentation or any nondestructive or destructive testing necessary to evaluate the homeowner's claim and to determine what repairs may be necessary to remedy the alleged construction defect. If destructive testing will be required, the contractor shall provide the homeowner with advanced notice of the need to conduct destructive testing and shall return the area of alleged defect to its pre-testing condition. The contractor's inspection shall be completed within the initial 30 day period.

Within 14 days after the completion of the contractor's inspection, contractor shall service written notice on the homeowner, which includes:

- An offer to fully or partially remedy the construction defect at no cost to the homeowner which includes a description of additional construction necessary to remedy the defect, as well as a timetable to complete the repairs, or
- An offer to settle the claim by money payment, or
- An offer to settle the claim by a combination of repairs and money payment, or
- A rejection of the homeowner's claim with reasons for the rejection.

If the homeowner accepts the contractors offer of repair or payment and the contractor does not proceed as agreed, the homeowner may bring a claim for the alleged construction defect and may include the contractors offer to repair and/or pay.

If the contractor rejects the homeowner's claim, the homeowner may file suit against the contractor for the construction defect set forth in the notice.

If the homeowner rejects the contractor's written offer of repair or payment, the homeowner shall provide written notice to the contractor which includes all known reasons for the homeowner's rejection. The contractor may, within 15 days of receipt of the homeowner's rejection of contractor's offer to settle, make a supplemental offer to settle. If the homeowner rejects the contractor's supplemental offer, the homeowner shall provide notice of rejection in writing to the contractor, with all known reasons for the rejection.

If the homeowner rejects a reasonable offer from the contractor or does not permit the contractor to make repairs, the homeowner may not recover an amount in excess of:

- The fair market value of the offer of settlement or the actual cost of repairs, or
- The amount of the monetary offer.

If the homeowner accepts an offer from the contractor, the homeowner shall provide written notice of that acceptance to contractor within 30 days of homeowner's receipt of contractor's offer. If the homeowner does not respond in writing within 30 days, the contractor's offer shall be deemed accepted.

If the homeowner accepts contractor's offer, homeowner shall provide unobstructed access to the area of alleged defect so the contractor can make the repairs within the agreed timetable.

If, during the period of notice, inspection, offer, acceptance or repair, and applicable limitations period will run, the homeowner may file suit against the contractor but the suit will be stayed until the completion of the notice process.

§ 8-2-39 If additional defects are discovered beyond those defects which are the subject of the notice required by § 8-2-38, the additional defects may not be included in any action against the contractor until the notice requirements of § 8-2-38 have been met. Additional claims may be added if failure to add the claim would prejudice any legal rights of the homeowner or the contractor.

§ 8-2-40 If the homeowner accepts an offer and the contractor fulfills the offer by making appropriate repairs or payment, homeowner will be barred from bringing suit regarding the alleged defect set forth in the notice. A contractors' performance of repairs does not, by itself, create insurance coverage under a contractor's liability policy.

An insurance company which pays a claim to a homeowner for an alleged construction defect covered under the Resolution of Construction Defects Act shall have the right to pursue that claim against the contractor.

§ 8-2-41 A contractor entering into a contract for the sale, construction or improvement of a dwelling shall serve the following notice on the homeowner:

GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED, IMPROVED, OR REPAIRED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS OR BOTH. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

IN SUMMARY

1. Homeowners must follow the notice provisions of the Resolution of Construction Defects Act before filing suit against a contractor. If the homeowner doesn't follow the notice requirements of the Act, the homeowner's lawsuit will be stayed until the notice provisions of the Act are complete.

2. The contractor has multiple alternatives in response to a homeowner's claim including, inspection of the issue, payment, performance of repair work or rejection of the homeowner's claim.

3. A homeowner will be limited to the fair market value of a contractor's offer to repair if the homeowner rejects a contractor's offer to repair.

4. If a contractor agrees to repair or payment and then fails to follow through, the homeowner may use the contractor's agreement as evidence of an agreement between the homeowner and contractor which should be enforced.

5. Additional defects found in the work are governed by the same notice provisions as the initial defects in that a lawsuit cannot be filed regarding any construction defect that has not been subject to the notice provision of the Act.

6. A contractor's offer and completion of the offer will bar a homeowner from bringing claims regarding the construction defects which were the subject of contractor's offer and work.

Chapter 10
How to proactively deal with Differing Site Conditions

The contractor is working on a project and subterranean conditions are different than what was anticipated. As a result, foundation construction is running over budget. As a general contractor or subcontractor involved with foundation or subsurface work, how do you protect yourself from differing site conditions?

Include a differing site conditions clause in the contract between the owner and the contractor or general contractor.

If there is no differing site conditions clause in the contract between the owner and contractor, then the contractor will likely bear the additional cost occasioned by the differing site condition. Therefore, if the work involves building a foundation or doing any subsurface work, a differing site conditions clause should be included in the contract between the owner and the contractor to allocate risk. If there is a differing site conditions clause in the contract between the owner and the contractor, the contractor needs to provide timely notice of the suspected differing condition to the owner.

The purpose of a differing site conditions clause is to balance risk between the owner and the contractor. A differing site conditions clause allows the contractor to bid the job taking into account the possibility of a differing site condition. If the contractor is forced to bid on a job with no provision for differing site conditions, that bid will be higher and the owner will pay more for the job. If there is no differing site condition, then the owner will have paid too much. On the other hand, if subsurface conditions are different than those anticipated by the contractor, the contractor may lose money in increased construction costs regarding the differing site conditions.

There are two main types of differing site conditions. Type I conditions are subsurface or latent conditions which are different from the site conditions identified in the construction contract and contract documents. Type II conditions are unknown physical conditions of an unusual nature which are different from the kinds of conditions normally seen with the type of work covered by the contract documents.

The way the two different types of differing sites work in a contract setting are this: If the contractor encounters a suspected differing site condition, notice is provided to the owner and an analysis is done to determine whether the site condition was anticipated (mentioned in the contract documents – Type I) or is an unusual site condition not mentioned in the contract (Type II). The issue with Type I conditions is whether the condition is different than what was anticipated in the contract. If there is no mention of the condition then it might be a Type II condition which is harder to prove because the definition of a Type II condition is more ambiguous. . . .what does "unusual nature" mean and what does "ordinarily encountered" mean? These terms can be subject to differing interpretations and therefore, disagreement.

Before entering into the prime contract, the general contractor should make sure that the site conditions set forth in the contract are those anticipate and adequately described. A contractor can only recover on a type I claim when the contract contains representations of the expected conditions which are encountered. Without representation of the expected conditions, there can be no Type I claim. Owners often use disclaimers to provide data to bidders while trying to avoid liability for errors in that information. The presence of a disclaimer is inconsistent with the differing site conditions clause, especially regarding Type I conditions which are based on conditions different than those set forth in the contract.

As a general contractor or subcontractor who encounters a differing site condition should:

- give prompt notice of the differing site condition to the owner;

- stop work or proceed in a manner that leaves the condition undisturbed so that the owner can inspect the condition

IN SUMMARY

1. If foundation work is part of the job, make sure there is a differing site conditions clause in contract.

2. Disclaimers are inconsistent with the differing site conditions clause and may indicate difficulty in prevailing on a differing site conditions clause claim.

3. When encountering a differing site condition, provide prompt written notice to the owner and stop work in a manner that leaves the condition undisturbed.

LEGAL TOOLBOX

Visit www.carsonandassociateslaw.com for information regarding Chip Carson and Carson & Associates.